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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13894
[Filed July 29, 2022]

RAY CHARLES SCHULTZ, et al.,
Plaintiffs,

BRADLEY HESTER,
Plaintiff-Appellee,

versus

STATE OF ALABAMA, et al.,
Defendants,

MATTHEW GENTRY, Sheriff of Cullman County, Alabama, in official and individual capacity,
AMY BLACK, in her official capacity as a Magistrate,
LISA MCSWAIN, in her official capacity as a Magistrate,
JUDGE J. CHAD FLOYD, JUDGE RUSTY TURNER,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 5:17-cv-00270-MHH

OPINION OF THE COURT

Before ROSENBAUM, LAGOA, and ANDERSON, Circuit Judges.

LAGOA, Circuit Judge:

Cullman County, Alabama, maintains a bail system that, until recently, was commonplace throughout the country. When arrested, the accused is assessed an amount of bail based on a bail schedule. Those who can pay the amount are immediately released. Those who cannot afford to post bail, however, are detained for a short time period until they can appear at a bail hearing. At that bail hearing, the arrestee must prove his inability to post bail and show that he is not a flight risk or a danger to the community in order to secure his release.

Today, we are asked to assess the constitutionality of this ubiquitous system. Bradley Hester, on behalf of a class of similarly situated pretrial detainees, argues that the bail system is unconstitutional because it discriminates against the indigent, both by absolutely depriving them of pretrial release and by depriving them of due process at their bail hearings. In the district court, Hester moved for a preliminary injunction on both grounds. The district court agreed with his position and enjoined the Sheriff of Cullman County from continuing to operate its bail system as written, essentially guaranteeing indigent arrestees immediate pretrial release. This appeal followed.

I. FACTUAL AND PROCEDURAL HISTORY

The factual background of this case is long and complicated. When Hester was first arrested and detained, Cullman County maintained a bail system that is no longer in effect. On March 26, 2018—after Hester filed his complaint but before the district court issued its preliminary injunction—Cullman County adopted a new bail system, as memorialized in what we will refer to as the "Standing Bail Order." The Standing Bail Order is the bail system at issue in this case.

We will thus summarize the facts in four parts. *First*, we describe the relevant provisions of Alabama law at issue. *Second*, we describe Cullman County's prior bail system—i.e., the bail system in place before March 26, 2018. *Third*, we detail the changes Cullman County made to its bail system upon the issuance of the Standing Bail Order. *Fourth*, we summarize Hester's arrest and the resulting procedural history of this case.

Under Alabama law, all arrestees not charged with capital murder have the statutory right to bail. *See* Ala. Code §§ 15-13-106 to -108. The purposes of setting bail are obvious: getting defendants to appear for court proceedings and ensuring public safety. *See* Ala. R. Crim. P. 7.2(a) (noting that conditions of pretrial release should "reasonably assure the defendant's appearance" at court proceedings and protect "the public at large" from "real and present danger").

Alabama Rule of Criminal Procedure 7.2(a) establishes the framework for the right to bail and specifies the factors to be considered when conducting an individualized bail determination:

> Rule 7.2. Right to release on one's personal recognizance or on bond.
>
> (a) **Before Conviction.** Any defendant charged with an offense bailable as a matter of right may be released pending or during trial on his or her personal recognizance or on an appearance bond unless the court or magistrate determines that such a release will not reasonably assure the defendant's appearance as required, or that the defendant's being at large will pose a real and present danger to others or to the public at large. If such a determination is made, the court may impose the least onerous

condition or conditions contained in Rule 7.3(b) that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large. In making such a determination, the court may take into account the following:

1. The age, background and family ties, relationships and circumstances of the defendant.

2. The defendant's reputation, character, and health.

3. The defendant's prior criminal record, including prior releases on recognizance or on secured appearance bonds, and other pending cases.

4. The identity of responsible members of the community who will vouch for the defendant's reliability.

5. Violence or lack of violence in the alleged commission of the offense.

6. The nature of the offense charged, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance.

7. The type of weapon used, e.g., knife, pistol, shotgun, sawed-off shotgun.

8. Threats made against victims and/or witnesses.

9. The value of property taken during the alleged commission of the offense.

> 10. Whether the property allegedly taken was recovered or not; damage or lack of damage to property allegedly taken.
>
> 11. Residence of the defendant, including consideration of real property ownership, and length of residence in his or her place of domicile.
>
> 12. In cases where the defendant is charged with a drug offense, evidence of selling or pusher activity should indicate a substantial increase in the amount of bond.
>
> 13. Consideration of the defendant's employment status and history, the location of defendant's employment, e.g., whether employed in the county where the alleged offense occurred, and the defendant's financial condition.
>
> 14. Any enhancement statutes related to the charged offense.

Ala R. Crim. P. 7.2(a).

Individuals in Cullman County can be arrested in one of two ways—pursuant to a warrant or pursuant to a warrantless probable cause arrest. For individuals arrested pursuant to a warrant issued by one of the County's magistrate judges, those judges set the initial bail amount in the warrant. For individuals arrested without a warrant, the Cullman County Sheriff's Office sets the initial bail amount. In Cullman County, both before and after the Standing Bail Order went into effect, bail was initially assessed under a Master Bail Schedule that matched an amount of bail with a particular criminal offense.

Because many individuals do not have liquid assets in an amount sufficient to satisfy the bail schedule, Cullman County also has a bonding process that allows arrestees to post bail. Arrestees can post either property bonds or surety bonds to make bail. In the case of property bonds, the arrestee posts either real or chattel property as collateral for his bail. With surety bonds, the arrestee contacts a bonding company and works out an arrangement by which he pays a fee or percentage of his bail to the bonding company, which then posts bail in the full amount.

Before March 26, 2018, the Cullman County bail schedule matched specific criminal offenses with a range of bail that could be assessed. When an individual was arrested without a warrant, the Sheriff's Office would set bail under that schedule based on the crime charged. Those individuals who could post bail through a secured bond were immediately released, while those who could not afford to post bail were detained until a magistrate judge could conduct an initial appearance. At that initial appearance, the magistrate judge would explain the basis of the bail amount set but was not permitted to evaluate the bail amount or determine whether it exceeded the amount necessary to satisfy the purposes of bail. After that bail hearing, an arrestee could move to have his bail amount reconsidered, which would then be heard by a district judge in Cullman County.

The parties disputed the efficacy of this now-defunct bail system. According to Alacourt—Alabama's electronic court monitoring system—around 34% of arrestees in February 2018 could not secure their release by posting bond within seventy-two hours of arrest. And of that group, Alacourt explained that a substantial percentage did not receive their initial ap-

pearance within the seventy-two hours prescribed by Alabama law. The Defendants, however, contended that Alacourt did not contain all relevant information and sometimes experienced substantial lag time in updating. According to them, the number of February 2018 arrestees who were released without the need of an initial appearance was 76%. But, according to the Defendants, a number of arrestees who ultimately did not post bond were ineligible for release anyway due to either a new probable cause arrest or a warrant for failure to appear.

On March 26, 2018, the presiding circuit judge of Cullman County issued a new "Standing Order Regarding Pre-Trial Appearance and the Setting of Bond." This Standing Bail Order set new policies for the County, including providing a new bail schedule that specified specific bail amounts (rather than a range) for specific crimes. Some bail amounts were also lower than in the previous system.

