

**No. 14 MAP 2021**

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**IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

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Commonwealth of Pennsylvania,  
Appellee,

v.

Daniel George Talley,  
Appellant.

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On Appeal from the order of the Superior Court of Pennsylvania,  
entered July 17, 2020 at No. 2627 EDA 2018,  
Affirming the Judgment of Sentence of the Montgomery County Court  
of Common Pleas, entered Aug. 24, 2018 at No. CP-46-CR-5241-2017

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**BRIEF OF THE PHILADELPHIA BAIL FUND,  
THE PHILADELPHIA COMMUNITY BAIL FUND,  
THE YOUTH ART & SELF-EMPOWERMENT PROJECT,  
AND THE YOUTH SENTENCING & REENTRY PROJECT  
AS *AMICI CURIAE* SUPPORTING APPELLANT**

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## INTERESTS OF THE AMICI CURIAE

*Amici Curiae* are a group of organizations that have extensive experience with people who have been detained pretrial. *Amici* all work on issues related to the question posed in case, and the outcome of this case will directly affect their clients and work.

The Philadelphia Bail Fund works to end money bail in the city of Philadelphia. In its advocacy on this topic, the Bail Fund urges a shift to a system that includes a presumption of pretrial release in all but the most exceptional circumstances. Until those changes come to pass, the Bail Fund pays bail for indigent people as early as possible to help them avoid pretrial detention. As part of this work, the Bail Fund has observed firsthand the harms of pretrial detention on individuals and communities.

The Philadelphia Community Bail Fund works to end cash bail in the city of Philadelphia. While bail continues to exist, the Community Bail Fund posts bail for people who cannot afford it to help them avoid unnecessary pretrial detention. The Community Bail Fund has worked with hundreds of pretrial detainees, and has observed firsthand the harms of pretrial detention on both individuals and communities. This case is of great interest to the organization, in no small part because of the effect that the outcome will have on its community and its work.

The Youth Art & Self-empowerment Project works to end the incarceration of youth, including particularly the common practice of incarcerating young people as adults. YASP is led by young people who have had cases in the adult criminal court system and been housed in adult jails and prisons. As part of its work, YASP has observed firsthand the pernicious effects of pretrial and other detention on youth, including how those effects fall even more heavily when youth are incarcerated in adult facilities.

The Youth Sentencing & Reentry Project is a nonprofit organization based in Philadelphia that uses direct service and policy advocacy to transform the experiences of children charged and prosecuted in the adult criminal justice system, and to ensure fair and thoughtful resentencing and reentry for individuals who were sentenced to life without parole as children (“juvenile lifers”). YSRP partners with court-involved youth and juvenile lifers, their families, and lawyers to develop holistic, humanizing narratives that mitigate the facts of each case; get cases transferred to the juvenile system or resentenced; and make crucial connections to community resources providing education, healthcare, housing, and employment. YSRP also provides trainings on mitigation, and recruits, trains, and supervises students and other volunteers to assist in this work. YSRP’s ultimate goals are to keep children out of adult jails and prisons and to enhance the quality of representation

juvenile lifers receive at resentencing as they prepare to reenter the community.

*Amici Curiae* submit this brief pursuant to Pa.R.A.P. 531(b)(2), and do not repeat arguments made by the parties. Neither party's counsel authored this brief, or any part of it. Neither party's counsel contributed money to fund any part of the preparation or filing of this brief. The brief was prepared entirely by *Amici* or their counsel.

## INTRODUCTION

For millions of Pennsylvanians, the stakes for this case could not be higher. Pretrial detention imposes numerous and substantial burdens on anyone subjected to it, under any standard of review or bail scheme. But the effects of pretrial detention do not fall solely on individuals—pretrial detention undermines the criminal justice system and harms communities across the Commonwealth. These effects flow directly from the very nature of pretrial detention, but are magnified when the Commonwealth holds people pretrial without that detention being absolutely necessary to serve its interests. *Amici* offer this Court their informed perspective based on substantial experience working with people who are arrested, charged, and otherwise pulled into the criminal legal process—both youth and adults—and with their communities. And in analyzing the legal issues in this case, *Amici* urge the Court to consider

the harms of pretrial detention on individuals and communities as vital context.

First, pretrial detention warps the criminal legal process and undermines justice. The criminal system seeks justice—holding different people accountable in similar ways for similar offenses, protecting communities, and vindicating wrongfully charged people—all while respecting individual constitutional rights. Pretrial detention undermines each of those objectives. In practice, pretrial detention coerces guilty pleas from both youth and adults, in defiance of individual rights. Pretrial detention impairs people’s ability to assist in their own defense, and increases conviction rates across charge types. Pretrial detention imposes unjust outcomes by resulting in harsher sentences for the same offenses as compared to people not detained pretrial. Pretrial detention increases the risk of wrongful convictions and miscarriages of justice. And it does all of these things without consistently serving its stated purpose of community protection.

Second, not only does pretrial detention fail to promote community safety, it actively harms individuals, families, and communities. Even short periods of pretrial detention—such as where charges are quickly dropped—exert enormous and long-term effects on employment, housing, and child custody, which cascade through families. The experience of pretrial detention of any length harms individuals, especially children and youth. That damage takes many forms, including direct trauma,

increased likelihood of future criminal charges, and rampant civil rights violations that may never be redressed. And while these harms should concern this Court regardless, the Court should take particular note of the inequitable imposition of the cost of pretrial detention—it falls primarily and disproportionately on people and communities of color.

