

NO. 20-0291

In the Supreme Court of Texas

In re Greg Abbott, Governor of the State of Texas, and Ken Paxton,
Attorney General of the State of Texas,

Relators.

On Petition for Writ of Mandamus
to the 459th District Court of Travis County
Petition from Amicus Curiae in Support of the Plaintiffs

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STATEMENT OF INTEREST AS AMICI CURIAE

Amici are current elected Texas District Attorneys and various criminal justice reform organizations whose goals are promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. They have a strong interest in this case because the Governor's broad categorical Order offends the Constitution, limits the ability of courts to address the unique circumstances of each case, adversely impacts those who cannot afford money bail, and inhibits the reduction of jail populations that is particularly critical in the face of the COVID-19 pandemic. All of these concerns underscore for amici that the Governor's Order does not advance public safety and, instead, puts our communities at risk.

ARGUMENT

The coronavirus represents an unprecedented risk to the safety of those who work in jails and prisons and those who are incarcerated in them. The unsuspecting officers who arrest and bring people to jail for booking, the doctors and guards who keep people safe and provide treatment, and those kept behind bars, most of whom are presumed innocent and have never had meaningful evidence presented against them, are now at grave risk of receiving a death sentence. At current incarceration levels, social distancing is simply impossible in those facilities, and public health officials far and wide have said that the coronavirus will spread like wildfire through them unless something changes. And it is not just those who are associated with the legal system who will be impacted. Every night, people leave these facilities, and if infected they will bring this disease with them into their communities. There will be more death, even as elected leaders and public health officials endeavor to flatten the curve. The only way to prevent this from occurring is to depopulate prisons and jails, bringing home those who do not pose a serious public safety risk.³

³ Martin Kaste, *Prisons And Jails Worry About Becoming Coronavirus 'Incubators'*, NATIONAL PUBLIC RADIO (Mar. 13, 2020), <https://www.npr.org/2020/03/13/815002735/prisons-and-jails-worry-about-becoming-coronavirus-incubators>; Rich Schapiro, *Coronavirus could 'wreak havoc' on U.S. jails, experts warn*, NBCNEWS (Mar. 12, 2020), <https://www.nbcnews.com/news/us-news/coronavirus-could-wreak-havoc-u-s-jails-experts-warn-n1156586>.

These warnings are not hypothetical. In Cook County, Illinois three inmates have already died from the coronavirus, and a staggering 306 have tested positive along with 218 members of the Sheriff's staff.⁴ As of last week, 287 people in custody and 441 employees at Rikers Island in New York have tested positive for the virus.⁵ An inmate died at a Federal Bureau of Prisons facility in North Carolina and sixty other people in custody there and 23 staff have tested positive.⁶

Because this is a matter of life or death, many countries have taken action to reduce prison and jail populations in this time of crisis. France and Britain ordered large-scale releases of imprisoned individuals;⁷ and even the Iranian government released approximately 85,000 prison inmates, nearly half of its previous incarcerated population.⁸ Jails across the United States have followed course. In Los Angeles, a quarter of the jail population has

⁴ ABC Chicago Digital Team, *Coronavirus Chicago: 3rd Cook County Jail Detainee Dies After Testing Positive for COVID-19* (Sunday, April 12, 2020)

<https://abc7chicago.com/3rd-cook-county-jail-detainee-with-covid-19-dies/6098349/>.

⁵ Asher Stockler, *More Than 700 People Have Tested Positive for Coronavirus on Rikers Island, Including Over 440 Staff* (Newsweek, April 8, 2020)

<https://www.newsweek.com/rikers-island-covid-19-new-york-city-1496872>.

⁶ Mitchell McCluskey, *A North Carolina Prison Complex Has 60 Inmates and 23 Staff Members with Coronavirus*, CNN (Apr. 12 2020),

<https://www.cnn.com/2020/04/12/us/butner-prison-coronavirus-cases/index.html>.

⁷ J. Edward Moreno, *Britain releases 4,000 inmates to curb spread of coronavirus*, THE HILL (April 4, 2020), <https://thehill.com/policy/international/491154-britain-releases-4000-inmates-to-curb-spread-of-coronavirus>.

