No. 17-13139-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MAURICE WALKER, on behalf of himself
and others similarly situated,

Plaintiff-Appellee

v.

CITY OF CALHOUN, GEORGIA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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Case No. 17-13139-GG

Maurice Walker v. *City of Calhoun, Georgia*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, *Amicus Curiae* United States certifies that, in addition to the persons and entities identified in the defendant-appellant's brief filed on September 6, 2017, the following persons may have an interest in the outcome of this case:

1. Bergethon, Ross W., Office of the Georgia Attorney General, counsel for *amicus curiae* the State of Georgia;

2. Calderon, Tovah R., United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States;

3. Flynn, Erin H., United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States;

4. Gore, John M., United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States; and

5. Warren, Sarah H., Office of the Georgia Attorney General, counsel for *amicus curiae* the State of Georgia.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

Date: September 13, 2017

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INTEREST OF THE UNITED STATES

The United States has a strong interest in ensuring that criminal justice systems—and bail practices within those systems—are fair and nondiscriminatory. The Department of Justice has authority to investigate unlawful criminal justice practices and to address unconstitutional conditions of confinement. See, *e.g.*, 34 U.S.C. 12601; 42 U.S.C. 1997 *et seq.*. Moreover, the Department's Office for Access to Justice encourages the delivery of fair and accessible outcomes in the

criminal and civil justice systems and, among other things, has sought to call attention to and address the problem of discriminatory bail practices in state and local courts that adversely affect the poor. In addition, the Department's Bureau of Justice Assistance funds the National Task Force on Fines, Fees and Bail Practices, a joint project of the Conference of Chief Justices and the Conference of State Court Administrators, as well as multiple grant programs, including the Smart Pretrial Initiative, that support state and local efforts to improve pretrial practices and end bail practices that unlawfully discriminate against indigent arrestees.

The United States filed a brief as *amicus curiae* in the first appeal of this case before this Court. See U.S. Amicus Br., *Walker* v. *City of Calhoun*, 682 F. App'x 721 (11th Cir. 2017) (No. 16-10521) (filed Aug. 8, 2016). The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

The United States will address the following questions[1]:

1. Under what circumstances does a jurisdiction violate the Fourteenth Amendment by detaining an indigent arrestee who cannot satisfy a financial condition of pretrial release.

[1] The United States takes no position on any other issue raised in appellant's brief, filed on September 6, 2017.

2. Whether a fixed monetary bail schedule is presumptively constitutional where it ensures that arrestees who are unable to pay a cash amount or furnish a secured bond in accordance with the fixed schedule are afforded, within 48 hours of their arrest, meaningful consideration of their indigence and of alternative methods of assuring their future appearance at trial.

STATEMENT OF THE CASE

1. Overview Of Bail In The United States

a. "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States* v. *Salerno*, 481 U.S. 739, 755 (1987). Courts have recognized that it is within this limited exception that conditions of pretrial release can be imposed, or in appropriate circumstances, release can be denied, to achieve important regulatory goals such as preventing a defendant's flight before trial or protecting the public from future danger. See *id.* at 754-755. These goals often can be achieved through the imposition of nonmonetary conditions, such as supervised release or reasonable restrictions on activities and movements. See Ga. Code Ann. §§ 17-6-1, 17-6-1.1, 17-6-12 (2017); see also, *e.g.*, D.C. Code §§ 23-1321(c)(3), 23-1322(b)-(e) (2017); Md. R. 4-216.1(b)-(e) (2017)[2]; N.J. Const. Art. 1, § 11 (2016); Constitutional Amdt. 1,

[2] https://tinyurl.com/R42161

N.M. Sen. Joint Res. 1 (Mar. 1, 2016)[3]. Thus, in many instances, requiring the full payment of a pre-fixed cash amount or the furnishing of a secured bond will not be necessary to "safeguard the courts' role in adjudicating the guilt or innocence of defendants," which is "a primary function of bail," *Salerno*, 481 U.S. at 753.