For all of these reasons, *Amici* urge this Court to reckon with the harms of pretrial detention, and to hold the Commonwealth and its attorneys to the highest possible standard when seeking it.

## ARGUMENT

### **I. Pretrial detention warps the criminal process and undermines justice.**

Pretrial detention undermines the very purpose of the criminal process—the quest for justice. Pretrial detention warps the criminal process by impairing individuals’ ability to assist in their own defense, and in doing so, puts a thumb on the scale in favor of the prosecution in criminal cases. *See Barker v. Wingo*, 407 U.S. 514, 533 (1972). That additional weight coerces guilty pleas, results in harsher penalties and longer sentences for the same offenses as compared to people not held pretrial, and, ultimately, increases the risk and number of wrongful convictions. It does all of this without consistently serving its stated purpose of protecting the community.

**A. Pretrial detention coerces guilty pleas of both children and adults.**

By impairing someone’s ability to assist in his or her own defense, imposing freestanding harms that people wish to avoid, and otherwise degrading someone’s capacity to investigate and litigate meritorious issues, pretrial detention creates enormous incentives for pretrial detainees to plead guilty. Especially for people charged with minor offenses, pretrial detainees often find themselves in the impossible position of receiving a plea offer that provides immediate release in exchange for a guilty plea, while waiting for trial to attempt to prove their innocence could take months or years more in detention. *See Anderson v. Perez*, 677 F. App’x 49, 50 n.1 (3d Cir. 2017) (“One who maintains his or her innocence may, as in *Curry*, take a plea deal rather than mount a meritorious defense, or may wait out prolonged imprisonment—as here, four months—until charges are dismissed.”);<sup>1</sup> *see also* Nick Pinto, *The Bail Trap*, THE NEW YORK TIMES (Aug. 13, 2015).<sup>2</sup> Those incentives are

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<sup>1</sup> The cost of waiting has only increased because of delays in proceedings and trials during the COVID-19 pandemic.

<sup>2</sup> *Available at*: <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>. *See also* Shaila Dewan, *When Bail Is Out of Defendant's Reach, Other Costs Mount*, N.Y. TIMES (June 10, 2015), *available at*: <http://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html>; *see also* Sadhbh Walshe, *America's Bail System: One Law for the Rich, Another for the Poor*, THE GUARDIAN (Feb. 14, 2013), *available at*: <http://www.theguardian.com/commentisfree/2013/feb/14/america-bail-system-law-rich-poor>; Alysia Santo, *The Marshall Project*, *When*

untenable, and exert enormous coercive power that results in miscarriages of justice.

The coercive power of pretrial detention is strong. “Conviction generally means getting out of jail; people detained on misdemeanor charges are routinely offered sentences for ‘time served’ or probation in exchange for tendering a guilty plea.” Paul Heaton, Sandra Mayson, and Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 715 (2017). Especially given the harms inherent to pretrial detention, *see* Section II, *infra*, people must be doggedly committed to their rights to wait out additional jail time to vindicate themselves. *See* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 308 (2011).

Differences in conviction rates between those detained pretrial and those released during their pretrial proceedings can even quantify the coercive effects. Studies have found a concerning disparity in outcomes based solely on pretrial detention. One report that analyzed ten years’ worth of criminal statistics found that conviction rates for those released

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Freedom Isn't Free (Feb. 23, 2015), *available at*: <https://www.themarshallproject.org/2015/02/23/buying-time>; Robert Lewis, No Bail Money Keeps Poor People Behind Bars, WNYC News (Sept. 19, 2013), *available at*: <http://www.wnyc.org/story/bail-keeps-poor-people-behind-bars/>.

pretrial were roughly 50%, while conviction rates for those detained pretrial—even accounting for numerous other factors that might explain the disparity—were roughly 92%. *See id.* One key reason for this is that people cannot assist in their own defense as effectively when held in custody pretrial. They cannot engage in fact gathering or communicate freely with their attorneys, and because of job and income losses and other financial pressures, they may not even be able to afford defense costs in the first instance. *See Downstream Consequences*, 69 STAN. L. REV. at 722.

*Amici* themselves have worked with clients who experience exactly this coercion. This includes coercion to take otherwise bad plea deals in related circumstances, such as people incarcerated on unconstitutional sentences entitled to resentencing. This group, whom the Commonwealth offered pleas to sentences that brought immediate parole eligibility and quicker release—but also, years of onerous probation and reporting requirements—had to choose between accepting those requirements or to waiting out adversarial resentencing over a longer timeline. Those offers—objectively less good than what clients believed they deserved and what many ultimately received at resentencing—relied on the coercion inherent to incarceration to entice them. The potential cost of taking the deal to get out earlier only increased for people who believed themselves to be candidates for exoneration on the basis of actual innocence. While some clients had more than ordinary firmness and waited, numerous

similarly-situated people took the deals because of the prospect of quicker release.

