

No. 18-814

---

---

In the Supreme Court of the United States

---

MAURICE WALKER, *PETITIONER*, v.  
CITY OF CALHOUN, GEORGIA, *RESPONDENT*

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT*

James Patterson McBaine  
Honors Moot Court Competition  
2022 Record

## Table of Contents

Questions Presented .....	3
<i>Walker v. City of Calhoun</i> , 901 F.3d 1245 (11th Cir. 2018).....	4
<i>Walker v. City of Calhoun</i> , 2017 WL 2794064 (N.D. Ga. June 16, 2017) .....	28
Excerpt of Brief of <i>Amicus Curiae</i> Law Professors of Criminal, Procedural, and Constitutional Law in Support of Petitioner, <i>Walker v. City of Calhoun</i> , 901 F.3d 1245 (11th Cir. 2018) (No. 18-814) .....	39

The judicial opinions contained in this packet have been edited for purposes of the 2022 James Patterson McBaine Moot Court Competition. While you may access and read the full opinions online, you need only be familiar with the material contained in the excerpts below. You are not expected to be familiar with or to address the arguments and parts of the case that have been removed.

This packet also includes 1) Questions Presented based on the Petitioner's petition for writ of certiorari and 2) an excerpt of an amicus brief filed in the case. For your brief, you may choose to edit the questions presented as you see fit, though their substance should remain the same. Outside of the material in this packet, you should not attempt to access the underlying briefs or petitions from *Walker* or any other related case, in accordance with the rules of the competition.

## QUESTIONS PRESENTED

1. Does heightened scrutiny under the Fourteenth Amendment apply to a government policy that keeps misdemeanor and traffic-offense arrestees in jail pretrial solely because they cannot afford bail?
2. Can the government keep misdemeanor and traffic-offense arrestees in jail for up to 48 hours after arrest solely because they cannot afford bail?

901 F.3d 1245

United States Court of Appeals, Eleventh Circuit.

Maurice WALKER, on behalf of himself and others similarly situated, Plaintiff-Appellee,

v.

CITY OF CALHOUN, GA, Defendant-Appellant.

No. 17-13139

|

(August 22, 2018)

**Procedural Posture(s):** On Appeal; Motion for Preliminary Injunction.

## **Opinion**

O'SCANNLAIN, Circuit Judge:

**\*1251** We must decide what process the Constitution requires in setting bail for indigent arrestees.

I

A

When this lawsuit began, Maurice Walker was a 54-year-old unemployed man with a mental health disability, whose income consisted only of \$530 in monthly Social Security disability payments. On Thursday, September 3, 2015, Walker was arrested in the City of Calhoun, Georgia by the Calhoun Police Department for being a pedestrian under the influence of alcohol, in violation of Ga. Code Ann. § 40-6-95. A violation of that section of Georgia's code “is a misdemeanor and is punishable upon conviction by a fine not to exceed \$500.00.” The statute does not provide for any possible jail sentence.

Walker alleges that, after he was taken to jail, he was told by an officer that “he would not be released unless he paid the standard \$160 cash bond” required for those charged with being a pedestrian under the influence. Walker says that neither he nor his family had enough money to post the bond. Walker alleges that while he was jailed, he was not given his necessary mental disorder medication, and he was confined to a single-person cell except for one hour each day.

Walker filed this suit five days after his arrest, while still detained, alleging on behalf \*1252 of himself and a class of similarly situated indigent arrestees that the City was violating the Fourteenth Amendment of the United States Constitution by “jailing the poor because they cannot pay a small amount of money.” On the day after filing suit Walker was released on a personal-recognizance bond by agreement with the City's counsel. A bond was subsequently tendered for Walker by one of his attorneys in this matter, and his criminal case was closed on October 20, 2015, by entry of a bond forfeiture.

## B

Walker alleges that, at the time of his arrest, the City followed a policy of using a secured-money bail schedule with bond amounts based on the fine an arrestee could expect to pay if found guilty, plus applicable fees. Defendants who could afford to deposit the bail amount were released immediately, whereas those who could not pay were held until the next court session on the following non-holiday Monday. In Walker's case, because the Monday after his arrest was Labor Day, he would have had to wait eleven days after his arrest to see a judge for a bail hearing.

Shortly after Walker's suit was filed, the Municipal Court of the City of Calhoun altered the prevailing bail policy by issuing a Standing Bail Order, which adopted a bail schedule for State offenses within the Municipal Court's jurisdiction, with cash bail set at “amount[s] represent[ing] the expected fine with applicable surcharges ... should the accused later enter a plea, or be found guilty.” As alternatives to cash bail, the Standing Bail Order recognized an arrestee's ability to use a driver's license as collateral or to “make secured bail by property or surety” at an amount “twice that set forth in [the] schedule.”

“For those individuals who do not obtain release pursuant to the secured bail schedule,” the Standing Bail Order provides that they “shall ... be brought before the [Municipal] Court” within 48 hours from their arrest, shall “be represented by court appointed counsel,” and “will be given the opportunity to object to the bail amount ..., including any claim of indigency.” The Municipal Court will then “determine whether the accused is unable to post secured bail because he/she is indigent, making an individualized determination based upon the evidence provided.” The Standing Bail Order adopts a standard of indigency as “earning less than 100 percent of the federal poverty guidelines, unless there is evidence that the person has other resources that might be reasonably used.” If the court finds that the defendant is indigent under that standard, “then he/she shall be subject to release on recognizance without making a secured bail.” If no hearing is held within 48 hours, “then the accused shall be released on a recognizance bond.” Finally, the Standing Bail Order provides that those charged with a violation of the City Code (as opposed to State law) “shall be released on an unsecured bond in the amount established by the ... bail schedule.”

In summary, the Standing Bail Order envisions three forms of release depending on the type of offense charged and the financial means of the arrestee. *First*, arrestees charged with State offenses within the Municipal Court's jurisdiction will be released immediately on a secured bond if they are able and willing to deposit money bail in the amount set by the bail schedule. They can post cash bail themselves or use a commercial surety at twice the amount set by the bail schedule. *Second*, arrestees charged with State offenses who do not post bail immediately must wait for a bail hearing with court-appointed counsel, to take place within 48 hours from arrest. Those who can prove they are indigent at the hearing will be released on a recognizance \*1253 bond—meaning no bail amount is set, either secured or unsecured. *Third*, all arrestees charged with violating City ordinances will be released on unsecured

bond, meaning that they need deposit no collateral immediately but will be assessed the bail schedule amount if they fail subsequently to appear in court.

C

1

Several months after Walker filed suit, and after the Standing Bail Order had gone into effect, the district court entered a preliminary injunction ordering the City “to implement post-arrest procedures that comply with the Constitution.” *Walker v. City of Calhoun, Ga. (Walker I)*, No. 4:15-CV-0170-HLM, 2016 WL 361612, at \*14 (N.D. Ga. Jan. 28, 2016). As the legal basis for the injunction, the district court found 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.” *Id.* at \*10. On the same day it issued the injunction order, the district court certified a class under Federal Rule of Civil Procedure 23, consisting of “[a]ll arrestees unable to pay for their release who are or will be in the custody of the City of Calhoun as a result of an arrest involving a misdemeanor, traffic offense, or ordinance violation.”

2

We vacated such preliminary injunction, holding that it violated Federal Rule of Civil Procedure 65 because it was insufficiently specific. *See Walker v. City of Calhoun, Ga. (Walker II)*, 682 F. App'x 721, 724–25 (11th Cir. 2017) (per curiam) (unpublished). We declined at that time to consider “whether, substantively, [the] district court properly issued a preliminary injunction.” *Id.* at 724.

3

On remand, the district court again found the City's bail policy under the Standing Bail Order to be unconstitutional and entered a new preliminary injunction. It reaffirmed its merits rulings from the original preliminary injunction order and found that the Standing Bail Order “still violates the Constitution insofar as it permits individuals who have sufficient resources to post a bond ... to be released immediately, while individuals who do not have those resources must wait forty-eight hours for a hearing.” *Walker v. City of Calhoun, Ga. (Walker III)*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at \*2–3 (N.D. Ga. June 16, 2017). The court enjoined the City “from detaining indigent ... arrestees who

6

are otherwise eligible for release but are unable, because of their poverty, to pay a secured or money bail.” *Id.* at \*4.

The order granting the new injunction prescribed an affidavit-based process for making such determination:

If an arrestee indicates that he or she is unable to pay a secured or money bail, arresting officers, jail personnel, or Municipal Court staff must, as soon as practicable after booking verify the arrestee's inability to pay a secured or money bail by means of an affidavit sworn before an authorized official.

*Id.* Such affidavit must include information about the arrestee's finances and the opportunity for the arrestee to attest indigency, which the injunction order defines as “less than 100 percent of the applicable federal poverty guidelines.” *Id.* An official must evaluate the affidavit “within twenty-four hours after arrest.” *Id.* at \*5. Those found indigent “shall be subject to release on ... recognizance without making secured bail ... or subject to release on an unsecured bond.” *Id.*

4

The City timely appealed the new preliminary injunction order,<sup>1</sup> as well as the district court's orders certifying the class and denying the City's motion to dismiss. The district court stayed further proceedings pending resolution of this appeal, but the injunction “remains in full force and effect.”

II

Before reaching the merits of the constitutional issues underlying the preliminary injunction, we must address two threshold challenges that the City raises to the district court's ability to enjoin the City at all.

A

*[Section discussing Younger abstention omitted.]*

B

*[Section discussing § 1983 local immunity omitted.]*

III

7



Turning to the merits, the City contends that the district court erred in finding the Standing Bail Order to be unconstitutional, a conclusion that led to the district court's issuance of the injunction now before us. The City argues that we should vacate this injunction.

As the party seeking a preliminary injunction, Walker bore the burden of establishing that he has a substantial likelihood of success on the merits.<sup>5</sup> *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016). The validity of the injunction thus turns on whether Walker did in fact show that he was likely to succeed in establishing that the City's bail policy was unconstitutional.

The district court ruled that the City's bail policy ran afoul of the Fourteenth Amendment because “[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.” *Walker I*, 2016 WL 361612, at \*10. Although the district court considered the Standing Bail Order to be “a step in the right direction” over the prior policy, it found that “[t]he Standing Bail Order ... still violates the Constitution insofar as it permits individuals who have sufficient resources to post a bond (or to have one posted for them) to be released immediately, while individuals who do not have those resources must wait forty-eight hours for a hearing.” *Walker III*, 2017 WL 2794064, at \*3.

The City argues that the district court applied the wrong legal standard in two ways: first, by analyzing this case under the Fourteenth Amendment rather than the Eighth Amendment; and second, by applying too exacting a form of scrutiny to the City's bail policy. We consider each challenge in turn.

#### A

*[Section discussing the application of the Eighth Amendment vs. Fourteenth Amendment omitted.]*

#### B

The City further contends that the district court applied the wrong legal standard by imposing too high a level of scrutiny in its equal protection and due process analysis. The City argues that only rational basis review should apply because there is no suspect classification involved or fundamental right at stake. Although somewhat ambiguous about what form of scrutiny it was applying, the district court was clear that it believed some form of heightened scrutiny applied to this case. *See Walker III*, 2017 WL 2794064, at \*3 n.2.

#### 1

The district court acknowledged that “generally, an individual's indigence does not make that individual a member of a suspect class,” but it contended that “detention based on wealth is an exception to the general rule that rational basis review applies to wealth-based classifications.” *Id.* (internal quotation marks omitted). In the district court's view, because the Standing Bail Order treated differently those who could afford immediately to pay the bail schedule amount and those who could not, it was subject to heightened scrutiny. *See id.* at \*3 & n.2. Walker has fully embraced the district court's reasoning,

going so far as to argue that that the use of a bail schedule is analogous to the City's imposing "pretrial detention only for black, female, or Catholic arrestees."

But such argument runs headlong into *Rainwater*. There, the court approved the "[u]tilization of a master bond schedule" without applying any heightened form of scrutiny. *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978). It explained that a bond schedule "provides speedy and convenient release for those who have no difficulty in meeting its requirements." *Id.* Of course, if the bond schedule provided "speedy" release to those who could meet its requirements, it necessarily provided less speedy release to those who could not. Nevertheless, the *Rainwater* court upheld the scheme because it gave indigent defendants who could not satisfy the master bond schedule a constitutionally permissible secondary option: a bail hearing at which the judge could consider "all relevant factors" when deciding the conditions of release. *See id.* at 1058.<sup>9</sup>

\***1261** *Rainwater's* conclusion is consistent with Supreme Court case law on how differential treatment by wealth is analyzed under the Equal Protection Clause. The definitive explanation comes from *San Antonio Independent School District v. Rodriguez*, which considered a wealth-based equal protection challenge to Texas's system of apportioning school funds based principally on local tax bases. 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Analyzing prior cases, with a focus on the antecedents of *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), the Court concluded that instances where wealth-based distinctions were impermissible "shared two distinguishing characteristics: because of their impecuniosity[, the indigent] were completely unable to pay for some desired benefit, and as a consequence, they sustained *an absolute deprivation* of a meaningful opportunity to enjoy that benefit." *Id.* at 20, 93 S.Ct. 1278 (emphasis added). Mere diminishment of a benefit was insufficient to make out an equal protection claim: "[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Id.* at 24, 93 S.Ct. 1278.

