IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

MAURICE WALKER, *et al.*,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	NO. 4:15-CV-00170-HLM
CITY OF CALHOUN, GEORGIA,	)	CLASS ACTION
Defendant.	)	

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, FOR PRELIMINARY INJUNCTION

Plaintiff Maurice Walker respectfully moves the Court to enter emergency injunctive relief preventing the City of Calhoun, Georgia ("the City"), from keeping Mr. Walker and similarly situated indigent people in jail without offering release on unsecured bond or recognizance. Defendant's conduct should be enjoined because it clearly violates the Fourteenth Amendment and causes irreparable injury to the rights of Mr. Walker and those similarly situated.

INTRODUCTION

Maurice Walker is an indigent person arrested for misdemeanor offenses who is currently being held in jail solely because he is unable to obtain what to

other people is a small sum of money. If Mr. Walker could afford to pay that money—as many other people arrested by the City and charged with the same offenses do every day—then he would be free.

The United States Supreme Court has repeatedly affirmed the principle that no person may be kept in jail solely because of her poverty. Although controlling decisions in this Circuit have applied that principle to the issue presented here and resolved it in Mr. Walker's favor, the principle is ignored by City officials, who jail people solely because they cannot pay a small amount of money to secure their release. This has become a routine law enforcement practice in the City of Calhoun.

Keeping the poor in jail because they cannot make a monetary payment violates longstanding and fundamental principles of American law. As described in detail below, the scheme enforced by the City has been rejected by the courts and by every major panel of legal experts to study the issue over the past fifty years. Because Mr. Walker and others are or will be held in jail solely by virtue of the amount of money that they and their families have, Mr. Walker respectfully requests that this Court hold a hearing on this motion in an expedited fashion. Following that hearing, this Court should issue a preliminary order preventing the continuation of this unlawful practice.

STATEMENT OF FACTS

The facts of this case are similar to the facts discussed nearly four decades ago, when the former Fifth Circuit condemned the jailing of indigent arrestees solely because they could not make small cash payments. *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc). As described below, the same defects found unconstitutional in *Pugh v. Rainwater* pervade the City of Calhoun's treatment of the poor.

A. Mr. Walker Is Indigent.

Maurice Walker is a 54-year-old indigent man. He was arrested on Thursday, September 3, 2015, by Calhoun Police Department officers for a misdemeanor offense. *See* Complaint Exhibit A, Declaration of Walker. Officers informed Mr. Walker that he would not be released unless he paid the standard bond amount that the City of Calhoun requires for his charges.

Mr. Walker is indigent and disabled. He cannot afford to purchase his release from jail. Pursuant to City policy, Mr. Walker will not be brought to court until the City's next court session on Monday, September 14, 2015.

B. The City's Bail Policies and Practices Result in Jailing the Poor While Releasing the Wealthy.

The relevant City policies and practices are simple. When Calhoun police arrest a person for a misdemeanor, traffic offense, or ordinance violation, they take

the person into custody and perform standard booking procedures. The person is then told that he or she can be released immediately with notice of a court date, but only if the person pays a predetermined sum of money. The amount of money is determined by reference to a bail schedule, which is a list containing types of offenses and corresponding dollar amounts required to pay for the person's immediate release. No inquiry is made into any of the person's circumstances, including the person's indigence.

Many of Calhoun's arrestees are freed almost immediately when they post these small amounts of money without difficulty. The rest are left to wait in jail until the City's next court date unless they or their families produce enough money in the intervening period. Because the City holds court only once per week, an indigent arrestee can spend up to seven days in jail without a first judicial appearance. Each Monday, when the City holds court, there are commonly four to six arrestees appearing for initial appearances after having been unable to purchase their freedom. These practices have resulted in the ongoing confinement of Mr. Walker.

In contrast to Calhoun, many other cities and counties in Georgia and throughout the country do not hold people in jail on minor offenses because of their poverty. Instead, for example, many other places release arrestees with a

signature bond or on their own recognizance. In the former, the person promises to pay the scheduled amount of money if the person fails to appear in court. In the latter, a person simply promises to appear, usually on penalty of an additional criminal charge for failure to appear. In some places, each of these options is accompanied by the person's agreement to other reasonable conditions of release. In neither of these situations, however, is a person kept in jail solely because she cannot afford a sum of money in advance.

ARGUMENT

"[A] preliminary injunction is warranted if the movant demonstrates (1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction is issued, and (4) an injunction would not disserve the public interest." *Odebrecht Const., Inc. v. Sec'y, Florida Dep't of Transp.*, 715 F.3d 1268, 1273-74 (11th Cir. 2013) (citations and internal quotation marks omitted). Mr. Walker satisfies each of these requirements.