Although adults experience this coercion, the problem is more acute for children. The mere fact of pretrial detention as a minor child in an adult detention facility imposes additional coercion on top of the existing coercion inherent to pretrial detention. *Amici* have observed this firsthand. In addition to the factors discussed above, children who are charged in the adult justice system, pursuant to Pennsylvania’s Act 33 of Special Session 1 of 1995, commonly referred to as the “Direct File Juvenile” statute, *see* 1995-33SB 100,<sup>3</sup> often are subject to conditional offers to remove their cases from adult court, where their pretrial detention plays a major role. By nature of the charges they face, these youth are held pretrial in adult jails or—in some instances in which a

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<sup>3</sup> Act 33 excepts certain charges from Pennsylvania’s Juvenile Act, which otherwise governs when youth are accused of criminal conduct. *See* 42 Pa. C.S.A. § 6302. Pennsylvania, like many states, includes numerous mechanisms that allow prosecution of juveniles and youth to take place in adult court—including presumptively in some entire classes of offense types. *See* Patrick Griffin et al, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, Office of Juvenile Justice and Delinquency Prevention (Sept. 2011), *available at*: <https://www.ojp.gov/pdffiles1/ojjdp/232434.pdf>.

county does not have a PREA-compliant<sup>4</sup> jail—in state prisons.<sup>5</sup> Prosecutors commonly offer youth being held in adult carceral settings a plea deal that will result in a “reslate” of their case in the juvenile system, but often only if they agree to plead guilty to a set of charges in juvenile court. In effect, a young person who chooses to exercise their constitutional right to a trial is punished for this decision by additional time in adult jail. Any period of time in adult jail increases the likelihood that a young person will experience substantial physical and psychological trauma, and exposes them to the possibility of solitary confinement. *See* International Human Rights Law Clinic et al., *Children in Pretrial Detention: Promoting Stronger International Time Limits*

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<sup>4</sup> The Prison Rape Elimination Act (PREA) is a federal statute enacted to address sexual assault in federal, state, and local detention facilities, and requires that youth be separated from adults in adult carceral settings. *See* 34 U.S.C. § 303, *available at*: <https://uscode.house.gov/view.xhtml?path=/prelim@title34/subtitle3/chapter303&edition=prelim>. *See also* National PREA Resource Center, *ABOUT: Prison Rape Elimination Act (2018)*, *available at* <https://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea>.

<sup>5</sup> Pa. R. Crim. P. 598 (Rule 598, adopted in 2012), provides the pre-trial procedures for place of detention during procedures for transfer from criminal proceedings to juvenile proceedings. Paragraph A provides the “norm” with regard to pretrial detention—the defendant in a direct file case is to be detained in the county jail unless released on bail.

(2018).<sup>6</sup> This is a particular issue in Pennsylvania because it is one of a small minority of states that imposes no minimum age to charge and try children as adults. *See* Equal Justice Initiative, “All Children Are Children: Challenging Abusive Punishment of Juveniles” (2017), at 5-6. Although youth so charged may seek to move back to juvenile courts, they cannot count on that, nor can they count on that move to happen quickly even when it happens at all. *See* *Trying Juveniles as Adults*.

**B. Pretrial detention results in harsher penalties for the same offenses.**

Pretrial detention not only increases the likelihood that someone will plead guilty, it also warps sentencing. People who are held in pretrial detention face harsher sentences than people charged with the same offenses who remain free prior to trial or sentencing. Although increased pretrial detention tracks with other demographic characteristics that also often result in inequitably harsher sentencing, the effect of pretrial detention on sentences applies regardless of other variables. Quantitative evidence suggests that detained defendants are “25% more likely to be convicted and 43% more likely to be sentenced to jail” for the same offenses. *Downstream Consequences*, 69 STAN. L. REV. at 717. There are several reasons for this, including among other things that

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<sup>6</sup> *Available at:*

<https://www.wcl.american.edu/index.cfm?LinkServID=336BF47E-F500-5734-BF735718257FE45B>

people who are held pretrial have less leverage in plea bargaining, and also that people who are held pretrial cannot engage in “commendable behavior that mitigate her sentence” or might result in an outcome like diversion. *Id.* at 722. But the fact remains that pretrial detention contributes to inequities in sentencing even holding other factors equal—to the detriment of justice.

**C. Pretrial detention increases the risk of wrongful conviction.**

Pretrial detention during an accused person’s criminal process also causes an increased risk of wrongful conviction. Pretrial detention causes wrongful convictions partly because, among other things, it compromises the identification and collection of exculpatory evidence. Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AMER. CRIM. L. REV. 4 (2005) (discussing the effect of pretrial detention and also arguing that weakening defense cases is intentional). But other effects of pretrial detention—including the coercive effect on pleading—directly result in not only wrongful convictions after adversarial trials, but of people pleading guilty for offenses they did not commit. That dynamic matters especially because negotiated pleas to offenses that people did not actually commit make up a larger share of wrongful convictions than trial losses, and because procedural bars based on those pleas limit any recourse or error correction after the fact.

Pretrial detention increases the likelihood of wrongful convictions at trial because it impairs one’s ability to assist in one’s own defense. But while individual exonerations of people who fought their case every step of the way attract more attention, evidence suggests that the majority of wrongfully incarcerated people actually pleaded guilty to their offense. *See, e.g.*, Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316 (2012) (“[E]very year the criminal system punishes thousands of petty offenders who are not guilty.”). In addition to the coercive effect on individuals in custody, many criminal defense systems even set up incentives for attorneys to encourage pleas to forestall trials. Jennifer L. Doleac, *To reduce wrongful convictions, reform the bail system*, The Brookings Institution (June 22, 2016).<sup>7</sup> Taken together, the system tolerates or even encourages wrongful convictions that stem solely from pretrial detention.

