No. 17-13139-GG

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MAURICE WALKER,
ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,

v.

CITY OF CALHOUN, GEORGIA,
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia, Rome Division,
No. 4:15-cv-00170-HLM

BRIEF OF *AMICI CURIAE* CURRENT AND FORMER DISTRICT AND STATE'S ATTORNEYS, STATE ATTORNEYS GENERAL, UNITED STATES ATTORNEYS, ASSISTANT UNITED STATES ATTORNEYS, LAW ENFORCEMENT AND DEPARTMENT OF JUSTICE OFFICIALS, IN SUPPORT OF PLAINTIFFS-APPELLEES

MARY B. MCCORD
Counsel of Record
JOSHUA A. GELTZER
ROBERT FRIEDMAN
SETH WAYNE
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave. NW
Washington, D.C. 20001
(202) 661-6607
mbm7@georgetown.edu
Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in 11th Cir. R. 26.1-2(a) have an interest in the outcome of this case, and were omitted from the Certificates of Interested Persons in briefs that were previously filed per 11th Cir. R. 26.1-2(b).

1. Roy Austin
2. A. Bates Butler
3. Kami N. Chavis
4. Brendan Cox
5. Justin Dillon
6. Richard Doran
7. Mark A. Dupree, Sr.
8. Robert Friedman
9. Stanley Garnett
10. Joshua A. Geltzer
11. Mark Gonzalez
12. Christian Gossett
13. Barry Grissom
14. Scott Harshbarger

15.Miriam Krinsky

16.William Lansdowne

17.Rory Little

18.Mary B. McCord

19.Barbara McQuade

20.Kenneth Mighell

21.Marilyn Mosby

22.Richard Pocker

23.Ira Reiner

24.Carol Siemon

25.David Soares

26.Carter Stewart

27.Raúl Torrez

28.Joyce Vance

29.Cyrus Vance, Jr.

30.Seth Wayne

31.Sally Yates

/s/Mary B. McCord
Mary B. McCord

Counsel of Record for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTEREST OF AMICI CURIAE

Amici curiae are 28 current and former prosecutors and law enforcement officials, representing 16 different states and including elected and appointed officials from both political parties. Amici all have been responsible for public safety in their jurisdictions. They have a strong interest in this case because the City of Calhoun's practice of detaining indigent misdemeanor defendants based solely on their inability to pay money bail, while others similarly situated but able to pay are released, offends the Constitution, undermines confidence in the criminal justice system, impedes the work of prosecutors and law enforcement officials, and fails to promote safer communities.[1]

STATEMENT OF THE ISSUE

Whether the use of a fixed money bail schedule that results in the detention of indigent misdemeanor defendants for up to 48 hours solely based on their inability to pay is constitutionally permissible where the City of Calhoun has offered no explanation for why it needs 48 hours to determine indigence and where other more effective alternatives exist.

[1] No party's counsel authored this brief in whole or in part. No person, other than amici curiae's counsel, funded the preparation or submission of this brief. All parties consented to the filing of this brief.

SUMMARY OF ARGUMENT

Whether elected, appointed, or career, amici current and former prosecutors and law enforcement officials ("prosecutors") are accountable to their communities to pursue justice fairly and without regard to race, religion, ethnicity, gender, sexual orientation, disability, or wealth. Their work depends on building relationships with community members, so that those community members will report crimes, cooperate with law enforcement, testify in court proceedings, and sit fairly as jurors. Fostering such relationships and thus protecting the public cannot be achieved when the legitimacy of the criminal justice system is undermined by a practice of detaining indigent misdemeanor defendants before trial solely because of their inability to pay monetary bail, while releasing similarly situated defendants who can.

The failures of wealth-based bail systems, from the personal harm inflicted on those detained to the widespread adverse impact on the justice system, led to the Federal Bail Reform Act of 1966 and similar reform efforts in many states. Reformed jurisdictions base pretrial release decisions on individualized determinations of flight risk and dangerousness, and utilize non-financial conditions of release with pretrial supervision where appropriate. In the experience of amici, these types of reformed bail practices not only are more effective than money bail at ensuring appearance, but also contribute to the legitimacy of the criminal justice

system, enhance public safety, better address the underlying causes of misdemeanor offenses and recidivism, and save taxpayers money.

Amici urge this court to adhere to the principle espoused in the *en banc* opinion in *Pugh v. Rainwater* that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." 572 F.2d 1053, 1056 (5th Cir. 1978). Reliance on the centuries-old history of bail does not make the City of Calhoun's practice constitutionally permissible, nor does the fact that the bond schedule is facially neutral, given its discriminatory implementation.

ARGUMENT

I. A Fair Criminal Justice System That Does Not Discriminate Based on Wealth Is Critical to Its Legitimacy.

The Supreme Court has recognized that the "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citations omitted).