⁸ Parisa Hafezi, *Iran temporarily frees 85,000 from jail including political prisoners*, REUTERS (Mar.17, 2020), <https://www.reuters.com/article/us-health-coronavirus-iran-prisoners/iran-temporarily-frees-85000-from-jail-including-political-prisoners-idUSKBN21410M>.

been released. Cleveland reduced its jail population by 50% in just over two weeks;⁹ Cincinnati reduced its jail population by 1/3.¹⁰ And nearly three dozen elected prosecutors joined in a statement committing to work with public health officials and other leaders in their communities to stop admitting people to jail absent a serious risk to the physical safety of the community. They explained, "we believe that the current crisis creates an even more pressing need for elected prosecutors, public health officials, and other leaders to work together to implement concrete steps in the near-term to dramatically reduce the number of incarcerated individuals and the threat of disastrous outbreaks."¹¹

Last month, as coronavirus cases began popping up in jails and prisons across Texas, local and state officials in Texas started to take action. The Texas Commission on Jail Standards ("TCJS") recommended a number of

⁹ Timothy Williams, Benjamin Weiser and William K. Rashbaum, *'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, NEW YORK TIMES (March 30, 2020) <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html>.

¹⁰ Nick Swartsell, *Will Hamilton County Change How it Jails People in the Wake of the Coronavirus? Some Officials Hope So*, CITYBEAT (Apr. 13 2020), <https://www.citybeat.com/news/blog/21128172/will-hamilton-county-change-how-it-jails-people-in-the-wake-of-the-coronavirus-some-officials-hope-so>; Timothy Williams, Benjamin Weiser and William K. Rashbaum, *'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, NEW YORK TIMES (March 30, 2020) <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html>.

¹¹ *Joint Statement from Elected Prosecutors On Covid-19 And Addressing The Rights And Needs Of Those In Custody* (March 2020) <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>.

measures to control the spread of the virus. On March 13, as requested by the TCJS, the Governor suspended visitation in all Texas jails.¹² Four days later, on March 17, TCJS provided additional guidance to local sheriffs and jail administrators. Among other guidance, TCJS urged local officials to “explore options for releasing nonviolent misdemeanor offenders with [their] local county/district attorney.”¹³ In the following days, sheriffs and district attorneys across the State worked together to identify people who could be safely released from Texas jails. In most counties, individuals targeted for release were predominantly accused of committing misdemeanor offenses. Bexar County has released 770 individuals, bringing the jail population down to 3,100.¹⁴ Travis County also granted personal bonds to those who were charged with low-level, nonviolent felonies, such as

¹² Brandon S. Wood, Executive Director of Texas Commission on Jail Standards, *Suspension of Visitation Plan*, Letter to Sheriffs and Jail Administrators (Mar. 13, 2020), https://www.tcjs.state.tx.us/wp-content/uploads/2020/03/TA_Memo_Suspension_Visitation.pdf.

¹³ Brandon S. Wood, Executive Director of Texas Commission on Jail Standards, *COVID-19 General Recommendations*, Letter to Sheriffs and Jail Administrators (Mar. 17, 2020), https://www.tcjs.state.tx.us/wp-content/uploads/2020/03/TA_Memo-COVID-19_Gen_Recom.pdf.

¹⁴ Emilie Eaton, *First Inmate at Jail in Downtown San Antonio Tests Positive for Coronavirus*, SAN ANTONIO EXPRESS-NEWS (April 10, 2020) <https://www.expressnews.com/news/local/article/First-inmate-at-jail-in-downtown-San-Antonio-15192338.php#>.

drug possession and theft.¹⁵ In Dallas, the jail population just fell below 5,000; on March 18th there were over approximately 6,000 people in jail.¹⁶

On March 29, Governor Abbott issued an Executive Order hampering these important mitigation efforts. That directive suspended critical provisions of Texas' bail law and severely limited the ability of local judges to release individuals who cannot afford to post a secured money bond.¹⁷ The Governor's Executive Order asserts that his intervention is necessary to prevent "broad scale release" of individuals from local jails, a release the Order claims would "gravely threaten public safety" and "would also hinder efforts to cope with the COVID-19 disaster."¹⁸ The Order largely takes aim at the use of personal, or unsecured, bonds that require no upfront payment but instead mandate that the person executes a written promise to pay a set sum only if he or she fails to appear for court.¹⁹ A secured money bond, on the other hand, requires the individual to either post money directly to obtain release or to contract with a surety (usually a bail bondsman) who assumes

¹⁵ *Id.*

¹⁶ Nic Garcia et.al., *Dallas' Criminal Justice Community Worries*, DALLAS MORNING NEWS (March 18 2020) <https://www.dallasnews.com/news/courts/2020/03/18/dallas-criminal-justice-community-worries-about-impact-of-canceled-jury-trials-jail-population/>.