**D. Pretrial detention undermines justice without consistently serving its stated purpose of community protection.**

Pretrial decision-making, at its root, seeks to protect the community from risks posed by a small number of defendants and to ensure that defendants appear at future proceedings in their cases. *See, e.g.*, Pa. Rule Crim. P. 523 (“Release Criteria”). It is not, however,

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<sup>7</sup> *Available at*: <https://www.brookings.edu/opinions/to-reduce-wrongful-convictions-reform-the-bail-system/>

effective at accomplishing either of those things. For one thing, it does not well serve the public interest in safety because the availability of cash bail for the majority of accused persons means that dangerous-but-wealthy people pay for pretrial release, while unthreatening-but-poor people who cannot pay remain detained. And in fact, empirical data suggest that even attempts to assess the “most dangerous” accused persons to support pretrial detention largely identify people who do not re-offend while on release. For another thing, pretrial detention and the associated bail system does nothing to address the actual problems that cause missed reappearances at future criminal proceedings. All told, the pretrial detention system causes all of the harms described, without offering the ostensible benefits to make up for them.

This Court sensibly rejected pretrial risk assessment algorithms in its prior consideration of the cash bail system, for numerous reasons. *See Philadelphia Community Bail Fund v. First Judicial District*, No. 21 EM 2019 (Pa. Jul. 27, 2020). But where pretrial risk assessment tools have been used, they reveal that the criminal legal system vastly overestimates the risk of future harm posed by even accused individuals deemed to be the highest possible risk. Two of the most common pretrial risk assessment tools—the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) and the Public Safety Assessment (PSA)—reflect this. In those tools, defendants flagged with the highest risk of violence have less than a 13 percent chance of being rearrested for

a new violent offense.<sup>8</sup> For COMPAS, defendants with the highest risk of new arrest for a violent offense only have an approximately eight percent rate of re-arrest for a violent offense within six months.<sup>9</sup> And these figures are for those defendants deemed to be the *highest* risk by the respective systems. The vast majority of individuals assessed as the highest risk are not re-arrested for anything if released pretrial, much less for violent offenses. Labeling them as “high risk” disserves pretrial decision-making and the policy-making underlying it, and suggests that many fewer people could be held pretrial without compromising community safety.<sup>10</sup>

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<sup>8</sup> See Matthew DeMichele, et al., *Public Safety Assessment: Predictive Utility and Differential Prediction by Race in Kentucky*, Crim. & Pub. Pol (forthcoming); see also Thomas Blomberg, et al., *Validation of the COMPAS Risk Assessment Classification*, Sept. 2010, available at: <http://criminology.fsu.edu/wp-content/uploads/Validation-of-the-COMPAS-Risk-Assessment-Classification-Instrument.pdf>, at 52.

<sup>9</sup> Blomberg, *Validation of COMPAS*, at 51-52.

<sup>10</sup> When people understand the actual risk posed, they recognize that more people should be released pretrial. A recent Pew survey found that two-thirds or more of Americans, when given the underlying numbers about likelihood of success upon release, support the release of individuals often labeled as “moderate or high risk.” See Pew Charitable Trusts, *Americans Favor Expanded Pretrial Release, Limited Use of Jail*, Figure 8 at 9, Nov. 2018, available at: <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/11/americans-favor-expanded-pretrial-release-limited-use-of-jail>.

Pretrial detention itself, however, *causes* more offenses in the period of time after people experience it. Pretrial detention causally “increases the likelihood of a future arrest for new crimes,” even holding other variables equal. Downstream Consequences, 69 STAN. L. REV. at 715. Within a year and a half, detention “is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges.” *Id.* at 717. This owes to numerous factors, including dislocation from stable lives occasioned by pretrial detention, *see* Section II.a., *infra*, and also trauma incurred during pretrial detention and other associated incarceration itself. *See* Lena J. Jaggi, et al., The Relationship between Trauma, Arrest, and Incarceration History among Black Americans: Findings from the National Survey of American Life, 6 Soc. Ment. Health 3 (Nov. 2016);<sup>11</sup> *see also* Section II.a, *infra*. But this means that pretrial detention not only negatively impacts the lives of people so held, it also undermines safety for the community rather than enhancing it.

Second, pretrial detention does not meaningfully help obtain reappearance at future criminal proceedings. One key reason for this is that many people who do not reappear at future proceedings do not actually intend to flee the criminal process. *See* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018) (arguing that there are three “subcategories” of “nonappearing defendants”: true flight, local

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<sup>11</sup> Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5079438/>.

absconders (those who *remain* in the jurisdiction but persistently and actively avoid court dates), and low-cost appearances (those who remain in the jurisdiction but whose failures to appear are easily preventable, addressable, and/or non-willful)). Pretrial detention coupled with cash bail does not help with people who intend to flee, because such people by definition have the resources to do so and therefore also to pay their bail. And on the flip side, people who comprise the largest category—those whose failures to appear could easily be prevented—need not be detained to assure their appearance. Low-impact (and inexpensive) interventions such as text message reminders of court dates could achieve substantial compliance without the numerous harms of pretrial detention.