Other cases bolster the line drawn in *Rodriguez* between mere diminishment of some benefit and total deprivation based solely on wealth. In *Ross v. Moffitt*, 417 U.S. 600, 616, 94 S.Ct. 2437, 41 L.Ed.2d 341 (U.S. 1974), the Court explained that in criminal proceedings involving indigents, "[t]he duty of the State ... is not to duplicate the legal arsenal that may be privately retained by a criminal defendant ..., but only to assure the indigent defendant an adequate opportunity to present his claims fairly." In *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996), the Court explained the *Bearden* line of cases to mean that wealth-based sanctions are impermissible when they are "not merely *disproportionate* in impact," but "[r]ather, they are wholly contingent on one's ability to pay." *Id.* at 127, 117 S.Ct. 555. In *McGinnis v. Royster*, the Supreme Court considered an equal protection challenge to a New York sentencing scheme that gave good-behavior credit on an equal basis to those who had and had not been bailed before trial, even though those who could not afford pretrial bail had already spent time incarcerated in jail. 410 U.S. 263, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973). The Court "inquire[d] only whether the challenged distinction *rationaly* furthers some *legitimate*, articulated state purpose." *Id.* at 270, 93 S.Ct. 1055 (emphasis added). It upheld the scheme because jails lacked the rehabilitative programs of prisons, which provided "a rational justification"—independent of wealth—"for declining to give good-time credit" for pretrial time served in jail. *Id.* at 273, 93 S.Ct. 1055. *Ross*, *M.L.B.*, and *McGinnis*, then, all bolster the principle that differential treatment by wealth is impermissible only where it results in a *total* deprivation of a benefit *because* of poverty.

Under the Standing Bail Order, Walker and other indigents suffer no "absolute deprivation" of the benefit they seek, namely pretrial release. Rather, they must merely wait some appropriate amount of

time to receive the same benefit as the more affluent.<sup>10</sup> Indeed, after such delay, \*1262 they arguably receive preferential treatment, in at least one respect, by being released on recognizance without having to provide any security. Such scheme does not trigger heightened scrutiny under the Supreme Court's equal protection jurisprudence.

Nor do we see how it could. If Walker were correct that wealth should be treated like race, sex, or religion, and that every policy that affects people differently based on ability to pay must be justified under heightened scrutiny, the courts would be flooded with litigation. Innumerable government programs—heretofore considered entirely benign—would be in grave constitutional danger. If the Postal Service wanted to continue to deny express service to those unwilling or unable to pay a fee, it would have to justify that decision under the same standard it would have to meet to justify providing express service only to white patrons. The University of Georgia would be unable to condition matriculation on ability to pay tuition unless it could meet the same constitutional standard that would allow it to deny admission to Catholics. In Walker's preferred constitutional world, taxes that are independent of income, such as property taxes or sales taxes, would be the target of perpetual litigation. All that is to say, we do not believe that *Bearden* or *Rainwater* announced such radical results with so little fanfare, and we therefore reject Walker's equal protection theory. The district court was wrong to apply heightened scrutiny under the Equal Protection Clause.

2

As an alternative basis for applying heightened scrutiny, Walker defends the district court on the ground that “the City's bail system infringes the fundamental right to pretrial liberty.” He argues this is so under the Due Process Clause, pointing to *United States v. Salerno*, in which the Supreme Court considered the federal Bail Reform Act's provision for preventative detention of dangerous defendants. 481 U.S. at 741, 107 S.Ct. 2095. In *Salerno*, the Court recognized that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception,” *id.* at 755, 107 S.Ct. 2095; but it also stated that an arrestee may be incarcerated before trial “if he presents a risk of flight or a danger to witnesses,” *id.* at 749, 107 S.Ct. 2095 (citing *Bell v. Wolfish*, 441 U.S. 520, 534, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)). The Court ultimately permitted preventative detention if the arrestee “pose[s] a threat to the safety of individuals or to the community which no condition of release can dispel.” *Id.* at 755, 107 S.Ct. 2095. Walker contends that this form of analysis is tantamount to heightened scrutiny and that it should be applied to his case.

But the *Salerno* Court's analysis was much closer to a relatively lenient procedural due process analysis than it was any form of heightened scrutiny. Rather than asking if preventative detention of dangerous defendants served a compelling or important State interest and then demanding relatively narrow tailoring, the Court employed a general due process balancing test between the State's interest and the detainee's. *See id.* at 746–51, 107 S.Ct. 2095. The Court's analysis borrowed heavily from a prior decision, *Schall v. Martin*, in which the Court upheld preventative detention of likely-to-reoffend juveniles based on an analysis that asked “whether preventative detention ... is compatible with the ‘fundamental fairness’ required by due process.” \*1263 467 U.S. 253, 263, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984). Answering that question required “[t]wo separate inquiries[:] ... First, does preventive detention ... serve a legitimate state objective? And, second, are the procedural safeguards ... adequate to authorize the pretrial detention?” *Id.* at 263–64, 104 S.Ct. 2403 (citations omitted). That analysis is a far cry from strict—or even intermediate—scrutiny.

Moreover, even if *Salerno* did embrace a form of heightened scrutiny, we do not believe it applies to this case because the City is not seeking to impose any form of preventative detention. Here, Walker himself was released, and the Standing Bail Order presently guarantees release within 48 hours of arrest to all indigent defendants in Walker's shoes. In a future case that raises the question whether a municipality may detain an indigent defendant because no feasible release conditions will assure his appearance in court, perhaps *Salerno's* framework might apply.<sup>11</sup> But that is not the question before us in this limited interlocutory appeal.

3

The appropriate level of scrutiny is the point of departure for the dissent, and its contrary conclusion on that issue is the foundation for the rest of its analysis. The dissent would adopt Walker's theory that any marginal increase in the length of detention attributable to inability to pay bail amounts to invidious discrimination warranting heightened scrutiny. As we have explained, accepting that premise effectively abandons the limitations on wealth-based equal protection claims drawn in *Rodriguez* and its successors.

The dissent provides a hypothetical that proves how far it would go. It asks us to consider two persons arrested for the same crime under the same circumstances, whose sole difference is the amount of money each has. The dissent says there is an equal protection problem because: “The person who has money pays it *and walks away*. The indigent can't pay, so he *goes to jail*.” Dissent at 1274 (emphasis added). But this hypothetical could apply to any government benefit contingent on ability to pay, including all the examples we used above. To illustrate, let's simply switch out, by substituting the italicized phrases, the dispensation sought by the hypothetical persons:

\*1264 “The person who has money pays it and *gets express postal service*. The indigent can't pay, so he *goes with snail mail*.”

“The person who has money pays it and *matriculates at the state university*. The indigent can't pay, so he *stays home*.”

“The person who has money pays it and *satisfies his property tax bill*. The indigent can't pay, so he *loses his home to a tax foreclosure*.”

Any government benefit or dispensation can be framed in artificially narrow fashion to transform a diminishment into total deprivation. The dissent takes the interest identified by *Rainwater*—the “right to freedom before conviction,” or the “right to bail before trial,” 572 F.2d at 1056–56—and narrows it to something like “the right not to be held a moment longer than a person who can satisfy a bail schedule.” If such narrowing is permissible, then any wealth-based equal protection claim becomes valid so long as the plaintiff frames his interest in a cramped enough style. Under the dissent's theory, then, the only reason the *Rodriguez* plaintiffs' equal protection claim failed was that they challenged overall disparities in school budgets (which was what they actually cared about). If instead they had focused on something smaller and less important—perhaps claiming that differences in school district funding completely deprived them of specialized art classes—then, in the dissent's world, they would have prevailed. That turns the Equal Protection Clause into a game of word play, a result inconsistent with the thrust of *Rodriguez* and its successors.

Recognizing its tension with *Rodriguez*, the dissent suggests that Walker's claim could fit into a “narrow exception” to the general rule against applying heightened scrutiny to wealth-based equal protection arguments. Dissent at 1277–78. But the dissent provides no limiting principle to such an exception. Although it suggests “access to judicial processes in [criminal] cases” as one category of exception, *id.* (quoting *M.L.B.*, 519 U.S. at 124, 117 S.Ct. 555), it does not explain what judicial proceeding an indigent person *cannot* access by the terms of the Standing Bail Order. More critically, as just demonstrated, the dissent's analysis is not amenable to so narrow an exception and would apply to any government action that treats people of different means differently. Disparate treatment based on wealth, in the dissent's constitutional methodology, would be treated the same as official religious or racial discrimination. The Supreme Court has rejected so radical an application of the Equal Protection Clause, *see Rodriguez*, 411 U.S. at 24, 93 S.Ct. 1278, and we cannot adopt it on the unprincipled ad hoc basis urged by the dissent.

Perhaps the basis for the dissent's proposed “narrow exception” could be the importance to indigents of being released from jail. But that quickly starts to sound like a claim based on a fundamental liberty interest, and the dissent has disavowed reliance on Walker's substantive due process argument. *See* Dissent at 1278 n.8. Perhaps that is so as to elide *Salerno* and *Schall*. Although the dissent formally relies only on the Equal Protection Clause, however, its tenor reveals that it is motivated by the importance of Walker's liberty interest, and it persuasively describes at length the value of pretrial liberty. *See* Dissent at 1275–76. We do not for a moment doubt the value of freedom from jail. But the Supreme Court in *Salerno* made clear that the government also has important interests at stake when considering whether to release an accused who may be a flight risk or public danger. Accordingly, it has instructed us to apply a less demanding level of scrutiny than the one necessary to support the dissent's conclusions. The dissent cannot avoid the Supreme Court's holding by smuggling a substantive \*1265 due process claim into the Equal Protection Clause.

## C

Thus the district court was correct to apply the *Bearden/Rainwater* style of analysis for cases in which “[d]ue process and equal protection principles converge,” *Bearden*, 461 U.S. at 665, 103 S.Ct. 2064, yet it was wrong to apply heightened scrutiny from traditional equal protection analysis.

The confusion is perhaps unsurprising because neither *Bearden* nor *Rainwater* is a model of clarity in setting out the standard of analysis to apply. As *Bearden* puts it, the proper 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.’” 461 U.S. at 666–67, 103 S.Ct. 2064 (alteration in original) (quoting *Williams v. Illinois*, 399 U.S. 235, 260, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) (Harlan, J., concurring in the result)); *accord Rainwater*, 572 F.2d at 1056 (“Resolution of the problems concerning pretrial bail requires a delicate balancing of the vital interests of the state with those of the individual.”).

We take *Bearden's* quotation of Justice Harlan's *Williams* concurrence as a sign that the *Bearden* Court shared his assessment that these kinds of questions should be evaluated along something akin to a traditional due process rubric. *See Williams*, 399 U.S. at 260, 90 S.Ct. 2018 (Harlan, J., concurring in the result) (“An analysis under due process standards, correctly understood, is ... more conducive to judicial

restraint than an approach couched in slogans and ringing phrases ... that blur analysis by shifting focus away from the nature of the individual interest affected.”). That makes particular sense in this case because the relief Walker seeks is essentially procedural: a prompt process by which to prove his indigency and to gain release.

In such due process analysis, “[t]he fundamental requirement ... is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (internal quotation marks omitted). Due process “is not a technical conception with a fixed content unrelated to time, place and circumstances,” but rather is “flexible” and “requires analysis of the governmental and private interests that are affected.” *Id.* at 334, 96 S.Ct. 893 (internal quotation marks omitted). The district court should have applied such analysis in evaluating whether the Standing Bail Order comported with the Constitution's equal protection and due process guarantees.

#### IV

Having established that *Bearden* and *Rainwater* command that courts should apply something akin to a procedural due process mode of analysis to claims like Walker's, it remains to be determined whether the district court acted within its discretion in entering its preliminary injunction. At this stage of litigation, the City seeks to overturn the preliminary injunction in order to maintain the Standing Bail Order, so we must focus our inquiry on the concrete distinctions between the preliminary injunction and the Standing Bail Order.

Under the Standing Bail Order, arrestees are guaranteed a hearing within 48 hours of arrest to prove their indigency (with court-appointed counsel) or they will be released. *See supra* Part I.B. In contrast, the preliminary injunction commands an affidavit-based process for determining indigency within 24 hours of arrest. *See supra* Part I.C.3. Both procedures \*1266 agree on the standard for indigency and that those found indigent are to be released on recognizance. There are thus only two real points of dispute. First, whether the City must make an indigency determination within 24 hours or 48 hours. Second, whether the City may use a judicial hearing to determine indigency or must use the affidavit-based system required by the preliminary injunction.

#### A

Within what time must the City make an indigency determination? To answer this question, the City asks us not to write on a blank slate but to borrow from Supreme Court precedent on the timing required for a probable cause determination. In *County of Riverside v. McLaughlin*, the Supreme Court considered what “prompt” meant for providing a constitutionally required prompt probable cause hearing for those arrested without a warrant. 500 U.S. 44, 55, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). “Taking into account the competing interests” of the individual and the government, the Court concluded that “a jurisdiction that provides judicial determinations of probable cause *within 48 hours of arrest* will, as a general matter, comply with the promptness requirement.” *Id.* at 56, 111 S.Ct. 1661 (emphasis added). The *McLaughlin* Court expressly rejected a 24-hour bright-line limitation suggested by Justice Scalia in dissent. *See id.* at 57–58, 111 S.Ct. 1661.

