No. 17-13139

In the United States Court of Appeals for the Eleventh Circuit

MAURICE WALKER, ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED,

Plaintiff-Appellee,

v.

CITY OF CALHOUN, GEORGIA,

Defendant-Appellant.

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

BRIEF *AMICUS CURIAE* OF THE CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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Dated: November 20, 2017 /s/ Ashwin P. Phatak
Ashwin P. Phatak

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fourteenth Amendment's protections for equality and liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

The City of Calhoun, Georgia has a policy and practice of using secured money bail to impose pretrial detention on misdemeanor defendants too poor to pay, requiring them to spend 48 hours behind bars unless they can pay—*before* trial and conviction—"the expected fine with applicable surcharges for all offenses charged as mandated by State Law

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for both parties have consented to the filing of this brief.

for disposition should the accused later enter a plea, or be found guilty following a bench trial." Doc. 29-5, at 4. This practice cannot be squared with the text and history of the Fourteenth Amendment, which guarantees equal justice under the law to rich and poor alike. The City's policy denies the most basic form of liberty to those unable to pay and exerts coercive pressure on defendants charged with misdemeanors to plead guilty in order to be released. Using the bail system in this way perverts the historic use of bail as a mechanism for ensuring pretrial liberty for persons charged with a crime. Moreover, this policy is completely unnecessary in light of numerous alternative approaches that serve the governmental interests in a defendant's appearance at trial and in community safety while respecting the constitutional guarantees of equal protection and due process enshrined in the Fourteenth Amendment.

Nearly 150 years ago, in the wake of a bloody Civil War fought over the issue of slavery, the Fourteenth Amendment fundamentally altered our Constitution's protection of individual, personal rights, adding to our nation's charter sweeping guarantees of liberty and equality in order to secure "the civil rights and privileges of all citizens in all parts of the

republic," *see* Joint Comm. on Reconstruction, *Report of the Joint Committee on Reconstruction*, No. 39-30, at xxi (1st Sess. 1866), and to keep "whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country," Cong. Globe, 39th Cong., 1st Sess. 1088 (1866). Crafted against the backdrop of the suppression of rights in the South, the Fourteenth Amendment was designed to protect the full scope of liberty and to "restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766. Together with its guarantee of equal protection, which "secur[ed] an equality of rights to all citizens of the United States, and of all persons within their jurisdiction," *id.* at 2502, the Fourteenth Amendment gives to "the humblest, the poorest, the most despised . . . the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty," *id.* at 2766.

The Fourteenth Amendment's guarantees of liberty and equality, which "are connected in a profound way," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015), together ensure equal justice under the law for all persons, rich and poor. As the Supreme Court has explained, the

"constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." *Griffin v. Illinois*, 351 U.S. 12, 17 (1956). Moreover, "[b]oth equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, as far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Id.* (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)). It is "a basic premise of our criminal justice system" that "[o]ur law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017).

In a long line of cases rooted both in equal protection and due process principles, the Supreme Court has faithfully applied this constitutional commitment to equal justice for rich and poor alike, striking down deprivations of liberty that affect people based on how much money they possess. *See Griffin*, 351 U.S. at 17; *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971); *Bearden v. Georgia*, 461 U.S. 660 (1983); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Indeed, the Supreme Court has recognized that even when fair on their face, state rules that "grossly discriminat[e] in [their] operation," *Griffin*,

351 U.S. at 17 n.11, cannot be squared with the constitutional command of due process and equal protection for all persons. Under these cases, "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc).[2]

Calhoun's bail system runs afoul of these principles. Quite simply, pricing those too poor to pay out of the "traditional right to freedom before conviction," *Stack v. Boyle*, 342 U.S. 1, 4 (1951)—even for only 48 hours—cannot be squared with the Fourteenth Amendment's mandate that all persons enjoy equal justice under the law. Nor can it be squared with the historic use of bail as a due process mechanism for preserving pretrial liberty, which ensures "the unhampered preparation of a defense" and "prevent[s] the infliction of punishment prior to conviction." *Id.* "The practice of admission to bail . . . is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, . . . [it] enables[s] them to stay out of jail until a trial