As many advocates for bail reform over the decades have recognized, a bail system that detains certain people based solely on their inability to afford money bail "'results in serious problems for defendants of limited means, imperils the effective operation of the adversary system, and may even fail to provide the most effective

deterrence of nonappearance by accused persons.'" H.R. Rep. No. 89-1541 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2293, 2298 (quoting report of Attorney General's Committee on Poverty and the Administration of Criminal Justice Procedure). As the Senate Committee on the Judiciary recognized in its report on the Bail Reform Act of 1966:

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

S. Rep. No. 89-750, at 7 (1965).[2]

The Federal Bail Reform Act of 1966 took the first major step toward ensuring that all persons, regardless of financial status, would have an opportunity for pretrial release. It required judicial officers to order the pretrial release of a non-capital defendant on personal recognizance or an unsecured appearance bond *unless* the judicial officer determined "that such a release will not reasonably assure the appearance of the person as required." Pub. L. 89-465, § 3(a), 80 Stat. 214, 214 (codified as amended at 18 U.S.C. § 3142). Upon such a finding, and after an individualized assessment of the defendant's circumstances, it permitted the judicial

[2] *See also* H.R. Rep. No. 89-1541, 1966 U.S.C.C.A.N. at 2297 (during subcommittee hearings, "all [witnesses] favored the enactment of this proposal," except bail bondsmen).

officer to impose conditions of release, giving priority to non-financial conditions. *Id.* When the Federal Bail Reform Act of 1984 was passed, allowing courts to consider dangerousness when imposing conditions of release and permitting detention where no conditions could reasonably ensure the defendant's appearance or public safety, it also added a provision explicitly prohibiting the imposition of a financial condition that results in pretrial detention. Pub. L. 98-473, § 203(a), 98 Stat. 1837, 1976-80 (codified at 18 U.S.C. § 3142(c)(2), (e)-(g)).

In amici's experience, the procedures afforded under the federal bail system have been effective not only in mitigating the risk of non-appearance, but also in fashioning conditions of release that ensure public safety and protect victims, *see, e.g.*, 18 U.S.C. § 3142(c)(1)(B)(v) (avoid contact with alleged victim), (vi) (report regularly to designated law enforcement or pretrial services agency), (viii) (refrain from possessing a firearm or dangerous weapon), and address personal circumstances that may have contributed to the unlawful behavior, *see, e.g., id.* § 3142(c)(1)(B)(ii) (maintain or seek employment), (iii) (maintain or commence education), (ix) (refrain from excessive use of alcohol or any non-prescribed use of controlled substances), (x) (undergo medical, psychological, or psychiatric treatment). The federal system allows custom-tailoring of conditions to individual circumstances and encourages compliance by providing that violations may result in revocation of release and prosecution for contempt of court. *Id.* § 3148.

Although many states, like the federal government, have reformed their bail statutes to allow for different pretrial release options based on individualized determinations of flight risk and dangerousness,[3] the use of monetary bail and the evils it imposes on indigents persist in many jurisdictions today. As prosecutors, amici know that detention before trial, even briefly, may result in loss of employment, shelter, education, and child custody. The individual detained may be unable to access mental health and medical treatment, including drug treatment. Opportunities for pretrial diversion programs, often available to those on pretrial release for misdemeanor offenses, are unavailable to detainees.[4] And access to counsel may be severely hampered, undermining preparation of a defense, enlistment of witnesses, and accumulation of evidence.

[3] *See, e.g.*, Arizona (Ariz. R. Crim. P. 7.2(a), 7.3); Arkansas (Ark. R. Crim. P. 9.1, 9.2(a)); Connecticut (C.G.S.A. §§ 54-63b(b), 54-63d(a), (c)); D.C. (D.C. Code § 23-1321); Illinois (725 ILCS 5/110-2); Kentucky (K.R.S. § 431.066); Maine (15 M.R.S.A. §§ 1002, 1026); Maryland (Md. Rule 4-216.1(b)); Massachusetts (M.G.L. Ch. 276, § 58); Michigan (M.C.L.A. § 780.62); Minnesota (49 M.S.A., Rules Crim. Proc. § 6.02(1)); Missouri (Mo. Sup. Ct. R. 33.01(d)-(e)); Montana (M.C.A. § 46-9-108(2)); Nebraska (Neb. Rev. Stat. § 29-901); New Mexico (N.M. Const. art. II, § 13); North Carolina (N.C.G.S.A. § 15A-534(b)); North Dakota (N.D.R. Crim. P. 46(a)); New Hampshire (N.H.R.S.A. § 597:2); Oregon (O.R.S. §§ 135.245, 135.260); Rhode Island (R.I. Stat. § 12-13-1.3); South Carolina (S.C. Code § 17-15-10(A)); South Dakota (S.D.C.L. § 23A-43-3); Tennessee (T.C.A. § 40-11-116); Vermont (13 V.S.A. § 7554); Washington (Wash. Super. Ct. Crim. R. 3.2(b)); Wisconsin (W.S.A. §§ 969.01, 969.02, 969.03); Wyoming (Wy. R.C.R.P. 46.1(c)-(d)); *see also* Southern Poverty Law Center, *SPLC Prompts 50 Alabama Cities to Reform Discriminatory Bail Practices* (Dec. 6, 2016), https://www.splcenter.org/news/2016/12/06/splc-prompts-50-alabama-cities-reform-discriminatory-bail-practices.