The Standing Bail Order prescribed new procedures for administering bail. As with the previous system, arrestees who could afford to pay the bail amount imposed upon arrest would be immediately released—usually within ninety minutes or so of arriving at the Sheriff's Office. But if the Sheriff believed that the amount in the bail schedule was insufficient for serving the purposes of bail—i.e., if the Sheriff believed that the arrestee posed a risk of flight or danger to the community that did not match the amount of bail prescribed by the schedule—the Standing Bail Order allowed the Sheriff to submit a "Bail Request Form." If such a form was submitted, the arrestee—regardless of ability to pay—would be held by the Sheriff's Office until a magistrate judge could hold an initial appearance, at which time the magistrate judge would conduct an

individualized determination of the conditions and release, and either grant the Sheriff's bail request (setting an amount higher than prescribed in the schedule) or deny the bail request (and thus fall back on the amount prescribed in the schedule). The Standing Bail Order requires that such a hearing will take place within seventy-two hours of arrest. If the hearing does not take place within seventy-two hours, the Standing Bail Order guarantees the arrestee release upon posting bail in the initial amount prescribed by the bail schedule.

Under the Standing Bail Order, indigent arrestees—those who cannot afford to post bail—receive similar treatment to arrestees for whom the Sheriff submits a bail request. After arrest, the Standing Bail Order guarantees them an initial appearance and bail hearing within seventy-two hours. At the initial appearance, a judge determines the terms of pretrial release. Before that initial appearance, the Standing Bail Order requires indigent arrestees to complete two forms: an "Affidavit of Substantial Hardship," and a "Release Questionnaire." In the Release Questionnaire, the arrestee can provide information about his residence, employment, family situation, health, and criminal history for the purpose of ascertaining information that might be relevant to a pre-trial release. It also asks for the contact information of his nearest living relatives and of people in the community, who may vouch for his character. In the Hardship Affidavit, the arrestee can provide information about his employment, assistance benefits, income, expenses, and assets to have a public defender appointed.

At the indigent arrestee's initial appearance, the court sets the terms of the arrestee's pretrial release. The judge ensures that the defendant is aware of the charges against him and reviews his paperwork to de-

termine whether he is indigent, as contemplated by the Alabama Rules of Criminal Procedure. *See* Ala. R. Crim. P. 7.2(a). The Standing Bail Order makes clear that the judge must impose the least onerous condition that will assure the purposes of bail are satisfied:

> The Court will not require a defendant to post a secured appearance bond that the defendant cannot afford to post, or a secured appearance bond in an amount less than that contained in the bond schedule that the defendant can afford to post, if there is a less onerous condition that would assure the defendant's appearance or minimize risk to the public.

The Standing Bail Order, however, does not guarantee an indigent arrestee release upon a showing of indigency. If the court determines at the initial appearance that releasing the indigent defendant on his own recognizance or on an unsecured appearance bond will not satisfy the purposes of bail—i.e., will not guarantee his appearance at trial or safeguard the public—the court may require the posting of a secured appearance bond even if the indigent arrestee cannot afford it. If the court determines that a secured appearance bond is necessary, it must detail its findings in a written order. If the defendant wants to have his bail amount reconsidered, he may file a motion with the court.

This new system had only been in place for sixteen days when the district court held the preliminary injunction hearing. As a result, there was almost no evidence presented regarding how the system had been implemented. Nevertheless, the district court concluded that: (1) the Sheriff's Office was rarely making bail requests; (2) one individual was arrested on April 8, 2018, and was released on April 13, 2018, after posting a

property bond; (3) judges were not fastidiously filling out their written findings of fact; and most importantly, (4) it was "not unusual for a judge to set bond for an indigent defendant in an amount the defendant cannot afford."

This lawsuit was first filed in February 2017—*before* the adoption of the Standing Bail Order—by a group of plaintiffs that are no longer a part of this case. Hester, the appellant here, did not move to intervene until August 1, 2017. He filed his intervenor complaint on March 9, 2018—about two weeks before the Standing Bail Order was adopted.

In his intervenor complaint, Hester alleges that he was arrested on August 27, 2017, for possession of drug paraphernalia. Because he could not afford to post the $1,000 bond required by the now-defunct bail schedule, he was held for two days before a magistrate judge could conduct an initial appearance. At that initial appearance, the magistrate judge explained to Hester the charge levied against him and how he could secure his pretrial release. But because he could not afford to post bond, Hester remained detained.

Hester sued six Defendants in his complaint: Matt Gentry—the Sheriff of Cullman County; Lisa McSwain—the Circuit Clerk of Cullman County; Joan White and Amy Black—magistrate judges; and Kim Chaney and Rusty Turner—district judges. He brought three 42 U.S.C. § 1983 claims: a wealth discrimination claim, a substantive due process claim, and a procedural due process claim. In essence, Hester alleged that the now-defunct bail system in Cullman County was unconstitutional because it guaranteed immediate pre-trial release to wealthy arrestees but imposed almost automatic detention orders on indigent arrestees.

On March 12, 2018, three days after filing his complaint, Hester moved for a preliminary injunction on his wealth-discrimination claim and his procedural due process claim. On March 26, 2018, as previously discussed, Cullman County instituted a new bail system as memorialized in the Standing Bail Order. Two days after that, Sheriff Gentry moved to dismiss Hester's complaint, in which he argued that he was not the proper party under § 1983 and *Ex parte Young*, 209 U.S. 123 (1908), because he was not responsible for the bail policies at issue and, as a result, Hester could not trace his injury to Sheriff Gentry's actions.

Sixteen days after the Standing Bail Order was implemented, the district court held a hearing on Hester's motion for a preliminary injunction. At some point between the filing of his complaint and the injunction hearing—although we do not know precisely on what date—Hester was released from jail. And five months later, on September 4, 2018, the district court issued its written order, concluding that Cullman County's new bail system unconstitutionally discriminated against the indigent by absolutely depriving them of immediate pretrial release and by denying them procedural due process at their bail hearings. The next day, the district court denied Sheriff Gentry's motion to dismiss.

On September 13, 2018, the district court entered a formal preliminary injunction order specifying the procedures that Cullman County would have to follow going forward in order to bring its bail system in compliance with the Constitution. Those procedures were detailed and expansive. The district court ordered the Sheriff's Office to immediately release all criminal defendants from pretrial confinement unless it was prepared to submit a bail request for that defendant. If the Sheriff's Office submitted such a request, then the

Sheriff was obligated to inform the defendant—both orally and in writing—that a judge would have to find, by clear and convincing evidence at an initial appearance, that he was a "significant risk of flight or danger to the community." Despite the fact that the County Defendants testified that they would be unable to hold initial appearances within forty-eight hours, the district court also ordered the Sheriff to immediately release all criminal defendants if they did not receive an initial appearance within that period. If the Sheriff submitted a bail request, the formal order also required the Sheriff to draft a new questionnaire to submit to criminal defendants that would elicit further information regarding flight risk and danger to the community. It also ordered the Sheriff to either provide criminal defendants with liaison deputies, who would assist criminal defendants in filling out this questionnaire, or inform the judge conducting the initial appearance that the defendant could not complete the questionnaire without assistance. And the formal order required the Sheriff to provide criminal defendants with an affidavit form in which the criminal defendants could provide information about their financial means. Importantly, the district court ordered nothing relating to the Judicial Defendants in this case—i.e., the other defendants named in Hester's complaint—each of the injunction's terms were directed only at the Sheriff's Office.