Walker argues that we should not import *McLaughlin*'s 48-hour presumption into the bail context because that case did not involve differential treatment based on wealth. He contends that any disparate treatment by wealth in granting bail must satisfy heightened scrutiny, thereby placing a strict burden on the government to justify its bail policy. That argument fails, however, because, as we explained above, the use of a bail schedule does not trigger heightened scrutiny. Instead, we evaluate the 48-hour window for making bail determinations on its own terms to ensure that it satisfies the due process mode of analysis in *Bearden* and *Rainwater*.

We are persuaded that it does. Under *McLaughlin*, the City can presumptively hold a person for 48 hours before even establishing probable cause—that is, without even proving that it has evidence that he has committed a crime. It stands to reason that that the City can take the same 48 hours to set bail for somebody held *with* probable cause. Indeed, *McLaughlin* expressly envisioned that one reason for the 48-hour window is so that probable cause hearings could be combined with “bail hearings and arraignments.” 500 U.S. at 58, 111 S.Ct. 1661. For those reasons, the Fifth Circuit in *ODonnell* recently imported the *McLaughlin* 48-hour rule to the bail determination context. *ODonnell v. Harris Cty.*, 892 F.3d 147, 160–61 (5th Cir. 2018). The *ODonnell* court was reviewing an injunction that imposed a 24-hour time limit for a bail determination—identical in that respect to the one we are reviewing—and it rejected such time limit because it worked a “heavy administrative burden” and was therefore “too strict.” *Id.*

We agree with the Fifth Circuit; indigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest.<sup>12</sup> By failing \*1267 to honor such presumption and insisting instead on a 24-hour window, the district court committed legal error and so abused its discretion.<sup>13</sup>

## B

*[Discussion of affidavit-based process required by district court injunction omitted]*

## C

In sum, Walker failed to make the necessary showing that he is likely to succeed on the merits of his claim that the Standing Bail order is unconstitutional. Neither the 48-hour window for a bail determination nor the use of an adversarial bail hearing in lieu of an affidavit-based process runs afoul of the Constitution. Walker therefore failed to satisfy one of the necessary conditions for a preliminary injunction against the Standing Bail Order, *Wreal*, 840 F.3d at 1247, and the district court erred in granting it.

## V

*[Discussion of equitable discretion of the district court and mootness omitted]*

For the foregoing reasons, the preliminary injunction entered by the district court is **VACATED**, and the case is **REMANDED** to the district court for further proceedings consistent with this opinion.<sup>15</sup>

**MARTIN, Circuit Judge, concurring in part and dissenting in part<sup>1</sup>:**

Maurice Walker was jailed by the City of Calhoun for six days because he was too poor to pay his bail. He challenges the City's practice of jailing people before trial when they are too poor to make bond, arguing it violates the constitutional guarantees of due process and equal protection. The Majority rejects this claim, characterizing the pretrial jailing as “merely wait[ing] some appropriate amount of time to receive the same benefit as the more \*1273 affluent.” Maj. Op. at 1261. In this way, the Majority renders it unnecessary to review the City's practice with heightened scrutiny. I believe the Majority rewrites this court's binding precedent in Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978) (en banc),<sup>2</sup> which held that “[t]he incarceration of those who cannot [pay for pretrial release], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.” Id. at 1057. The Majority fails to recognize this infringement on the rights of indigents, so I dissent.

I.

The Supreme Court has repeatedly recognized that wealth-based detention is not permitted by our Constitution. See Williams v. Illinois, 399 U.S. 235, 240–41, 90 S.Ct. 2018, 2022, 26 L.Ed.2d 586 (1970) (holding that Illinois's practice of extending a prisoner's sentence beyond maximum authorized by statute of conviction because of a prisoner's “involuntary nonpayment of a fine or court costs” is “an impermissible discrimination that rests on ability to pay”); Tate v. Short, 401 U.S. 395, 397–98, 91 S.Ct. 668, 670–71, 28 L.Ed.2d 130 (1971) (extending Williams to prohibit “jailing an indigent for failing to make immediate payment of any fine”); Bearden v. Georgia, 461 U.S. 660, 672–73, 103 S.Ct. 2064, 2073, 76 L.Ed.2d 221 (1983) (extending Williams and Tate to hold that a state court can't revoke probationary sentence for inability to pay fine or restitution without considering “alternate measures of punishment other than imprisonment”). The Bearden line of cases involved criminal penalties imposed after a conviction. In Rainwater, the former Fifth Circuit extended these cases' “principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible” to “[t]he punitive and heavily burdensome nature of pretrial confinement.” 572 F.2d at 1056.

The Majority is right when it says Mr. Walker's claim “fits squarely” within the Bearden-like cases that raise both due process and equal protection concerns. Maj. Op. at 1258–59. But I part ways with the Majority, because I read these cases to support the District Court's application of heightened scrutiny under the Equal Protection Clause to the City's bail policy. See id. at 1262.

The Majority relies on San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), in deciding that Mr. Walker cannot make out an equal protection claim warranting heightened scrutiny. But I read Rodriguez to say he can. Rodriguez established the test for



whether a wealth-based detention claim is subject to heightened scrutiny under an equal protection framework. The *Rodriguez* test first asks whether the challenged scheme uses indigency as a classification, examining whether it treats differently a “class [ ] composed only of persons who were totally unable to pay.” *Id.* at 20, 22, 93 S.Ct. at 1290. The second question is whether the class has suffered an “absolute deprivation” of a benefit. *See id.* 20, 93 S.Ct. at 1290.

The Majority never addresses whether the Standing Bail Order discriminates against indigents. *See* Maj. Op. at 1261–62. I say the Bail Order clearly uses indigency as a classification, and offer this simple example in support. Consider two people, one who has money and the other who does not. They are arrested for the same crime at the same time under the same circumstances. Under the Standing Bail Order, these two would have the identical \*1274 bail amount, as established by the master bail schedule. The person who has money pays it and walks away. The indigent can't pay, so he goes to jail. This is plainly “imprisonment solely because of indigent status.” *Rainwater*, 572 F.2d at 1056; *accord* *ODonnell v. Harris Cty.*, 892 F.3d 147, 162–63 & n.6 (5th Cir. 2018).

The Majority Opinion says this hypothetical shows I would require the government to be involved in all sorts of wealth-based interactions—including intervening to make pricier express mail options available to all postal patrons. *See* Maj. Op. at 1263–65. Not so. Instead I look to the Supreme Court, which has expressly established limiting principles for equal protection claims by indigents. *M.L.B. v S.L.J.*, 519 U.S. 102, 123–24, 117 S.Ct. 555, 567, 136 L.Ed.2d 473 (1996). In *M.L.B.*, the Court plainly said “[s]tates are not forced by the Constitution to adjust all tolls to account for disparity in material circumstances.” *Id.* (quotation omitted). It explained that lawsuits seeking “state aid to subsidize [ ] privately initiated action or to alleviate the consequences of differences in economic circumstances that existed apart from state action” are different from those vindicating a person's right to participate in political processes or to have access to the courts in criminal cases. *Id.* at 123–25, 117 S.Ct. at 568.

As to *Rodriguez's* second question, the Majority relies on the fact that the Standing Bail Order caps an indigent arrestee's pretrial detention at 48 hours to conclude that the detention isn't an “absolute deprivation.”<sup>3</sup> In fact, the Majority refers to this person's time in jail as just a “diminishment of a benefit.” Maj. Op. at 1261–62. But this is word play. First, the Majority renames the interest in “freedom from incarceration” at issue here, as an interest in “access to pretrial release.” *But see* *ODonnell*, 892 F.3d at 162 (identifying the interest as “freedom from incarceration”). Second, the Majority's characterization treats 48 hours in jail as a mere delay or “diminishment” of the benefit of being released, instead of the deprivation of liberty it surely is.<sup>4</sup>

In my view, an incarcerated person suffers a complete deprivation of liberty within the meaning of *Rodriguez*, whether their jail time lasts two days or two years. Certainly the *Rodriguez* Court had no problem concluding there was an “absolute deprivation” of liberty in *Williams* and *Tate* because the challenged state laws “subjected indigents to incarceration simply because of their inability to pay a fine.” *Rodriguez*, 411 U.S. at 20–22, 93 S.Ct. at 1290. *Rainwater* also described pretrial \*1275 confinement as a “deprivation of liberty.” 572 F.2d at 1056. Neither *Rodriguez* nor *Rainwater* qualified how long the confinement had to last before it became a deprivation of liberty. *See* *Rodriguez*, 411 U.S. at 20–22, 93 S.Ct. at 1290; *Rainwater*, 572 F.2d at 1056. More recently, the Supreme Court reaffirmed that “[a]ny amount of actual jail time is significant and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration.” *Rosales-Mireles v. United States*, 585 U.S. —, 138 S.Ct. 1897, 1907, — L.Ed.2d — (2018) (citation and quotation omitted). And since *Rainwater* eliminated any distinction between a post-

conviction and pre-conviction detention, the precedent that binds us tells us that two days in jail is a deprivation of liberty, whether it happens before or after a person has been convicted. See ODonnell, 892 F.3d at 162 n.6 (“[T]his court in Rainwater concluded that the distinction between post-conviction detention targeting indigents and pretrial detention targeting indigents is one without a difference.”).

I am not alone in this view. In addressing a challenge to the bail policies of Harris County, Texas, the Fifth Circuit looked to Rodriguez in holding that “indigent misdemeanor arrestees are unable to pay secured bail, and, as a result, sustain an absolute deprivation of their most basic liberty interests—freedom from incarceration.” ODonnell, 892 F.3d at 162. The Fifth Circuit thus held that “[h]eighted scrutiny of the County’s [bail] policy is appropriate.”<sup>5</sup> Id. The Majority Opinion says this case is “factually distinct” from ODonnell. For support, it looks to the District Court’s findings about Harris County’s written bail policies as they existed before the injunction was issued. See Maj. Op. at 1261–62 n.10. Texas law required individualized assessments in determining bail. ODonnell, 892 F.3d at 153. But the Texas District Judge found Harris County failed to live up to this law because: “County officials impose[d] the scheduled bail amounts on a secured basis about 90 percent of the time,” and its officers “were aware that, by imposing a secured bail on indigent arrestees, they were ensuring that those arrestees would remain detained.” See id. at 153–54. In Calhoun, Georgia, the Standing Bail Order sets a secured bail amount for all arrestees, with no individualized assessment. And by creating a requirement for a determination of indigency within 48 hours, it implicitly acknowledges that people who are unable to pay for release will be detained under this system. Thus, the only difference between Harris County’s system, as described by the Texas District Judge, and Calhoun’s system, is that the Texas system allowed indigents to be detained for longer than 48 hours. See id. at 154 (noting arrestees “must wait days for their hearings”). Under our precedent, I do not view this factual difference as meaningful.

It seems unremarkable to say that being jailed for 48 hours is more than a mere \*1276 inconvenience. There are very real consequences for detained indigents. They can lose their jobs. They can lose their homes and transportation. Their family connections can be disrupted. And all this is to say nothing of the emotional and psychological toll a prison stay can have on an indigent person and her family members. See Nick Pinto, The Bail Trap, N.Y. Times Mag. (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> (“ ‘Most of our clients are people who have crawled their way up from poverty or are in the throes of poverty,’ [Scott] Hechinger says. ‘Our clients work in service-level positions where if you’re gone for a day, you lose your job. People in need of caretaking—the elderly, the young—are left without caretakers. People who live in shelters, where if they miss their curfews, they lose their housing. Folks with immigration concerns are quicker to be put on the immigration radar. So when our clients have bail set, they suffer on the inside, they worry about what’s happening on the outside, and when they get out, they come back to a world that’s more difficult than the already difficult situation that they were in before.’ ”); see also Gerstein v. Pugh, 420 U.S. 103, 114, 95 S.Ct. 854, 863, 43 L.Ed.2d 54 (1975) (“Pretrial confinement may imperil the suspect’s job, interrupt his source of income, and impair his family relationships.”). And these consequences can be just as dire for a two-day jail stay as for a longer one. See Juleyka Lantigua-Williams, Why Poor, Low-Level Offenders Often Plead to Worse Crimes, The Atlantic (July 24, 2016), <https://www.theatlantic.com/politics/archive/2016/07/why-pretrial-jail-can-mean-pleading-to-worse-crimes/491975/> (“[S]ome of the most damaging effects of pretrial detention can happen really quickly within the first few days or a week. If you lose your job, if you lose your apartment, if you need to find somebody else to take care of your kids, at that point the cost of future incarceration might not be so high ... [so] [i]t reduces incentive to fight against a plea deal that involves another six months of jail.”

(interview with Megan Stevenson) ); Samuel R. Wiseman, Pretrial Detention and the Right to be Monitored, 123 Yale L.J. 1344, 1356–57 (2014).

I am puzzled by the Majority's conclusion that detained indigents are somehow better off than their free and wealthy counterparts. Maj. Op. at 1261–62. It is true that a person with money will be out-of-pocket whatever funds they paid as bond. But these wealthier bond payers have a choice: they can pay the bond or not. The poor have no choice. I simply reject the idea that people who have the ability to pay bond decide to keep it and go to jail to gain some sort of financial advantage.

Neither do I view the *Bearden* Court's single quotation from Justice Harlan's concurrence in Williams sufficient to support the Majority's embrace of the due process framework approved of in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). See Maj. Op. at 1264–66. First, *Bearden* began with a reminder that the Supreme Court had “long been sensitive to the treatment of indigents in our criminal justice system.” 461 U.S. at 664, 103 S.Ct. at 2068. And the *Bearden* Court ultimately reversed rulings of Georgia courts that had resulted in the jailing of a probationer who failed to pay his court ordered fines. Id. at 674, 103 S.Ct. at 2074.