I. MR. WALKER IS LIKELY TO SUCCEED ON THE MERITS BECAUSE THE CITY'S CONDUCT VIOLATES BASIC PRINCIPLES OF EQUAL PROTECTION AND DUE PROCESS.

The constitutional principles at issue in this case are well established. This Circuit long ago identified the basic equal protection violation when reviewing Florida's post-arrest detention procedures: "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) (en banc).[1]

Calhoun's post-arrest detention scheme of secured bail is materially indistinguishable from the scheme declared unconstitutional earlier this year in *Pierce et al. v. City of Velda City*, 15-cv-570-HEA (E.D. Mo. 2015) (issuing a declaratory judgment that the use of a secured bail schedule is unconstitutional as applied to the indigent and enjoining its operation), *see* Exhibit 2, and *Cooper v. City of Dothan*, 1:15-cv-425-WKW (M.D. Ala. June 18, 2015) (issuing temporary restraining order and holding that the City of Dothan's secured money bail schedule violated the Fourteenth Amendment), *see* Exhibit 3. The scheme at issue in this case is also indistinguishable from the scheme condemned by the United

[1] All decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1210 (11th Cir. 1981) (en banc).

States Department of Justice recently in a federal court case raising the same issues against the City of Clanton, Alabama. *See* Exhibit 1, United States Department of Justice, Statement of Interest, *Varden et al. v. City of Calhoun*, 15-cv-34 (M.D. Ala. 2015) (arguing on behalf of the United States government that the use of secured monetary bail to keep indigent arrestees in jail "not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy"). As described below, the same illegalities pervade Calhoun's treatment of the poor.

A. The Constitution Prohibits Keeping a Person in Jail Solely Because the Person's Poverty Renders Him Unable to Afford a Monetary Payment.

The rule that poverty and wealth status have no place in deciding whether a person should be incarcerated relies on some of the most fundamental principles of American law. *See Williams v. Illinois*, 399 U.S. 235, 241 (1970) ("[T]he Court has had frequent occasion to reaffirm allegiance to the basic command that justice be applied equally to all persons."); *Douglas v. California*, 372 U.S. 353, 355 (1963) (condemning the "evil" of "discrimination against the indigent"); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.").

These principles have been applied in a variety of contexts in which a government sought to keep a person in jail solely because of the person's inability to make a monetary payment. *See, e.g., Tate v. Short*, 401 U.S. 395, 398 (1971) ("[T]he 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."). In *Bearden v. Georgia*, the Supreme Court explained that to "deprive [a] probationer of his conditional freedom simply because, through no fault of his own he cannot pay [a] fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment." 461 U.S. 660, 672-73 (1983).

Consistent with Supreme Court precedent, it has long been the law of this Circuit that any kind of pay-or-jail scheme is unconstitutional when it operates to jail the poor. In *Frazier v. Jordan*, 457 F.2d 726, 728–29 (5th Cir. 1972), the court found that an alternative sentencing scheme of $17 dollars or 13 days in jail was unconstitutional as applied to those who could not immediately afford the fine. Because those people would be sent to jail if they could not pay the $17 fine, the local court's order of imprisonment was unconstitutional. *Id*. at 728. Put simply, *Frazier* condemned the municipal court scheme because it created a system in which "[t]hose with means avoid imprisonment [but] the indigent cannot escape

imprisonment." *Id.*; *see also Barnett v. Hopper*, 548 F.2d 550, 554 (5th Cir.1977) ("To imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws."), *vacated as moot*, 439 U.S. 1041 (1978).

District courts in this Circuit and elsewhere have reaffirmed these basic principles. In *United States v. Flowers*, a district court was confronted with a criminal defendant who faced imprisonment only because he could not afford the cost of release on home confinement monitoring. 946 F. Supp. 2d 1295 (M.D. Ala. 2013). The district court found—as the United States government conceded, *id*. at 1301—that keeping a person in jail solely because he could not afford to pay for home confinement monitoring would be "wrong" and that "the Constitution's guarantee of equal protection is inhospitable to the Probation Department's policy of making monitored home confinement available to only those who can pay for it." *Id*. at 1302.