## **II. Pretrial detention harms individuals, families, and communities.**

Pretrial detention not only fails to serve its purpose within the criminal system, it also actively imposes harms to individuals, families, and communities. Because “Constitutional law authorizes pretrial detention when the government’s interest in safety outweighs the individual’s interest in liberty . . . pretrial detention must, at minimum, avert more harm than it inflicts.” Megan Stevenson and Sandra Mayson, *Pretrial Detention and the Value of Liberty*, Virginia Public Law and Legal Theory Research Paper No. 2021-14, at 5 (Feb. 16, 2021).<sup>12</sup> As currently administered, pretrial detention likely imposes more harm

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<sup>12</sup> *Available at*: <https://ssrn.com/abstract=3787018>

than it averts. *See id.* at 6. Even short periods of pretrial detention can cause far-reaching effects in individual lives that cascade through families and communities—loss of jobs and income, housing, and child custody, among other things. Pretrial detention of any length also subjects individuals to rampant civil rights violations, for which individuals often have no recourse. Although pretrial detention harms adults in numerous ways, pretrial detention is especially damaging to children and youth. And all of these harms fall inequitably on people and communities of color.

**A. Even short periods of pretrial detention burden individuals and families in far-reaching ways.**

Pretrial detention disrupts lives. These disruptions take many forms, and occur most catastrophically for people who suffer protracted—multi-month or multi-year—pretrial detention. But “[e]ven short periods of jail detention impose harms as grave as serious crimes.” *Pretrial Detention and the Value of Liberty*, at 7. Even in the short term, people can miss work shifts, and suffer loss of income and employment. *See, e.g., Curry v. Yachera*, 835 F.3d 373, 377 (3d Cir. 2016) (describing individual detained pretrial because he could not post bail missing the birth of his son and losing his job); *see also* OPEN SOC’Y JUSTICE INITIATIVE, THE SOCIOECONOMIC IMPACT OF PRETRIAL DETENTION: A GLOBAL CAMPAIGN FOR PRETRIAL JUSTICE REPORT 13 (2011), *available at*: <http://www.unicef.org/ceecis/>

Socioeconomic\_impact\_pretrial\_detention.pdf. Loss of income and employment—or simply missing a payment based on the timing of detention—can cause someone held pretrial to lose housing. Missing a scheduled school pickup, visitation window, or other parental obligation can cause someone to lose custody rights to their own children. Although short periods of detention can impose these burdens, disentangling them takes far longer. And these burdens are borne not only by individuals subjected to pretrial detention, but by families—including children—of those people, and by their communities.

Because low-income people are disproportionately held pretrial, they face particular risks from detention. For one thing, many of them work in jobs where missing a shift without calling out can result in losing one’s job. *See The Bail Trap* (quoting a public defender observing that “Our clients work in service-level positions where if you’re gone for a day, you lose your job”); *see also* Catherine S. Kimbrell and David B. Wilson, “Money Bond Process Experiences and Perceptions,” George Mason University (Sept. 9, 2016) (noting that the “vast majority” of pretrial detainees “believ[ed] they may lose their job”).<sup>13</sup> Some live in shelters, where missing a curfew can result in expulsion, *see The Bail Trap*, but

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<sup>13</sup> *Available at:*

<https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4ce69b9e-36d1-328f-30e3-416ee82abdbf&forceDialog=0>

even those who rent often cannot afford to miss income without risking a spiral that results in them losing housing.

For parents, even short periods of pretrial detention can result in children going into state custody. *See id.* For women, who often have greater caregiving responsibilities, the risk is particularly acute—66% of women detained pretrial because they cannot afford bail have minor children from whom they become dislocated. Wendy Sawyer, How does unaffordable money bail affect families?, Prison Policy Initiative (Aug. 15, 2018).<sup>14</sup> For all pretrial detainees, including men, more than half of people in jail because they could not pay bail were parents of minor children. *Id.* All of those parents face serious risk of losing custody—a small study by researchers at George Mason reported that more than 40% of parents in custody told them that their own pretrial detention would change, or had already changed, their child’s living arrangements and custody situation. *See* “Money Bond Process Experiences and Perceptions”.

The effects of lost income, missed caretaking, and losing housing or custody, do not fall only on accused people. In *Amici*’s experience and observation, the people who ultimately suffer the most are family members, including and especially children. Children with loving parents go into the foster care system unnecessarily, and have stable lives

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<sup>14</sup> *Available at:* <https://www.prisonpolicy.org/blog/2018/08/15/pretrial/>

undermined indefinitely. If someone loses child custody because of a brief period of pretrial detention, the process to regain custody takes months or years. *See, e.g., The Bail Trap* (describing failure to regain custody months after brief arrest). In households that rely on two incomes and lose one because someone held pretrial cannot get to work, another adult must fill the financial gap, somehow, often at the expense of family time and caretaking. And to the extent that some of the worst problems are sometimes addressed by government services, incarcerating people pretrial stresses the system and puts the Government in the position of paying both for pretrial detention and to mitigate some—although never all—of the harm that results. The criminal justice system should pay particular attention to the need to hold people pretrial, because the decision at the very outset can have far-reaching effects on families that linger for years.

Longer periods of pretrial detention impose many of the same harms to a greater degree and also impose other costs. Longer periods of detention make job or housing loss more certain. They also impose psychological costs accompanying prolonged detention, including increased risk of suicide. *See, e.g., Jennifer Gonnerman, Kalief Browder, 1993-2015, THE NEW YORKER* (June 7, 2015) (describing the suicide of Mr. Browder, detained pretrial at an adult jail for more than three years after

being arrested at age 16 for a crime that he did not commit).<sup>15</sup> And the longer that someone stays detained, the greater the dislocation from regular life and associated costs upon reentry. Jeffrey Manns, “Liberty Takings: A Framework for Compensating Pretrial Detainees,” 26 *CARDOZO L. REV.* 5, 1971 (2005). *Amici* have personally observed the challenges accompanying longer periods of detention, and attempt to forestall those challenges by helping people afford bail sooner, and by assisting with reentry for those who struggle to afford bail. But neither fundraising nor reentry support can make up for all of the challenges occasioned by pretrial detention, especially for prolonged periods.