[4] Pretrial diversion programs divert misdemeanor defendants away from incarceration and address underlying factors that contribute to criminal behavior, such as drug abuse, mental illness, and veteran-related issues. *See infra* at 13-14.

To avoid these consequences, the accused may see an early guilty plea as the most expedient way to obtain release, as many misdemeanor defendants are sentenced to time served. This in turn may result in the conviction of innocent people, caught in the Hobson's choice between pleading guilty and being released or contesting their charges and continuing to be detained even while retaining, at least formally, the presumption of innocence

Many of amici prosecutors have seen firsthand the adverse consequences that can result from pretrial detention of misdemeanor defendants. In amici's experience, individualized risk-based assessments and pretrial release with non-financial conditions where appropriate are more effective than money bail not only in mitigating the risk of non-appearance, but also in ensuring a fair criminal justice system, enhancing public safety, addressing the underlying causes of misdemeanor offenses and recidivism, and saving money.

II. The Standing Bail Order is An Important Step Toward Ending Wealth-Based Pretrial Detention, But Ultimately Fails to Eliminate Discrimination Against Indigent Arrestees And The Attendant Loss of Community Trust.

Amici prosecutors recognize that the implementation of the City of Calhoun's Standing Bail Order, created in response to the Plaintiff's suit, represents a meaningful step away from unnecessary pretrial detention of indigent misdemeanor defendants based on their inability to pay. But it is still only a partial solution, and

one that allows continued constitutional violations, and the harms that follow, to persist.

The Order divides arrestees into two categories. Persons charged with municipal ordinance violations who have no outstanding failure-to-appear arrest warrants "shall be released on an unsecured appearance bond[.]" A. Vol. II at 153-54.[5] Individuals charged with state misdemeanor offenses under Municipal Court jurisdiction, by contrast, are subject to a money bail schedule. If an individual does not pay the bail amount—which is set to match, precisely, the expected fine to be imposed upon conviction—the individual is provided a "first appearance" hearing before the Court within 48 hours of arrest. If, at the hearing, the Court determines that the individual is indigent and unable to pay, "then he/she shall be subject to release on recognizance without making a secured bail." A. Vol. II at 152-53.

These measures help ensure that indigent misdemeanor defendants will not be detained for an extended period of time while awaiting trial, solely based on their inability to pay money bail. In this respect, the Order mitigates some of the constitutional harms a money bail system causes. However, even brief detention based on inability to pay can yield serious harms such as loss of a job or disrupted family connections. Appellee's Br. at 32. And the Order remains inadequate to dispel

[5] "A. Vol. ___ at ___" refers to the designated volume and page of the appendix filed by the City of Calhoun.

the public perception of unfairness in the justice system caused by use of a cash bail schedule that results in the inequitable detention of indigent persons until the "first appearance" hearing.

For those amici who have prosecuted in the federal, state, and local courts, the importance of a fair criminal justice system, including at the critical early moment of setting pretrial release conditions, cannot be overstated. Because the people most adversely impacted by wealth-based bail systems are often those from communities where crime is more prevalent, victims and witnesses on whom prosecutors rely for evidence and testimony often are or have been defendants in criminal cases, especially misdemeanor cases. And it is quite common for a family member or close friend of a victim or witness to have been charged with a crime at some point. The willingness of these victims and witnesses to report crimes to law enforcement, cooperate with prosecutors, show up for court proceedings, and testify truthfully depends on their confidence that the system will treat them and their loved ones fairly. Seeing indigent defendants detained (or experiencing it themselves), even for 48 hours, for no reason other than indigence, while others similarly situated but able to post bail go free, undermines the legitimacy of the criminal justice system and the credibility of those entrusted to prosecute crimes within it.

A fair criminal justice system that does not discriminate based on wealth is also critical to the effective functioning of our jury system. Jurors are drawn from

the communities in which the crimes being prosecuted occur. In amici's experience, potential jurors—much like victims and witnesses—often have, themselves, been charged with a crime or are close to someone who has been charged with a crime. When jurors perceive the criminal justice system as unfair or illegitimate, the result can be a hung jury or, worse, jury nullification.

For many reasons, the Standing Bail Order is likely to perpetuate preexisting perceptions of unfairness in the City of Calhoun's criminal justice system. The Order retains the money bail schedule that has long resulted in incarceration of the poor based on an inability to pay. This is especially pernicious when it results in the detention of indigent defendants for the non-jailable offenses included in the Standing Bail Order, such as the offense with which plaintiff Walker was charged. Additionally, by imposing bail amounts that "represent[] the expected fine with applicable surcharges for all offenses charged," A. Vol. II at 151, the schedule contributes to perceptions that bail is intended to extract a fine from the defendant prior to a finding of guilt, in the shadow of an additional day of detention and uncertain outcome of the "first appearance" hearing. Appellant's failure to explain why it needs 48 hours to hold the hearing bolsters this perception of inequity. Finally, because state misdemeanor offenses are punishable as violations of either a local ordinance or state law, *see* Calhoun Mun. Code § 62-1, the Order allows detention to turn on how the arresting officer chooses to label the arrestee's alleged

misconduct. This further undermines the purported need to detain, and ingrains a sense of arbitrariness. Although the "first appearance" hearing provides a necessary backstop for the release of indigent misdemeanor defendants, this is likely insufficient to purge perceptions of inequality prompted by the initial use of the bail schedule.