In *Flowers*, the court began by acknowledging that "the principle that wealth and poverty have no place in sentencing decisions is nothing new." *Id.* The *Flowers* court then confronted the constitutional implications for indigent defendants of a probation department policy that required a probationer to pay the cost of electronic monitoring services. The court held that it could not put a person

in jail simply because the person could not afford the cost of electronic monitoring services. *Id*. at 1301. After recounting the ample Supreme Court and Eleventh Circuit precedent relevant to the issue, the court concluded that, just as "it violates the Constitution's guarantee of equal protection under the laws to convert a fine-only sentence into a prison term based on inability to pay," it would also violate the constitution to turn a sentence of electronic monitoring into a jail sentence simply because the defendant could not afford to pay for the service. *Id*. at 1300.[2]

[2] As *Flowers* described the basic violation: "[A] defendant identical to Flowers but with a thicker billfold would receive home confinement, while Flowers would receive prison." *Id*. at 1301. Other district courts have similarly rejected billfold thickness as a permissible basis for restricting a person's liberty. *See, e.g.*, *United States v. Waldron*, 306 F. Supp. 2d 623, 629 (M.D. La. 2004) ("It is well established that our law does not permit the revocation of probation for a defendant's failure to pay the amount of fines if that defendant is indigent or otherwise unable to pay. In other words, the government may not imprison a person solely because he lacked the resources to pay a fine."); *De Luna v. Hidalgo County*, 853 F. Supp. 2d 623, 647-48 (S.D. Tex. 2012) ("[T]he Court finds that . . . before a person charged with a . . . fine-only offense may be incarcerated by Hidalgo County for the failure to pay assessed fines and costs, this deprivation of liberty must be preceded by some form of process that allows for a determination as to whether the person is indigent and has made a good faith effort to discharge the fines, and whether alternatives to incarceration are available."); *Brown v. McNeil*, 591 F. Supp. 2d 1245, 1260 (M.D. Fla. 2008) (granting federal habeas petition because "Petitioner did not have the ability to remain current with his supervision payments given his other financial obligations at the time," which meant that state's revocation of his conditional release constituted "an unreasonable application of clearly established federal law").

Just as it is unlawful to put a convicted person in jail because of his inability to make a monetary payment, it is unlawful to put a presumptively innocent person in jail for the same reason. *Rainwater*, 572 F.2d at 1057. Indeed, in the context of pretrial arrestees, the rights at stake are even more significant because their liberty is not diminished by criminal conviction; they are presumed innocent.

Justice William O. Douglas recognized this principle at the onset of the successful movement to rid the federal courts of the use of the kind of poverty-based jailing now prevalent in Calhoun. Noting that such a scheme "raises considerable problems for the equal administration of the law," Justice Douglas asked, "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?" *Bandy v. United States*, 81 S. Ct. 197, 197-98 (1960). The former Fifth Circuit answered that question in *Rainwater*. The panel opinion, *Pugh v. Rainwater*, 557 F.2d 1189, 1190 (5th Cir. 1977), had struck down the Florida Rule of Criminal Procedure dealing with money bail because it is unconstitutional to keep an indigent person in jail prior to trial solely because of the person's inability to make a monetary payment. The en banc court agreed with the constitutional holding of the panel opinion but reversed the panel's facial invalidation of the *entire* Florida Rule. *Rainwater*, 572 F.2d at 1057.

Rainwater's reasoning is easy to understand and dispositive of this case. The en banc court held that the Florida Rule itself did not require on its face the setting of monetary bail for arrestees and explained that, if such a thing were to happen to an indigent person, it would be unconstitutional. In other words, the court held that the Florida courts could not be expected to enforce the new Rule—which had been amended during the litigation in that case—in a manner that violated the Constitution by requiring monetary payments to secure the release of an indigent person. The court explained the constitutional principles at stake:

> 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. We do not read the State of Florida's new rule to require such a result.

Id. at 1058.[3] Summing up its reasoning, the en banc court held: "The incarceration of those who cannot [afford a cash payment], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection

[3] *Rainwater* further explained that it refused to require a priority to be given in all cases—including those of the non-indigent—to non-monetary conditions of release. The court noted that, at least for wealthier people, some might actually prefer monetary bail over release with certain other conditions, and that the court would not invalidate a state Rule that allowed for those other conditions in appropriate cases. *Id*. at 1057.

requirements."[4] *Id*. at 1057 (emphasis added);[5] *see also, e.g.*, *Williams v. Farrior*, 626 F.Supp. 983, 985 (S.D. Miss. 1986) ("For the purposes of the Fourteenth Amendment's Equal Protection Clause, it is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainee infringes on both equal protection and due process requirements.").

The City of Calhoun's scheme does exactly what *Rainwater* and the entire line of precedent on which it was founded reject: it carves out jail for those who cannot afford to pay the City and freedom for those who can. In no case is an indigent arrestee offered an alternative to posting an immediate payment. The City has determined that people committing minor misdemeanor offenses are eligible for immediate release after arrest. The City cannot make exercising that right to freedom contingent solely on the ability to pay arbitrary amounts of cash. *Cf. Bearden*, 461 U.S. at 667-68 (holding that "if [a] State determines a fine or

[4] Four circuit judges dissented in *Rainwater* because they thought that the Constitution required even more protection for the indigent. *Id*. at 1067 (Simpson, J., dissenting) ("I cannot escape the conclusion that the majority has chosen too frail a vessel for such a ponderous cargo of human rights.").