b. The federal bail system illustrates this point. Present-day federal bail determinations are governed by the Bail Reform Act of 1984, as amended. See 18 U.S.C. 3141 *et seq.* Under the Bail Reform Act, a federal judge decides whether to detain a defendant based on risk of flight or danger to the public after a hearing at which both the government and the defendant may present evidence. See 18 U.S.C. 3142(a) and (f). The Act provides as a default that "[t]he judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court." 18 U.S.C. 3142(b). However, if the judge determines that release on personal recognizance or on an unsecured bond "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person * * * subject to the least restrictive further condition, or combination of

[3] http://www.sos.state.nm.us/uploads/files/CA1-SJM1-2016.pdf; http://electionresults.sos.state.nm.us/resultsSW.aspx?type=SW&map=CTY (reflecting approval of the amendment on November 8, 2016).

conditions, that * * * will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. 3142(c). If the judge determines that no condition or combination of conditions will reasonably assure the defendant's presence at trial or the public's safety, the judge shall order the person detained pursuant to a detention order that includes written findings of fact and a written statement of the reasons for the detention. See 18 U.S.C. 3142(e) and (i).

The Bail Reform Act expressly contemplates that financial conditions of release may be among those imposed to ensure a defendant's future appearance. See 18 U.S.C. 3142(c)(1)(B)(xi), (xii) and (xiv). It also specifies, however, that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. 3142(c)(2). This Court and others that have construed the detention provisions of the Bail Reform Act in tandem with its rules regarding financial conditions have concluded that a federal court *may* impose financial conditions that a defendant may lack the resources to satisfy, if the court determines that the financial condition is necessary to ensure the defendant's court appearance. See *United States* v. *Wong-Alvarez*, 779 F.2d 583, 584 (11th Cir. 1985); see also *United States* v. *Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991); *United States* v. *McConnell*, 842 F.2d 105, 107-110 (5th Cir. 1988); *United States* v. *Tirado*, 72 F.3d 130 (6th Cir. 1995); accord S. Rep. No.

225, 98th Cong., 1st Sess. 16 (1983) (explaining that Section 3142(c)(2) "does not necessarily require the release of a person who says he is unable to meet a financial condition of release which the judge has determined is the only form of conditional release that will assure the person's future appearance").

Taken together, the provisions of the Bail Reform Act help ensure that federal courts base pretrial detention decisions on an individualized assessment of dangerousness and risk of flight and that courts consider, in a meaningful way, defendants' ability to pay and the presence of nonmonetary conditions of release that satisfy the government's regulatory interests. See 18 U.S.C. 3142(g) (listing factors that courts should consider when determining whether any condition or combination of conditions will reasonably assure the defendant's appearance in court and the public's safety).

c. Some state and local jurisdictions have reformed their bail systems to resemble the federal system and to rely predominantly on individualized bail determinations and nonmonetary conditions of release. See, *e.g.*, D.C. Code §§ 23-1321(c)(3), 23-1322(b)(1)-(d)(7) (2017); Md. Ct. App., Rules Order (Feb. 16, 2017)[4]; N.J. Const. Art. 1, § 11 (2016); Constitutional Amdt. 1, N.M. Sen. Joint Res. 1 (Mar. 1, 2016), p. 3, *supra*.

[4] http://www.mdcourts.gov/rules/rodocs/ro192.pdf

2. Relevant Facts And Procedural History

a. According to facts set forth in the complaint, in September 2015, plaintiff Maurice Walker was arrested by the City of Calhoun (the City) Police Department and charged with the misdemeanor offense of being a pedestrian under the influence. Doc. 1, at 3-4.[5] At the time of Walker's arrest, the City used a fixed bail schedule for misdemeanors, traffic offenses, and ordinance violations, under which an arrestee could be immediately released by either paying a pre-set cash amount or furnishing a secured bond. Doc. 1, at 1-2. An arrestee who did neither would be kept in custody until a hearing before a magistrate judge, which the City held only on non-holiday Mondays. Doc. 1, at 4-5. Walker's bail amount was $160, which he claims he could not afford because he was indigent. Doc. 1, at 4.