Appellant's attempt to cast doubt on the propriety of the district court's order by noting an increase in failures to appear is misplaced. Amici prosecutors share the concerns of Appellant that an increase in unsecured releases has correlated with an increase in incidents of failure to appear. Appellant's Br. at 10. But the problem is avoidable.[6] As an extensive body of evidence reveals, pretrial release with non-financial conditions determined by individual risk-based assessments can be very effective at ensuring appearance for court proceedings. In Kentucky, for example, county judges in 2013 began using a new risk-based assessment tool to inform decisions about pretrial release options. Laura and John Arnold Foundation, *Results from the First Six Months of the Public Safety Assessment-Court in Kentucky* 1 (2014), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf. Data from July 1, 2014, through June 30, 2016, showed that 85 percent of defendants released before trial appeared as required; in

[6] The extent of the problem is unclear. Appellant has only provided the total number of released arrestees who fail to appear, without explaining whether this is a greater percentage of released persons than before the imposition of the preliminary injunction.

the low-risk category, the appearance rate was 91 percent. Kentucky Pretrial Services, Administrative Office of the Courts ("Kentucky 2014-2016 Data"). In the District of Columbia, which also utilizes a risk-based assessment to evaluate pretrial release options, data from FY 2016 showed that 91 percent of defendants released before trial made all scheduled court appearances. *See* Pretrial Services Agency for the District of Columbia, *Congressional Budget Justification and Performance Budget Request Fiscal Year 2018* 16 (2017), *https://www.psa.gov/sites/default/files/FY%202018%20PSA%20Congressional%20Budget%20Justification.pdf* ("DC PSA Budget Request")[7]; *cf.* Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* 3, 12 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_Supervision_FNL.pdf (in two-state study, defendants who received supervision were significantly more likely to appear for assigned court dates than those released without supervision); Claire M.B. Brooker et al., *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds* 1, 6-7 (2014), https://www.pretrial.org/download/pji-reports/Jeffersion%20County%20Bail%20

[7] The data on pretrial criminal activity for released defendants are equally impressive: In Kentucky, between July 1, 2014, and June 30, 2016, 94 percent of released defendants assessed to be low-risk committed no new criminal activity, Kentucky 2014-2016 Data; in Washington, D.C., in FY 2016, 98 percent of all released defendants remained arrest-free from violent crimes during pretrial release, while 88 percent remained arrest free from all crimes. DC PSA Budget Request at 16.

Project-%20Impact%20Study%20-%20PJI%202014.pdf (in study of impact of bond type on pretrial release outcomes where pretrial supervision was ordered in all cases, no significant difference found in court appearance rate or public safety rate).

Studies of the use of money bail, meanwhile, reveal no greater effectiveness in mitigating the risk of non-appearance, while resulting in significant negative outcomes, including increased rates of conviction and recidivism. *See* Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization,* 45 J. Leg. Studies 471, 472-475 (2016) (in study of Philadelphia and Pittsburgh court data, concluding that money bail did not increase probability of appearance, but was significant independent cause of convictions and recidivism); *cf.* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention,* 69 Stan. L. Rev. 711, 714-15 (2017) (using Harris County, Texas, misdemeanor case data, finding compelling evidence that pretrial detention "causally increases the likelihood of conviction, the likelihood of receiving a carceral sentence, the length of a carceral sentence, and the likelihood of future arrest for new crimes").

As the federal system and many states have realized, pretrial supervision can also address some of the underlying drivers of misdemeanor criminal activity, thus breaking the cycle of recidivism and enhancing public safety. In Kentucky, dozens of misdemeanor diversion programs allow misdemeanor defendants to agree to comply with individually tailored terms in order to obtain dismissal of criminal

charges. Terms may include alcohol and drug treatment, mental health and counseling services, educational, vocational, and job training requirements, and volunteer work. In 2012, Kentucky Pretrial Services supervised more than 4,000 misdemeanor diversion cases; 87 percent of misdemeanor clients successfully completed their programs, resulting in reduced trial dockets, decreased recidivism, and 25,000 hours of community service. Kentucky Pretrial Services, Administrative Office of the Courts, *Pretrial Reform in Kentucky* 6-7 (2013), https://www.pretrial.org/download/infostop/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%202013.pdf.[8]

In the District of Columbia, the Pretrial Services Agency (PSA) has responsibility for over 17,000 misdemeanor and felony defendants each year, and supervises approximately 4,600 on any given day. DC PSA Budget Request at 1. PSA assigns supervision levels based on risk, but also provides or makes referrals for treatment to defendants with substance use and mental health disorders. *Id.* at 20, 24. In FY 2016, 88 percent of all defendants in pretrial supervision remained on

[8] In the last five years, approximately two-thirds of states passed legislation creating, authorizing, and expanding pretrial diversion programs. *See* National Conference of State Legislatures (NCSL), *Trends in Pretrial Release: State Legislation Update* (2017), http://www.ncsl.org/portals/1/html_largeReports/trends_pretrial_release17.htm; NCSL, *Trends in Pretrial Release: State Legislation* 3-4 (2015), http://www.ncsl.org/Portals/1/Documents/cj/pretrialTrends_v05.pdf.

release status through the conclusion of the release period without any request for revocation based on non-compliance. *Id.* at 16.