[2] Decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding precedents in this Circuit, unless overruled by this Court, sitting en banc, or the Supreme Court. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1210 (11th Cir. 1981) (en banc).

has found them guilty." *Id.* at 7-8 (Jackson, J., concurring); *see United States v. Salerno*, 481 U.S. 739, 755 (1987) (fundamental constitutional principles make "liberty . . . the norm" and "detention prior to trial or without trial . . . the carefully limited exception"). The City's use of bail as a mechanism for imposing pretrial detention on those too poor to pay turns bail, a fundamental aspect of our heritage of liberty, into an engine of oppression. "[H]olding a defendant on an unaffordable bail amount defeats bail's purpose of securing pretrial liberty." *Brangan v. Commonwealth,* 80 N.E.3d 949, 966 (Mass. 2017). The Fourteenth Amendment does not permit "pretrial confinement for inability to post money bail" where an indigent defendant's "appearance at trial could reasonably be assured by one of the alternate forms of release." *Pugh*, 572 F.2d at 1066.

The fact that the City's policy imposes wealth-based detention for only 48 hours, and not some longer period, does not save it. Forty-eight hours of wealth-based detention still denies the defendant "the unhampered preparation of a defense," and "inflict[s] . . . punishment prior to conviction," *Stack,* 342 U.S. at 4; no less than a longer period, it may "imperil the suspect's job, interrupt his source of income, and impair

his family relationships," *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). That Calhoun provides a mechanism to afford indigent defendants pretrial liberty after two days of imprisonment does not make it lawful for Calhoun to impose 48 hours of wealth-based pretrial detention. In other words, it cannot excuse the City's failure to comply with the Fourteenth Amendment's guarantee of equal justice for rich and poor alike.

Importantly, Calhoun's discriminatory bail policy is not calculated to advance either of the well-recognized governmental interests inherent in bail: it neither serves the goal of ensuring defendants appear for trial nor protects community safety. The City's bail schedule requires misdemeanor defendants to pay—before trial and conviction—"the expected fine with applicable surcharges for all offenses charged as mandated by State Law for disposition should the accused later enter a plea, or be found guilty following a bench trial." Doc. 29-5, at 4. As this bail schedule reflects, the bail amounts the City assesses are driven by the fine that would be due following conviction, not what would ensure the appearance of defendants at trial. This denies pretrial liberty to indigent defendants, without any consideration of whether alternatives

to jailing them would ensure their attendance at trial. Meanwhile, wealthier defendants—whether or not they would appear for trial or pose a safety threat—are free to pay their way out. That disparity is fundamentally inconsistent with the Constitution's guarantees of equal protection and due process, and the judgment of the district court should be affirmed.

ARGUMENT

I. THE TEXT AND HISTORY OF THE FOURTEENTH AMENDMENT GUARANTEE EQUAL JUSTICE UNDER THE LAW FOR ALL PERSONS.

The Fourteenth Amendment commands that "[n]o State" "shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. These overlapping guarantees—which "fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), in order to "repair the Nation from the damage slavery had caused," *id.* at 807 (Thomas, J., concurring)—"call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." *Griffin*, 351 U.S. at 17. The Fourteenth Amendment enshrined

in the Constitution the idea that "[e]very human being in the country, black or white, man or woman . . . has a right to be protected in life, in property, and in liberty." Cong. Globe, 39th Cong., 1st Sess. 1255 (1866). The Amendment gives to "the humblest, the poorest, the most despised . . . the same rights and the same protection of the law as it gives to the most powerful, the most wealthy, or the most haughty." *Id.* at 2766.

As the Supreme Court has recognized, "[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection . . . may be instructive as to the meaning and reach of the other." *Obergefell*, 135 S. Ct. at 2603. "Each concept—liberty and equal protection—leads to a stronger understanding of the other." *Id.*

This principle is particularly true in the context of discrimination in the court system. "Due process and equal protection principles converge," *Bearden*, 466 U.S. at 665, to ensure that the state may not "bolt the door to equal justice." *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring); *see M.L.B.*, 519 U.S. at 120 ("The equal protection concern relates to the legitimacy of fencing out [litigants] based solely on their

inability to pay . . . . The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action."); *cf. Pugh*, 572 F.2d at 1057 ("Rules under which personal liberty is to be deprived are limited by the constitutional guarantees of all, be they moneyed or indigent . . . .").