¹⁷ Executive Order No. GA-13, *Relating to detention in county and municipal jails during the COVID-19 disaster* (Tx. Mar. 29, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-13_jails_and_bail_for_COVID-19_IMAGE_03-29-2020.pdf.

¹⁸ *Id.*

¹⁹ *Id.*

liability for the bond amount in exchange for a cash fee.²⁰ Individuals with limited financial means are often unable to meet either requirement necessary for release pursuant to a secured bond.²¹

Rather than encouraging judges and law enforcement officials to carefully consider the impact of their release decisions on public safety and health in light of the coronavirus epidemic, the Order *categorically prohibits* the release on personal or unsecured bond of any individual who is currently accused of any offense, even a misdemeanor, that “involves physical violence or the threat of physical violence.”²² It also prohibits the release on personal bond of all individuals who have ever, at any time, been convicted of such an offense, regardless of how much time has passed or what the nature of their current charges are. It leaves no room for judges to consider whether there are release conditions, including home confinement, which would allow for safe release.

²⁰ Tx. Code Crim. P. Art. 17.08.

²¹ See Michael Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, PRETRIAL JUSTICE INSTITUTE (2012)(showing money bail increases jail bed use), <https://pdfs.semanticscholar.org/5444/7711f036e000af0f177e176584b7aa7532f7.pdf>.

²² The Governor provided no definitions of these terms, nor any guidance that would allow judicial officials to discern what constitutes a sufficient “threat of physical violence.” For example, is a direct threat required, as in the case of an attempted punch that missed its mark? Or do some property crimes, which carry some remote risk that a physical altercation could ensue, also pose a “threat of physical violence”? The terms of the Order do not answer these or other important questions.

This order will do nothing to protect public safety and it will devastate public health. It has become increasingly clear that relying on money bail, as opposed to the case-by-case decisions employed by every judge in this state, does not promote public safety and instead makes our communities less safe. As countless studies have conclusively found, over-detaining individuals results in unnecessarily destabilized lives. “Though presumed innocent, [people held on bail] lose their jobs and families, and are more likely to reoffend.”²³ In addition to undermining public safety in the future, the money bail system does not ensure that the most dangerous individuals remain behind bars in the present. To the contrary, individuals with means can buy their way out, while individuals without means who could safely return home sit in jail. Reliance on the money bail system has also led to a tremendous increase in pretrial incarceration.²⁴ It has caused jail populations in both Texas and the rest of the country to explode at the seams, expanding well beyond capacity. That situation is now deadly.

²³ The Honorable Nathan L. Hecht, Chief Justice of the Texas Supreme Court, Remarks Delivered to the 85th Texas Legislature, Feb. 1, 2017; *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (“Pretrial confinement may imperil the suspect’s job, interrupt his source of income, and impair his family relationships.”).

²⁴ P.R. Lockhart, *Thousands of Americans are jailed before trial. A new report shows the lasting impact*, (May 7, 2019, Vox) (available at <https://www.vox.com/2019/5/7/18527237/pretrial-detention-jail-bail-reform-vera-institute-report>)

Additionally, despite the Governor's claim that the order is necessary to protect public safety, the order restricts only non-monetary release. In this way, it misses its mark. Apparently believing that a secured money bond provides adequate protection against this purported "grave" threat to public safety, the Governor placed no limitations whatsoever on the release of those who can afford to pay their way out of jail. That means that people accused of murder, sexual assault, or other serious offenses can bond their way out, while people who got in a bar fight twenty years ago cannot. This simply is not how public safety is promoted.