As a result of his detention, Walker filed this class action alleging that the Equal Protection and Due Process Clauses of the Fourteenth Amendment barred the City from immediately releasing persons who pay a fixed monetary bond, unless individuals who are unable to pay are also granted immediate release. Doc. 1, at 5-7, 12-13. Walker sought damages on behalf of himself and declaratory and injunctive relief, including preliminary relief, on behalf of the class. Doc. 1, at 12-

[5] Citations to "Doc. __, at __" are to documents on the district court docket sheet and relevant page numbers.

14; Doc. 4, at 1-2. After Walker filed suit, the City released Walker—who had by then spent six nights in jail—on his own recognizance. Doc. 29, at 2.

In November 2015, while Walker's suit was pending, the chief judge of the City's municipal court issued a new "Standing Order" for bail procedures that modified the City's bail policy. Doc. 29-5, at 1-7. The new policy retained a fixed bail schedule but revised the preexisting system to require that an accused's first appearance occur within 48 hours of arrest and include an opportunity to raise an indigency-based objection to the fixed bail amount. Doc. 29-5, at 5-6. Where a defendant raises such an objection, the judge must determine whether the accused is, in fact, indigent. Doc. 29-5, at 5-6. Under the new policy, arrestees who are deemed indigent and otherwise eligible for release must be released on their own recognizance without posting secured bail. Doc. 29-5, at 6. Arrestees also must be released if they are not brought before a judge within 48 hours. Doc. 29-5, at 6.

Walker contended that both the City's old and new bail systems violated the Fourteenth Amendment. Doc. 34, at 3-4. As for the new policy, Walker argued that proposing to hold indigent arrestees "for two days instead of four or five" had the same constitutional defects as the old policy because only non-indigent arrestees could secure immediate release under the fixed schedule. Doc. 34, at 4.

b. The district court granted Walker's motion for a preliminary injunction. Doc. 40. The court ordered the City to implement constitutional post-arrest

procedures and, in the interim, to release any misdemeanor arrestees on their own recognizance or on an unsecured bond. Doc. 40, at 72-73. In finding a likelihood of success on the merits, the court stated that "[a]ny bail or bond scheme that mandates payment of pre-fixed amounts for different offenses to obtain pretrial release, without any consideration of indigence or other factors, violates the Equal Protection Clause." Doc. 40, at 49. The court found the City's original bail policy unconstitutional and concluded that the new policy did not cure any constitutional defect where arrestees unable to pay secured bail could remain detained for up to 48 hours while awaiting an indigency determination. Doc. 40, at 56. Accordingly, the court ordered that the City "may not continue to keep arrestees in its custody *for any amount of time* solely because the arrestees cannot afford a secured monetary bond." Doc. 40, at 72-73 (emphasis added).

c. The City appealed from the district court's order. Doc. 42, at 1. Before this Court, the United States filed a brief as *amicus curiae*. See U.S. Amicus Br., *Walker* v. *City of Calhoun*, 682 F. App'x 721 (11th Cir. 2017) (No. 16-10521) (filed Aug. 8, 2016). After briefing and oral argument, this Court issued an unpublished per curiam opinion vacating the preliminary injunction and remanding the case to the district court because the order was an unenforceable "obey the law" injunction that lacked a command capable of review or enforcement. See *id.* at 724-725.