**B. Pretrial detention of any length subjects people to civil rights violations for which they often have no recourse.**

Pretrial detention, including in the Commonwealth, regularly subjects people to civil rights violations. Those civil rights violations include but are not limited to excessive force, dislocation from necessary and/or ongoing medical treatment, violence by other detained people of which the facility has knowledge and from which it should protect them, and unnecessary use of restraints. In the Commonwealth, where an opioid epidemic continues apace, lack of attention and treatment in pretrial detention also regularly violates the rights of people who undergo withdrawal while detained. And for many reasons, including the Prison

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<sup>15</sup> *Available at:* <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

Litigation Reform Act, lack of access to attorneys, simultaneous criminal process, retaliation, and other dynamics, many people who suffer such violations in pretrial detention never have any recourse to seek accountability or vindicate their rights.

Many pretrial detention facilities, including those in the Commonwealth, have dangerous and unsafe conditions. Some pretrial facilities are particularly notorious for civil rights violations, as even the U.S. Department of Justice has recognized. *See The Bail Trap* (quoting DOJ describing Rikers Island’s “‘deep-seated culture of violence’ among Rikers guards,” as well as stabbings, slashings, rape, and extortion). Within the Commonwealth, violations occur routinely at, for example, the Philadelphia City Jail, as of the very moment of this filing. Samantha Melamed, Another assault at Philly jail leaves a man on life support and staff and prisoners warning of a crisis, PHILADELPHIA INQUIRER (Apr. 23, 2021) (describing five fatal beatings since August, as well as numerous other assaults and an absence of staff protection);<sup>16</sup> *see also* Samantha Melamed, The Philly jail unit where a man was killed was left unsupervised for hours, records show, PHILADELPHIA INQUIRER (Mar. 30, 2021) (describing several hours of no staff supervision, and quoting the officer union head as observing that “the prisons are crying for help and

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<sup>16</sup> Available at: <https://www.inquirer.com/news/philadelphia-jail-murder-christopher-hinkle-armani-faison-20210423.html>.

nobody is listening”).<sup>17</sup> But this is not solely a Philadelphia issue, as *Amici* also have firsthand experience with widespread civil rights violations at George W. Hill Correctional Facility in Delaware County, among other locations. *See* Kenny Cooper, Delco takes first ‘physical step’ toward deprivatizing George W. Hill Correctional Facility, WHYY (Apr. 15, 2021).

COVID-19 has exacerbated all of this. In pretrial detention across the country and Commonwealth, jails and prisons have struggled to maintain safe conditions during the course of the pandemic. This owes to numerous factors, including chronic absenteeism among staff, *see* Another assault at Philly jail; high turnover as people cycle in and out, *see id.*; and, simply, the impossibility of social distancing in packed pretrial detention facilities, *see* Matthew J. Akiyama, et al., Flattening the Curve for Incarcerated Populations—Covid-19 in Jails and Prisons, 382 NEW ENGLAND J. MED. 2075 (May 28, 2020). But the effect is clear: First, pretrial detention centers have imposed lockdowns that have caused numerous mental health challenges for detainees. *See* Samantha Melamed, Federal judge: Philly jails must relax extreme COVID-19 lockdown measures for sake of mental health, PHILADELPHIA INQUIRER (Jan. 14, 2021). And second, pretrial detainees have been infected with and died of COVID-19 at rates far exceeding the non-incarcerated

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<sup>17</sup> *Available at:* <https://www.inquirer.com/news/philadelphia-prisons-jail-armani-faison-homicide--20210330.html>

population. *See* Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71 (July 8, 2020) (collecting statistics); *see also* Eric Reinhart and Daniel L. Chen, *Carceral-community epidemiology, structural racism, and COVID-19 disparities*, 118 PNAS 21 (May 25, 2021) (describing short-term jailing as having significantly driven COVID-19 spread in surrounding communities, and collecting sources).<sup>18</sup>

People very rarely have any recourse to address these violations of their civil rights and liberties. This is partly because the Prison Litigation Reform Act has imposed so many limits on incarcerated plaintiffs that many fewer can vindicate their rights in court. *See* Andrea Fenster and Margo Schlanger, *Slamming the Courthouse Door: 25 years of evidence for repealing the Prison Litigation Reform Act*, Prison Policy Initiative (Apr. 26, 2021).<sup>19</sup> Among other things:

it requires courts to dismiss civil rights cases from incarcerated people for minor technical reasons before even reaching the case merits, requires incarcerated people to pay filing fees that low-income people on the outside are exempt from, makes it hard to find representation by sharply capping attorney fees, creates high barriers to settlement, and weakens the ability of courts to order changes to prison and jail policies.

*Id.* Beyond those obstacles, pretrial detainees face additional problems not based in statute. This includes cultures of lying among officers. *See*

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<sup>18</sup> *Available at:* <https://www.pnas.org/content/118/21/e2026577118>.

<sup>19</sup> *Available at:* [https://www.prisonpolicy.org/reports/PLRA\\_25.html](https://www.prisonpolicy.org/reports/PLRA_25.html).