[5] *See also Williams v. Farrior*, 626 F.Supp. 983, 985 (S.D. Miss. 1986) ("For the purposes of the Fourteenth Amendment's Equal Protection Clause, it is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainee infringes on both equal protection and due process requirements.").

restitution to be the appropriate and adequate penalty for [a] crime, it may not thereafter imprison a person solely because he lacked the resources to pay it"); *see also* Exhibit 2 at 1, Declaratory Judgment, *Pierce et al. v. City of Velda City*, 15-cv-570-HEA (E.D. Mo. June 2, 2015) ("If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond.").

Money-based detention schemes have also been rejected by state courts. In *State v. Blake*, the Alabama Supreme Court struck down a statute that allowed for indigent arrestees to be held for 72 hours solely because they could not afford monetary payments to secure their release prior to their first appearance. 642 So. 2d 959, 968 (Ala. 1994). Likewise, the Mississippi Supreme Court long ago condemned the jailing of the poor based on inability to pay secured monetary bail. *See, e.g.*, *Lee v. Lawson*, 375 So. 2d 1019, 1023 (Miss. 1979) ("A consideration of the equal protection and due process rights of indigent pretrial detainees leads us to the inescapable conclusion that a bail system based on monetary bail alone would be unconstitutional."). In *Lawson*, the court explained that Mississippi law provided for release without payment of money and that, following the American Bar Association Standards, Mississippi courts should adopt a presumption of

release on recognizance (at least in cases not involving "violent or heinous crimes"). *Id.* ("There is incorporated in these standards a presumption that a defendant is entitled to be released on order to appear or on his own recognizance."). The court observed that a presumption of non-monetary release "will go far toward the goal of equal justice under law." *Id*. at 1024.[6]

The principles announced in binding decisions of the United States Supreme Court and reaffirmed by countless lower courts are being ignored by the City of Calhoun. While some arrestees in Calhoun hand cash to the police and are released immediately, poor arrestees charged with the same offenses languish in a jail. A system that jails the poor and frees the rich for no reason other than their wealth is not a system consistent with the "fundamental fairness" enshrined in the Fourteenth Amendment. *Bearden* 461 U.S. at 673.

B. Calhoun Has Simple Alternatives to Jailing the Poor.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755

[6]*See also, e.g.*, *Robertson v. Goldman*, 369 S.E.2d 888, 891 (W.Va. 1988) ("[W]e have previously observed in a case involving a "peace bond," which we said was analogous to a bail bond, that if the appellant was placed in jail because he was an indigent and could not furnish [bond] while a person who is not an indigent can avoid being placed in jail by merely furnishing the bond required, he has been denied equal protection of the law.") (internal quotation marks omitted).

(1987). Georgia recognizes this norm and applies it with special force to most misdemeanor cases. *See* O.C.G.A. § 17-6-1(b)(1) ("Except [with respect to certain enumerated offenses], at no time, either before a court of inquiry, when indicted or accused, after a motion for new trial is made, or while an appeal is pending, shall any person charged with a misdemeanor be refused bail."). All over the country, in the area of post-arrest procedure, jurisdictions have taken this constitutional obligation seriously and instituted simple alternatives to the odious system of jailing the poor and freeing the rich. For example, in Jefferson County, Alabama—that state's most populous county—money bail set at or below $2,500 is in practice set as a signature bond, allowing a person to be released on the promise to pay that amount should the person later fail to appear. Arrestees are not required to produce that cash immediately in order to secure their release. In Washington, D.C., arrestees are released on recognizance with appropriate non-financial conditions. *See* D.C. Code § 23-1321. In Clanton, Alabama, after being confronted with a federal suit in January 2015, the city adopted a policy of releasing all arrestees on $500 unsecured recognizance bonds, allowing every new arrestee to be released on the promise to pay that amount should the person later fail to appear. *See Jones et al. v. City of Clanton*, 2:15-cv-34-MHT (Doc. 72-2) M.D. Ala. July 1, 2015). After a similar lawsuit was filed against Dothan,