Ensuring equal justice in the courts for all persons was of particular concern to the drafters of the Fourteenth Amendment. In the wake of the Civil War, widespread maladministration of justice in the South meant that neither freed slaves nor Unionists could feel confident that they would be treated fairly in the courts. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 602, 783, 1065, 1090-91, 1093-94, 1263 (1866). The Framers understood that the lack of basic free trial rights was instrumental in the subordination of African Americans and their Unionist allies. Sadly, it was all too "easy to show how impossible it is for the freedmen . . . to receive anything like justice, protection, equity . . . . Judges, juries, lawyers, officers . . . carry with them such a hatred and contempt for the freedmen as to utterly preclude the idea that they can do him full justice." *Id.* at 1838; *id.* at 653 ("Where is your court of justice in any southern State where the black man can secure protection? Again there is no

response."); Cong. Globe, 39th Cong., 2nd Sess. 160 (1866) (noting that Union delegations in the South have reported "that they can get no justice in the courts, and that they have no protection for life, liberty, or property").

These abuses—together with the injustices wrought in the North by the federal Fugitive Slave Act of 1850, *see* Akhil Reed Amar, *America's Constitution: A Biography* 388 (2005) (noting the "due-process claims of free blacks threatened by the rigged procedures of the Fugitive Slave Act of 1850")—convinced the Framers that it was necessary to add to the Constitution new limits on state governments in order to secure liberty and equality for all persons.

The Fourteenth Amendment thus guarantees to all persons—"no matter how poor, no matter how friendless, no matter how ignorant"—"due process of law . . . which is impartial, equal, exact justice," Cong. Globe, 39th Cong., 1st Sess. 1094 (1866), establishing "a wholesome and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue," *id.* at app. 256; Cong. Globe, 42nd Cong., 1st Sess. app. 153 (1871) (arguing that the due process guarantee "realizes the full force and effect

of the clause in Magna Carta, from which it was borrowed" and provides that "there is no power . . . to deprive any person of those great fundamental rights on which all true freedom rests, the rights of life, liberty, and property, except by due process of law; that is by an *impartial trial* according to the laws of the land" (emphasis added)).

Under these principles, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755; *see Foucha v. Louisiana*, 504 U.S. 71, 83 (1992). An "indigent defendant's loss of personal liberty . . . lies 'at the core of the liberty protected by the Due Process Clause'" and its "threatened loss through legal proceedings demands 'due process protection.'" *Turner v. Rogers*, 131 S. Ct. 2507, 2518 (2011) (citations omitted); *Foucha*, 504 U.S. at 90 (Kennedy, J., dissenting) ("As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, . . . freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution."). Detaining an individual prior to trial requires careful factual findings supporting the denial of this most basic form of liberty; it cannot be imposed on the basis of indigency alone. *See Brangan*, 80

N.E.3d at 965 ("A statement of findings and reasons, either in writing or orally on the record, is a minimum requirement where a defendant faces a loss of liberty.").

The Fourteenth Amendment not only guarantees due process of law—forbidding deprivations of liberty not accompanied by fair procedures—but also guarantees equal protection of the law to all persons, establishing "a shield and protection over the head of the lowliest and poorest citizen in the remotest region of the nation[.]" Cong. Globe, 39th Cong., 1st Sess. 586 (1866). The constitutional guarantee of equal protection "establishes equality before the law," *id.* at 2766, ensuring that, in the administration of justice, all persons—regardless of their race, their gender, or the amount of money they possess—are entitled to equal rights under the law. The constitutional guarantee of equal protection also "abolishes all class legislation in the states and does away with the injustice of subjecting one caste of persons to a code not applicable to another." *Id.* at 2766*; see id.* at 2459 ("Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man."); *id.* at 2766

("It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man."). This serves to ensure that that "the Constitution, in the administration of justice, in the organization of tribunals for the administration of justice, is no respecter of persons." Cong. Globe, 36th Cong., 2nd Sess. app. 83 (1861).