Sheriff Gentry immediately appealed the district court's orders denying his motion to dismiss and issuing the preliminary injunction. The remaining Judicial Defendants also filed a notice of appeal, directed only at the preliminary injunction orders. After initiating his appeal, however, Sheriff Gentry failed to file an appendix within the time required and, as a result, we dismissed his appeal for failure to prosecute, under this

Court's Rule 42-1, on January 7, 2019. Following that dismissal, the appeal proceeded only as between Hester and the Judicial Defendants. On January 30, 2019, however, Hester moved to dismiss the Judicial Defendants' appeal for lack of appellate jurisdiction, arguing that, because the injunction bound only the Sheriff, they had no interest in the appeal. After that motion was filed, we reinstated Sheriff Gentry's appeal. We then carried the motion to dismiss with the case.

All in all, we have three issues to address in this appeal: the district court's denial of Sheriff Gentry's motion to dismiss; the district court's issuance of a preliminary injunction; and Hester's motion to dismiss the Judicial Defendants from this appeal for lack of appellate jurisdiction.

II. STANDARDS OF REVIEW

We review a district court's order granting or denying a preliminary injunction for abuse of discretion. *See Baker v. Buckeye Celulose Corp.*, 856 F.2d 167, 169 (11th Cir. 1988). But we review de novo a district court's determination of the facial constitutionality of a statute. *See Rodriguez ex rel. Rodriguez v. United States*, 169 F.3d 1342, 1346 (11th Cir. 1999).

We review de novo a district court's order denying a state officer's motion to dismiss based on the Eleventh Amendment's grant of sovereign immunity. *See Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999); *Hundertmark v. State of Fla. Dep't of Transp.*, 205 F.3d 1272, 1274 (11th Cir. 2000). Additionally, we have discretion to exercise our pendent appellate jurisdiction over the denial of any motion to dismiss if it is "inextricably intertwined" with an appealable decision or if "review of the former decision [is] necessary to ensure meaningful review of the lat-

ter." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995); *accord Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1365 (11th Cir. 1997).

Finally, we determine our own appellate jurisdiction in the first instance. *Savannah Coll. of Art & Design, Inc. v. Sportswear, Inc.*, 978 F.3d 1347, 1348 (11th Cir. 2020) ("We have inherent jurisdiction to determine our own jurisdiction.").

III. ANALYSIS

Before reaching the merits of the appeal, we have some threshold issues to unpack. The Defendants argued that the district court should abstain from hearing any part of this case under the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). Because a ruling for the Defendants on that issue would moot the rest of the discussion, we will begin there. Next, we will turn to Sheriff Gentry's motion to dismiss—if we determine that we have jurisdiction over that motion on appeal, we will decide whether the district court was correct in denying the motion. After discussing the Sheriff's motion to dismiss, we will move on to the Judicial Defendants' own arguments for dismissal—that they are entitled to absolute judicial immunity for their actions in setting bail. And after disposing of all threshold issues, we will turn to the injunction itself.

A. *Younger* Abstention

The district court was correct not to abstain from hearing this case under *Younger*. *Younger* abstention "restrain[s] courts of equity from interfering with criminal prosecutions." *Id.* at 44. The doctrine is "based not on jurisdiction, but on the principles of equity and comity," and it commands that "absent extraordinary circumstances federal courts should not enjoin pending

state criminal prosecutions." *Hughes v. Atty Gen. of Fla.*, 377 F.3d 1258, 126263 (11th Cir. 2004) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 364 (1989)). Under *Younger*, the "normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." 401 U.S. at 45.

Younger does not apply here because Hester is not asking us to enjoin any prosecution. He merely seeks a faster bail determination, which does not require enjoining or even interfering with any ongoing or imminent state prosecution. *See Walker v. City of Calhoun*, 901 F.3d 1245, 1254 (11th Cir. 2018) ("*Younger* does not readily apply here because Walker is not asking to enjoin any prosecution. Rather, he merely seeks prompt bail determinations for himself and his fellow class members."); *Pugh v. Rainwater*, 483 F.2d 778, 781-82 (5th Cir. 1973)[1] (noting that a federal question whose "resolution … would [only] affect state procedures for handling criminal cases … is not 'against any pending or future court proceedings as such'" (quoting *Fuentes v. Shevin*, 407 U.S. 67, 71 n.3 (1972))), *aff'd in part and rev'd in part sub nom.*, *Gerstein v. Pugh*, 420 U.S. 103 (1975)).

Gerstein is instructive on this point. In that case, a class of Florida detainees sought injunctive relief to receive faster probable cause determinations. 420 U.S. at 106-07. The state argued that *Younger* should have barred the claim. *See id.* at 108 n.9. But the Supreme Court disagreed, making clear that *Younger* did not apply because "[t]he injunction was not directed at the

[1] Opinions issued by the former Fifth Circuit prior to October 1, 1981, are binding precedent in our Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution." *See id.* The same is true here. Because Hester could not have challenged in state court the issues he has raised in this federal action, *Younger* abstention is inappropriate. Thus, the district court was correct to deny the Defendants' requests to abstain from hearing this case.

B. Sheriff Gentry's Motion to Dismiss

The district court was also correct to deny Sheriff Gentry's motion to dismiss. Sheriff Gentry asked the district court to dismiss Hester's complaint against him under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). His motion raised three alternative grounds for dismissal: failure to state a claim, lack of standing, and sovereign immunity. The district court denied the Sheriff's motion in full.

Our precedent makes clear that the only portion of the order over which we have automatic jurisdiction is the ruling on sovereign immunity. "A district court's denial of a motion to dismiss on Eleventh Amendment immunity grounds is appealable immediately." *Summit Med.*, 180 F.3d at 1334.

That is not to say, however, that we may not review the entirety of the order. We may, "within our discretion, exercise jurisdiction over otherwise nonappealable orders under the pendent appellate jurisdiction doctrine." *Id.* at 1335. That doctrine allows a court of appeals to exercise jurisdiction over otherwise nonappealable orders if those orders are "inextricably intertwined" with an appealable decision or if "review of the [nonappealable] decision [is] necessary to ensure

meaningful review of the [appealable decision]." *Swint*, 514 U.S. at 51.

We had occasion to expound on this rule in *Moniz v. City of Fort Lauderdale*, 145 F.3d 1278 (11th Cir. 1998). In *Moniz*, we considered whether the doctrine of pendent appellate jurisdiction allowed us to review a district court's decision on standing in tandem with the district court's decision on qualified immunity.[2] *See id.* at 1281 n.3. We concluded that the standing issue was neither "inextricably intertwined" with nor "necessary to ensure meaningful review" of the immunity issue because we could "resolve the qualified immunity issue in [the] case without reaching the merits of appellants' challenge to Moniz's standing." *Id.* (quoting *Swint*, 514 U.S. at 50-51); *see also Summit Med.*, 180 F.3d at 1335 ("As in Moniz, we may resolve the Eleventh Amendment immunity issue here without reaching the merits of standing.").