Alabama, the United States District Court for the Middle District of Alabama issued a Temporary Restraining Order declaring unconstitutional the materially indistinguishable secured bail schedule used in Dothan. *See Cooper v. City of Dothan*, 1:15-cv-425-WKW (M.D. Ala. June 18, 2015). The City of Dothan thereafter agreed to end the use of secured money bail for new arrestees. *Id*. at Doc. 25 (M.D. Ala. June 26, 2015) (issuing preliminary injunction agreed upon by the parties). Similarly, in April 2015, after being confronted with a federal suit, Velda City, Missouri, ended its use of secured bail and implemented a system of recognizance release for all new arrestees. *Pierce et al. v. City of Velda City*, 4:15-cv-570-HEA (E.D. Mo. 2015). In so doing, Clanton, Dothan, and Velda City joined many other cities and counties in following the advice of the en banc court in *Rainwater*: "Systems which incorporate a presumption favoring personal recognizance avoid much of the difficulty inherent in the entire subject area." *Rainwater*, 572 F.2d at 1057.[7] Calhoun could cure the illegality at the core of this case simply by allowing arrestees to sign unsecured bonds in the same monetary

[7] The en banc court in *Rainwater* also cited favorably to overwhelming academic authority outlining the unconstitutionality of generic bail schedules, calling the academic consensus "convincing." *Rainwater*, 572 F.2d at 1056 ("The punitive and heavily burdensome nature of pretrial confinement has been the subject of convincing commentary.").

amounts that it currently uses or by releasing them on their own recognizance under penalty of a new charge for failure to appear.

In Washington, D.C., Clanton, Dothan, Velda City, and many other areas around the United States,[8] chaos in the streets has not ensued by following *Rainwater*'s guidance and relying on recognizance or unsecured bond. Some areas have chosen to supplement release on recognizance or unsecured bond with standard conditions of release that place additional obligations on arrestees. The City of Calhoun is free to choose reasonable measures among these options without offending the Fourteenth Amendment, but it may not adopt a blanket monetary chart as its only criterion for determining custody or freedom. Calhoun's detention scheme disregards the "carefully limited" circumstances, *Salerno*, 481 U.S. at 755, in which continued detention of a presumptively innocent arrestee is allowed.

[8] The federal government and the District of Columbia both removed money bail virtually entirely from their court systems after the Department of Justice, Congress, and legal experts concluded that the old system of post-arrest detention based on money bail was fundamentally unfair and unconstitutional. For example, federal law explicitly forbids obtaining post-arrest detention through the use of money bail that a person cannot meet. *See* 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.").

Like the courts of this Circuit, the American Bar Association's seminal Standards for Criminal Justice condemn the City of Calhoun's policies as having no place in American law. *See American Bar Association Standards for Criminal Justice – Pretrial Release* (3rd ed. 2007) ("ABA Standards").[9] The ABA Standards, which have been relied on in more than 100 Supreme Court decisions spanning decades, first began addressing post-arrest release procedures in 1968. The latest revision of the ABA Standards constitutes one of the most comprehensive and definitive statements available on the issue of post-arrest release, setting forth clear, reasonable, and simple alternatives to the unconstitutional scheme used by the City of Calhoun.

For example, the ABA Standards caution that a state "should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay." ABA Standards § 10-1-4(e). Indeed, the Standards endorse a presumption of release on recognizance, or under the least restrictive non-financial conditions:

> Consistent with these Standards, each jurisdiction should adopt procedures designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond. Additional

[9] Available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

> conditions should be imposed on release only when the need is demonstrated by the facts of the individual case. . . .

ABA Standards § 10-1.4(a).[10] The Standards approve of financial conditions only as a last resort:

> Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court. The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.

ABA Standards at § 10-5.3(a). Financial conditions should never be used in a generic fashion, as they are in Calhoun:

> Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and *should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge*.

ABA Standards at § 10-5.3(e) (emphasis added). The National Association of Pretrial Services Agencies (NAPSA) has also issued definitive Standards that

[10] Moreover, when financial conditions are used, "the least restrictive conditions principle requires that unsecured bond be considered first." *Id*. § 10-1.4(c) (commentary) at 43-44. The ABA commentary goes on: "If the court finds that unsecured bond is not sufficient, it may require the defendant to post bail; however, the bail amount must be within the financial reach of the defendant and should not be at an amount greater than necessary to assure the defendant's appearance in court." *Id*. at 44.

condemn the use of generic monetary schedules. *See* NAPSA, Standards on Pretrial Release (3rd ed. 2004) at § 2.5(f).[11]

The ABA Standards are viewed as authoritative in a variety of contexts,[12] and they are seen as the seminal text reflecting best practices by the leading commentators on post-arrest procedures. *See* Department of Justice, National Institute of Corrections, *Fundamentals of Bail* 75(2014) (discussing the importance

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[11] Available at http://www.napsa.org/publications/2004napsastandards.pdf. The NAPSA Standards provide:

> Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the risk of the defendant's failure to appear for court proceedings, and should *never be set by reference to a predetermined schedule of amounts based solely on the nature of the charge*.