The Governor's order raises serious concerns about separation of powers and Due Process. Amici will defer to the plaintiffs' discussion of these larger legal and constitutional issues presented by this Order.²⁵ But the Order also rests on a fundamental misunderstanding of the efficacy of the money bail system and the way in which our communities are best protected, now and always. As current elected Texas District Attorneys and various criminal justice reform organizations, we file this brief to address the misguided factual premises that undergird this thinking and to discuss how, if followed,

²⁵ Amici also find other parts of the order troubling, including the ability to grant commutation of time for good conduct, and the limitation on the use of electronic home monitoring. This brief, however, is not intended to address those issues.

the Order is likely to threaten, not protect, the safety of all members of our communities.

I. The Governor’s broad, categorical Order is unnecessary, limits the ability of courts to address the unique circumstances of each case, and adversely impacts many who pose no threat to public safety

Texas law regarding pretrial release vests a magistrate or judge with the authority to determine what type of bond, what amount, and which conditions are necessary to ensure an individual’s appearance in court and to protect public safety.²⁶ This inquiry is intensely fact-specific, and may vary according to the charges pending, the criminal history of the individual, his or her employment status, family ties, and many other factors. By considering an array of individualized factors in each case, the judge is equipped to strike a careful balance between protecting public safety and maximizing liberty.

This individualized, case-specific evaluation of necessary conditions of pretrial release is not just good public policy enshrined in State law – it is constitutionally mandated.²⁷ Courts have recognized that pretrial detention unconstitutionally deprives a person of his liberty interest unless there are

²⁶ See Tx. Code of Crim. P. §§ 17.15, 17.40.

²⁷ See *O’Donnell v. Harris County*, 892 F.3d 147, 159 (5th Cir. 2018)(holding that Harris County’s practice of automatically requiring misdemeanor defendants, regardless of individual financial circumstances, to post secured bond violates Due Process).

individualized reasons for implementing it. Unaffordable bail effectively leads to “preventative [pretrial] detention,” which is “abhorrent to the American system of justice.”²⁸ Rather than permitting Texas law to operate as it is designed, and as the State and federal constitutions require, the Governor’s Order undermines the courts’ ability to make case-specific determinations that maximize public safety.

Any suspension of non-monetary release would interfere with the courts’ ability to constitutionally and equitably ensure justice for all, but the Governor’s order is particularly troubling because of its breadth. It affects any person accused of any crime, no matter how minor, felony or misdemeanor, that involves any allegation of violence or that allegedly poses a threat of violence, no matter how distant in time or insignificant. Even worse, it also affects anyone with a prior conviction for such a crime, regardless of how distant in time that conviction was. Under the Governor’s order, for example, a person accused of misdemeanor trespass or failure to pay child support is ineligible for a personal bond if, twenty years earlier, he was convicted of a misdemeanor assault. Likewise, a person who paid a 20 dollar fine on a family violence assault case fifteen years ago, and today is charged with 4.05 ounces of marijuana — barely a felony offense — will be

²⁸ *Ex Parte Davis*, 574 S.W.2d 166, 169 (Tex. Crim. App. 1978); *Taylor v. State*, 667 S.W.2d 149, 151 (Tex. Crim. App. 1984)).

held under the Governor's order, even though he is not a flight risk or a public safety threat. If he cannot afford monetary bail, he must stay in jail, while all court functions are suspended, in order to get his day in court.

There is simply no basis to conclude that such an individual would pose an unreasonable public safety threat if released without posting a secured bond. To the contrary, studies confirm that people age out of violent crime and pose fewer risks with the passage of time.²⁹ But someone accused of murder, of sexual assault, or of armed robbery could pay the bondsmen and return home. This is, at bottom, the problem with the money bail system, and the Governor's order fails to grapple with that issue.

It is also worth noting that the Governor's order was entirely unnecessary. Prior to its issuance, there was not a single jurisdiction in the State engaged in the mass release of dangerous persons. Quite the contrary, expanded release was granted to those accused of misdemeanor offenses or nonviolent, low-level felonies.³⁰ Now, under the Governor's order, even many of these individuals are ineligible for release.

²⁹ Bruce Western, *New Thinking in Community Corrections* (Sept. 2015) <https://www.ncjrs.gov/pdffiles1/nij/248900.pdf>.