Jan Ransom, *In N.Y.C. Jail System, Guards Often Lie About Excessive Force*, THE N.Y. TIMES (Apr. 24, 2021) (describing nearly 150 officers over a 20-month period demonstrably lying about uses of force). It includes isolation, transfers, and other tactics by facilities and staff that inhibit detainees' ability to investigate facts or engage in PLRA-required exhaustion. *See, e.g., Hill v. Lappin*, 630 F.3d 468, 469 (6th Cir. 2010) (“Hill alleges that the McCreary prison staff placed him in segregated housing and threatened to transfer him to the lock-down unit at [USP] Lewisburg in retaliation for grievances that he had filed against the McCreary staff.”). And it includes lack of transparency through denied access to videos and other information that might help prove cases, even once litigation has been filed. *See, e.g., Fed. R. Civ. P. 26(a)(1)(B)(iv)* (providing for absence of normal disclosure to *pro se* incarcerated litigants).

Notably, pretrial detention also often stops people from getting redress for civil rights violations that predate the detention. Because of the coercive effect of pretrial detention on pleas, *see* Section I.b., *supra*, accused people often plead guilty simply to escape pretrial detention. But that plea subsequently places any misconduct leading up to their pretrial detention—malicious prosecution or fabricated evidence, for example—outside of the scope of civil rights lawsuits because of the favorable termination bar. *See Curry*, 835 F.3d at 377 (“Curry's inability to post bail deprived him not only of his freedom, but also of his ability to seek

redress for the potentially unconstitutional prosecution that landed him in jail in the first place.”). The Third Circuit described this problem as an “unsettling imperfection,” *id.*, but the lack of available redress should be more than unsettling—it promotes misconduct and civil rights violations by eliminating the deterrent effect of possible civil rights lawsuits. The removal of deterrence harms everyone in the system, and everyone who comes into contact with it.

**C. Pretrial detention is especially damaging to children and youth.**

Pretrial detention causes substantial harm to adults—but causes more and deeper harms to children and youth who are detained pretrial. Children suffer the harms discussed above, but do so at a more vulnerable point of their lives. Research shows that children detained pretrial, especially in adult facilities,<sup>20</sup> experience substantial trauma and distress. And the effects are worse for children who have previously experienced trauma; incarceration can exacerbate past trauma among children who are already the most vulnerable. *See* Children in Pretrial Detention (“Many children who suffer from trauma and mental health

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<sup>20</sup> To be clear, even juvenile facilities present enormous dangers. *See, e.g.,* Samantha Melamed, Pa. lawmakers urge sweeping reforms after Delco youth facility closure, PHILADELPHIA INQUIRER (Mar. 23, 2021), *available at* <https://www.inquirer.com/news/lima-delaware-county-juvenile-detention-center-abuse-justice-task-force-20210323.html> (describing youth facility where “abuse is endemic” and lack of action on the part of the Commonwealth upon receiving reports of mistreatment of youth).

disorders before they are detained see these problems worsen as their mental health deteriorates in detention. Children in pretrial detention, given the new environment, the trauma of being detained, and the uncertainty in their legal situation, are more vulnerable than adults.”).

The harms are serious and quantifiable. Incarcerated youth are up to 9 times more likely to commit suicide when held in an adult jail or prison than when they are held in juvenile facilities. *See* Equal Justice Initiative, *Children in Adult Prisons*.<sup>21</sup> They are five times more likely to suffer sexual assault when held in adult versus youth facilities. Equal Justice Initiative, “All Children Are Children: Challenging Abusive Punishment of Juveniles” (2017). Even when facilities attempt to protect them, that often takes the form of solitary confinement, which causes enormous mental and emotional stress, and can “trigger devastating psychological consequences, including a loss of a sense of self.” *Williams v. Wetzel*, 848 F.3d 549, 563 (3d Cir. 2017). This occurs especially over prolonged periods of solitary, and especially for children in adolescence.

Children experience the harm of pretrial detention not only because of what it *is*, but also because of what it *is not*. Children and youth in adult facilities do not typically have access to education resources relevant to their age and background. *See* All Children Are Children, at 8. They often cannot see their families, much less engage in age-

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<sup>21</sup> Available at: <https://eji.org/issues/children-in-prison/>

appropriate socialization with peers. *See id.* And although children who are detained pretrial often end up in that position because of issues with mental health, they do not typically have access to the resources available on the outside to treat and manage those issues, either. *Id.* at 12-13. In fact, to the contrary, they often face additional punishment for issues with rule-following and impulse control that are normal to their age group but anathema in prison settings. *See* Campaign for Youth Justice, “Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America” (Nov. 2007).

**D. Pretrial detention imposes all of these harms inequitably on people and communities of color.**

Pretrial detention imposes all these harms regardless of race, gender, nationality, or other demographic characteristics—nobody is exempt. But the harms of pretrial detention also fall heaviest on people and communities of color. Although this is partly because of existing inequities, the fact remains that people of color disproportionately experience pretrial detention and its resulting harms. Those disparities should concern this Court, in addition to concerns engendered by the nature of pretrial detention itself.