Amici prosecutors are attentive to Appellant's concern that "extensive and expensive pretrial programs" "are simply not workable for a municipality of Calhoun's size[.]" Appellant's Br. at 45. Although pretrial supervision and diversion programs require resources, the financial cost is far less than that of pretrial detention. In the District of Columbia, for example, supervision cost about $18 per defendant per day in 2014, and it is considered one of the costlier jurisdictions because PSA personnel are paid on a federal pay schedule. Clifford T. Keenan, Pretrial Services Agency for the District of Columbia, *It's About Results, Not Money* (2014), http://www.pretrial.org/results-money/. Compared to the conservative $85-per-day estimate for pretrial detention, pretrial supervision is far more cost-effective. *See* Pretrial Justice Institute, *Pretrial Justice, How Much Does it Cost?* 1, 5 (2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c666992-0b1b-632a-13cb-b4ddc66fadcd&forceDialog=0. Moreover, neither "extensive" nor "expensive" programs are needed: even limited and low-cost steps at encouraging appearances, such as phone calls or text message reminders about court dates, effectively reduce failure-to-appear rates. *See, e.g.*, Timothy R. Schnacke et al., *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado,*

FTA Pilot Project and Resulting Court Date Notification Program, Court Review: The Journal of the American Judges Association 393 (2012) (finding that reminder calls significantly decreased failure-to-appear rates); Abigail Becker, *Court date reminder text messages may be reducing failure to appear rates*, The Capital Times, Sept. 16, 2016, http://host.madison.com/ct/news/local/govt-and-politics/court-date-reminder-text-messages-may-be-reducing-failure-to/article_af2e9a9f-d77f-57c6-a793-9aa37cb2c9a6.html (describing initial evidence from Wisconsin county that text message reminders reduce missed court dates).

III. Appellant's Suggestion that Use of the Money Bail Schedule Would Be Constitutional Even Without the Standing Bail Order is Unavailing.

Although Appellant relies on the Standing Bail Order to justify the constitutionality of its pretrial release system, Appellant nevertheless suggests that the Order, adopted after the initiation of this case, could be amended or repealed without risking constitutional infirmity. Particularly, Appellant appealed both because Appellant "believes that the Standing Bail Order is constitutional *and because [Appellant] believes that the specifics of any bail procedures should be left to the Judge of the Municipal Court of the City of Calhoun, Georgia—assuming the judge is complying with Georgia law on bail.*" Appellant's Br. at 13 (emphasis added). Appellant not only argues that "use of a bail schedule is … permissible and appropriate[,]" *id.* at 43, but also suggests that it would be permissible to impose

money bail that results in the detention of an indigent misdemeanor defendant, even if a similarly situated defendant who could pay would be released. *See id.* at 45-46.

Sitting *en banc,* the Fifth Circuit (prior to creation of this Circuit) rejected this argument: "At the outset we accept the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978). Although the court proceeded to hold that Florida's then-new bail rule was not facially unconstitutional for failing to include a presumption against money bail among the six forms of release permitted, *id.* at 1058-59, the court also stated, "We have no doubt that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint." *Id.* at 1058. With regard to the use of a set bond schedule, the *en banc* court stated, "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." *Id.* at 1057.

As the Supreme Court noted in *Bearden v. Georgia*, the Court "has long been sensitive to the treatment of indigents in our criminal justice system," and has applied the principle of "equal justice," articulated in *Griffin v. Illinois*, 351 U.S 12,

19 (1956) (plurality), in numerous contexts.[9] *See Bearden*, 461 U.S. 660, 664 (1983) (citing cases invalidating state practices denying indigents access to appellate review, appellate counsel, transcripts and other materials for appeal). *Bearden* invalidated a state practice of automatically revoking probation for failure to pay a fine or restitution, without considering whether the probationer has made all efforts to pay yet cannot do so, and without considering whether other alternative measures are adequate to meet the state's interest in punishment and deterrence. *Id.* at 672. "To do otherwise 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.

Appellant attempts to justify the use of money bail pending a hearing by referencing the Supreme Court's observation in *Bearden* that "a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime." *Id.* at 668. Paraphrasing, appellant argues that "[t]he Supreme Court's contemplation of a probationer borrowing money from family members or friends to satisfy a fine is comparable to an arrestee making bona

[9] In *Griffin*, the Supreme Court invalidated a practice of limiting appellate review of criminal convictions only to persons who could afford a trial transcript, pronouncing: "[b]oth 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.'" 351 U.S. at 17 (quotation omitted).

fide efforts to post a secured bond, including borrowing funds from family members or friends." Appellant's Br. at 32.