In this case, unlike in *Moniz* and *Summit Medical*, Sheriff Gentry is entitled to immediate appellate review of both a denial of his sovereign immunity and the district court's issuance of a permanent injunction. The two remaining issues—the two that are not immediately appealable—are standing and failure to state a claim. But because a litigant requires both in order to obtain a preliminary injunction, we are permitted to exercise our pendent appellate jurisdiction to review the entirety of the district court's order denying Sheriff Gentry's motion to dismiss. Indeed, without standing or a viable legal claim, a litigant is not entitled to a preliminary injunction. Thus, exercising our pendent appellate juris-

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[2] A district court's denial of a motion to dismiss based on qualified immunity, like sovereign immunity, is immediately appealable. *See Summit Med.*, 180 F.3d at 1335 n.9.

diction to review the standing and pleading issues, over which we do not have automatic appellate jurisdiction, is "necessary to ensure meaningful review" of the preliminary injunction.

In the motion to dismiss, Sheriff Gentry—despite nominally raising three different bases for relief—rests his argument on essentially one point: that because he is not the individual responsible for writing Cullman County's bail policy or the individual bail order under the Standing Bail Order, he is not the proper defendant in this case. It is for this reason that Sheriff Gentry argues that he is entitled to sovereign immunity, that Hester fails to state a claim, and that Hester lacks standing. But no matter how the argument is framed, it fails.

First, Sheriff Gentry is not entitled to sovereign immunity. To be sure, the Eleventh Amendment's "fundamental principle of sovereign immunity limits the grant of judicial authority in Art[icle] III." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984). "States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity." *Green v. Mansour*, 474 U.S. 64, 68 (1985). In *Ex parte Young*, however, the Supreme Court created an exception to this general principle by holding that a suit challenging the constitutionality of a state official's action in enforcing state law is *not* a suit against the state. *See* 209 U.S. at 159-60. Instead, the law at issue, if found unconstitutional, is void, and therefore does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States." *Id.* at 160. The Supreme Court also made clear that the way to bring such a suit—the only way to avoid the

shield of sovereign immunity—is to bring a suit for prospective injunctive relief against the official charged with enforcing the law. *See id.* at 155-56, 159. Because a state cannot authorize an official to do something that violates the Constitution, a state official who enforces an unconstitutional action is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.* at 160. Thus, a federal court has authority, under the Constitution, to grant "prospective injunctive relief to prevent a continuing violation of federal law." *Green*, 474 U.S. at 68.

Sovereign immunity, however—as well as the *Ex parte Young* exception to it—generally applies only to *state* officials, not *county* officials. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (noting that the Eleventh Amendment does not apply to "counties and similar municipal corporations"). It extends to county officials only when relief against them would drain the state treasury or the county officials have been enlisted to carry out state policy. *See Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 401 (1979) (noting that the Eleventh Amendment may bar suit against county officials "in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself."). Sheriff Gentry, as the Sheriff of Cullman County, is not acting as a state official. Moreover, it is a *county* policy that we are reviewing, and the only relief sought is injunctive, not monetary. As a result, Sheriff Gentry is not entitled to Eleventh Amendment sovereign immunity in the first instance, and we need not reach the *Ex parte Young* analysis.

Admittedly, at least some portions of Hester's challenge to the bail scheme implicate state law—specifically, the factors to be considered at a bail hearing and the timing within which that hearing must occur. But even if we were to conclude that Sheriff Gentry was thereby enlisted to carry out state policy, he still would not be entitled to sovereign immunity under *Ex parte Young*. As our precedent makes clear:

> Personal action by defendants individually is not a necessary condition of injunctive relief against state officers in their official capacity. All that is required is that the official be responsible for the challenged action. As the *Young* court held, it is sufficient that the state officer sued must, "by virtue of his office, ha[ve] some connection" with the unconstitutional act or conduct complained of.

Luckey v. Harris, 860 F.2d 1012, 1015-16 (11th Cir. 1988) (alteration in original) (quoting *Ex parte Young*, 209 U.S. at 157). And here it is the Sheriff who is tasked with the portions of the Standing Bail Order that are relevant to the injunction—specifically, the directive to continue detaining criminal defendants after forty-eight hours have passed and to provide defendants with certain forms while in custody. He thus has "some connection" with the allegedly unconstitutional act.

Second, Hester has stated a plausible claim for relief against Sheriff Gentry, meaning that the district court rightfully rejected Sheriff Gentry's arguments about plausibility and standing because Sheriff Gentry was properly named as a defendant. In arguing for dismissal on this ground, Sheriff Gentry relies on *ODonnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018), *abrogated by Daves v. Dallas County*, 22 F.4th

522(5th Cir. 2022) (en banc), for support. In that case, the Fifth Circuit concluded that the Sheriff was not the proper defendant in a § 1983 action challenging unconstitutional bail procedures, and that the suit was appropriately brought only against the county judges. *See* 892 F.3d at 155-56.

The problem with Sheriff Gentry's reliance on *ODonnell*[3] is twofold. First, *ODonnell* was concerned with whether the Sheriff was a "policymaker" under § 1983 such that municipal liability could attach to his actions. *See id.* at 156. This case, however, does not seek to impose municipal liability under § 1983. In this respect, this case is more similar to *Pugh v. Rainwater*, 483 F.2d 778 (5th Cir. 1973),[4] in which this Court allowed a constitutional challenge to bail to proceed against eight judges and other state officials including the State Attorney.

Second, the question of whether a state official has been given sufficient authority to be sued under § 1983 is "a question of state law." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). *ODonnell* dealt with a Sheriff's authority under Texas law, while this case concerns Alabama law. In Texas, as the *ODonnell* Court itself noted, the Sheriff "is legally obliged to execute all lawful process and cannot release prisoners

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[3] Following oral argument in this appeal, the *en banc* Fifth Circuit in *Daves* abrogated its decision in *ODonnell*. The *en banc* court, however, did not reach the standing issue as to whether the Sheriff of Dallas County was the proper party, leaving that issue to be considered by the *en banc* court following its limited remand on the *Younger* abstention issue. *See Daves*, 22 F.4th at 545.

[4] Opinions issued by the former Fifth Circuit prior to October 1, 1981, are binding precedent in our Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

committed to jail by a magistrate's warrant." 892 F.3d at 156 (citing Tex. Code Crim. Pro. arts. 2.13, 2.16, 2.18, and Tex. Loc. Gov't Code § 351.041(a)). In Alabama, on the other hand, Cullman County's Standing Bail Order requires the Sheriff to release criminal defendants—regardless of how they were arrested—after a specific time period has passed. *See* Standing Bail Order at 8 ("In the unlikely event that a defendant arrested for a bailable offense cannot obtain release by posting the bond contained in the bond schedule or set in a warrant and cannot be given a hearing to determine conditions of release within 72 hours after arrest, such a defendant *will be released* on an appearance bond in the amount of the minimum bond set in Rule 7.2 at the expiration of the 72-hour period." (emphasis added)).