Second, while the Court did reference Justice Harlan's view that a “due process approach more accurately captures the competing concerns” in this type of analysis, it made clear that cases implicating both due process and equal protection concerns “cannot be resolved by resort to easy slogans or pigeonhole analysis” and require a context-specific inquiry. See id. at 666–67, 103 S.Ct. at 2069. If it appears the *Bearden* Court focused on due process \*1277 principles as opposed to equal protection, that's because the particular case before it—challenging the State's failure to consider an indigent probationer's reasons for nonpayment of fines and restitution at a probation revocation hearing—rested more naturally on due process concerns than equal protection. Id. at 666 n.8, 103 S.Ct. at 2069 n.8. The Court reasoned that, “in setting or resetting a sentence,” “a defendant's level of financial resources is a point on a spectrum,” making indigency “a relative term rather than a classification” in that context. Id. However, the Court also explained that “whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants [is analyzed] under the Equal Protection Clause.” Id. at 665, 103 S.Ct. at 2069. Under Calhoun's Standing Bail Order, bail is established by a predetermined schedule without consideration of the arrestee's financial resources. Thus, Calhoun does not treat indigency as a “relative term.” Instead, as set out above, only indigents are detained under the Bail Order, because people with money simply pay the preset amount and go home. This means, like with the statute in Williams, the Standing Bail Order “in operative effect exposes only indigents to the risk of imprisonment” and “visit[s] different consequences on two categories of persons.” Williams, 399 U.S. at 242, 90 S.Ct. at 2023. This case, therefore, like “[m]ost decisions in this area,” is properly analyzed under the equal protection framework. See Bearden, 461 U.S. at 665, 103 S.Ct. at 2068–69.

In light of Supreme Court precedent, our sister circuit's agreement that *Rainwater* requires application of heightened scrutiny under the Equal Protection Clause to claims like Mr. Walker's, and the significant consequences stemming from incarceration, the Justice Harlan quote is simply not enough to support the Majority's due-process-only approach.<sup>6</sup>

I also reject the Majority's concern that a flood of litigation will result from treating wealth “like race, sex, or religion” as a reason not to apply heightened scrutiny. Maj. Op. at 1260–62. First, there will be no flood. The Supreme Court has already placed limits on bringing equal protection challenges to wealth-based classifications. Beyond the requirements set out in *Rodriguez* discussed above, the Supreme Court has also said that “fee requirements ordinarily are examined only for rationality,” except

when they implicate the “basic right to participate in political processes as voters and candidates” and “access to judicial processes in cases criminal or quasi criminal in nature.” M.L.B., 519 U.S. at 123–24, 117 S.Ct. at 567 (quotation omitted).<sup>7</sup> Thus, Mr. Walker's claim falls into \*1278 quite a narrow exception, and recognizing it as such does not portend striking down tuition fees or express service at the local post office. This Court and the Fifth Circuit have survived over the forty years since *Rainwater* was decided without being flooded with litigation raising wealth-based discrimination claims. And we are only called upon here to make explicit what was already implicit in *Rainwater*—namely that pretrial detention based solely on indigency is subject to heightened scrutiny. Second, even if our workload increased a bit, “the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo.” Williams, 399 U.S. at 245, 90 S.Ct. at 2024. I believe the courts are up to the task.

In sum, I read *Rodriguez* (and *Bearden* for that matter) to require that Mr. Walker's claim of wealth-based discrimination be subject to heightened scrutiny under a traditional equal protection framework. Thus, I would have affirmed the District Court's analysis.<sup>8</sup>

## II.

In applying heightened scrutiny to Mr. Walker's claim, I recognize that the Supreme Court has not made clear whether the level of scrutiny to be applied in *Bearden*-like cases is intermediate or strict scrutiny. See, e.g., M.L.B., 519 U.S. at 120–21, 123–24, 117 S.Ct. at 566, 567–68 (acknowledging that “[a] precise rationale has not been composed” and rejecting review “for rationality” in criminal or quasi criminal cases “concerning access to judicial processes”). *Rainwater* is similarly unclear, though its discussion of “vital” and “compelling” interests and the need to “delicate[ly] balance[e]” them, seems to me to point toward strict scrutiny. See Rainwater, 572 F.2d at 1056. Nevertheless, it is my view that on this record, the City's Standing Bail Order cannot survive even under intermediate scrutiny. The City failed to show that a 48-hour detention of only those who cannot afford to pay bond is “reasonably necessary to the accomplishment of legitimate state objectives.” See Bullock v. Carter, 405 U.S. 134, 144, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972).<sup>9</sup>

\*1279 The City of Calhoun says it has the same interest that was identified in Rainwater. That is the “compelling interest in assuring the presence at trial of persons charged with crime.” Rainwater, 572 F.2d at 1056. But the City never explains why or how a 48-hour detention period is “reasonably necessary” to accomplish this interest. After the 48 hours, everyone who was arrested, but could not make bond, is released on personal recognizance bonds (their promises to appear), whether they get a hearing or not. The obvious question comes to mind: if every indigent's promise to appear is enough to assure his presence at trial after 48 hours passes, why is 48 hours necessary to determine indigency and execute a personal recognizance bond? Wouldn't 47 work just as well? Forty, perhaps?

The City makes no effort to justify its policy of detaining those who cannot pay for 48 hours, because it says it doesn't need to. It argues only that capping detentions at 48 hours is “sufficient to immunize the City from a challenge to its process for a determination of indigency.” In making this argument, the City relies on two cases: Gerstein, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54, and its sequel, County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). In Gerstein, the Supreme Court held that “the Fourth Amendment requires a timely judicial determination of probable cause as a

prerequisite to [pretrial] detention.” 420 U.S. at 126, 95 S.Ct. at 869. The opinion defined “timely” as “before or promptly after arrest.” *Id.* at 125, 95 S.Ct. at 869. Later, in *McLaughlin*, the Court said “*Gerstein* struck a balance between competing interests” by requiring a “prompt—not immediate” probable cause determination. *McLaughlin*, 500 U.S. at 54–55, 111 S.Ct. at 1669. Acknowledging the “everyday problems of processing suspects through an overly burdened criminal justice system,” the Supreme Court said that “judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement.” *Id.* at 55–56, 111 S.Ct. at 1669–70.

According to the City, “this case is to *Rainwater* what *McLaughlin* was to *Gerstein*.” But there are two problems with this argument. First, *McLaughlin* said hearings “delayed unreasonably” can still violate *Gerstein*, for example, when the “delay [is] for delay's sake.” *McLaughlin*, 500 U.S. at 56, 111 S.Ct. at 1670. Here, the City has given no reason to justify the 48-hour detention period under the Standing Bail Order (not even an argument citing “everyday problems of processing suspects,” *see id.* at 55, 111 S.Ct. at 1669). As best I can tell, the City is thus asking for 48 hours of “delay for delay's sake,” which is precisely what *McLaughlin* forbade.

Second, *McLaughlin* decided when a probable cause hearing is required by the Fourth Amendment. 500 U.S. at 47, 111 S.Ct. at 1665. Again, this case involves \*1280 both equal protection and due process concerns. And while a hearing within 48 hours could satisfy the due process concerns, it does not necessarily satisfy the demands of equal protection. For example, consider a bail policy that releases all arrestees after booking, except for female, black, or Catholic arrestees. Those arrestees are detained for 48 hours, given a hearing, and then released. Under the City's theory, *McLaughlin* immunizes this policy from any challenge merely because, after all, the female, black, and Catholic arrestees get a hearing within 48 hours. This is plainly wrong. Equal protection principles require us to inquire of the City why it needs to treat female, black, and Catholic arrestees differently from all others and then to examine whether the given reason is sufficiently tailored to accomplish the City's legitimate or compelling objective. So the same goes for wealth-based classifications in the criminal justice system. The City should have been required to explain why it is “reasonably necessary” to treat poor people differently from all others by keeping them in jail for 48 hours. Since Calhoun offered no reason during this appeal, let alone a “legitimate” one, the Standing Bail Order cannot survive constitutional scrutiny. *See Bullock*, 405 U.S. at 144, 92 S.Ct. at 856.<sup>10</sup>

Finally, my view of *McLaughlin* and the interests at stake is not contrary to *ODonnell*. While the Fifth Circuit relied in part on *McLaughlin* to hold that “the federal due process right entitles detainees to a hearing within 48 hours,” it did not grant immunity from systemic challenges to Harris County like the immunity sought by Calhoun here. *See ODonnell*, 892 F.3d at 160. Instead, the Fifth Circuit determined that, in light of the evidentiary record, the District Court's injunction mandating a bail hearing within 24 hours was “too strict” and so extended the time for the hearing to 48 hours. *Id.* at 160–61 (noting the “heavy administrative burden” on the County as shown by the finding that “20% of detainees do not receive a probable cause hearing within 24 hours despite [a] statutory requirement”). Because Calhoun here offered no justification for its 48-hour period, I would have affirmed the preliminary injunction entered by Judge Murphy in the District Court, as well the 24-hour release requirement he imposed. On remand, the City would have had the opportunity to develop an evidentiary record and make the showing necessary to survive heightened scrutiny.

It seems worthy of mention that the Fifth Circuit's modified injunction in *ODonnell* is remarkably similar to what the District Court ordered in this case. The modified injunction required, within 24



hours, a determination of indigency based on affidavits, for those who could not pay the prescheduled bail amounts in a process overseen by “Pretrial Services officers”; release based on an “unsecured personal bond with nonfinancial conditions of release” or “on a secured money bond for which the defendant could pay a commercial surety's premium”; and for those who are not so released, “a hearing within 48 hours of arrest.” *Id.* at 164–65. This system provided “meaningful consideration of other possible alternatives” concurrently \*1281 with the utilization of a master bail schedule, as opposed to 48 hours later, and the County justified its need for 48 hours as opposed to 24. For that reason, I believe the Fifth Circuit's modified injunction appropriately addresses both the equal protection and due process concerns. *See Rainwater*, 572 F.2d at 1055–56 & n.2, 1058 (mooting a challenge to Florida Supreme Court's new rule, which subjected indigent and non-indigent arrestees alike to a first appearance hearing where a judge would select from six different kinds of release, including personal recognizance bonds, unsecured bonds, and secured bonds, because the rule did not “suffer such infirmity that its constitutional application is precluded”); *see also Bearden*, 461 U.S. at 672, 103 S.Ct. at 2073 (requiring courts to consider a probationer's reasons for failures to pay a fine or restitution and, for those without means to pay, consider “alternate measures of punishment other than imprisonment” before imposing jail time). Nevertheless, the Majority has established that in this Circuit, only due process interests are at stake; only a hearing is necessary; and the hearing must be held within 48 hours.

### III.

I believe Mr. Walker has shown a substantial likelihood of success on the merits. *See Palmer v. Braun*, 287 F.3d 1325, 1329 (11th Cir. 2002). I also believe Mr. Walker can show the other three requirements for getting a preliminary injunction: Jail time is an “irreparable injury” because “it cannot be undone through monetary remedies.” *See Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987). And because the City gave no justification for its policy of detaining indigents for 48 hours, the harm to the plaintiff class clearly outweighs any harm to the City. Last, in light of studies showing how bail policies like the City's contribute to systemic injustices in the criminal justice system and harm poor communities, *see, e.g.*, Brief for Am. Bar Ass'n at 6–21 as Amicus Curiae Supporting Appellee, *Walker v. City of Calhoun* (No. 17-13139), the public interest clearly weighs in favor of the injunction. In my view, the District Court did not abuse its considerable discretion in granting Mr. Walker's motion for a preliminary injunction. *See Palmer*, 287 F.3d at 1329.

*[The last portion of the concurrence in part discussing the scope of the injunction omitted.]*

### CONCLUSION

I read Supreme Court precedent and *Rainwater* to require a traditional equal protection analysis of the City of Calhoun's Standing Bail Order, applying heightened scrutiny review. On the record before us, I would have upheld the District Court's grant of a preliminary injunction to Mr. Walker. I recognize that the City has not yet had a chance to develop an evidentiary record about its need for a 48-hour detention

policy for indigents only. For that reason, I would have allowed the City an opportunity to develop that record on remand and seek a different result when this case is considered on the merits.

### All Citations

901 F.3d 1245, 27 Fla. L. Weekly Fed. C 1207

### Footnotes

\* Honorable Diarmuid F. O'Scannlain, United States Circuit Judge for the Ninth Circuit, sitting by designation.

1 We have jurisdiction to review an interlocutory order granting a preliminary injunction under 28 U.S.C. § 1292(a)(1).

2 [Deleted]

3 [Deleted]

4 [Deleted]

5 A party seeking a preliminary injunction must make four necessary showings:

(1) [he] has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

*Wreal*, 840 F.3d at 1247 (quoting *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc)). Although the parties dispute all four elements, the principal point of dispute is likelihood of success on the merits.