This reliance is misplaced. Pretrial defendants have not been found guilty and owe no debt to society, bail bondspersons, or the Court. Indeed, the principles articulated in these cases have greater applicability before trial, when the accused is presumed innocent and the liberty interest is therefore notably higher than after conviction. *See Stack*, 342 U.S. at 4 ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."); *Rainwater*, 572 F.2d at 1056 (accused persons "remain clothed with a presumption of innocence and with their constitutional guarantees intact"). The legitimacy of our criminal justice system and its presumption of innocence before trial—essential to the effectiveness of prosecutors and law enforcement officials—should not be undermined by a bail system that infringes on both due process and equal protection requirements.

IV. Amici's Additional Arguments Should be Rejected.

A. The historical use of bail does not make discrimination based solely on inability to pay constitutionally permissible

Amici Curiae American Bail Coalition and Georgia Association of Professional Bondsmen ("bondsmen") argue that the district court overlooked the history of bail as a "liberty-promoting institution" older than the Republic, Bondsmen Br. at 5-6, and *Amici Curiae* States of Georgia, Alabama, and Florida

("states") criticize the district court for interpreting case law in a way that undercuts money bail, which they describe as a "centuries-old institution." States Br. at 11.

Although the bondsmen and states are correct that bail has a long history, they are wrong to suggest that *money* bail has a long history. As the Supreme Court explained in *Stack*, "[t]he right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." 342 U.S. at 4. *Stack* recognized that assurances had evolved over time from "the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused" to "the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture." *Id.* at 5.

The "liberty-promoting institution" to which the bondsmen refer did not even include money bail until the 1800s, with the first commercial surety reportedly opened for business in America in 1898. *See* Timothy R. Schnacke, National Institute of Corrections, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (2014), http://www.pretrial.org/download/research/Fundamentals%20of%20Bail%20-%20NIC%202014.pdf. For centuries before that, bail was a personal surety system whereby the surety agreed to stand in for the accused upon default, but was not permitted to be repaid or otherwise profit from the arrangement. *Id*. Only when the demand for personal sureties outgrew the supply, leading to many bailable

defendants being detained, did American states begin permitting money bail. *Id.* Ironically, the purposeful move toward money bail to help more bailable defendants be released evolved quickly to unnecessary pretrial detention due to bondmen's demands for payment up front, *id.*, which, as this case illustrates, many misdemeanor defendants are unable to pay.

Even if the bondsmen rely on the much shorter history of money bail, that history cannot sustain a system that offends equal protection by detaining indigent misdemeanor defendants solely based on their inability to pay while releasing those who can. The Supreme Court rejected a similar historical argument in *Williams v. Illinois*, 399 U.S. 235 (1970). In *Williams*, the defendant challenged a state law that resulted in him remaining incarcerated after the maximum statutory period of confinement due to his failure to pay fines and costs. Acknowledging that the custom of imprisoning indigent defendants for non-payment of fines dated back to medieval England and that "almost all States and the Federal Government have statutes authorizing incarceration under such circumstances," the Court made clear that "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." *Id*. at 239-40. The Court continued: "[t]he need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution is illustrated by

the present case since the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country." *Id.* at 240.[10]

In *Williams*, the Court considered the state's interests in enforcing judgments against those financially unable to pay a fine, and made clear that numerous alternatives to imprisonment existed that could be enacted by state legislatures or imposed by judges within the scope of their authority. *Id.* at 244-45 & n.21. In its final nod to history, the Court concluded, "We are not unaware that today's holding may place a further burden on States in administering criminal justice. . . . But the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo." *Id.* at 245.

Here, not only is the "comfortable convenience of the status quo" constitutionally barred, it also is not a sensible way to ensure appearance in court and advance community safety in light of more effective alternatives that are consistent with a fair and impartial criminal justice system. The bondsmen argue that the commercial bail industry "provides the most effective means of allowing defendants to obtain release before trial while ensuring the protection of communities." Bondsmen Br. at 9. But as many studies establish, commercial bail

[10] The bondsmen also argue that no Fourteenth Amendment equal protection challenge should lie because the Eighth Amendment provides the textual source for the right to bail. Bondsmen Br. at 20. But in *Rainwater*, analyzing the equal protection challenge to Florida's then-new bail rule, this Circuit recognized "the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." 572 F.2d at 1056.

is not more effective at ensuring appearance or law-abiding conduct than release on unsecured bonds and non-financial conditions of supervision.

B. Prosecutor amici do not advocate a "uniform" or "categorical" system, but a system based on individualized assessments

The bondsmen suggest that the money bail system is preferable to "uniform detention, uniform unsecured bail, or uniform release subject to liberty-infringing conditions," Bondsmen Br. at 10. Neither appellee nor prosecutor amici advocate any of these extremes. Any "uniform system" or "categorical rule" that fails to take into consideration the circumstances of individual defendants and their alleged crimes would not enhance public confidence in the system and—other than uniform detention—would do little to ensure appearance and public safety.