d. On remand, the district court entered a more specific order that again addressed the constitutionality of the City's revised bail policy (Doc. 68, at 11-14), which Walker maintained was unconstitutional because it did not allow "indigent people the same prompt release that the City offers arrestees who can pay" Doc. 66, at 14. The court determined that, although an accused generally can be held for up to 48 hours for a probable cause determination, it violates equal protection to hold an indigent arrestee for up to 48 hours before making an indigency determination where non-indigent arrestees can obtain immediate release. Doc. 68, at 13-14. Turning to the remedy for arrestees unable to pay the pre-fixed cash amount, the court directed the City to verify their indigence through a sworn affidavit as soon as practicable after booking. The City then must review the affidavit as soon as practicable but no later than 24 hours after arrest to determine whether the defendant is subject to release on an unsecured bond or his own recognizance. Doc. 68, at 22-28. After the court entered its new injunction, the City filed this timely appeal. Doc. 69, at 1.

SUMMARY OF THE ARGUMENT

Bail schemes that mandate payment of fixed amounts to obtain pretrial release, without meaningful consideration within a reasonable period of time of indigence and alternative means to achieve the government's interests in future appearance at trial and public safety, violate the Fourteenth Amendment.

In a long line of cases beginning with *Griffin* v. *Illinois*, 351 U.S. 12 (1956), the Supreme Court has held that denying equal access to justice—including and especially through incarceration—without consideration of ability to pay and possible alternatives to achieving a legitimate government interest violates the Fourteenth Amendment. In these cases, the Supreme Court has rejected use of the traditional equal protection inquiry in favor of an analysis that reflects the dual equal protection and due process concerns underlying claims by indigent defendants. This analysis focuses on "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose." *Bearden* v. *Georgia*, 461 U.S. 660, 666-667 (1983) (alteration in original; citation omitted).

The Supreme Court's holdings and analysis apply with special force in the bail context, where deprivations of liberty are at issue and defendants are presumed innocent. Under *Bearden* and other cases in *Griffin*'s progeny, a bail scheme that

imposes financial conditions, without individualized consideration of ability to pay and whether such conditions are necessary to secure a defendant's appearance at trial, violates the Fourteenth Amendment. Thus, as the former Fifth Circuit acknowledged, while the use of fixed bail schedules may provide a convenient way to administer pretrial release, incarcerating those who cannot afford to pay the bail amounts, without meaningful consideration of alternatives, infringes on equal protection and due process requirements. See *Pugh* v. *Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc).[6]

Although application of the Fourteenth Amendment to fixed monetary bail systems demands meaningful consideration of indigence and alternative methods of ensuring a defendant's future appearance at trial, it does not follow that jurisdictions that rely on such systems are constitutionally required to adopt procedures that enable the *immediate release* of both indigent and non-indigent arrestees. Indeed, neither the Supreme Court in *Bearden* nor the former Fifth Circuit in *Pugh* addressed the speed at which jurisdictions must consider a defendant's indigence. Moreover, in the Fourth Amendment probable-cause context, where concerns over significant pretrial restraint of liberty also are

[6] In *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

paramount, the Supreme Court has recognized the realities of law enforcement and the need for jurisdictions to have some flexibility in the administration of pretrial processes. There, the Court has found probable-cause determinations that occur within 48 hours of a defendant's arrest to be presumptively constitutional. See *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-58 (1991).

This Court likewise should accord fixed monetary bail systems a presumption of constitutionality where, within 48 hours of arrest, the jurisdiction provides defendants meaningful consideration of their indigence and alternative means of securing their future appearance. Such a presumption both addresses the Fourteenth Amendment's substantial protections of indigent defendants and affords jurisdictions reasonable latitude to conduct individualized bail determinations in light of administrative necessities and other practical considerations. This symmetrical presumption for individualized probable cause and bail determinations also would allow jurisdictions to engage in the efficient and commonsense practice, "explicitly contemplated" by the Supreme Court, of "[i]ncorporating probable cause determinations into the procedure for setting bail or fixing other conditions of pretrial release." *McLaughlin*, 500 U.S. at 54 (citation and internal quotation marks omitted). And of course, nothing in this presumption would preclude jurisdictions from offering individualized bail (or probable cause)

determinations or otherwise releasing indigent defendants in less than 48 hours if they choose to do so.