Id. at § 2.5 (f). The Commentary to the NAPSA Standards further explains:

> Some jurisdictions have historically used a "bail schedule" that establishes set bond amounts for various charge categories and excludes consideration of other factors that may be far more relevant to the risk of nonappearance. The practice of using a bail schedule easily leads to detention for those too poor to post the bail amount and to the release of others for whom the amount is relatively nominal and thus creates no incentive to return to court.

[12] *See, e.g., Strickland v. Washington*, 466 U.S. 668, 688 (1984) (relying on the ABA Standards to ascertain "prevailing norms of practice"). As Chief Justice Burger explained when discussing an earlier version of the ABA Standards, the ABA Standards constitute "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." Warren E. Burger, *The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974).

of the ABA Standards and their rejection of standardized financial conditions of release after arrest). These Standards, which include detailed treatment of all relevant policies and procedures necessary for creating a lawful and effective post-arrest release system, have been a model for numerous jurisdictions around the country to eliminate the antiquated and unlawful practice of detention based on small amounts of money.

The Constitution guarantees that the poor will not face a different criminal legal system than the system faced by wealthier people. Because the Plaintiff and the similarly situated impoverished arrestees that he represents are being held based solely on their inability to pay the generic amount of money set by the schedule used by the City of Calhoun, they are highly likely to prevail on the merits of their constitutional claim.

II. MR. WALKER AND CLASS MEMBERS WILL SUFFER IRREPARABLE HARM IF THIS COURT DOES NOT ISSUE AN INJUNCTION.

Without intervention from this Court, Mr. Walker and the class of similarly situated people that he represents will continue to suffer the serious and irreparable harm of being jailed. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001);

Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). Even one additional night in jail is a harm to a person that cannot be later undone. *See, e.g.*, *United States v. Bogle*, 855 F.2d 707, 710–711 (11th Cir. 1988) (holding that the "unnecessary deprivation of liberty clearly constitutes irreparable harm"); *Wanatee v. Ault*, 120 F.Supp.2d 784, 789 (N.D. Iowa 2000) ("[U]nconstitutional incarceration generally constitutes irreparable harm to the person in such custody."); *SEC v. Bankers Alliance Corp.*, 1995 WL 317586, *3 (D.D.C. 1995) ("As for the question of irreparable harm in the absence of a stay, clearly Mr. Lee will be harmed by being incarcerated."); *Lake v. Speziale*, 580 F. Supp. 1318, 1335 (D. Conn. 1984) (granting preliminary injunction requiring court to inform child support debtors of their right to counsel because unlawful incarceration would be irreparable harm); *Cobb v. Green*, 574 F.Supp. 256, 262 (W.D. Mich. 1983) ("There is no adequate remedy at law for a deprivation of one's physical liberty. Thus the Court finds the harm asserted by Plaintiff is substantial and irreparable.").[13]

[13] Each jailing also carries with it numerous other indignities for each class member, including intrusive body searches and cramped, crowded, and unsanitary living conditions.

Moreover, even a few days in jail can have devastating consequences in a person's life, such as the loss of a job or the inability to arrange safe alternate care for minor children. It also exposes arrestees to the risk of unsanitary conditions, infection, and other medical and safety emergencies prevalent in jails.[14] Forcing people to risk all of these additional harms because they cannot raise several hundred dollars to avoid them would only further contribute to the unnecessary and irreparable harm visited on Mr. Walker and other class members in this case.

The result of the City's current policies is that the pretrial detainees jailed by the City are those too poor to pay the required bond amounts. Mr. Walker and other class members are therefore confined in jail solely because they do not have enough money to buy their release. Mr. Walker asks this Court to enjoin the City, pending a final resolution of this case on the merits, from keeping him and others in jail because they cannot afford to pay cash up front to secure their release.

III. AN INJUNCTION WILL SERVE THE PUBLIC INTEREST AND WILL NOT HARM DEFENDANT.

As numerous courts have emphasized, "It is always in the public interest to prevent the violation of a party's constitutional rights." *Simms v. District of*

[14] *See, e.g.*, Bureau of Justice Statistics, Sexual Victimization In Prisons And Jails Reported By Inmates, 2011-12-Update, *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4654 (finding that 3.2% of jail inmates reported being sexually abused during their current stay in jail).

Columbia, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (quoting and citing cases). Overwhelming federal precedent treats the amelioration of constitutional violations to be in the public interest. *See Giovani Carandola v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("[W]e agree with the district court that upholding constitutional rights surely serves the public interest."); *G & V Lounge v. Michigan Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Freedberg v. United States Dept. of Justice*, 703 F. Supp. 107, 111 (D.D.C. 1988) ("[I]t is in the public interest to uphold a constitutionally guaranteed right." (quotations and citation omitted); *see also, e.g., Wiley Mission v. New Jersey, Dep't of Cmty. Affairs*, 2011 U.S. Dist. LEXIS 96473, at * 59 (D.N.J. Aug. 25, 2011) (granting permanent injunction against state agency in part because "requiring the Department to abide by the Constitution serves the public interest"); *Glatts v. Superintendent Lockett*, 2011 U.S. Dist. LEXIS 1910, at *18-19 (W.D. Pa. 2011) ("[H]aving a State's employees follow the Federal Constitution is also in the public interest.").