6 [Deleted]

7 [Deleted]

8 [Deleted]

9 The dissent does not grapple meaningfully with *Rainwater's* explicit approval of bail schedules. The most it does is to argue that the bail system reviewed in *Rainwater* is different from the City's because it “subjected indigent and non-indigent arrestees alike to a first appearance.” Dissent at 1281. The dissent would thus turn *Rainwater* on its head. *Rainwater* endorsed the use of a bail schedule to provide “speedy and convenient release,” but the dissent would transform that endorsement into a requirement that all arrestees be held for a hearing even if they can immediately satisfy the release conditions. That is, to say the least, an odd reading of *Rainwater*. In any event, the dissent is wrong that Florida's scheme required all persons to wait for a bail hearing, as it only required such a hearing for those who had not “been previously released in a

lawful manner.” *In re Fla. Rules of Criminal Procedure*, 272 So.2d 65, 81 (Fla. 1972) (Rule 3.130(b)(1)).

<sup>10</sup> This case is therefore quite factually distinct from *ODonnell*, in which the government “did not achieve any individualized assessment in setting bail,” and as a result “some amount of upfront payment [was] required for release in the vast majority of cases,” thereby “ensuring that [indigent] arrestees would remain detained.” 892 F.3d at 153–54. The Standing Bail Order lacks such features that could support a conclusion that there is an “absolute deprivation” of pretrial release.

<sup>11</sup> There is some force to the City's contention that such analysis is inextricably linked to the excessiveness of bail conditions and so should be evaluated under the Eighth Amendment. Indeed, the Eighth Amendment was borrowed from a provision of the English Bill of Rights that was itself the culmination of a long process to prevent royal abuses of bail wrongly to deny pretrial liberty. *See, e.g.*, William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 63–66 (1977); *see also* June Carbone, *Seeing through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 529–33 (1983) (noting that the early American experience was to adopt and then further to liberalize British legal principles governing bail); *id.* at 548–49, 99 S.Ct. 1861 (“In England, the colonies, and the early states, bail bonds were set without reference to the financial circumstances of the accused. Lower bonds for the poor were considered to violate, not vindicate, the principle of equal justice.”).

Such history may support reinvigorating the Eighth Amendment as the proper vehicle for evaluating whether a State has imposed impermissible conditions of pretrial release. *Cf. Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 805–07 (9th Cir. 2014) (en banc) (O'Scannlain, J., dissenting) (arguing that legislation governing pretrial detention based on flight risk should be evaluated under the Eighth Amendment). In any event, it will be for a future court to decide whether *Salerno's* framework or an Eighth Amendment analysis applies when a defendant is eligible for bail but is detained because he cannot provide adequate assurance of his future appearance.

<sup>12</sup> The dissent accuses us of opening a split with the Fifth Circuit's *ODonnell* decision. *See* Dissent at 1275 n.5. But it is the dissent's position that would lead to a split. The *ODonnell* court expressly adopted the 48-hour requirement of *McLaughlin*—and, contrary to the dissent's equal protection analysis, it did so based on a due process analysis. *See ODonnell*, 892 F.3d at 160. *ODonnell* held a 24-hour rule too burdensome even though the defendant in that case was Harris County, Texas—home to Houston—which presumably could much more easily provide frequent bail hearings than can the City's one-judge municipal court.

It is true that, in a separate part of its opinion, the *ODonnell* court applied heightened scrutiny under the Equal Protection Clause, after concluding that the facts of that case fit into the *Rodriguez* classification of plaintiffs who suffer an “absolute deprivation of their most basic liberty interests.” *Id.* at 162. But there, the court had extensive factual findings from the district court, resulting from a lengthy evidentiary hearing, that Harris County did not provide arrestees “any opportunity to submit evidence of relative ability to post bond at the scheduled amount,” *id.* at 154 (emphasis added), evidence that permitted the Fifth Circuit to conclude that the County acted with a “discriminatory purpose” that “resulted in [indefinite] detainment solely due to a person's indigency,” *id.* at 161. Were the facts of this case the same, Walker would have a much



stronger argument that indigents in the City face an absolute deprivation on account of wealth that would trigger the *Rodriguez* exception, but the Standing Bail Order guarantees release to indigents within 48 hours. It therefore accords entirely with *O'Donnell's* holding that what the Constitution requires is “an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decisionmaker.” *Id.* at 163. The dissent would demand more and so is inconsistent with *O'Donnell*.

13 We note, however, that we do not consider whether Walker can show that the facts of his particular case (or other class members') fall outside the *McLaughlin* safe harbor. The *McLaughlin* Court made clear that the 48-hour presumption was rebuttable: a probable cause hearing held within 48 hours may nonetheless be unconstitutional “if the arrested individual can prove that his or her probable cause determination was delayed unreasonably.” *McLaughlin*, 500 U.S. at 56, 111 S.Ct. 1661. “Examples of unreasonable delay” include “delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake.” *Id.* *McLaughlin* only provides that jurisdictions which comply with the 48-hour rule “will be immune from *systemic* challenges.” *Id.* (emphasis added). That being said, the *McLaughlin* Court cautioned that, “[i]n evaluating whether the delay in a particular case is unreasonable, ... courts must allow a substantial degree of flexibility.” *Id.*

Nor do we decide whether a jurisdiction could adopt a system that allows a longer period of time than 48 hours to make a bail determination, because the City does not seek to take longer than 48 hours. As amicus pointed out at oral argument, the federal system permits a court to delay a bail hearing by three days after an arrestee's first appearance (plus intervening weekends or holidays) upon the government's motion. *See* 18 U.S.C. § 3142(f). And Georgia law allows 72 hours for an officer making an arrest pursuant to a warrant to bring the arrestee before a judicial officer. *See* Ga. Code Ann. § 17-4-26. Whether such lengths of delay are permissible is not a question before us. We are satisfied that *McLaughlin* establishes at least a 48-hour presumptive safe harbor for making bail determinations without deciding if that safe harbor extends longer. Because a probable cause determination establishes whether the government has a basis to detain a person at all, *see Gerstein*, 420 U.S. at 125, 95 S.Ct. 854, the onus on the government to make a probable cause determination promptly must be at least as great as it is to set the conditions of pretrial release. Whether jurisdictions have greater leeway in making bail determinations than probable cause determinations is a question for another case with a more complete factual record. The dispute between the parties over whether the preliminary injunction led to an increase in the non-appearance rate in the City may be relevant to such inquiry, but we need not resolve that dispute to determine that the Standing Bail Order facially passes constitutional muster.

14 [Deleted]

15 Because we would vacate the preliminary injunction irrespective of whether the district court was correct to certify Walker's proposed class or whether it properly denied the City's motion to dismiss, such two orders are not “inextricably intertwined” with the preliminary injunction order, and reviewing them is not “necessary to ensure meaningful review” of the preliminary injunction. *Hudson v. Hall*, 231 F.3d 1289, 1294 (11th Cir. 2000) (internal quotation marks and alterations omitted). We therefore lack pendant appellate jurisdiction over such otherwise unappealable interlocutory orders. Accordingly, Walker's Motion to Dismiss Appeal in Part (Doc. No. 16) is **GRANTED**.

- <sup>1</sup> I join the Majority in rejecting the City's arguments that Younger abstention applied; that the City wasn't liable for the bail policy under 42 U.S.C. § 1983; and that the Eighth Amendment, not the Fourteenth Amendment, applied to this case. See Maj. Op. Parts II.A, II.B, and III.A.2. I also agree that Mr. Walker's suit against the City's original bail policy is not moot and the District Court may enjoin the City from reinstating that policy. See *id.* Part V.A.3. Last, I join the Majority's grant of Mr. Walker's motions to supplement the record and dismiss the appeal in part. See *id.* at 1256 n.4, 1272 n.15.
- <sup>2</sup> In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. *Id.* at 1209.
- <sup>3</sup> The requirement to have a bond hearing within 48 hours is properly considered in determining whether the Standing Bail Order survives scrutiny. However, the Majority relies on the 48-hour time period in deciding whether there was a deprivation in the first place. This approach locks in the Majority's ultimate holding—that a bail system in which indigents get a hearing within 48 hours survives all systemic due process challenges. Maj. Op. at 1266–67.
- <sup>4</sup> The Majority contends I do not “grapple meaningfully with *Rainwater's* explicit approval of bail schedules.” Maj. Op. at 1260 n.9. But *Rainwater* did not approve of bail schedules being used in the way Calhoun's Standing Bail Order works. *Rainwater* said, “Utilization 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.” 572 F.2d at 1057. The Majority Opinion emphasizes the first sentence but is blind to what the second sentence plainly says. Calhoun's Standing Bail Order jails those who cannot pay bail for up to two days before it provides any alternative. The Majority does not appear to believe these two days of incarceration qualify as incarceration, as that term was used by the Court in *Rainwater*.
- <sup>5</sup> *ODonnell* interpreted *Rainwater* as I do—that is, extending *Williams* and *Tate* to the pretrial context and holding that pretrial detention of indigents solely because of their indigency is a deprivation of liberty and is subject to heightened scrutiny. *ODonnell*, 892 F.3d at 162 & n.6. The Majority's contrary interpretation of *Rainwater*, Maj. Op. at 1260–61, thus draws this Court into a circuit split with the Fifth Circuit, based on interpretation of a case that is binding precedent for both courts. Although our Court is not bound to follow the decisions of the Fifth Circuit, we have observed that its interpretation of former Fifth Circuit precedent is entitled to “great weight.” See *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1535 n.13 (11th Cir. 1986) (noting that a post-split Fifth Circuit decision was “entitled to great weight because it [was] based on cases of the former Fifth Circuit that are binding precedent in this circuit”).
- <sup>6</sup> However, I do not read the Majority Opinion to reject heightened scrutiny for all cases challenging indigency-based jail stays. The outcome of the Majority decision relies entirely on the idea that 48 hours in jail is not an “absolute deprivation” of liberty. See Maj. Op. at 1260–61. The Majority Opinion also explains that it believes *ODonnell* to be a different case from this one, because Harris County's practices resulted in longer jail stays despite already-in-place requirements for individualized assessments in determining bail. See Maj. Op. at 1261–62 n.10 & 1266–67 n.12. Thus, even under the Majority's view, challenges to indigency-based jail stays warrant heightened scrutiny so long as they show that the challenged system, in practice, results in indigents being detained longer than 48 hours. Thus, if Calhoun cannot live up to the

procedural safeguards it promises in the Standing Bail Order and detains indigents longer than 48 hours, Mr. Walker will be able to revive his equal protection challenge under a heightened scrutiny review.

<sup>7</sup> The Majority asks how Mr. Walker's claim fits into M.L.B.'s narrow exception for cases concerning access to judicial processes. Maj. Op. at 1264. Again, M.L.B. explicitly answers this question. The Court explained that its “decisions concerning access to judicial processes,” including *Bearden* and its progeny, “reflect both equal protection and due process concerns.” M.L.B., 519 U.S. at 120, 117 S.Ct. at 566. “The equal protection concern relates to the legitimacy of fencing out [individuals] based solely on their inability to pay core costs.” Id. Or said yet another way, “‘[e]qual protection’ emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.” Ross v. Moffitt, 417 U.S. 600, 609, 94 S.Ct. 2437, 2443, 41 L.Ed.2d 341 (1974). I have already explained how the Standing Bail Order discriminates against indigents, and the Majority has not disputed that. Thus, this case plainly falls into the category of cases concerning access to judicial processes. See M.L.B., 519 U.S. at 120, 117 S.Ct. at 566.

<sup>8</sup> Mr. Walker alternatively challenged the Standing Bail Order under a substantive due process theory, arguing there is a fundamental right to pretrial liberty. See United States v. Salerno, 481 U.S. 739, 749–50, 107 S.Ct. 2095, 2102–03, 95 L.Ed.2d 697 (1987) (affirming the individual's “strong interest in liberty,” the State's “sufficiently weighty” interest in preventing crime, and the “‘general rule’ of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial” absent “special circumstances”). Because I would affirm the District Court's application of heightened scrutiny under the traditional equal protection analysis, I do not address the substantive due process theory.

<sup>9</sup> Over the years, the Supreme Court has given us many formulations of “intermediate scrutiny.” For example, “[a] gender classification fails unless it is substantially related to a sufficiently important governmental interest.” City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441, 105 S.Ct. 3249, 3255, 87 L.Ed.2d 313 (1985). But classifications based on a person's legitimacy, which is of course beyond that person's control, “will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.” Id. (quotation omitted). In Bullock, the Supreme Court subjected Texas's filing-fee requirement for primary candidates to get on a ballot to “close[ ] scrutin[y]” and invalidated it as a “denial of equal protection of the laws.” Bullock, 405 U.S. at 144, 149, 92 S.Ct. at 856, 859. In applying heightened scrutiny to this wealth-based discrimination, the Court sought to determine whether the “filing-fee scheme” was “reasonably necessary to the accomplishment of legitimate state objectives.” Id. at 144, 92 S.Ct. at 856; see also Rodriguez, 411 U.S. at 22, 93 S.Ct. at 1290–91 (including Bullock in a list of cases in which the Court invalidated impermissible wealth-based classifications on equal protection grounds). Because M.L.B. also cited to Bullock in discussing the other exception to the rule that “fee requirements are ordinarily examined for rationality,” M.L.B., 519 U.S. at 124 n.14, 117 S.Ct. at 568 n.14, this seems to me to be the most analogous case explicitly setting out the kind of tailoring required between the competing interests. Thus, I use its standard.

<sup>10</sup> At oral argument, the City did offer one justification for its 48-hour detention policy: “to get the players to the game”—meaning to get the City's only municipal judge to the municipal court so she can hold a hearing. Nevertheless, this Court's longstanding rule is that arguments not briefed to the court and raised for the first time at oral argument are deemed abandoned. See Mesa Air

Grp., Inc. v. Delta Air Lines, Inc., 573 F.3d 1124, 1130–31 (11th Cir. 2009) (refusing to consider the merits of an argument made only at oral argument but not in briefs). This rule seems especially appropriate here, in light of the City's position in its briefs that it did not need to justify its policy.