Communities of color bear the costs of pretrial detention more heavily than white people because they face disparities at every step of the criminal process. In a disparity that has persisted for decades, Black people are arrested at a higher rate than similarly situated White people

for a large number of misdemeanor offenses.<sup>22</sup> Decades of research have shown that arrest data primarily document the behavior and decisions of police officers and prosecutors, not the individuals or groups that the data claim to objectively describe.<sup>23</sup> Beyond arrest rates,<sup>24</sup> defendants of different races experience different treatment from police officers,<sup>25</sup>

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<sup>22</sup> Megan Stevenson, Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 769-770 (2018).

<sup>23</sup> Carl B. Klockars, *Some Really Cheap Ways of Measuring What Really Matters*, in *Measuring What Matters: Proceedings from the Police Research Institute Meetings*, 201, U.S. Dept. of Justice, Office of Justice Programs (1999), available at: <https://www.ncjrs.gov/pdffiles1/nij/170610.pdf> (“It has been known for more than 30 years that, in general, police statistics are poor measures of true levels of crime. This is in part because citizens exercise an extraordinary degree of discretion in deciding what crimes to report to police, and police exercise an extraordinary degree of discretion in deciding what to report as crimes. ... In addition, both crime and crime clearance rates can be manipulated dramatically by any police agency with a will to do so. It is also absolutely axiomatic that for certain types of crime (drug offenses, prostitution, corruption, illegal gambling, receiving stolen property, driving under the influence, etc.), police statistics are in no way reflective of the level of that type of crime or of the rise and fall of it, but they are reflective of the level of police agency resources dedicated to its detection.”).

<sup>24</sup> Brad Heath, *Racial Gap in U.S. Arrest Rates: ‘Staggering Disparity,’* USA Today (Nov. 18, 2014), available at: <https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207> (“Blacks are more likely than others to be arrested in almost every city for almost every type of crime.”).

<sup>25</sup> See, e.g., Rob Vogt et al., *Language from Police Body Camera Footage Shows Racial Disparities in Officer Respect*, 114 Proceedings of the Nat’l Acad. Sci. 6521, 6521 (2017) (“We find that officers speak with

during plea bargaining,<sup>26</sup> in their ability to prepare or wait for trial,<sup>27</sup> and at sentencing,<sup>28</sup> among other points. Pretrial detention amplifies all of

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consistently less respect toward black versus white community members, even after controlling for the race of the officer, the severity of the infraction, the location of the stop, and the outcome of the stop.”).

<sup>26</sup> See Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L. REV. 1187 (2018) (finding in Wisconsin state courts that “[w]hite defendants are twenty-five percent more likely than black defendants to have their principal initial charge dropped or reduced to a lesser crime,” making whites who face felony charges less likely to be convicted of felonies, and that “white defendants initially charged with misdemeanors are more likely than black defendants either to be convicted for crimes carrying no possible incarceration, or not to be convicted at all.”).

<sup>27</sup> Kristian Lum & Mike Baiocchi, *The Causal Impact of Bail on Case Outcomes for Indigent Defendants*, Proceedings of 4th Workshop on Fairness, Accountability & Transparency in Machine Learning 1, 4, Aug. 2017, available at: <https://arxiv.org/pdf/1707.04666.pdf> (“We find a strong causal relationship between setting bail and the outcome of a case. . . . [F]or cases for which different judges could come to different decisions regarding whether bail should be set, setting bail results in a 34 percent increase in the chances that they will be found guilty.”).

<sup>28</sup> See U.S. Sentencing Comm’n, *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*, 2 (Nov. 2017) (finding that from 2012 to 2016, “Black male offenders received sentences on average 19.1 percent longer than similarly situated White male offenders”); see also Jill K. Doerner & Stephen Demuth, *The Independent and Joint Effects of Race/Ethnicity, Gender, and Age on Sentencing Outcomes in U.S. Federal Courts*, 27 Justice Quarterly 1 (2010) (“We find that Hispanics and blacks, males, and younger defendants receive harsher sentences than whites, females, and older defendants after controlling for important legal and contextual factors.”).

those disparities, and by doing so disproportionately harms communities of color.

The weight that falls on those communities is significant. “In a given year, city and county jails across the country admit between 11 million and 13 million people.” *See The Bail Trap*. And as many as 90% of those people cannot afford bail set for them—including as many as 85% who cannot afford bail of \$500 or less in even the least serious cases—and so remain detained pretrial. *Id.* Given the existing disparities across the system, this means that millions of people in communities of color suffer all of the harms of pretrial detention on a year over year basis—and suffer all of the downstream consequences on employment, housing, and family life, including ones that affect children and other loved ones.

## CONCLUSION

While the Parties and other amicus briefs have discussed the legal issues in great detail, *Amici* urge this Court to consider the enormous harms of pretrial detention in its assessment of the legal issues in this case. For millions of Pennsylvanians, these issues transcend a legal standard—pretrial detention harms anyone who wants a fundamentally just criminal legal system, and it harms individuals and communities across the Commonwealth. *Amici’s* observations and experience prompt them to urge this Court to recognize the harms of pretrial detention, and

to hold the Commonwealth's attorneys to the highest possible standard when seeking it.

Respectfully submitted,

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May 19, 2021

## **CERTIFICATE OF COMPLIANCE WITH WORD LIMIT**

I hereby certify pursuant to Pa.R.A.P. 531 that this brief does not exceed 7,000 words.

## **CERTIFICATE OF COMPLIANCE**

I hereby 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.

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of May, 2021, a true and correct copy of the foregoing Brief of *Amici Curiae* was served on the Parties via PACFile.

/s/ Jim Davy  
Jim Davy

Dated: May 19, 2021