An injunction will not harm the City. The City already offers release to every misdemeanor arrestee—but only if they can pay for it. At worst, the City would be required to do what other cities and counties in Georgia and throughout

the country do every day: release both rich and poor after arrest instead of requiring the poor to sit in jail only because they cannot afford to purchase their release.

Indeed, continuing to keep impoverished arrestees in jail cells because of their poverty has significant negative consequences for the public interest. The overwhelming consensus of experts is that the City will be safer by ceasing needlessly to detain the poor. In the past twenty years, law enforcement officials and researchers have learned even more about the negative effects of post-arrest poverty custody. The National Institute of Corrections at the Department of Justice (DOJ) has led the way in highlighting both the unequal nature of generic bail schedules and their negative impacts on community safety. *See* United States Department of Justice, National Institute of Corrections, *Fundamentals of Bail*, at 28-29 (2014).[15] There is overwhelming evidence that keeping indigent people in

[15] *See also, e.g.*, Arnold Foundation, *The Hidden Costs of Pretrial Detention* (2013) at 3, *available at*: http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_hidden-costs_FNL.pdf (studying 153,407 defendants and finding that "when held 2-3 days, low risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours"); Arnold Foundation, *Pretrial Criminal Justice Research Summary* (2013) at 5, *available at*: http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf (finding that "low-risk defendants held 2-3 days were 17 percent more likely to commit another crime within two years" and that those detained "4-7 days yielded a 35 percent increase in re-offense rates.").

jail—even for a few days after an arrest—has terrible consequences. First, it is enormously expensive to house people in jail.[16] Second, jailing the poor can devastate lives by disrupting stable employment and child custody arrangements. Third, even just 72 hours in jail after an arrest leads to worse outcomes for all involved by increasing poverty, hurting an arrestee's family, and making it more likely that an arrestee will recidivate.[17] *See* DOJ, National Institute of Corrections, at 24-29;[18] *see also, e.g.*, Int'l Ass'n of Chiefs of Police, Resolution (October

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[16] *See* The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration, Vera Institute of Justice (May 2015), available at http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/05/The-Price-of-Jails-report.pdf (explaining that even the reported costs of approximately $50 to $570 per inmate per day in custody at local jails around the country was a significant underestimate of the cost to local jurisdictions of incarceration in local jails).

[17] For all of these reasons, as well as the issues of fundamental fairness that render pretrial poverty-based custody unconstitutional, opposition to the routine use of generic bail schedules has been incorporated into the policy positions of the major American law enforcement stakeholders. *See, e.g.*, National Sheriff's Association, Resolution 2012-6 ("[A] justice system relying heavily on financial conditions of release at the pretrial stage is inconsistent with a fair and efficient justice system.").

[18] A*vailable at*, http://static.nicic.gov/UserShared/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf. Summarizing the current state of research, the DOJ report, *id.* at 29, concluded:

> [R]esearchers found that low- and moderate-risk defendants held only 2 to 3 days were more likely to commit crimes and fail to appear for court before trial than similar defendants held 24 hours or less. As the time in jail increased, the researchers found, the likelihood of defendant misbehavior also increased. The study also found similar correlations between pretrial detention and long-term recidivism,

2014), 121st Annual Congress at 15-16 ("[D]efendants rated low risk and detained pretrial for longer than one day before their pretrial release are more likely to commit a new crime once they are released, demonstrating that length of time until pretrial release has a direct impact on public safety.").[19]

IV. THE COURT SHOULD USE ITS DISCRETION NOT TO REQUIRE THE POSTING OF SECURITY.

Federal Rule of Civil Procedure 65(c) provides that a district court may require the moving party to post security to protect the other party from any financial harm likely to be caused by a temporary injunction if that party is later found to have been wrongfully enjoined. Rule 65(c), however, "vest[s] broad discretion in the district court to determine the appropriate amount of an injunction bond," *DSE v. United States*, 169 F.3d 21, 33 (D.C. Cir. 1999), including the discretion to require no bond at all, *Steward v. West*, 449 F.2d 324, 325 (5th Cir. 1971) (finding that no injunction bond need be posted when "it is very unlikely that the defendant will suffer any harm"); *RoDa Drilling v. Siegal*, 552 F.3d 1203,

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> especially for lower risk defendants. In a field of paradoxes, the idea that a judge setting a condition of bail intending to protect public safety might be unwittingly increasing the danger to the public—both short and long-term—is cause for radically rethinking the way we administer bail.