Additionally, in *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), a group of indigent plaintiffs sought to challenge the lack of effective legal representation in Georgia's state courts. *See id.* at 1013. We allowed the suit to proceed against both the Governor of Georgia and a group of judges in the state—even though none of those defendants "personally" participated in the deprivation of counsel—because each of the defendants had at least "some connection" to the public-defender scheme at issue. *See id.* at 1015-16.

Here, as in *Luckey*, it is immaterial that Sheriff Gentry is not personally responsible for drafting the policy at issue. Because he has the authority, under Cullman County's currently operative bail procedures, to release criminal defendants from jail after a specified amount of time has passed, he has a sufficient connection with the policy for suit to be brought against him. Thus, the district court was right to deny Sheriff Gentry's motion to dismiss. Regardless of whether Sheriff Gentry is a state official (in which case *Ex parte Young*

would allow suit) or whether he is a county official (in which case sovereign immunity does not apply), the Eleventh Amendment does not shield the Sheriff from litigation. And Hester has stated a viable § 1983 claim for violation of his rights under the equal protection and due process clauses. Hester has standing for these claims because his injury—not being promptly released from jail—is traceable to the Sheriff's decision not to promptly release him from jail. Given this level of authority, we have no trouble concluding that Sheriff Gentry is the appropriate defendant here, and we therefore conclude that his arguments for dismissal fail. We thus affirm the district court's denial of the Sheriff's motion to dismiss.

C. Hester's Motion to Dismiss the Judicial Defendants from this Appeal

Finally, we reach the only motion filed directly in this Court: Hester's motion to dismiss the Judicial Defendants from this appeal for lack of appellate jurisdiction. Hester's argument for dismissal—that the Judicial Defendants may not appeal the entry of an injunction because the injunction binds only the Sheriff—is in large part based on an argument that the Judicial Defendants themselves raised in the first instance. In response to Hester's motion for a preliminary injunction, and again in this Court, the Judicial Defendants argued that, as sitting judges, they are entitled to judicial immunity for their actions. And because, according to them, at least, the injunction has the practical effect of binding their actions and is enforceable against them through contempt, they argue that this Court has appellate jurisdiction over their appeal and should reverse the injunction based on their judicial immunity.

Hester raises the inverse of this argument in his motion to dismiss before this Court. Here, he argues that the Judicial Defendants may not even appeal the injunction because no part of the injunction is directed at them, and, as such, this Court lacks appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

For an order to be appealable under § 1292(a)(1), it must be a clear and understandable directive from the district court, it must be enforceable through contempt proceedings if the directive is disobeyed, and it must give some or all of the substantive relief sought in the complaint. *See Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1128 (11th Cir. 2005); *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1358 (11th Cir. 2008). But to appeal an order granting or dissolving a preliminary injunction, "[l]itigants must establish their standing not only to bring claims, but also to appeal judgments." *Wolf v. Cash 4 Titles*, 351 F.3d 1348, 1353 (11th Cir. 2003). A litigant may appeal only if he is aggrieved by the decision. *Id.* at 1354. Thus, parties may lack standing to appeal trial court rulings that do not affect their interests. *Id.*

The Judicial Defendants, in an attempt to establish their standing to bring this appeal, make three arguments in support of appellate jurisdiction. They say that: (1) the injunction has the "practical effect" of enjoining them; (2) even if the injunction does not directly bind them, it is still enforceable against them through contempt; and (3) even if the first two arguments fail, this Court may exercise "pendent party appellate jurisdiction" to hear their appeal.

Each of these arguments lacks merit. There is little question here that the injunction, by its very terms, does not require the Judicial Defendants to do any-

thing, and that the injunction could not be enforceable against the Judicial Defendants through contempt. Moreover, this Court does not exercise pendent party appellate jurisdiction.

The Judicial Defendants first argue that the injunction, despite binding only the Sheriff, has the "practical effect" of enjoining them as well. They cite *Sierra Club* as support for this argument. But in that case, we were concerned with an altogether different question: whether an order that we unquestionably had appellate jurisdiction over was only a merits ruling or was also an injunction. *See* 526 F.3d at 1358-59 ("Sierra Club points to the district court's express declaration that it was not issuing an injunction, but we conclude this is an instance where substance should control over form. The district court issued commands of such specificity and breadth that no litigant would dare violate them. If the Miners had violated the commands, the district court could have initiated contempt proceedings, and it is not clear to us that the court would accept 'But you said it wasn't an injunction' as a defense." (citation omitted)). *Sierra Club* said nothing about the issue raised here: whether an injunction directed at one defendant is appealable by some other defendant.

And we also note that the injunction does not have the effect—practically or otherwise—of binding their actions. Nothing in the injunction prevents the Judicial Defendants from taking any action they wish. It orders the *Sheriff* to provide notice to arrestees, prevents the *Sheriff* from continuing to hold arrestees after forty-eight hours, and orders the *Sheriff* to deliver forms to the Clerk of Court. No part of this injunction requires anything of the Judicial Defendants. If they wish to continue scheduling bail hearings more than forty-eight hours after arrest, they may continue to do so. If they

wish to ignore the information that the Sheriff provides them, they may do that as well. No part of the injunction requires them to modify their actions in any way.

For this same reason, the Judicial Defendants' argument that the injunction is enforceable against them through contempt—as required for appellate jurisdiction—fails. It is true that a district court may hold in contempt any entity who acts in concert with an enjoined party to assist in violating the injunction. *See* Fed. R. Civ. P. 65. But even if the Judicial Defendants *order* the Sheriff to disobey the federal court's injunction, or jail him for failing to do so, they would not themselves be participating in the violation of the injunction.

Under the Supremacy Clause, the federal Constitution is the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. If faced between the decision to obey federal law, as memorialized in the injunction, and state law, as memorialized in whatever order the Judicial Defendants issue, the choice is easy: the Sheriff must follow the injunction. As such, if and when the Sheriff chooses to obey state law over federal law, it will be his—and only his—violation of the injunction. The Judicial Defendants cite no case to the contrary. And our conclusion that the district court may not use its contempt power over the Judicial Defendants is bolstered by the fact that this is not a question we answer on a blank slate: the district court has already made clear, in a written order, that it will not use its contempt power against the Judicial Defendants if they choose to continue their current bail-setting practices. Specifically, the district court in its written order concluded that "[b]ecause the preliminary injunction does not direct the conduct of the judicial defendants in any manner and because this [c]ourt has no contempt power over

the judicial defendants under the injunction, the judicial defendants are unlikely to succeed in their procedural effort to present their substantive arguments." Thus, under the law-of-the-case doctrine, the issue has been decided. *See This That & the Other Gift & Tobacco, Inc. v. Cobb County*, 439 F.3d 1275, 1283 (11th Cir. 2006) (noting that "the law-of-the-case doctrine bars relitigation of issues that were decided either explicitly or by necessary implication").

Finally, the Judicial Defendants' attempt to have their case heard based on the doctrine of pendent party appellate jurisdiction is a nonstarter as this Court does not recognize that doctrine. *See Swint v. City of Wadley*, 51 F.3d 988, 1002 (11th Cir. 1995) ("There is no pendent party appellate jurisdiction."); *see also Haney v. City of Cumming*, 69 F.3d 1098, 1102 (11th Cir. 1995).