While the Fourteenth Amendment's guarantee of equality was written in the aftermath of the Civil War and the end of slavery, it protects all persons. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."); *The Civil Rights Cases*, 109 U.S. 3, 24 (1883) ("The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."). The Fourteenth Amendment's "neutral phrasing," "extending its guarantee to 'any person,'" *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring), secures equal rights

and "equal dignity in the eyes of the law," *Obergefell*, 135 S. Ct. at 2608, for all men and women of any race, whether young or old, citizen or alien, rich or poor. *See* Cong. Globe, 39th Cong., 1st Sess. 343 (1866) ("[T]he poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and proudest man in the land[.]"); *id.* at 1159 ("A true republic rests upon the absolute equality of rights of the whole people, high and low, rich and poor, white and black.").

Together, the Fourteenth Amendment's overlapping guarantees of due process and equal protection prevent the states from "bolt[ing] the door to equal justice," for rich and poor alike, *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring), a principle with deep roots in our constitutional heritage. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (quoting oath requiring Article III judges to swear to "administer justice without respect to persons, and do equal right to the poor and to the rich"); Magna Carta, chs. 39-40 (1215), http://avalon.law.yale.edu/medieval/magframe.asp ("No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of

his peers or by the law of the land. To no one will we sell, to no one will we refuse or delay, right or justice."); John Locke, *Second Treatise of Government* § 142, at 75 (C.B. Macpherson ed., 1980) (1690) ("They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court, and the country man at plough."). Under these principles, imprisonment before trial may not be based on indigency alone.

II. SUPREME COURT PRECEDENT PROHIBITS CRIMINAL DEFENDANTS FROM BEING IMPRISONED SOLELY AS A RESULT OF INDIGENCY.

Consistent with the Fourteenth Amendment's text and history, the Supreme Court has long held, under both due process and equal protection principles, that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin*, 351 U.S. at 17. As that Court has explained, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19. Applying *Griffin*'s teachings, the Supreme Court has repeatedly held that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh*, 572 F.2d at 1056. As that Court has recognized, use

of a blanket policy of incarcerating indigent defendants based on their inability to pay—particularly when there are alternative means of achieving the government's interests—cannot be squared with the Fourteenth Amendment's overlapping guarantees of liberty and equality for all persons. These protections apply both before and after trial.

In *Williams v. Illinois*, the Supreme Court held that "a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment . . . since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly." *Williams*, 399 U.S. at 243; *id.* at 264-65 (Harlan, J., concurring) (concurring on due process grounds). It did not matter that "the Illinois statutory scheme [did] not distinguish between defendants on the basis of ability to pay fines," because, as in *Griffin*, "'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." *Id.* at 242 (quoting *Griffin*, 351 U.S. at 17 n.11). As the Supreme Court has since explained,

"[s]anctions of the *Williams* genre . . . are not merely *disproportionate* in impact. Rather, they are wholly contingent on one's ability to pay, and thus 'visi[t] different consequences on two categories of persons,'; they apply to all indigents and do not reach anyone outside that class." *M.L.B.*, 519 U.S. at 127 (quoting *Williams*, 399 U.S. at 242) (emphasis in original) (internal citation omitted); s*ee Tate*, 401 U.S. at 397-98 (holding that "petitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency").

The *Williams* Court recognized that its holding "may place a further burden on States in administering criminal justice," but held that "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. The Fourteenth Amendment requires states to "canvass the numerous alternatives" rather than simply apply a blanket policy of imprisoning indigent defendants for "involuntary nonpayment of a fine or court costs." *Id.* at 244; *Tate*, 401 U.S. at 399 (requiring states to use nondiscriminatory "alternatives . . . to serve its concededly valid interest in enforcing payment of fines").

In *Bearden v. Georgia*, the Supreme Court held that "*Griffin*'s principle of equal justice," *Bearden*, 461 U.S. at 664, did not permit a state court to revoke automatically an indigent's probation for failure to pay a fine. Under due process and equal protection principles, "the State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty." *Id*. at 671. "Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 672-73.