[19] *Available at* http://www.theiacp.org/Portals/0/documents/pdfs/2014Resolutions.pdf.

1215 (10th Cir. 2009) ("[T]rial courts have wide discretion under Rule 65(c) in determining whether to require security . . . ."); *Donohue v. Mangano*, 886 F. Supp. 2d 126, 163 (E.D.N.Y. 2012) ("[A] district court has wide discretion to dispense with the bond requirement of Fed.R.Civ.P. 65(c) where there has been no proof of likelihood of harm . . . ."); *Council on American-Islamic Rels. v. Gaubatz*, 667 F. Supp. 2d 67, 81 (D.D.C. 2009) (same). The Court should use its considerable discretion to find that no security or nominal security of $1 is required in this case for three reasons.

First, the likelihood of Defendants suffering any harm from an improperly issued injunction requiring the City to comply with federal law is almost non-existent. *See, e.g.*, *Gaubatz*, 667 F. Supp. 2d at 81 (requiring no bond where the defendant would not be substantially injured by the issuance of an injunction); 11A Charles A. Wright, Arthur R. Miller, et al., Federal Practice and Procedure § 2954 (2d ed.) ("[T]he court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant."). Indeed, the limited injunction sought in this Motion would not eliminate the City's ability to release Mr. Walker or other future arrestees on a signature bond. The City may issue the same bond to Mr. Walker and other arrestees and charge them the same amount of

money should they fail to appear in court. Thus, no financial harm would result from this preliminary injunction.

Second, Mr. Walker and other Class members are indigent, and the very reason for bringing this case is their lack of financial resources. *See, e.g.*, *Mitchell v. City of Montgomery*, 14-cv-186-MEF, Doc. 18 at 3, (May 1, 2014) (issuing preliminary injunction without requiring a bond for indigent plaintiffs because they were likely to succeed on the merits and because the City was unlikely to suffer significant financial harm); *Swanson v. Univ. of Hawaii Prof. Assembly*, 269 F. Supp. 2d 1252, 1261 (D. Haw. 2003) (waiving the security requirement for public employees based on ability to pay and also because the injunction sought enforcement of constitutional rights); *Johnson v. Bd. of Police Comm'rs*, 351 F. Supp. 2d 929, 952 (E.D. Mo. 2004) (requiring no bond for homeless plaintiffs); *Wayne Chem. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977) (requiring no bond for indigent person); *Bass v. Richardson*, 338 F. Supp. 478, 490 (S.D.N.Y.1971) ("It is clear to us that indigents, suing individually or as class plaintiffs, ordinarily should not be required to post a bond under Rule 65(c)."); *see also* 11A Wright & Miller § 2954 (courts can waive the bond requirement in cases involving poor plaintiffs).

Finally, Mr. Walker is overwhelmingly likely to succeed on the merits. The outcome of any future trial, if necessary, is likely to reaffirm the basic principles that have been repeatedly applied by the Supreme Court and the Eleventh Circuit.[20]

CONCLUSION

This case is about the City of Calhoun jailing some of its poorest people because of their inability to pay a small amount of money. For the reasons stated above, the Court should grant Maurice Walker's motion for emergency injunctive relief and enjoin the City from keeping Mr. Walker and those similarly situated in jail without offering release on unsecured bond or recognizance.

Respectfully submitted,

/s/ Sarah Geraghty
Sarah Geraghty

[20] Although Plaintiffs seek class certification, this Court need not formally certify a class in order to issue preliminary injunctive relief. *See* Newberg on Class Actions § 24:83 (4th ed. 2002) ("The absence of formal certification is no barrier to classwide preliminary injunctive relief."); Moore's Federal Practice § 23.50, at 23-396, 23-397 (2d ed.1990) ("Prior to the Court's determination whether plaintiffs can maintain a class action, the Court should treat the action as a class suit."); *see, e.g.*, *Lee v. Orr*, 2013 WL 6490577 at *2 (N.D. Ill. 2013) ("The lack of formal class certification does not create an obstacle to classwide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons."); *N.Y. State Nat. Org. For Women v. Terry*, 697 F. Supp. 1324, 1336 (S.D.N.Y.1988); *Illinois League of Advocates for the Developmentally, Disabled v. Illinois Dep't of Human Servs*., 2013 WL 3287145 at *4 (N.D. Ill. 2013).

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[21] Pending admission *pro hac vice*.

[22] Counsel hereby certifies that this document has been prepared in compliance with Local Rule 5.1C using 14-point Times New Roman font.