KeyCite Red Flag - Severe Negative Treatment  
Vacated and Remanded by Walker v. City of  
Calhoun, GA, 11th Cir.(Ga.), August 22, 2018  
2017 WL 2794064

Only the Westlaw citation is currently  
available.

United States District Court, N.D. Georgia,  
Rome Division.

Maurice WALKER, on behalf of himself  
and others similarly situated, Plaintiff,  
v.

CITY OF CALHOUN, GEORGIA,  
Defendant.

CIVIL ACTION FILE NO.: 4:15-CV-0170-  
HLM

|  
Signed 06/16/2017

### **Attorneys and Law Firms**

Alec Karakatsanis, Equal Justice Under Law,  
Washington, DC, Ryan Primerano, Sarah E.  
Geraghty, Southern Center for Human Rights,  
Atlanta, GA, for Plaintiff.

Abby C. Grozine, David Frank Root, Carlock  
Copeland & Stair, LLP, Atlanta, GA, Ansel  
Franklin Beacham, III, Jesse Anderson Davis,  
Samuel Leslie Lucas, Brinson Askew Berry  
Siegler Richardson & Davis, LLP, Rome, GA,  
George Patrick Govignon, Govignon Law  
Office, Calhoun, GA, for Defendant.

### ORDER

Harold L. Murphy, SENIOR UNITED STATES  
DISTRICT JUDGE

\*1 This case is before the Court on the Court's  
April 7, 2017, Order [56] and on the Court's

own Motion.

## **I. Background**

### **A. Factual Background**

#### **1. Plaintiff's Allegations**

Plaintiff has sued Defendant, alleging that Defendant jails "the poor because they cannot pay a small amount of money." (Compl. (Docket Entry No. 1) ¶ 1.) Plaintiff is a recent arrestee who is imprisoned because he cannot afford to pay the money set by Defendant's bail schedule. (*Id.* ¶ 2.) Plaintiff alleges that Defendant releases "many people arrested for minor traffic or misdemeanor offenses ... almost immediately upon payment of money." (*Id.*) However, those "who are too poor to purchase their release remain in jail because of their poverty for up to seven days before a first court appearance." (*Id.*) Plaintiff "challenges in this action the use of fixed amounts of secured money bail that results in the detention of only the poorest of those arrested for petty offenses," and "seeks a declaration that [Defendant's] conduct is unlawful, and injunctive relief assuring that his rights and the rights of the other class members will not continue to be violated." (*Id.* ¶ 3.)

Plaintiff alleges that Defendant has a policy and practice of refusing "to release traffic and misdemeanor arrestees from jail unless they pay a generically set bond amount," which varies by offense but usually ranges from \$90 to \$1,000. (Compl. ¶ 4.) According to Plaintiff, Defendant does not consider individualized factors when setting bonds, and "anyone who cannot afford to pay is held in jail for up to seven days before [Defendant] brings its arrestees before the municipal court." (*id.*)

Defendant is a Georgia municipal corporation and is the seat of Gordon County, Georgia.

(Compl.¶ 9.) Defendant operates the Calhoun Police Department (the “CPD”) and contracts with the sheriff of Gordon County to hold its arrestees in the Gordon County Jail (the “Jail”). (*Id.*)

Plaintiff is fifty-four years old and has a serious mental disorder that causes him to be disabled. (Compl.10.) Plaintiff alleges that his only income consists of \$530 per month in Social Security disability payments, which his sister receives and manages. (*Id.*) Plaintiff lives with his sister and has no property or assets. (*Id.*) Plaintiff has been unable to work for the past five years. (*Id.*)

On September 3, 2015, the CPD arrested Plaintiff and charged him with being a pedestrian under the influence. (Compl.¶ 11.) CPD officers brought Plaintiff to the Jail, where he was booked and placed in a holding cell. (*Id.* ¶ 12.) An officer told Plaintiff “that he would not be released unless he paid the standard \$160 cash bond that [Defendant] requires for people charged with being a pedestrian under the influence.” (*Id.*)

Plaintiff is indigent and cannot afford to post the bond. (Compl.¶ 13.) Plaintiff's family cannot afford to post the bond. (*Id.*) Plaintiff has asked officers at the Jail when he will go to court, and has received three different answers. (*Id.* ¶ 14.) Defendant holds weekly court sessions on Mondays, and new arrestees who cannot post bond must wait until the following Monday to see the judge. (*Id.*) Defendant did not hold court on September 7, 2015, due to the Labor Day holiday, and Plaintiff will not appear in court until September 14, 2015. (*Id.*)

\*2 Plaintiff has a prescription for medication for his mental disorder and must take the medication every day. (Compl.¶ 15.) In August 2015, Plaintiff spent eight days in the hospital because he had stopped taking his medication.

(*Id.*) Plaintiff alleges that he has not received his medication while in the Jail, that he is assigned to a single-person cell, and that he is allowed out of the cell for one hour each day. (*Id.*)

Plaintiff alleges that, under Georgia law, most arrestees who are charged with misdemeanors are entitled to pretrial release. (Compl.¶ 16.) Plaintiff contends that Defendant would release him immediately if he or a family member paid the bond amount. (*Id.* ¶ 17.) According to Plaintiff, his treatment, and that of other class members, results from and is representative of Defendant's post-arrest detention policies and practices. (*Id.* ¶ 18.) Plaintiff alleges that under Defendant's policy and practice,

when the [CPD] makes an arrest for a minor traffic or misdemeanor offense, officers inform the arrestee that the arrestee will be released immediately if he or she pays the bond amount set for each charge of arrest pursuant to an offense-based and pre-set bail schedule. The arrestee is told that he or she will remain in jail if unable to make that payment.

(*Id.* ¶ 19 (footnote omitted).) According to Plaintiff, those who remain in Defendant's custody typically cannot afford to pay a third-party bonding agent the ten to twenty percent required to obtain a commercial bail bond. (*Id.* at 6 n.2.) Plaintiff states that he cannot afford such a bond. (*Id.*)

According to Plaintiff, “[b]ecause [Defendant] does not deviate from secured money bail and holds court only once per week, any arrestee too poor to pay the pre-set secured bail could spend as many as seven days in jail prior to a first

court appearance.” (Compl.¶ 20.) Plaintiff alleges that Defendant, unlike many other cities, “does not allow postarrest release on recognizance or with an unsecured bond (in which a person would be released by promising to pay the scheduled amount if the person later does not appear).” (*Id.* ¶ 21.) Defendant instead requires payment up front. (*Id.*)

Plaintiff alleges:

After arrest, [J]ail employees inform arrestees of the secured bond amount based on their training and [Defendant] policies. Many of [Defendant’s] minor misdemeanor arrestees are thus released soon after arrest upon payment of the scheduled amount of cash. Some remain detained for varying lengths of time until they or their families are able to borrow sufficient amounts of money or arrange for third-party payment. Others, like [Plaintiff], who are too poor even to find anyone to pay the money bond for them, are kept in jail.

(Compl.¶ 22.) According to Plaintiff, “[e]ach Monday, there are commonly about four to six indigent defendants who were not able to pay enough money to secure their release.” (*Id.* ¶ 23.)

[...]

Plaintiff alleges that Defendant violated his Fourteenth Amendment rights by jailing him because he cannot afford to pay the cash bond. (Compl.¶¶ 46–47.) Plaintiff seeks a declaratory

judgment that Defendant violated his rights, and those of the class members, “by jailing them because of their inability to pay a generically set amount of money to secure release after an arrest” (*id.* at 13), as well as an Order preliminarily and permanently enjoining Defendant from enforcing its post-arrest money-based detention policies against Plaintiff and the class (*id.* at 13–14), monetary damages (*id.* at 14), and attorneys’ fees and costs (*id.*)

## 2. Plaintiff’s Declaration

Plaintiff submitted a Declaration. (Compl. Ex. A (Docket Entry No. 1–2).) Plaintiff states that he is fifty-four years old. (*Id.* ¶ 1.) Plaintiff further states that he was arrested on September 3, 2015, by the CPD on charges of pedestrian under the influence. (*Id.* ¶ 2.) When Plaintiff arrived at the Jail, he was told that he had to pay a \$160 cash bond or he would be kept in jail. (*Id.* ¶ 3.) According to Plaintiff, he has a major mental health disorder and is disabled, and his only income is \$530 per month in Social Security benefits, which his sister receives. (*Id.* ¶ 4.) Plaintiff has not worked in five years, does not have a driver’s license, owns no property, and lives with his sister. (*Id.*) Plaintiff states that he does not know when his court date will be, as he has received three different answers from guards, and notes that he cannot afford to buy his release. (*Id.* ¶ 5.)

## 3. Defendant’s Materials

### a. Affidavit of Samuel Heath Everett

Mr. Everett is a police officer with the City of Calhoun, Georgia’s Police Department (the “CPD”). (Aff. of Samuel Heath Everett (Docket Entry No. 29–1) ¶ 1.) On September 3, 2015, Mr. Everett was dispatched to the area of Experiment Station Road and Georgia State Route 53 Spur to respond to a report of a black male walking in the roadway who appeared to be intoxicated. (*Id.* ¶ 2.) After reaching that

location, Mr. Everett located an individual who matched the description provided, and noted that the individual appeared to be stumbling as he was walking. (*Id.* ¶ 3.) As Mr. Everett approached the individual, he smelled a strong odor of alcohol. (*Id.* ¶ 4.) The individual identified himself as Plaintiff. (*Id.*) Mr. Everett also observed that Plaintiff had slurred speech and red, glassy eyes, which are consistent with intoxication. (*Id.* ¶ 5.) Mr. Everett arrested Plaintiff and transported him to the Jail, where he was booked and cited for a violation of O.C.G.A. § 40–6–95. (*Id.* ¶ 6.) Mr. Everett told Plaintiff “that he would need to make contact with someone who could then call the [CPD] regarding the process for making bail.” (*Id.* ¶ 7.) Mr. Everett did not “advise [Plaintiff] with regard to the amount necessary for bail.” (*Id.*)

#### **b. Prisoner Release Authorization**

Defendant presented a copy of a prisoner release authorization indicating that Plaintiff was directed to be released from the Jail on September 9, 2015. (Prisoner Release Authorization (Docket Entry No. 29–2).)

#### **c. Ticket Information Sheet**

\*4 The ticket information sheet from Plaintiff's arrest indicates that, on September 3, 2015, Plaintiff was charged with being a pedestrian under the influence, in violation of O.C.G.A. § 40–6–95. (Ticket Information Sheet (Docket Entry No. 29–3).) The ticket information sheet also reflects that Plaintiff paid a fine in the amount of \$160.00, which was forfeited on October 19, 2015. (*Id.*)

#### **d. Affidavit of Matthew Chad Silvers**

Defendant presented the Affidavit of Matthew Chad Silvers, who is employed by the Municipal Court of the City of Calhoun, Georgia as a deputy clerk and as a deputy marshal. (Aff. of Matthew Chad Silvers (Docket

Entry No. 29–4) ¶ 1.) Mr. Silvers states that the Calhoun Municipal Court “allows individuals to post a bond secured by electronic payment for most offenses through an online service provided by Government Window, LLC.” (*Id.* 2.) According to Mr. Silvers, the records provided by the online services indicate that, on October 10, 2015, a \$160.00 bond was posted for a ticket belonging to Plaintiff, who was scheduled to appear before the Calhoun Municipal Court on October 12, 2015. (*Id.* ¶ 3.)

#### **e. Standing Order**

Defendant also presented a copy of the Calhoun Municipal Court's Standing Order Regarding Pre-Trial Appearance, Establishment of Bonds in Advance of Initial Appearance Pursuant to State Law and Individualized Indigency Determinations (the “Standing Order”). (Standing Order (Docket Entry No. 29–5).) The Standing Order states, in relevant part:

Pursuant to O.C.G.A. § 17–6–1(f)(1), the Court for the City of Calhoun, Georgia, as a court of inquiry with original jurisdiction acting in the stead of the Superior Court of Gordon County, Georgia, for certain offenses hereby re-adopts and reaffirms the written and established bail schedule attached as Exhibit “A.” The provisions of said exhibit are hereby incorporated by reference by this standing order as if fully set forth herein.

Any party, defendant, accused, or other person required or permitted by law to give or post bail as surety or security in a criminal matter may discharge this requirement by depositing cash in the amount of said bail. O.C.G.A. § 17–6–4(a). Additionally, an accused may provide his/her driver's license as collateral for any bail as provided for by O.C.G.A. § 17–6–2.

The purpose is to permit the posting of bail without a delay associated with the “First Appearance” within 48 hours of being



confined to the Gordon County Jail, as mandated by Georgia Uniform Superior Court Rule 26.1. It is the opinion of the Court that the employ of such a schedule, as authorized by state law, “provides speedy and convenient release for those who have no difficulty in meeting its requirements[.]” *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir.1978).

(*Id.* at 3.) The schedule “shall apply to all custodial arrests permitted by O.C.G.A. §§ 17–4–20 and 17–4–23, or other applicable code provisions” for various offenses. (*Id.* at 4.)