ARGUMENT

A BAIL PRACTICE VIOLATES THE FOURTEENTH AMENDMENT IF, WITHOUT CONSIDERATION OF ABILITY TO PAY AND ALTERNATIVE METHODS OF ASSURING APPEARANCE AT TRIAL, IT RESULTS IN THE PROLONGED PRETRIAL DETENTION OF INDIGENT ARRESTEES

A. The Fourteenth Amendment Prohibits Incarcerating Arrestees Without Meaningful Consideration Of Indigence And Alternative Methods Of Achieving A Legitimate Regulatory Interest

The Supreme Court has long held that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v. *Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion); accord *Smith* v. *Bennett*, 365 U.S. 708, 710 (1961). As explained more fully below, in a long line of cases beginning with *Griffin*, the Court has repeatedly reaffirmed that denying access to equal justice, without meaningful consideration of indigence and alternative methods of achieving a legitimate government interest, violates the Fourteenth Amendment. Although a jurisdiction has discretion to determine which rights and penalties beyond what the Constitution minimally requires are appropriate to achieve its legitimate interests, the Fourteenth Amendment prohibits a jurisdiction from categorically imposing different criminal consequences—including and especially incarceration—on poor people without accounting for their indigence.

In *Griffin*, the Court first considered whether a State "may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, * * * deny adequate appellate review [of a criminal conviction] to the poor while granting such review to all others." 351 U.S. at 13. The Court held that once a State decides to grant appellate rights, it may not "do so in a way that discriminates against some convicted defendants on account of their poverty." *Id.* at 18. The Court therefore found it unconstitutional to deny indigent criminal defendants appellate review by effectively requiring them to furnish appellate courts with a trial transcript, which cost money, before they could appeal their convictions. See *id.* at 18-19. In holding that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts," *id.* at 19, the Court declined to hold that the State "must purchase a stenographer's transcript in every case where a defendant cannot buy it," *id.* at 20. Instead, it held that the State "may find other means of affording adequate and effective appellate review to indigent defendants." *Ibid.*

Building on *Griffin*, the Supreme Court subsequently held that incarcerating individuals solely because of their inability to pay a fine or fee, without regard for indigence and a meaningful consideration of alternative methods of achieving the government's interests, effectively denies equal protection to one class of people within the criminal justice system while also offending due process principles. In

Williams v. *Illinois*, 399 U.S. 235, 244 (1970), for example, the Court struck down a practice of incarcerating an indigent individual beyond the statutory maximum term because he could not pay the fine and court costs to which he had been sentenced. The Court held that "once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." *Id.* at 241-242. The Court made clear, however, that "[t]he State is not powerless to enforce judgments against those financially unable to pay a fine." *Id.* at 244. On the contrary, nothing in the Court's holding "limits the power of the sentencing judge to impose alternative sanctions" under state law. *Id.* at 245.

Similarly, in *Tate* v. *Short*, 401 U.S. 395 (1971), the Court held that incarcerating an indigent individual convicted of fines-only offenses to "satisfy" his outstanding fines constituted unconstitutional discrimination because it "subjected [him] to imprisonment solely because of his indigency." *Id.* at 397-398. The Court explained that the scheme in *Tate* suffered from the same constitutional defect as that in *Williams*, and again emphasized that there are "other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines." *Id.* at 399.

And in *Bearden* v. *Georgia*, 461 U.S. 660 (1983), the Court held that the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution "without determining that [the defendant] had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist." *Id.* at 661-662. To do otherwise would amount to "little more than punishing a person for his poverty." *Id.* at 671.