In short, because the injunction at issue on appeal: (1) does not bind the Judicial Defendants on its face or in practice; (2) is not enforceable against the Judicial Defendants through contempt; and (3) because no other basis exists to exercise jurisdiction, the Judicial Defendants' appeal must be dismissed. And because they will be excused from this lawsuit, we will not reach their arguments related to judicial immunity. Those questions may be answered only when properly presented.

D. The Preliminary Injunction

Having concluded that Sheriff Gentry is the appropriate Appellant and that the district court was right not to abstain from hearing the case under *Younger*, we now turn to the merits of the appeal—the injunction.

In its written order, the district court found that Cullman County's bail system violated both the Equal

Protection and Due Process Clauses of the Fourteenth Amendment. The district court concluded that the bail system impermissibly discriminated against the indigent by absolutely depriving them of pretrial release and by denying them procedural due process at their bail hearings.

Our first task is to properly construe the nature of Hester's challenge to the bail system. At oral argument, the parties disputed whether Hester was bringing a facial challenge to the bail system or an as-applied challenge to the bail system, especially as the district court never made clear in its order whether it was construing the challenge as a facial or an as-applied factual challenge. It is clear, however, that Hester was neither arrested nor imprisoned under Cullman County's current operative bail system. And by the time of the hearing on the preliminary injunction, Hester had been released. As such, Hester cannot trace his injury to the current operative bail system, and thus may not challenge it on an as-applied basis. *Cf. Pugh v. Rainwater*, 572 F.2d 1053, 1058-59 (5th Cir. 1978) (en banc) (reconstruing as-applied challenge to Florida bail rules as facial challenge because Florida had changed the applicable rules during pendency of litigation); *Walker*, 901 F.3d at 1267 n.13 (determining only whether the City of Calhoun's bail scheme is facially unconstitutional because the bail scheme was amended during pendency of litigation).

Moreover, the bail system at issue had only been in place for *sixteen days* before the district court held its preliminary injunction hearing. Indeed, as the district court found in its order: "at the hearing on Mr. Hester's motion, the defendants were able to offer little evidence concerning the implementation of the new policy." And because a factual, as-applied chal-

lenge "asserts that a statute cannot be constitutionally applied in particular circumstances, it necessarily requires the development of a factual record for the court to consider." *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009). This is because an as-applied challenge "addresses whether 'a statute is unconstitutional on the facts of a particular case or to a particular party.'" *Id.* (quoting *Black's Law Dictionary* 223 (7th ed. 1999)).

In this case, both the party—Hester—and the facts of his case are tied to the now-defunct bail scheme in Cullman County, as the new scheme had been in place only for a very short while before the district court ruled on its constitutionality. Construing Hester's challenge as an as-applied challenge to the new bail scheme, given the record before us, would violate core justiciability principles. Hester's lawsuit will succeed only if Cullman County's new scheme is facially unconstitutional—i.e., if Hester can "establish that no set of circumstances exists under which the [bail scheme] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Our dissenting colleague, however, suggests that, based on our determination that Hester cannot trace his injury to the current operative bail system, as he was detained under the pre-Standing Bail Order bail policies that are no longer in effect, we should conclude that Hester lacks standing to raise a challenge against the Standing Bail Order. *See* Dis. Op. at 9-12. But based on our binding precedent in the nearly indistinguishable *Rainwater* and *Walker* cases, we conclude that, as to Hester's facial challenge to the Standing Bail Order, we have jurisdiction because Hester's challenge is not moot.

It is well-established that, to establish standing, a plaintiff must have: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Johnson v. 27th Ave. Caraf, Inc.*, 9 F.4th 1300, 1311 (11th Cir. 2021) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)). We have long held that standing is determined as of the time at which the plaintiff's complaint is filed. *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1340 (11th Cir. 2014); *Focus on the Family v. Pinelas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003); *Sims v. Fla., Dep't of Highway Safety & Motor Vehicles*, 862 F.2d 1449, 1458-59 (11th Cir. 1989). Where a plaintiff establishes standing at the time he filed his complaint but "[w]hen events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give the plaintiff meaningful relief," the question becomes whether the case is moot. *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1217 (11th Cir. 2000); *see also Coral Springs Street Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328 (11th Cir. 2004) ("Mootness can occur due to a change in circumstances, or … a change in the law.").

When Hester moved to intervene and filed a proposed intervenor complaint in the underlying action, Hester alleged that he had suffered an injury in fact, i.e., his detention on a bond that he could not pay due to his indigent status, which he claimed was essentially an automatic detention order. This injury was fairly traceable to the challenged conduct of the Defendants and would have likely been redressed by a favorable judicial decision—a court ruling that Cullman County's former bail policies were unconstitutional and injunc-

tive relief against those policies. Thus, Hester had standing at the time he filed his intervenor motion and proposed intervenor complaint.

The question then becomes whether the Standing Bail Order issued by the presiding circuit judge of Cullman County on March 26, 2018—issued after Hester was granted leave to intervene in the case and while the case was still pending in the district court—renders Hester's challenge moot or prevents him from raising any challenge to the new Standing Bail Order policies. Under our binding precedent in *Rainwater* and *Walker*, we conclude that the case is not moot and that we have jurisdiction to hear Hester's facial challenge to the Standing Bail Order.

For example, in *Rainwater*, during the pendency of the litigation, Florida adopted a new rule of criminal procedure governing bail determinations within the state. *See* 572 F.2d at 1055, 1058. Sitting *en banc*, the former Fifth Circuit noted that, given the new rule, the record before it "reflect[ed] neither [the rule's] interpretation nor application by the courts of Florida," as it contained "only evidence of practices under criminal procedures which predate the adoption of the current Florida rule." *Id.* at 1058. Although the court determined that "[a]s an attack on the Florida procedures which existed as of the time of trial, the case has lost its character as a present, live controversy and is therefore moot," it nonetheless concluded that Florida's new rule, "on its face," did "not suffer such infirmity that its constitutional application is precluded." *Id.* The former Fifth Circuit further emphasized this conclusion: "We hold that the new Florida rule is not facially unconstitutional." *Id.* at 1059. But, as to any as-applied challenges, the court explained that "[f]urther adjudication … should await presentation of a proper record re-

flecting application by" Florida courts. *See id.* at 1058-59.

This case is virtually identical to *Rainwater*. As in *Rainwater*, there has been almost no evidence presented as to the Standing Bail Order, and Hester was not detained under the new bail procedures. And, as in *Rainwater*, as a result of the Standing Bail Order, Hester's challenge to Cullman County's former bail procedures is now moot. Yet the *en banc* former Fifth Circuit ruled on the facial challenge to the new Florida bail procedures; we likewise reach Hester's facial challenge to the Standing Bail Order.

Moreover, while our predecessor court did not expressly discuss standing, its decision in *Rainwater* expressly discussed mootness, which is closely related to the standing doctrine. *See Sims*, 862 F.2d at 1459 (citing *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)) ("Mootness and standing are related doctrines. Where a party challenges standing, the court inquires whether the plaintiff is entitled to relief. Where mootness is at issue, the court determines whether judicial activity remains necessary."). And given its mootness discussion, we disagree with our dissenting colleague that the former Fifth Circuit did not conclude it had jurisdiction to address the facial challenge to the new bail procedures issued during the pendency of that litigation. Thus, under *Rainwater*, Hester has standing to challenge the Standing Bail Order.