The Standing Order also contains a provision concerning scheduling a First Appearance for individuals who are not capable of making bail under the bail schedule, which states:

For those individuals who do not obtain release pursuant to the secured bail schedule as outlined above, within forty-eight (48) hours from their arrest, they shall then be brought before the Court for a “first appearance” in accordance with Georgia Uniform Superior Court Rule 26.1. In additional [sic] to those obligations established by the Uniform Rule, the accused shall be represented by court appointed counsel. At this time the accused will be given the opportunity to object to the bail amount set for him or her, including any claim of indigency and the need for appointed legal counsel to assist in their release. The Court shall then determine whether the accused is unable to post a secured bail because he/she is indigent, making an individualized determination based upon the evidence provided.

**\*5** The standard for making an individualized determination of indigency shall be that established by O.C.G.A. § 36–32–1(f) and (g), as defined by O.C.G.A. § 17–2–2(6)(A) regarding an “indigent person” charged with a misdemeanor, violation of probation, or a

municipal code offense punishable by imprisonment. These legislative provisions have established an “indigent person” or “indigent defendant” for appointed legal counsel as one “earning less than 100 percent of the federal poverty guidelines, unless there is evidence that the person has other resources that might be reasonably used to employ a lawyer without undue hardship on the person or his or her dependents[.]” For purposes of this order, “100 percent of the federal poverty guidelines” shall specifically mean the guidelines published in the Federal Register of January 22, 2015, Volume 80, Number 14 on ppgs 3237, 3238 (a copy of same being attached as Exhibit “B” hereto), and as may be further promulgated and adopted for subsequent years in the Federal Register.

Should the Court find, based upon the evidence then provided that the accused is indigent by said standard, then he/she shall be subject to release on recognizance without making a secured bail in accordance with O.C.G.A. § 17–6–1(i). Said individual shall then be provided written notice of the date for the next proceeding or trial. It shall be the responsibility of the accused to notify the Clerk of Municipal Court should he/she have a change of residence or mailing address prior to a[n] adjudication and sentencing to ensure notice of any change in the scheduled proceedings.

In the unlikely event that no hearing can be held within the forty-eight (48) hour time frame established by Georgia Uniform Superior Court Rule 26.1, then the accused shall be released on a recognizance bond in accordance with O.C.G.A. § 17–6–1(i).

The staff of the Gordon County Jail shall inform the Municipal Court staff of any such accused in a timely fashion and shall additionally facilitate his/her appearance via video transmission or teleconference at a time to be set by the Court.

(Standing Order at 5–6.) Finally, the Standing Order provides:

All persons charged with violations of The Code of Calhoun, Georgia who have no outstanding failure to appear arrest warrant from the City of Calhoun, or any other similar governing authority duly established by the Georgia General Assembly or the Constitution of The State of Georgia, shall be released on an unsecured appearance bond in the amount established by the aforementioned bail schedule. The unsecured appearance bond form which shall be used is hereto attached as Exhibit “C,” and same is incorporated as if fully set forth herein.

(*Id.* at 6–7.)

[...]

Defendant submitted a second affidavit from Matthew Chad Silvers in opposition to Plaintiff’s renewed request for a preliminary injunction. (Second Aff. of Matthew Chad Silvers (Docket Entry No. 63).) Mr. Silvers states that, prior to January 28, 2016, the Municipal Court of Calhoun, Georgia (the “Municipal Court”) allowed for individuals to be released from pre-trial detention in the Gordon County Jail by posting a secured pre-trial bond, which could be made via the payment of currency, the posting of property, or the employment of a local surety. (*Id.* ¶ 9.) According to Mr. Silvers, during a period of

approximately fifteen months immediately before January 28, 2016, the Municipal Court issued twenty-seven bench warrants for individuals who posted one of the forms of the secured pre-trial bonds. (*Id.* ¶ 10 & Ex. E.) After January 28, 2016, when the Court issued its first preliminary injunction Order, “the Municipal Court immediately initiated a policy of having all detained individuals released only on a pre-trial recognizance bond issued.” (*Id.* ¶ 11.) Mr. Silvers states that, during a period of approximately fifteen months afterward, the Municipal Court issued eighty-five bench warrants for individuals released on recognizance. (*Id.* ¶ 12 & Ex. F.)

Between October 28, 2014, and January 28, 2016, 5,374 cases were docketed in the Municipal Court (Second Silvers Aff. ¶ 13), while 5,559 cases were docketed in the Municipal Court between January 29, 2016, and May 8, 2017 (*id.* ¶ 14). Mr. Silvers notes that the Municipal Court issued thirty-four bench warrants for failure to appear for the cases filed between October 28, 2014, and January 28, 2016, and that each of those defendants were released after posting some form of secured bail or bond. (*Id.* ¶ 16.) In contrast, the Municipal Court issued eighty-five bench warrants for failure to appear for the cases filed between January 29, 2016, and May 8, 2017, and each of those defendants had been released on his or her own recognizance after initial arrest. (*Id.* ¶ 17.) Mr. Silvers asserts that, after January 28, 2016, “the number of bench warrants issued for individuals who failed to appear before the Municipal Court increased by approximately one hundred and fifty percent (150%) in merely 15 months.” (*Id.* ¶ 20.)

[...]

### **B. Procedural Background**

On September 8, 2015, Plaintiff filed this lawsuit. (Docket Entry No. 1.) On that same day, Plaintiff filed a Motion for TRO and

Preliminary Injunction. (Docket Entry No. 4.) The Court denied the Motion for TRO without prejudice on September 10, 2015, following Plaintiff's release from confinement, but left the Motion for Preliminary Injunction pending. (Order of Sept. 10, 2015 (Docket Entry No. 13).) The briefing process for the Motion for Preliminary Injunction is complete.

[The United States Court of Appeals for the Eleventh Circuit subsequently vacated the Trial Court's original order granting a preliminary injunction in favor of Plaintiff.]

After the United States Court of Appeals for the Eleventh Circuit vacated the Court's Order granting a preliminary injunction in favor of Plaintiff based on lack of specificity and remanded the case to the Court for further proceedings, the Court entered an Order directing the Parties to notify the Court as to how the Parties believed the Court should proceed with this case. (Order of Apr. 7, 2017 (Docket Entry No. 56).) Plaintiff responded by indicating that the Court should simply enter a more specific injunction. (See generally Pl.'s Notice (Docket Entry No. 57).) Defendant filed a response indicating that it disagreed with Plaintiff's proposed approach, and requested time to respond to Plaintiff's Notice. (See generally Def.'s Notice (Docket Entry No. 58).) The Court then entered an Order establishing a briefing schedule. (Order of April 24, 2017 (Docket Entry No. 59).) Defendant filed a response arguing against granting a preliminary injunction, and presented exhibits that included affidavits, Defendant's briefs on appeal, a recording of the oral argument before the Eleventh Circuit, and a number of amici curiae briefs filed on appeal. (Notice of Filing (Docket Entry No. 62) (containing CD of oral arguments); Resp. Pl.'s Renewed Request Prelim. Inj. (Docket Entry No. 64); Notice of Filing (Docket Entry No. 65) (containing amicus curiae briefs).)<sup>1</sup> Plaintiff filed a reply disputing the arguments raised by Defendant,

and noting that the Court should simply enter a more specific injunction. (See generally Reply Supp. Pl.'s Notice (Docket Entry No. 66).) The Court finds that the matter is ripe for resolution.

## II. Discussion

The Court finds that no hearing is necessary, as there are no significant factual disputes or credibility determinations relevant to the request for a preliminary injunction. Cumulus Media, Inc. v. Clear Channel Commcn's, Inc., 304 F.3d 1167, 1178 (11th Cir. 2002) (internal quotation marks and citation omitted); McDonald's Corp. v. Robertson, 147 F.3d 1301, 1313 (11th Cir. 1998). The Court also agrees with Plaintiff that the appropriate course of action here is for the Court to issue a more specific injunction that complies with Federal Rule of Civil Procedure 65(d). See S.E.C. v. N. Am. Clearing, Inc., Case No.: 6:08-cv-829-Orl-35KRS, 2013 WL 12173711, at \*1-3 (M.D. Fla. Apr. 3, 2013) (entering a more specific injunction after a remand from the Eleventh Circuit due to a failure to comply with Rule 65(d)). The Court reaffirms its previous Order granting Plaintiff's Motion for Preliminary Injunction, and incorporates the Discussion portion of that Order into this Order as if fully set forth herein. (Order of Jan. 28, 2016, at 47-73.)

This is not an opportunity for Defendant to re-litigate the merits of the underlying preliminary injunction Order; however, for Defendant's benefit, the Court will briefly address the arguments Defendant raises in its response.

*[Discussion of § 1983 immunity omitted].*

\*3 Second, the Court rejects Defendant's contention that the Standing Bail Order, as it is presently worded, is constitutional. The Court notes that the Standing Bail Order is certainly an improvement over the policy in effect prior to the Standing Bail Order, and, to that extent, the Standing Bail Order is a step in the right direction. The Standing Bail Order, however,

still violates the Constitution insofar as it permits individuals who have sufficient resources to post a bond (or to have one posted for them) to be released immediately, while individuals who do not have those resources must wait forty-eight hours for a hearing. The Court rejects Defendant's contention that the Standing Bail Order's forty-eight hour waiting period for a bond hearing is constitutional because Gerstein v. Pugh, 420 U.S. 103 (1975), set a presumptively reasonable forty-eight hour probable cause deadline following arrest. See Odonnell v. Harris Cty., Tex., Civil Action No. H-16-1414, — F. Supp. 3d —, —, 2016 WL 7337549, at \*17 (S.D. Tex. Dec. 16, 2016) (“The 48-hour probable-cause-hearing standard ... is not a safe harbor for the defendants.”). The primary issue here is that the Standing Bail Order establishes a mechanism by which non-indigent arrestees may obtain immediate release, while indigent arrestees must wait an additional forty-eight hours to have an opportunity to obtain release, simply because of those arrestees' financial condition. This is impermissible.<sup>2</sup>

*[Younger abstention discussion omitted]*

\*4 Finally, the Court concludes that Defendant's arguments concerning an increase in failures to appear are immaterial. As an initial matter, the Court's January 28, 2016, Order did not require Defendant to release all arrestees on their own recognizance. The Court simply ordered Defendant to “implement post-arrest procedures that comply with the Constitution” or offer indigent arrestees release “on their own recognizance or on an unsecured bond.” (Order of Jan.28, 2016, at 73.) Although the Court acknowledges that its lack of specificity may have caused confusion on Defendant's part, the Court did not intend to require Defendant to release each and every arrestee on his or her own recognizance. Thus, the increase in arrests for failure to appear does not, in and of itself, affect the propriety of injunctive relief. Indeed,

other alternatives exist, including unsecured bonds, in which an arrestee need not pay money in advance but may be released with an obligation to pay the amount listed in the bail schedule if the arrestee fails to appear for his or her scheduled court date.<sup>3</sup> Importantly, nothing in the January 28, 2016, Order purported to require release of all arrestees on their own recognizance, as the Order addressed only indigent arrestees.<sup>4</sup> Non-indigent arrestees may still be required to post bail in accordance with the bail schedule in the Standing Bail Order. Finally, as Plaintiffs point out, even if Defendant decided to retain secured bonds, it could distinguish arrestees who are able to pay from indigent arrestees without requiring anyone to remain in jail for forty-eight hours prior to a hearing. (Reply Supp. Notice at 11.) During the booking process or shortly after booking, Defendant could require arrestees who claim to be indigent to complete a sworn affidavit, under threat of prosecution for perjury or false statements, attesting to their financial resources and their inability to pay. (Id.) Defendant could validly detain any individual who refused to sign the affidavit, and it could require any arrestee with the financial means to do so to post a monetary bond in accordance with the Standing Bail Order. (Id.) Defendant's argument concerning an increase in failures to appear after the January 28, 2016, Order does not warrant reconsidering injunctive relief.

In sum, the Court concludes that none of Defendant's arguments in its response to Plaintiff's Notice warrant denying or reconsidering injunctive relief. The Court will enter another, more specific, preliminary injunction.

### III. Conclusion

ACCORDINGLY, the Court **GRANTS** Plaintiff's Motion for Preliminary Injunction [4]. The Court **ORDERS AS FOLLOWS:**

Defendant shall, unless and until otherwise ordered by this Court, comply with the following:

(1) Defendant is prohibited from detaining indigent misdemeanor or Calhoun Municipal ordinances arrestees who are otherwise eligible for release but are unable, because of their poverty, to pay a secured or money bail in accordance with the Standing Bail Order.

(2) If an arrestee indicates that he or she is unable to pay a secured or money bail, arresting officers, jail personnel, or Municipal Court staff must, as soon as practicable after booking verify the arrestee's inability to pay a secured or money bail by means of an affidavit sworn before an authorized official. The affidavit must give the arrestee sufficient opportunity to swear to his or her financial conditions, including the arrestee's monthly income and expenses, the value of any assets that the arrestee has, including money in bank accounts, real estate, or automobiles, and the amount of any liabilities that the arrestee may have, such as loans, liens, or other obligations, and to the number of individuals living in the arrestee's household. The affidavit also must give the arrestee an opportunity to swear as to the amount of financial security or funds that the arrestee would be able to post or pay up front, from any source, including contributions from family and friends, within twenty-four hours of arrest. Finally, the affidavit shall give the arrestee the opportunity to swear that he or she is indigent, meaning that he or she earns less than 100 percent of the applicable federal poverty guidelines.