³⁰ For example, McClennan County released some individuals with pending misdemeanors, including charges of failure to pay child support, driving with a suspended license, and misdemeanor theft. Sydney Isenberg, Texas jails to release non-violent misdemeanor inmates due to coronavirus pandemic, KXXV NEWS (Mar. 18, 2020), <https://www.kxxv.com/news/local-news/texas-jails-to-release-non-violent-misdemeanor-inmates-due-to-coronavirus-pandemic>; Bexar County also expedited the release of 200 persons charged with "nonviolent misdemeanors," Jacob Beltran, *Bexar*

II. The Order will inhibit the necessary reduction of jail populations, exacerbating the threat to public health already posed by the coronavirus

In addition to being unnecessary and unconstitutional, the Governor's Order will inhibit efforts to reduce jail populations in the short-term and in this time of crisis. Yet decreasing the size and density of the incarcerated population is what public health experts recommend to control the spread of the coronavirus. And doing so is integral to public health and safety.

It is now understood that the fewer people behind bars, the safer we all are from the risk of infection.³¹ The conditions in our jails mean that the virus threatens not only the people incarcerated in them, but also the guards, administrators, and other staff who work in them, the doctors and psychologists who provide necessary care, and of course, their families and communities, to whom all of those staff members and doctors and caregivers

sheriff releases more than 200 from downtown San Antonio jail amid coronavirus concerns, SAN ANTONIO EXPRESS-NEWS (Mar. 20, 2020), <https://www.expressnews.com/news/local/article/Sheriff-quarantines-11-deputies-releases-more-15144847.php>; Travis County took perhaps the most proactive measures in the State, but nevertheless only granted personal bonds to people charged with low-level, nonviolent felonies, Ryan Autullo and Katie Hall, *Travis County grants automatic personal bonds in many felony cases during outbreak*, STATESMAN (Mar. 24, 2020), <https://www.statesman.com/news/20200324/travis-county-grants-automatic-personal-bonds-in-many-felony-cases-during-outbreak>.

³¹ Brendan Pierson and Jan Wolfe, *'Ticking time bombs': U.S. jails raise alarm amid coronavirus outbreak*, REUTERS (Mar. 17, 2020), https://www.reuters.com/article/us-health-coronavirus-usa-bail/ticking-time-bombs-u-s-jails-raise-alarm-amid-coronavirus-outbreak-idUSKBN2141HJ?utm_source=twitter&utm_medium=Social.

return at the end of their shifts.³² Thousands of arrestees also cycle in and out of jails every week, increasing the likelihood that the virus will be brought into the facilities or carried back into the community.

As public health advocates have recognized, once the virus starts to spread within our jails, it cannot be contained. Just this week, researchers tracking the virus found that the Cook County, Illinois jail in Chicago is currently the largest “hotspot” for coronavirus infection in the country, with 306 inmates and 218 staff members testing positive.³³ If hundreds of people who are currently incarcerated in the jail or work there have the coronavirus, how many more people, who have either come into contact with these staff members or who were once in custody but are now released after being infected, are there in the community? Though the exact impact on the spread of the virus is almost impossible to quantify, available data and public health research suggests it must be extensive.

³² Anna Flagg and Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, NEW YORK TIMES (Mar. 31, 2020),

<https://www.nytimes.com/2020/03/31/upshot/coronavirus-jails-prisons.html?action=click&module=RelatedLinks&pgtype=Article>.

³³ Marvie Basilan, *Coronavirus Update: Cook County Jail Loses Third Detainee To COVID-19*, INTERNATIONAL BUSINESS TIMES (April 13, 2020),

<https://www.ibtimes.com/coronavirus-update-cook-county-jail-loses-third-detainee-covid-19-2957578>; Timothy Williams and Danielle Ivory, *Chicago’s Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars*, NEW YORK TIMES (April 8, 2020), <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>.

III. Substituting secured money bail for personal bonds does not prevent reoffending or otherwise advance public safety.

The Governor's Order is premised on the assumption that requiring secured money bail, rather than unsecured personal bonds, will have some positive impact on public safety in Texas. In reality, the reverse is true.