Similarly, in *Walker*, the plaintiff was arrested and detained, but could not post bail. 901 F.3d at 1251. While still detained, the plaintiff sued the city, alleging that the city's bail procedures were unconstitutional. *See id.* at 1251-52. The day after filing suit, the plaintiff was released, and while the plaintiff's case was pend-

ing, the city altered the bail policies by issuing a standing bail order. *Id.* at 1252. On appeal, we concluded that the district court abused its discretion in enjoining the standing bail order, reaching the merits of the plaintiff's claim even though he was detained under the city's former bail procedures. *Id.* at 1269, 1272; *accord id.* at 1267 n.13 (stating that the standing bail order facially passed constitutional muster). In so doing, we addressed the city's argument that the standing bail order, if constitutional, rendered the plaintiff's claim moot. *See id.* at 1269-71. Specifically, the city contended that "because a new policy has been promulgated after this litigation began, which supplanted the original policy, the claim against the original policy is now moot." *Id.* at 1269.

We found the city's argument without merit. We explained that "[v]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *Id.* at 1270 (quoting *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1255 (11th Cir. 2017) (en banc), *abrogated on other grounds by Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021)). Rather, the case was moot only if this Court had "no reasonable expectation that the challenged practice will resume after the lawsuit is dismissed." *Id.* (quoting *Flanigan's*, 868 F.3d at 1255-56). We considered three factors to determine whether a reasonable expectation existed: (1) "whether the change in conduct resulted from substantial deliberation or is merely an attempt to manipulate our jurisdiction," i.e., by examining "the timing of the repeal, the procedures used in enacting it, and any explanations independent of this litigation which may have motivated it"; (2) "whether the government's decision to terminate the challenged conduct

was 'unambiguous,'" i.e., "whether the actions that have been taken to allegedly moot the case reflect a rejection of the challenged conduct that is both permanent and complete"; and (3) "whether the government has consistently maintained its commitment to the new policy or legislative scheme." *Id.* (quoting *Flanigan's*, 868 F.3d at 1257). Based on our analysis of these factors, we concluded the case was not moot. As to the first factor, we doubted the city intended to manipulate jurisdiction (as opposed to correcting a deficient policy) but explained that the city was unnecessarily secretive, as it failed to disclose the process to create the standing bail order. *Id.* at 1271. As for the second factor, we explained the city had not changed its bail policy through a legislative act; instead, a single judge had issued the new bail policy "and, while it is perhaps unlikely, we [could not] say that this judge might not revert to the original policy." *Id.* And as to the third factor, we concluded that it did "not cut strongly either way" because the implementation of the policy was enjoined shortly after its creation by the district court. *Id.*

As in *Rainwater*, in *Walker* this Court addressed the facial constitutionality of the city's new bail policy instead of determining that the plaintiff lacked standing. And, as to the "reasonable expectation" factors for mootness, this case has key factual similarities to the facts in *Walker*. For example, the second factor weighs against a finding of mootness, as the Standing Bail Order was issued by a single judge in Cullman County, not a legislative body. Additionally, as to the first factor, while the "unnecessarily secretive" concerns as to the creation of the new bail policy present in *Walker*, *see id.*, are not present, other concerns weigh in favor of a finding against mootness, i.e., the Standing Bail Order's issuance after Hester intervened in the case and

while the case was pending in the district court. Accordingly, *Walker* likewise supports our determination that we have jurisdiction to consider Hester's challenge to the Standing Bail Order.[5]

Concluding we have jurisdiction, we now turn to address Hester's wealth-discrimination claim.

1. *Equal Protection*

The Constitution makes clear that "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. But this promise of equal protection "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage

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[5] We also disagree with our dissenting colleague's assertion that we are "throw[ing] out" the facts we rely on to establish jurisdiction in analyzing Hester's claim. Dis. Op. at 12. Our determinations on this issue are simply based on the undisputed background below—i.e., Hester was detained under the pre-Standing Bail Order, and the Standing Bail Order was issued after Hester was released and while he was litigating in the district court below—and how that background places this case jurisdictionally under the purview of *Rainwater* and *Walker*. We also conclude that the fact that the district courts in *Rainwater* and *Walker* did not make factual findings on the new bail procedures, which is unlike the case before us (*see* Dis. Op. at 12-16), to be a distinction that does not make a difference in our conclusion that we are limited to considering only Hester's *facial* challenge to the Standing Bail Order and that we have jurisdiction to consider that challenge. The dissent's attempt to distinguish our precedents in *Rainwater* and *Walker* on that basis is a weak read on which to rely given the district court's minimal findings of fact concerning the Standing Bail Order. *See* Docket 159 at 19 (the district court acknowledged that "the defendants were able to offer little evidence concerning implementation of the new policy, but the limited evidence that the defendants did offer indicates that officials in Cullman County do not always comply with the written requirements in the new Standing Order").

to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Accordingly, we, as a general matter, examine laws only to determine whether they bear a rational basis to a legitimate government interest. *See, e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955). Heightened scrutiny, on the other hand, is reserved for state laws that burden fundamental rights or draw lines between suspect classes. As the Supreme Court has directed, we must, in the equal protection context

> decide, first, whether [the law] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny… . If [it does] not, the [law] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

The Supreme Court has unambiguously held that discrimination against the indigent, without more, does not implicate a suspect classification—and thus does not trigger strict scrutiny. *See, e.g.*, *Maher v. Roe*, 432 U.S. 464, 471 (1977) ("In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."); *Rodriguez*, 411 U.S. at 29 (noting that "this Court has never here-

tofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny").

The Supreme Court, however, has signaled that heightened scrutiny for claims of wealth discrimination may be appropriate in certain contexts. And two of those contexts have been in setting the terms of carceral punishment and ensuring access to judicial proceedings. *See Jones v. Governor of Florida*, 975 F.3d 1016, 1030 (11th Cir. 2020) (en banc) (citing *Bearden v. Georgia*, 461 U.S. 660 (1983), and *Grifin v. Illinois*, 351 U.S. 12 (1956)). That such contexts are implicated in a case, however, does not immediately require the application of heightened scrutiny. In *Rodriguez*, the Supreme Court explained that, in the historical cases in which heightened scrutiny applied to claims of wealth discrimination, the

> individuals, or groups of individuals, who constituted the class discriminated against … shared two distinguishing characteristics: because of their impecunity they were *completely unable to pay* for some desired benefit, and as a consequence, they sustained an *absolute deprivation* of a meaningful opportunity to enjoy that benefit.

411 U.S. at 20 (emphasis added). In *Walker*, we similarly noted that

> [t]he *sine qua non of a Bearden-* or *Rainwater*-style claim … is that the State is treating the indigent and the non-indigent categorically differently. Only someone who can show that the indigent are being treated systematically worse "solely because of [their] lack of financial resources"—and not for some legitimate State interest—will be able to make out such a claim.

901 F.3d at 1260 (alteration in original) (quoting *Bearden*, 461 U.S. at 661). For heightened scrutiny to apply to a claim of wealth discrimination, then, not only must the claim arise in certain well-defined contexts that the Supreme Court has identified, but the indigent must suffer an absolute deprivation of a government benefit in that context due solely to their inability to pay for it. *See*, *e.g.*, *Jones*, 975 F.3d at 1055 (Lagoa, J., concurring).