The *Bearden* Court further explained that, because "[d]ue process and equal protection principles converge in the Court's analysis in these cases," 461 U.S. at 665, the traditional equal protection framework that usually requires analysis under a particular level of scrutiny does not apply. Because "indigency in this context is a relative term rather than a classification, fitting the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished." *Id.* at 666 n.8 (citation and internal quotation marks omitted). "Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis." *Id.* at 666. Instead, the relevant analysis "requires a careful inquiry into such factors as the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of

alternative means for effectuating the purpose." *Id.* at 666-667 (alteration in original; citation and internal quotation marks omitted).[7]

Although *Bearden* and other cases in *Griffin*'s progeny have arisen in the sentencing and post-conviction contexts, their holdings apply with equal, if not greater, force in the bail context. Indeed, defendants who have not been found guilty have an especially "strong interest in liberty." *United States* v. *Salerno*, 481 U.S. 739, 750, 755 (1987). Because of that liberty interest, pretrial release should be the norm, and pretrial detention "the carefully limited exception." *Id.* at 755. To be sure, in certain circumstances, such as when a court finds that a defendant poses a threat to others or presents a flight risk, this fundamentally important right may be circumscribed on a case-by-case basis. See, *e.g.*, *id.* at 750-751, 754-755. And in appropriate circumstances, financial conditions may be constitutionally imposed—but "bail must be set by a court at a sum designed to ensure that goal,

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[7] The Supreme Court has rejected the argument that its decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), overruled or otherwise called into question the protections that the *Griffin-Williams-Bearden* line of cases provides to indigent individuals. See *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 127 (1996). *Davis* held that, absent evidence of a discriminatory purpose, a facially neutral law with a racially discriminatory effect does not violate equal protection. 426 U.S. at 244-245. But *Davis* involved traditional equal protection analysis, whereas *Griffin* and its progeny "reflect both equal protection and due process concerns." See *M.L.B.*, 519 U.S. at 120; see also *id.* at 126-127 (distinguishing *Davis*). Moreover, as the Court noted in *M.L.B.*, the decision in *Davis* predated *Bearden* by seven years, making it impossible for the former to have overruled the latter. *Id.* at 127 & n.16.

and *no more*." *Id.* at 754 (emphasis added). Importantly, although in such circumstances the imposition of bail may result in a person's pretrial detention, the deprivation of liberty is not based *solely* on inability to pay, but rather on an individualized assessment of risk and a finding of no other adequate alternatives.

By contrast, bail systems that result in deprivation of liberty based solely on inability to pay unlawfully discriminate based on indigence. Such systems include fixed bail schedules that do not provide for individualized determinations regarding ability to pay, risk, and alternative methods of assuring future appearance and, thus, allow for the pretrial release of only those who can pay. Under such bail schemes, arrestees who can afford to pay the fixed bail amount are promptly released whenever they are able to access sufficient funds for payment, even if they are likely to miss their assigned court date or pose a danger to others. Conversely, arrestees who cannot afford to pay the fixed bail amount are denied pretrial release even if they pose no flight risk and alternative methods of assuring appearance (such as an unsecured bond or supervised release) could be imposed. Such individuals are kept unnecessarily in jail pending their future court appearance for even minor offenses, such as a traffic or ordinance violation, including violations that are not punishable by incarceration.

Thus, as the former Fifth Circuit recognized, while "[u]tilization of a master bond schedule provides speedy and convenient release for those who have no

difficulty in meeting its requirements," the "incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Pugh* v. *Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc). Although the court in *Pugh* found plaintiffs' claim moot, it acknowledged "that imprisonment *solely* because of indigent status"—*i.e.*, without meaningful consideration of ability to pay and alternative means of ensuring appearance at trial—"is invidious discrimination and not constitutionally permissible." *Id.* at 1056 (emphasis added) (citing *Williams*, *supra*; *Tate*, *supra*). In fact, where fixed bail schedules are used without meaningful consideration of alternatives that account for inability to pay, indigent arrestees seeking release are faced with precisely the type of "illusory choice" that "works an invidious discrimination." *Williams*, 399 U.S. at 242.