The principles laid out in *Williams*, *Tate*, and *Bearden*—all cases involving defendants convicted after a fair trial—apply with even greater force to imprisonment *before* trial, when the presumption of innocence still attaches and the individual accused of a crime is entitled to the full

scope of the Constitution's protections. Indeed, because of "the individual's strong interest in liberty" and the "fundamental nature of this right," *Salerno*, 481 U.S. at 750, the Supreme Court has upheld the constitutionality of federal statutes providing for pretrial detention only in sharply circumscribed instances, holding that "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, . . . a court may disable the arrestee from executing that threat." *Id.* at 751; *id.* (approving the use of pretrial detention because of "Congress' careful delineation of the circumstances under which detention will be permitted"); *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001) ("[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections."); *Foucha*, 504 U.S. at 81 (holding that "*Salerno* does not save" a system of detention where the "scheme of confinement is not carefully limited" and the "State need prove nothing to justify continued detention").

This strong protection of pretrial liberty reflects that "[t]h[e] traditional right to freedom before conviction permits the unhampered

preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." *Stack*, 342 U.S. at 4. Without this basic right, "the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Id.* Virtually all of the Constitution's safeguards that "ensur[e] against the risk of convicting an innocent person" and "make it more difficult for the State to rebut and finally overturn the presumption of innocence which attaches to every criminal defendant," *Herrera v. Collins*, 506 U.S. 390, 398-99 (1993), are harder to exercise and meaningfully enjoy when the defendant is denied his liberty and incarcerated before trial. "If a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. 514, 533 (1972); *Stack*, 342 U.S. at 8 (Jackson, J., concurring) (recognizing that defendants denied their pretrial liberty "are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense").

Even more troubling, in misdemeanor cases of the sort at issue here—crimes that generally carry short sentences or only fines—"the pretrial detention can approach and even exceed the punishment that a

court would impose after trial. So even an acquittal at trial can be a hollow victory, as there is no way to restore the days already spent in jail. The defendant's best-case scenario becomes not zero days in jail, but the length of time already served." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2492-93 (2004). Notably, our system of "criminal justice . . . is for the most part a system of pleas, not a system of trials," *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012), and "pretrial detention places a high premium on quick plea bargains in small cases, even if the defendant would probably win acquittal at an eventual trial," Bibas, *supra*, at 2493. Indeed, "research shows that defendants detained in jail while awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released during the pretrial period." Pretrial Justice Inst., *Rational and Transparent Bail Decision Making: Moving from a Cash-Based to a Risk-Based Process* 2 (2012), http://www.pretrial.org/download/pji-reports/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf.

Calhoun's bail policy imposes 48 hours of pretrial detention on indigent misdemeanor defendants too poor to pay and thereby denies the "'core of the liberty protected by the Due Process Clause,'" *Turner*, 131 S. Ct. at 2518 (quoting *Foucha*, 504 U.S. at 80), without any "careful delineation of the circumstances," *Salerno*, 481 U.S. at 751, and without any findings at all. This subjects indigent defendants—simply because they are poor and without consideration of alternatives to incarceration—to "one of the most feared instruments of state oppression and state indifference," *Foucha*, 504 U.S. at 90 (Kennedy, J., dissenting), makes it more difficult for them to "gather evidence, contact witnesses, or otherwise prepare [a] defense," *Barker*, 407 U.S. at 533, and pressures them to plead guilty simply to get out of jail. This "lump[s] [plaintiffs] together with other poor persons," effectively "punishing [them] for [their] poverty." *Bearden*, 461 U.S. at 671. That practice cannot be squared with the Fourteenth Amendment's guarantee of liberty and equality for all persons.

III. CALHOUN'S DISCRIMINATORY BAIL POLICY DOES NOT FURTHER ANY LEGITIMATE STATE INTEREST.

Calhoun's discriminatory bail policy is not calculated to advance either of the well-recognized governmental interests in bail: it neither

serves the goal of ensuring defendants appear for trial nor protects community safety. The district court was correct to enjoin it.