A. As compared to unsecured or personal bonds, secured money bonds do not reduce reoffending

Research shows that, as a release mechanism, secured money bond does nothing to advance public safety. There is no evidence that paying money up front to get out of jail prevents or discourages the commission of new criminal offenses while on pretrial release.³⁴ On this issue, scholars are in complete agreement. Even studies regularly touted by the bail industry, which utilize skewed research methods that have been widely criticized as inaccurately favoring the use of money bail, show no difference whatsoever in the rate of reoffending among persons released through money bail versus nonmonetary release mechanisms.³⁵ Likely because secured money bond

³⁴ Jones (2012) at 10.

³⁵ See, e.g., Eric Helland and Alexander Tabarrok, *The Fugitive: Evidence on Public versus Private Law Enforcement from Bail Jumping*, 47 J. OF LAW AND ECON. 93, 115-16 (2004), https://pdfs.semanticscholar.org/30a4/0196896ee629f7b28955cd464cfbe931f24d.pdf?_ga=2.6987378.1793080812.1586283319-1875816464.1586193492 (reporting that secured money bonds increase the likelihood of court appearance as compared to unsecured bonds, but finding no difference in rates of reoffending across release categories); Kristin Bechtel, et. al, *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research*, PRETRIAL JUSTICE INSTITUTE (Nov. 2012), <https://community.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?Do>

has no value as a tool to promote public safety, the American Bar Association's Standards for Criminal Justice specifically provide, "[f]inancial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person."³⁶

The failure of lengthy sentences to deter crime further underscores the fallacy of the "money bail deters crime" argument. Numerous studies reveal that, while the degree to which criminal prohibition deters the general public from offending is influenced by the certainty of apprehension, it is largely unaffected by the severity of punishment that follows.³⁷ Scholars who reviewed over thirty years of deterrence studies concluded: "We could find no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence."³⁸ Because of the consistency in findings across time, data sets, jurisdictions, and study methodologies, these results suggest that there simply is no relationship

[cumentFileKey=83a253bf-e833-32f4-1392-3bc48f65777b&forceDialog=0](#) (criticizing methodology in Helland and Taborrok's 2004 study).

³⁶ *ABA Standards for Criminal Justice, Pretrial Release*, 3rd ed. § 10-5.3(b)(2007), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf.

³⁷ *Id.* at 201-202; see also John Braithwhite, *Minimally Sufficient Deterrence*, in Michael Tonry, ed., *CRIME AND JUSTICE IN AMERICA, 1975-2025*, v. 42, at 83 (2013).

³⁸ Anthony N. Doob and Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, in Michael Tonry, ed., *CRIME AND JUSTICE: A REVIEW OF RESEARCH*, vol. 30, at 187 (2003).

between the two – harsher sentences do not deter crime.³⁹ And it is not just harsh sentences that fail to deter crime, it is all sanctions. “[S]tudies that examined the effects of sanctions quite uniformly found that sanctions either had no effect on or increased the level of subsequent offending, and that as the severity of sanctions applied increased, the level of subsequent offending also either showed no change or actually increased.”⁴⁰ As the authors summarized, “[w]hether to employ no sanctions, lenient sanctions, or harsh sanctions cannot be determined by the effect on the offender; the outcome is the same.”⁴¹ If the threat of prison, and decades in prison, does not deter reoffending, it is beyond the pale to believe that forfeiture of a monetary amount will.

B. The proliferation of secured money bonds inevitably leads to increased rates of pretrial detention, which negatively impact public safety

Any expansion in the use of secured money bonds will inevitably lead to increased rates of pretrial detention.⁴² The number of people detained

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 250.

⁴² See Jones (2012) (showing money bail increases jail bed use); Bernadette Rubuy, *Pretrial detention costs \$13.6 billion each year*, PRISON POLICY INITIATIVE (Feb. 7, 2017), https://www.prisonpolicy.org/blog/2017/02/07/pretrial_cost/. The Prison Policy Initiative calculated that of the over 600,000 people incarcerated in local jails across the country, more than 450,000 have not yet been convicted of any crime. See Wendy Savage and Peter Wagner, *Mass Incarceration: The Whole Pie*, PRISON POLICY INITIATIVE (March 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

pretrial increased by 433 percent between 1970 and 2015, and this aligned with an increase in jurisdictions' use of money bail.⁴³ Research has shown that detaining an individual pretrial causes substantial and often long-term harm to that person's well-being – damage that is later reflected in higher rates of reoffending.