B. A Jurisdiction That Uses A Fixed Monetary Bail Schedule Presumptively Satisfies The Fourteenth Amendment When It Takes Up To 48 Hours To Verify A Defendant's Indigence And Consider Any Alternative Means Of Release That Will Assure The Defendant's Future Appearance At Trial

The Fourteenth Amendment's protections for indigent defendants in the bail context reflect that pretrial detention is a significant deprivation of liberty. See *e.g.*, *Salerno*, 481 U.S. at 754-755; *Pugh*, 572 F.2d at 1057. Yet neither *Bearden* nor *Pugh* had occasion to address the Fourteenth Amendment's requirements for the speed of the individualized bail determination necessary to protect indigent defendants. See *Pugh*, 572 F.2d at 1057.

The Supreme Court, however, has addressed the timing of a pretrial determination in an analogous context that also presents a "significant" liberty interest: a presumptively innocent defendant's Fourth Amendment right to an individualized probable cause determination. *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 52 (1991) (citation omitted). The Supreme Court has held that detaining an arrestee for up to 48 hours before making a probable cause determination is presumptively constitutional under the Fourth Amendment. See *id.* at 56. That 48-hour safe harbor for probable cause determinations applies to both felony and misdemeanor arrests. See *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 352 (2001).

In *McLaughlin*, the Supreme Court reiterated its earlier concern that unfair, unreliable, and unnecessarily delayed determinations of probable cause could result in the "significant pretrial restraint of liberty." 500 U.S. at 52 (quoting *Gerstein* v. *Pugh*, 420 U.S. 103, 125 (1975)). At the same time, the Court recognized the need to strike a "'practical compromise' between the rights of individuals and the realities of law enforcement." *McLaughlin*, 500 U.S. at 53 (citation omitted). The Court also recognized the need for states to experiment with systems that reflect their "differing systems of pretrial procedures." *Ibid.* And the Court "explicitly contemplated" that some jurisdictions would choose to "[i]ncorporat[e] probable cause determinations 'into the procedure for setting bail

or fixing other conditions of pretrial release,'" and the Court emphasized the importance of giving jurisdictions the flexibility to make that choice. *McLaughlin*, 500 U.S. at 54 (citation omitted). Balancing these considerations, the Court held that a jurisdiction presumptively satisfies the Fourth Amendment when it conducts a probable cause determination within 48 hours of the arrest. See *ibid.*

These same considerations establish that a jurisdiction presumptively satisfies the Fourteenth Amendment when it takes up to 48 hours after a defendant's arrest to conduct an individualized bail determination. As explained above, see Part A, *supra*, unduly delaying individualized bail determinations could result in the "significant pretrial restraint of liberty," *McLaughlin*, 500 U.S. at 52; see also *Bearden*, 461 U.S. at 666-667; *Pugh*, 572 F.2d at 1057. Moreover, the "'practical compromise' between the rights of individuals and the realities of law enforcement," *McLaughlin*, 500 U.S. at 53 (citation omitted), applies with equal force in the bail context as in the probable cause context. And adopting a 48-hour safe harbor in the bail context symmetrical to the presumption in the probable cause context would allow jurisdictions the flexibility to adopt "differing systems of pretrial procedures," including the efficient and commonsense practice of "[i]ncorporating" probable cause and bail determinations into a single proceeding.

Id. at 53-54.[8]

To be sure, fixed monetary bail systems that incorporate individualized determinations for indigent arrestees affect non-indigent and indigent individuals differently. A non-indigent arrestee can secure his immediate release by posting the amount set by the fixed bail schedule. An indigent arrestee, on the other hand, may have to wait some period of time for a government official or judicial officer to make a determination of indigency. But the former Fifth Circuit has already held that a jurisdiction's use of a master bond schedule is not per se unconstitutional, see *Pugh*, 572 F.2d at 1057, and it simply cannot be the case that any disparities between indigent and non-indigent arrestees in the bail context are unconstitutional. Just as the Constitution permits some delay in affording an accused a probable cause hearing, some delay in releasing indigent arrestees is inevitable if a local jurisdiction is to have an orderly process – either independent