The bondsmen nonetheless argue that the modern commercial surety system is statistically the most effective at ensuring court appearances, relying briefly on a handful of studies that largely do not purport to compare failure-to-appear (FTA) rates of defendants released on commercial surety bonds with those released on non-financial conditions based on individualized risk assessments. Bondsmen Br. at 13-15. Discussing the one study (of felony defendants only) that included a category for "conditional release," the bondsmen neglect this category and instead compare the FTA rate of those released on secured bonds (18 percent) to those given emergency release to relieve jail overcrowding (45 percent) and those released on unsecured bonds (30 percent). *Id.* at 14 (citing Thomas H. Cohen & Brian A.

Reaves, Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts* 8 (2007)). The FTA rate of those in the "conditional release" category (representing just 12 percent of the sample), was 22 percent—much closer to the FTA rate of those released on secured bonds. *Pretrial Release* at 2, 9. Notably, in one very dated study relied on by the bondsmen for its conclusion that surety bonds are more effective than personal recognizance, Bondsmen Br. at 14, the same study credited some of the success of surety bonds to bondsmen using many of the same tools that pretrial services agencies use: collecting information about defendants' residences, employers, and families; monitoring defendants and requiring them to check in periodically; and reminding defendants of court dates. *See* Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping,* 47 J. L. & Econ. 93, 96-97 (2004).[11] [12]

The bondsmen's assertion that the imposition of pretrial conditions of release is not only "invasive," but also "raise[s] serious constitutional concerns," Bondsmen Br. at 12-13, is unfounded. The sole case cited by the bondsmen, *United States v. Scott,* 450 F.3d 863 (9th Cir. 2006), hardly calls into question the constitutionality

[11] Moreover, this study used data from 1990-1996, when imposition of non-financial conditions of release supervised by pretrial services was much less prevalent than today.

[12] In addition to these two studies of felony defendants only, the bondsmen cite one dated study commissioned by the Maryland Bail Bond Association, which compared FTA rates from 1992 for those released on unsecured bail, 10-percent deposit bail, full cash bail, and corporate security bail, but not with those released on non-financial conditions. Bondsmen Br. at 14 (citing Byron L. Warnken, *Warnken Report on Pretrial Release* 17-18 (2002)).

of pretrial supervision. In *Scott*, the defendant had agreed as a condition of pretrial release to random drug testing and home searches without a warrant, and later sought to suppress evidence found during a warrantless search. *Id.* at 865. Because the "unconstitutional conditions doctrine" limits the government's ability to exact waivers of constitutional rights—particularly Fourth Amendment rights—as a condition of benefits, the court held that Scott's consent to search was valid only if the search was reasonable. *Id.* at 866-68. The court never purported to address other pretrial conditions of release, nor did it suggest that conditions that do not directly infringe on well-established constitutional rights, such as those protected by the Fourth Amendment, raised any concerns.

The bondsmen complain that release on non-financial conditions is financially costly and a drain on pretrial supervision systems. Bondsmen Br. at 15. But the financial cost of pretrial supervision pales in comparison to the cost of detention. *See supra* at 14-15. And pretrial detention does nothing to address underlying conditions, such as drug abuse, mental health issues, or lack of employment and educational opportunities, which can be addressed through non-financial conditions, thus contributing to better outcomes for misdemeanor defendants and lowering the risk of recidivism.

C. The bond schedule's facial neutrality does not save it from constitutional infirmity

Finally, the bondsmen attempt to deflect the challenge to the City of Calhoun's practice by arguing that "[d]efendants who cannot post bail are not detained because they are poor. Instead they are detained because the government had probable cause to arrest and charge them with crimes, and wishes to secure their appearance at trial and protect the community." Bondsmen Br. at 16. The Supreme Court rejected this very argument in *Williams*:

> It is clear, of course, that the sentence was not imposed upon appellant because of his indigency but because he had committed a crime. And the Illinois statutory scheme does not distinguish between defendants on the basis of ability to pay fines. But, as we said in *Griffin v. Illinois,* 'a law nondiscriminatory on its face may be grossly discriminatory in its operation.' Here, the Illinois statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. . . . By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.

399 U.S. at 242 (citation omitted).

The bondsmen dispute that what they perceive as the City of Calhoun's equal treatment of charged defendants could violate the Equal Protection Clause. Bondsmen Br. at 4. The bondsmen imply that a system that takes individual circumstances, including indigence, into consideration would "discriminate in favor of the indigent[.]" *Id.* But this argument, too, was rejected in *Williams. Williams*

recognized that non-enforcement of judgments against those financially unable to pay "would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction." 399 U.S. at 244. But non-enforcement was unnecessary, *Williams* explained, because states could rely on alternative enforcement mechanisms that did not result in imprisonment of indigents beyond the statutory maximum for involuntary nonpayment of fines and court costs. *Id.* This solution was reiterated in *Tate v. Short* a year later, when the Court applied *Williams*'s analysis to invalidate the practice of imprisoning indigents for failure to pay the fine on a fines-only offense: "There are, however, other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines." 401 U.S. 395, 399 (1971); *see also Bearden*, 461 U.S. at 668-69 ("fundamentally unfair" to revoke probation automatically without considering alternatives).

Amici prosecutors recognize and share the interest of the City of Calhoun, the State of Georgia and its fellow states, and the general public in ensuring that misdemeanor defendants appear for trial and do not commit crimes while on pretrial release. But, as discussed, alternatives exist that are not only constitutional, but also more effective. They promote a justice system that avoids perpetuating modern-day

debtors' prisons that incarcerate individuals based on wealth and that inherently erode community trust.