People held in jail pretrial may lose their jobs due to absence,⁴⁴ and for many, their homes, apartments, or place in a shelter as well. Medical care is disrupted, and those who receive government benefits often lose their health insurance, housing assistance, and other necessary subsidies when incarcerated.⁴⁵ Families are impacted because parents are unable to care for their children, who may have to move to a relative's home or enter the foster care system. Education and home life stability disappears, and children suffer lasting trauma as a result.⁴⁶ Children of incarcerated parents are more

⁴³ Vera, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, (April 2019) <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

⁴⁴ See, e.g., *DeWolfe v. Richmond*, 76 A.3d 1019, 1023 (Md. 2019) (ruling that people have a right to counsel at initial bail hearings under the state's constitution, in part, because a "bail determination can have devastating effects on arrested individuals," including for many who "may be employed in low wage jobs which could be easily lost because of incarceration").

⁴⁵ Justice Policy Institute, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*, (Sept. 2012), at 13-14, 25-26, <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf>.

⁴⁶ *Id.*

likely to be expelled or suspended from school and are also more likely to engage in criminal conduct than other youth.⁴⁷

Pretrial detention renders people less likely to be formally employed or have any household income whatsoever for years after their release.⁴⁸ These effects are substantial across offenses, but are greatest for those detained pretrial on misdemeanors.⁴⁹ “[People] charged with misdemeanors generally do not pose a grave crime risk, and incentives to abscond should be weakest in low-level cases. . . . [M]isdemeanor pretrial detention has lasting criminogenic effects, thus generating more crime than it prevents.”⁵⁰

Likely because it is so destabilizing, several studies have confirmed that people detained pretrial are more likely to reoffend in the future.⁵¹ Increased recidivism is found even after controlling for the initial bail amount, charged

⁴⁷ Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. Rev. 1399, 1427 (2017), <https://pdfs.semanticscholar.org/87ad/71765ab7023af0292979c001aa7b6d4a293f.pdf>.

⁴⁸ *Id.* at 1424.

⁴⁹ *Id.*

⁵⁰ Megan Stevenson and Sandra Mayson, *Pretrial Detention and Bail*, U of Penn Law School, Public Law Research Paper No. 17-18 at 16 (2017), <https://ssrn.com/abstract=2939273>.

⁵¹ Lowenkamp et. al., *The Hidden Costs of Pretrial Detention* (Nov. 2013) https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf; Arpit Gupta, Christopher Hansman, and Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUDIES 471 (2016), <http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf>; Paul Heaton, Sandra G. Mayson, Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017), <http://ssrn.com/abstract=2809840>.

offense, demographics, and criminal history.⁵² Because the Governor's Order will inevitably cause pretrial incarceration to increase, especially for individuals charged with lower-level offenses who would otherwise be released on a personal bond, the long-term public safety impact of the Order could be disastrous for Texas communities.

IV. Conclusion

Local officials know that, if they want to avoid endangering the health and safety of communities, the time to act is *now*. These concerns are all the more pressing given the fact that TDCJ is refusing new inmates, increasing the burden at the county level to depopulate the jail population where it can be done so safely.⁵³ Governor Abbott's broad and unnecessary order poses a substantial obstacle to those efforts. And it does so based on unsupported assumptions about what does and does not make communities safe. As elected prosecutors tasked with protecting our communities and organizations working closely with prosecutors, we ask this Court to act now and stay the order.

⁵² Heaton, et. al (2017) at 711.

⁵³ Jolie McCullough, *Texas Prisons Won't Accept New County Jail Inmates as Coronavirus Spreads in Lockups* (Texas Trib. April 11, 2020), https://www.texastribune.org/2020/04/11/coronavirus-texas-prisons-spurs-halt-new-inmates-county-jails/?utm_campaign=trib-social&utm_content=1586646330&utm_medium=social&utm_source=facebook&fbclid=IwAR1UFUCLAIqaEfBY2gIjSx07mJKMNa33t7mUy5MPJdzITJUAFvRqv1fgKvg.

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