[8] The Supreme Court recognized that applying a presumption of constitutionality to probable cause determinations made within 48 hours "is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." 500 U.S. at 56; see *ibid.* (citing, for example, "a delay motivated by ill will * * * or delay for delay's sake"). Likewise, an indigent arrestee provided an individualized bail determination within 48 hours of his arrest might nonetheless succeed in proving facts that rebut the presumption of constitutionality and establish that his pretrial detention violated the Fourteenth Amendment.

from or encompassed within other pretrial proceedings – for handling claims of indigence by individuals unable to pay the amounts prescribed by a bail schedule.

One way to ensure precisely equal outcomes would be to hold all arrestees for the same amount of time before an individualized bail determination, even those who immediately could afford to pay a fixed bail amount. Yet such perfect equality generally is not required under the Equal Protection Clause. See, *e.g.*, *United States* v. *MacCollom*, 426 U.S. 317, 324 (1976) (opinion of Rehnquist, J.); accord *Pugh*, 572 F.2d at 1057 ("Utilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting[ ] its requirements."). Indeed, mandating such a system ignores the balancing approach outlined in *Bearden*, as well as the federalism interests that the Court recognized in *McLaughlin* in affording jurisdictions some flexibility in the administration of their pretrial procedures.

Of course, nothing in this presumption of constitutionality forecloses jurisdictions from choosing to conduct individualized indigency determinations sooner than 48 hours after the arrest. Unnecessary pretrial detention strains the limited resources of taxpayers and state and local governments and may create other problems by contributing to jail overcrowding. Moreover, the unnecessary and disproportionate pretrial detention of indigent individuals can reverberate in other parts of the criminal justice process and impede the fair administration of

justice by, for example, hampering the ability to prepare a defense and incentivizing decisions to plead guilty for a speedier release. See, *e.g.*, *Pugh*, 572 F.2d at 1056-1057; *Barker* v. *Wingo*, 407 U.S. 514, 533 (1972). And detained individuals can suffer harms outside the criminal justice process, as even short periods of pretrial detention can mean the loss of a job and disruptions to family life. See, *e.g.*, *Barker*, 407 U.S. at 532. Thus, jurisdictions may decide, as a matter of policy and consistent with the Constitution, to provide for individualized bail determinations more quickly than the 48-hour safe harbor.

The City's new Standing Order at issue in this appeal retains a fixed bail schedule but now requires that an accused's first court appearance occur within 48 hours of arrest and include an opportunity to raise an indigency-based objection to the fixed bail amount. Doc. 29-5, at 5-6. The new Standing Order thus creates a timeframe for individualized determinations that is presumptively constitutional under the Fourteenth Amendment. Cf. *McLaughlin*, 500 U.S. at 52-54; see also *Bearden*, 461 U.S. at 666-667; *Pugh*, 572 F.2d at 1057. Instead of applying this presumption, the district court rejected the 48-hour period and ordered the City—regardless of the circumstances—to verify *all* claims of indigence via affidavit as soon as practicable after booking and no later than 24 hours after the arrest. Doc. 68, at 13-14, 23-24, 27-28. In so ordering, the district court employed an overly broad interpretation of the Fourteenth Amendment and constrained the City's

flexibility to administer its pretrial procedures in light of both "the rights of individuals and the realities of law enforcement." *McLaughlin*, 500 U.S. at 53. This Court should correct this error by applying the presumption of constitutionality to the 48-hour timeframe reflected in the City's new Standing Order.

CONCLUSION

In resolving the questions presented on appeal, this Court should apply the legal analysis set forth by the United States in this brief.

Respectfully submitted,

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s/ Erin H. Flynn
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Date: September 13, 2017

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I hereby certify that on September 13, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

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