\*5 (3) The standard for making an individualized determination of indigency is, as set forth in the Standing Bail Order, "that established by O.C.G.A. § 36-32-1(f) and (g), as defined by O.C.G.A. § 17-[12]-2(6)(A) regarding an 'indigent person' charged with a

misdemeanor, violation of probation, or a municipal code offense punishable by imprisonment." (Standing Bail Order at 5.) Those provisions "have established an 'indigent person' or 'indigent defendant' for appointed legal counsel as one 'earning less than 100 percent of the federal poverty guidelines, unless there is evidence that the person has other resources that might be reasonably used to employ a lawyer without undue hardship on the person or his or her dependents[.]' " (Id. at 5-6 (alteration in original).) For purposes of this Order, 100 percent of the federal poverty guidelines shall specifically mean the guidelines published in the Federal Register, 82 Fed. Reg. 8831-03, 2017 WL 395763 (Jan. 31, 2017), and as may be further promulgated and adopted for subsequent years in the Federal Register. For 2017, the poverty guidelines for the forty-eight contiguous States and the District of Columbia are as follows: (1) for a one-person household, \$12,060; (2) for a two-person household, \$16,240; (3) for a three-person household, \$20,420; (4) for a four-person household, \$24,600; (5) for a five-person household, \$28,780; (6) for a six-person household, \$32,960; (7) for a seven-person household, \$37,140; (8) for an eight-person household, \$41,320.<sup>5</sup> 82 Fed. Reg. 8831-03, 2017 WL 395963 (Jan. 31, 2017).

(4) If it appears, from the affidavit sworn by the arrestee, that the arrestee is indigent, according to the above standard, the arrestee shall be subject to release on his or her own recognizance without making a secured bail in accordance with O.C.G.A. § 17-6-1 (i), or subject to release on an unsecured bond, with an obligation to pay the amount listed in the bail schedule set forth in the Standing Bail Order if the arrestee fails to appear for a scheduled court date. Either the arresting officer or jail personnel, or, if available, the Municipal Court Clerk or the Judge of the Municipal Court, must conduct a review of the affidavit as soon as practicable,

or, at the latest, within twenty-four hours after arrest to determine whether the arrestee meets the indigency requirement set forth in paragraph (3) and is subject to release.

(5) An arrestee who is released pursuant to paragraph (4) shall be provided with written notice of the date for the next proceeding or trial. The arrestee has the responsibility of notifying the Clerk of the Municipal Court if he or she has a change of residence or mailing address prior to adjudication and sentencing, to ensure notice of any change in the scheduled proceedings. Arrestees who fail to appear for scheduled court proceedings may, of course, be subject to arrest for failure to appear.

(6) As provided in the Standing Bail Order, “[a]ll persons charged with violations of The Code of Calhoun, Georgia who have no outstanding failure to appear arrest warrant from the City of Calhoun, or any other similar governing authority duly established by the Georgia General Assembly or the Constitution of The State of Georgia, shall be released on an unsecured appearance bond in the amount established by the” bail schedule set forth in the Standing Bail Order. (Standing Bail Order at 6-

7.)

(7) Nothing in this Order prohibits Defendant from detaining an arrestee who is intoxicated, under the influence of drugs, or a danger to himself or herself or others such that said arrestee would not otherwise be eligible for release, until such time as that arrestee becomes eligible for release. Defendant also may detain arrestees who are subject to outstanding active warrants or other holds preventing their release from detention, arrestees who are subject to detention without bond under state or federal law, and arrestees who refuse to cooperate in determining their indigence. Further, nothing in this Order prohibits Defendant from applying the bail schedule set forth in the Standard Bail Order to arrestees who are financially able to post bond in accordance with that schedule.

IT IS SO ORDERED, this the 16<sup>th</sup> day of June, 2017.

#### **All Citations**

Not Reported in Fed. Supp., 2017 WL 2794064

#### **Footnotes**

<sup>1</sup> The Court has reviewed all of the materials presented by Defendant.

<sup>2</sup> Defendant also is concerned about what level of scrutiny applies. Defendant is correct that, generally, an individual’s indigence does not make that individual a member of a suspect class. However, case law from the Supreme Court and the Eleventh Circuit “make clear that detention based on wealth is an exception to the general rule that rational basis review applies to wealth-based classifications.” Odonnell v. Harris Cty., Tex., Civil Action No. H-16-1414, — F. Supp. 3d —, —, 2017 WL 1735456, at \*64 (S.D. Tex. Apr. 28, 2017) (collecting cases). Indeed, under Williams v. Illinois, 399 U.S. 235 (1970), Tate v. Short, 401 U.S. 395 (1971), Bearden v. Georgia, 461 U.S. 660 (1983), and Pugh v. Rainwater, 557 F.2d 1189 (5th Cir. 1977), vacated on other grounds, 572 F.2d. 1053 (5th Cir. 1978) (en banc), “an absolute deprivation of liberty based on wealth creates a suspect classification deserving of heightened scrutiny.” Odonnell, 2017 WL 1735456, at \*64 (footnote omitted). “At a minimum, heightened scrutiny requires a court to evaluate the government’s legitimate interest in a challenged policy or practice and then inquire

whether there is a sufficient ‘fit’ between the government’s means and ends.” Id. at \*66. “At a maximum, [c]lassifications created by state action which disadvantage a suspect class or impinge upon the exercise of a fundamental right are subject to strict scrutiny, and will be upheld only when they are precisely tailored to serve a compelling state interest.” Id. (alteration in original) (internal quotation marks and citation omitted). Admittedly, “[s]tate and local governments have a compelling interest in assuring the presence at trial of persons charged with a crime.” Id. (internal quotation marks, citation, and footnote omitted). Given that Plaintiff bears the “burden to show a likelihood of success on the merits, the court applies the tailoring requirement of intermediate scrutiny.” Id. at \*67.

<sup>3</sup> The Court rejects Defendant’s contention that Georgia law does not provide for unsecured bonds in misdemeanor cases. O.C.G.A. § 17-6-1(i) provides that “the term ‘bail’ shall include the releasing of a person on such person’s own recognizance.” O.C.G.A. § 17-6-1(i). Further, Georgia Uniform Municipal Court Rule 18.3 provides that “[b]ail may be conditioned upon such other specified and reasonable conditions as the court may consider just and proper.” Ga. Unit. Mun. Ct. R. 18.3. Surely, those conditions could include an unsecured bond. Indeed, Defendant’s Standing Bail Order already provides that “[a]ll persons charged with violations of the Code of Calhoun, Georgia who have no outstanding failure to appear arrest warrant from the City of Calhoun, or any other similar governing authority duly established by the Georgia General Assembly or the Constitution of the State of Georgia, shall be released on an unsecured appearance bond in the amount established by [the Standing Bail Order’s] bail schedule.” (Standing Bail Order (Docket Entry No. 29-5) at 6-7.)

<sup>4</sup> Thus, arguments that the Court’s January 28, 2016, Order somehow is intended to abolish or undermine the entire system of monetary bail in this country are clearly misplaced. The Court has no problem with monetary bail or with the bail bond industry in general. The Court’s concern in this case is for indigent arrestees who cannot afford to post bail or pay a surety a percentage of a bond. Those individuals would not be using the bail bond industry or system even if the Court declined to enter an injunction.

<sup>5</sup> For families or households with more than eight persons, \$4,180 shall be added for each additional person to determine the poverty guidelines.

## **Brief of Amicus Curiae Law Professors of Criminal, Procedural, and Constitutional Law in Support of Petitioner**

The Eleventh Circuit dismissed a defendant’s pretrial detention pending bail as mere “delay” that “does not trigger heightened scrutiny.” Pet. App. 23a. But, the right to timely bail is *fundamental*. And, any policy denying such a significant criminal-procedure right solely due to a defendant’s indigence is subject to heightened scrutiny. Indeed, this Court prohibits the government from “invidiously den[ying] one class of defendants a substantial benefit available to another class of defendants.” *Bearden*, 461 U.S. at 665.

### **A. The Government May Not Condition a Substantial Benefit on a Defendant’s Ability to Pay, Unless the Government Has No Available Alternative**

This Court has long been attuned to the danger that, without vigilance, core aspects of liberty and judicial process might become a function of resources rather than of personhood. In a line of cases beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court established that the government cannot condition a defendant’s liberty from detention or access to judicial processes on a payment that the defendant cannot afford, unless no alternative means can meet the state’s needs.

In *Griffin*, indigent prisoners lacked the funds to procure necessary transcripts for a direct appeal. This Court held the Fourteenth Amendment prohibited Illinois from conditioning practical access to a direct appeal on wealth. As Justice Black wrote: “Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’” *Id.* at 17 (plurality) (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)); *see id.* at 24 (Frankfurter, J., concurring in the judgment) (“If [Illinois] has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity.”).

The Court expanded upon *Griffin* in *Douglas v. California*, 372 U.S. 353 (1963). In cases where an indigent defendant requested appellate counsel, California law directed a state appellate court to conduct “an independent investigation of the record” and appoint counsel only if it judged that counsel would be “helpful” to the presentation of the case. *Id.* at 355 (internal quotation marks and citation omitted). The appellate court was thus “forced to prejudge the merits [of an indigent defendant’s appeal] before it can even determine whether counsel should be provided,” whereas people who could afford counsel were not “forced to run this gauntlet of a preliminary showing of merit.” *Id.* at 356–57. This Court held that a such a system violates the Fourteenth Amendment: “[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.” *Id.* at 357 (emphasis removed).

Soon thereafter, this Court applied the logic of *Griffin* and *Douglas* to wealth-based deprivations of physical liberty. In *Williams v. Illinois*, the petitioner was held in prison after the expiration of his one-year term pursuant to an Illinois law that permitted continued confinement in lieu of paying off a fine. U.S. 235, 236–37 (1970). Although the law offered “an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment,” this Court held that this was “an illusory choice for Williams or any indigent[.]” *Id.* at 242. This Court concluded that the Fourteenth Amendment prohibits the state



from “making the maximum confinement contingent upon one’s ability to pay.” *Id.* The following year, in *Tate v. Short*, this Court held that “the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.” 401 U.S. 395, 398 (1971) (quoting and adopting the reasoning of the concurrence in *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970) (White, J., concurring)).

*Bearden v. Georgia*, 461 U.S. 660 (1983), synthesized this line of cases. The petitioner in *Bearden* challenged the revocation of his probation for failure to pay a fine. *Id.* at 662–63. This Court explained that “[d]ue process and equal protection principles converge in the Court’s analysis” of cases where the state treats criminal defendants differently on the basis of wealth: “[W]e generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.” *Id.* at 665. With appeal to both principles, this Court required “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 666–67 (quoting *Williams*, 399 U.S. at 260 (Harlan, J., concurring)).

Considering the relevant factors, this Court concluded that the Fourteenth Amendment prohibits revocation of probation solely on the basis of nonpayment when alternate measures suffice to meet the state’s interests. *Id.* at 672–73. “Only if alternate measures are not adequate to meet the State’s interests . . . may the court imprison a probationer who has made sufficient bona fide efforts to pay.” *Id.* at 672. To hold otherwise, this Court reasoned, “would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine.” *Id.* at 672–73.

Although this Court did not specify a tier of scrutiny by name, the *Bearden* rule is heightened scrutiny in substance. *Bearden* states a narrow tailoring requirement. Detention for nonpayment must be the only means of achieving the state’s interests; if alternative means of securing those interests are available, detention is impermissible.

## **B. The Government May Not Condition Release from Pretrial Detention on Indigency, Unless the Government Has No Available Alternative**

The *Bearden* rule—that the Fourteenth Amendment prohibits deprivations of liberty on the basis of indigence alone, unless no alternative means exists to meet the government’s interests—applies “with special force in the bail context, where fundamental deprivations are at issue and arrestees are presumed innocent.” *Buffin v. City & Cty. of San Francisco*, No. 15-cv-4959, 2018 WL 424362, at \*9 (N.D. Cal. Jan. 16, 2018); accord, e.g., *Pugh v. Rainwater*, 572 F.2d 1053, 1056–57 (5th Cir. 1978) (en banc) (“[Pretrial] imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.”). Timely bail is “a substantial benefit” that may not be “invidiously denied one class of defendants.” *Bearden*, 461 U.S. at 665. The substantiality and importance of bail were well-established long before the Constitution was drafted. Thus, “[d]ue process and equal protection principles converge,” *Bearden*, 461 U.S. at 665, and the *Bearden* rule applies.

Below, the Eleventh Circuit did not meaningfully attempt to follow the *Bearden* rule, despite acknowledging the case’s applicability to Mr. Walker’s claim. But application is not

difficult. The state’s interest in the pretrial context is in ensuring defendants’ appearance at future court dates and in protecting public safety. *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *Salerno*, 481 U.S. at 750. *Bearden* thus prohibits a court from conditioning a defendant’s pretrial liberty on payment of an unaffordable amount—that is, essentially denying bail—unless no alternative measure can adequately promote those goals. An increasing number of federal courts have recognized this straightforward application of the *Bearden* doctrine. *See, e.g., ODonnell v. Harris Cty.*, 892 F.3d 147, 162 (5th Cir. 2018) (concluding that “although the County had a compelling interest in the assurance of a misdemeanor detainee’s future appearance and lawful behavior, its policy [of detaining misdemeanor defendants who could not afford prescheduled bond amounts] was not narrowly tailored to meet that interest”). *See also Rainwater*, 572 F.2d at 1057.