The touchstone of bail is to ensure a defendant's appearance at trial, not to coerce the defendant into paying the fine that would be imposed after a finding of guilt. *See Stack*, 342 U.S. at 4 ("Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."); *Pugh*, 572 F.2d at 1057 ("The ultimate inquiry in each instance is what is necessary to reasonably assure defendant's presence at trial."). This "safeguard[s] the courts' role in adjudicating the guilt or innocence of defendants." *Salerno*, 481 U.S. at 753. At the very least, this requires a jurisdiction to consider, on an individualized basis, what conditions are necessary to ensure a defendant's appearance at trial.

"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." *Pugh*, 572 F.2d at 1057.

This reflects that "[e]ach defendant stands before the bar of justice as an individual . . . . The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance." *Stack*, 342 U.S. at 9 (Jackson, J., concurring). Indeed, it is settled in this Court that secured money bail cannot constitutionally be used to impose pretrial detention on those too poor to pay where there are other means of ensuring a defendant's appearance at trial. *Pugh*, 572 F.2d at 1058 ("[I]n 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."); *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) ("[W]hen the government detains someone based on his or her failure to satisfy a financial obligation, the government cannot reasonably determine if the detention is advancing its purported governmental purpose unless it first considers the individual's financial circumstances and alternative ways of accomplishing its purpose.").

The City's discriminatory bail policy does not comport with these principles because it is wholly unrelated to the goal of ensuring

attendance at trial: it requires misdemeanor defendants to pay—before trial and conviction—"the expected fine with applicable surcharges for all offenses as mandated by State Law for disposition should the accused later enter a plea, or be found guilty following a bench trial" in order to obtain their pretrial liberty. Thus, the bail amounts the City assesses seek to coerce defendants to pay the fine that would be imposed after conviction, not ensure their presence at trial. This turns the bail system on its head. The City's policy, which ignores that the purpose of bail is to ensure attendance at trial and thus does not provide any individualized consideration, does not further any legitimate bail-related interest.

Nor does the City's bail policy serve any interest in community safety. Denial of pretrial liberty may sometimes be justified by the goal of "preventing danger to the community," *Salerno*, 481 U.S. at 747, but the City's policy is not designed to further this goal. It does not take into account the potential dangerousness of any defendant. On the contrary, it permits release of any wealthy defendant—whether or not he or she poses a danger to the community pending trial—so long as he or she can pay the fine that would be imposed after conviction. It denies pretrial liberty to indigent defendants simply because they lack the funds,

whether or not they pose a danger and whether or not they would appear at trial. This cannot be squared with the Fourteenth Amendment's guarantee of equal justice for rich and poor alike.

Fortunately, there are "numerous" far less onerous alternatives that both ensure pretrial liberty for rich and poor alike—as the Fourteenth Amendment requires—and serve the governmental interests in ensuring a defendant's appearance at trial and public safety. *Williams*, 399 U.S. at 244; *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972). Calhoun could treat persons charged with a crime based on the risks they pose, not the amount of money they possess; it could use pretrial risk assessments and non-monetary conditions of release to ensure pretrial liberty for rich and poor alike, while also ensuring attendance at trial and ensuring public safety. *See, e.g.*, Pretrial Justice Inst., *supra*, at 22-39. Calhoun "is free to choose from among the variety of solutions already proposed and, of course, it may devise new ones." *Williams*, 399 U.S. at 244-45. But given the host of nondiscriminatory alternatives available to satisfy all the governmental interests related to the fair functioning of its bail system, it may not deny the "traditional right to freedom before conviction," *Stack*, 342 U.S. at 4, to indigent

defendants simply because they are poor. In doing so, Calhoun does "little more than punish[] [them] for [their] poverty." *Bearden*, 461 U.S. at 671. The "comfortable convenience of the status quo," *Williams*, 399 U.S. at 245, must give way to our Constitution's commitment to equal justice for rich and poor alike.

CONCLUSION

For all the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 5,747 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief *amicus curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

Executed this 20th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on November 20, 2017.

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