CONCLUSION

The district court's order should be affirmed.

Respectfully Submitted,

MARY B. MCCORD
Counsel of Record
JOSHUA A. GELTZER
ROBERT FRIEDMAN
SETH WAYNE
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave. NW
Washington, D.C. 20001
(202) 661-6607
mbm7@georgetown.edu
Counsel for Amici Curiae

APPENDIX: LIST OF AMICI

Sally Yates
Acting Attorney General (2017-2017); Deputy Attorney General (2015-2017); U.S. Attorney, Northern District of Georgia (2010-2015)

Roy L. Austin
Deputy Assistant to the President for Urban Affairs, Justice and Opportunity, White House Domestic Policy Council (2014-2017); Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice (2010-2014); Senior Assistant U.S. Attorney, District of Columbia (2009-2010); Assistant U.S. Attorney, District of Columbia (2002-2007, 2009-2010)

A. Bates Butler
U.S. Attorney, District of Arizona (1980-1981); First Assistant U.S. Attorney, District of Arizona (1977-1980)

Kami Chavis
Assistant U.S. Attorney, District of Columbia (2003-2006)

Brendan Cox
Chief, Albany Police Department (2015-2017)

Justin Dillon
Assistant U.S. Attorney, District of Columbia (2008-2014)

Richard Doran
Attorney General, State of Florida (2002-2003); Chief Deputy Attorney General of Florida (1997-2002)

Mark A. Dupree, Sr.
District Attorney, Wyandotte County, Kansas (2017-Present)

Stanley Garnett
District Attorney, 20th Judicial District, Colorado (2009-Present)

Mark Gonzalez
District Attorney, Nueces County, Texas (2017-Present)

Christian A. Gossett
District Attorney, Winnebago County, Wisconsin (2007-Present)

Barry Grissom
U.S. Attorney, District of Kansas (2010-2016)

Scott Harshbarger
Attorney General, State of Massachusetts (1991-1999); District Attorney, Middlesex County (1983-1991)

Miriam Aroni Krinsky
Assistant U.S. Attorney, Central District of California (1987-1988; 1990-2002); Criminal Appellate Chief and Chief, General Crimes; Former Assistant U.S. Attorney, District of Maryland (1988-1990); Chair, Solicitor General's Criminal Appellate Advisory Group

William Lansdowne
Chief, San Diego Police Department, California (2003-2014)

Rory K. Little
Associate Deputy Attorney General, U.S. Department of Justice (1996-1997); Assistant U.S. Attorney, Chief, Appellate Section, Northern District of California (1989-1994); Trial Attorney, Organized Crime & Racketeering Strike Force, U.S. Department of Justice (1987-1989)

Mary B. McCord
Acting Assistant Attorney General (2016-2017) and Principal Deputy Assistant Attorney General (2014-2017) for National Security, Department of Justice; Assistant U.S. Attorney (1994-2014); Chief, Criminal Division (2012-2014); Deputy Chief, Appellate Division (2006-2012)

Barbara McQuade
U.S. Attorney, Eastern District of Michigan (2010-2017); Assistant U.S. Attorney, Eastern District of Michigan (1998-2010)

Kenneth Mighell
U.S. Attorney, Northern District of Texas (1977-1981)

Marilyn J. Mosby, Esq.
State's Attorney, Baltimore City, Maryland (2015-Present)

Richard Pocker
U.S. Attorney, District of Nevada (1989-1990); Assistant U.S. Attorney, District of Nevada (1985-1989)

Ira Reiner
District Attorney, Los Angeles County, California (1984-1992); City Attorney, Los Angeles, California (1981-1984)

Carol A. Siemon
Prosecuting Attorney, Ingham County, Michigan (2017-Present)

David Soares
District Attorney, Albany County, New York (2004-Present)

Carter Stewart
U.S. Attorney, Southern District of Ohio (2009-2016)

Raúl Torrez
District Attorney, Bernalillo County, New Mexico (2017-Present)

Cyrus R. Vance, Jr.
District Attorney, New York County, New York (2010-Present)

Joyce Vance
U.S. Attorney, Northern District of Alabama (2009-2017); Assistant U.S. Attorney, Northern District of Alabama (1991-2009)

CERTIFICATE OF SERVICE

I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit on November 20, 2017, by using the appellate CM/ECF system, and service was accomplished on all counsel of record by the appellate CM/ECF system.

/s/Mary B. McCord
Mary B. McCord

CERTIFICATE OF COMPLIANCE

1. This brief complies with: (1) the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5), 32(a)(7)(B)(i), and 11 Cir. R. 32-4 because it contains 6500 words, excluding the parts of the brief exempted by Rule 32(a)(7)(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type style requirements of Fed. R. Appl. P. 32(a)(6) and 11 Cir. R. 32-3 because it has been prepared in a proportionally spaced typeface using Microsoft Word(14-point Times New Roman), and is double-spaced.

/s/Mary B. McCord
Mary B. McCord