The question we must answer to resolve this appeal is thus whether Cullman County's bail scheme absolutely deprives indigent arrestees of pretrial release solely because of their inability to pay. We begin this analysis by noting that the right to pretrial release is not absolute. Rather, it is "conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." *Rainwater*, 572 F.2d at 1057 (quoting *Stack v. Boyle*, 342 U.S. 1, 4 (1951)). Indeed, states have "a compelling interest in assuring the presence at trial of persons charged with crime." *Id.* at 1056. At the same time, however, the accused individuals "remain clothed with a presumption of innocence and with their constitutional guarantees intact." *Id.* For this reason, the resolution of "the problems concerning pretrial bail requires a delicate balancing of the vital interests of the state with those of the individual." *Id.*

No one disputes that Cullman County maintains a compelling interest in ensuring that pretrial detainees appear for trial and do not pose a risk of danger to their community while on release. *See* Ala. R. Crim P. 7.2. And Hester does not allege that his bail amount—or that any bail amount in Cullman County—is higher than necessary to satisfy those two purposes of bail. For good reason: that would be an Eighth Amendment

claim under the Excessive Bail clause, and analysis under the Eighth Amendment proceeds without reference to ability to pay. *See United States v. James*, 674 F.2d 886, 891 (11th Cir. 1982) ("The basic test for excessive bail is whether the amount is higher than reasonably necessary to assure the accused's presence at trial."). Indeed, "we have implicitly held that bail is not excessive under the Eighth Amendment merely because it is unaffordable." *Walker*, 901 F.3d at 1258.

Here, we conclude that indigent pretrial detainees in Cullman County are not discriminated against solely based on their inability to pay, and neither do they suffer an absolute deprivation of a meaningful opportunity to obtain pretrial release. On this point, we reiterate that bail serves an important purpose. By the posting of bail, the accused has made a showing—a financial sacrifice—that he will appear for his trial. Thus, the indigent and the non-indigent arrestees are not on equal footing—only the latter has made a showing that he will appear for his trial, and he has made that showing by satisfying the terms of Cullman County's master bail schedule. *See Rainwater*, 572 F.2d at 1057 (approving of the "[u]tilization of a master bond schedule"). In this way, pretrial detainees who do not secure immediate release are not being discriminated against due to inability to pay—they are being discriminated against for failure to ensure in the first instance their future appearance at trial.

Although an indigent arrestee cannot secure his immediate release by satisfying the terms of the master bond schedule, the Standing Bail Order guarantees indigent arrestees an initial appearance and bail hearing before a circuit judge. At the bail hearing, the judge is tasked with assessing the accused's indigency, flight risk, and likelihood of appearing at trial. *See* Ala.

R. Crim. P. 7.2(a). The Standing Bail Order makes clear, however, that the judge must impose the least onerous condition that will assure the purposes of bail are satisfied:

> The Court will not require a defendant to post a secured appearance bond that the defendant cannot afford to post, or a secured appearance bond in an amount less than that contained in the bond schedule that the defendant can afford to post, if there is a less onerous condition that would assure the defendant's appearance or minimize risk to the public.

The Standing Bail Order thus adopts a presumption *against* money bail, that an indigent arrestee cannot afford, at individualized bail hearings. At the hearing, the judge may impose a secured appearance bond on the accused *only* if the judge determines that there is no less onerous method of ensuring the accused's appearance at trial. This is not discrimination against the indigent. All arrestees are presumptively entitled to pretrial release as soon as they make a showing that they will appear at trial—either by posting bail or by appearing at a hearing and attempting to show through other means that they will appear at trial.

Our caselaw amply supports the conclusion that Cullman County's bail system does not unconstitutionally discriminate against the indigent. Indeed, this Court has already applied the *Bearden* wealth-discrimination framework to the bail context on two separate occasions. In *Rainwater*, this Court was tasked with deciding whether "in the case of indigents, equal protection standards require a presumption against money bail." 572 F.2d at 1056. And in *Walker*, this Court analyzed "what process the Constitution re-

quires in setting bail for indigent arrestees." 901 F.3d at 1251. In both cases, this Court upheld the constitutionality of money bail against constitutional challenges.

In an earlier *Pugh v. Rainwater* decision, our predecessor court decided the narrow issue of "whether the imprisonment of an indigent prior to trial solely because he cannot afford to pay money bail violates his right to equal protection under the Fourteenth Amendment." *See* 557 F.2d 1189, 1192 (5th Cir. 1977), *vacated in part on reh'g en banc*, 572 F.2d 1053 (5th Cir. 1978) (en banc). The plaintiffs, a class of pretrial detainees, sued a group of judges and state officials to enjoin the pretrial detention of arrestees without a determination of probable cause and the pretrial detention of indigent arrestees solely because they could not post money bail. *Id.* at 1193. This Court, rehearing the case en banc, acknowledged the "principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." 572 F.2d at 1056. At the same time, however, the Court noted the delicate balance of the competing interests at play: "Florida has a compelling interest in assuring the presence at trial of persons charged with crime. Yet such individuals remain clothed with a presumption of innocence and with their constitutional guarantees intact." *Id.* (footnote omitted).

During the *Rainwater* litigation, Florida passed a new Rule of Criminal Procedure that governed bail determinations in the state: Rule 3.130(b)(4). *See id.* at 1055; *see also In re Fla. Rules of Crim. Proc.*, 272 So. 2d 65, 82 (Fla. 1972), *amended sub nom., In re Fla. Rules of Crim. Proc., Amends. to Rules 3.140 & 3.170*, 272 So. 2d 513 (Fla. 1973) (adopting new rules of criminal procedure, including Rule 3.130(b)(4), "Hearing at

First Appearance"). Under that new rule, Florida mandated that judges consider "all relevant factors" in determining "what form of release is necessary to assure the defendant's appearance." *Id.* at 1058 (quoting Rule 3.130(b)(4)). And this Court interpreted the Rule to require the judge to impose the least onerous condition that would assure the defendant's appearance at trial. *Id.* at 1058 n.8.

This Court said that the record "contain[ed] only evidence of practices under criminal procedures which predate the adoption of the current Florida rule." *Id.* Thus, it determined that "[a]s an attack on the Florida procedures which existed as of the time of trial, the case ha[d] lost its character as a present, live controversy and [was] therefore moot." *Id.* The *en banc* Court proceeded—as we do here—to assess only whether the new scheme was constitutional on its face. *See id.* at 1058-59. As relevant here, the Court said that "[t]he demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail." *Id.* at 1057 (quoting *Rhem v. Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974)). Therefore, "[t]he incarceration of those who cannot" meet a master bond schedule's requirements, "without meaningful consideration of other possible alternatives, [would infringe] on both due process and equal protection requirements." *Id.* Ultimately, the *Rainwater en banc* Court found that Florida's bail system met this test. In Florida, indigent arrestees who could not afford to post bail were given a bail hearing at which all relevant factors for bail would be considered and the judge was required to impose the least onerous condition on release

that would satisfy the purposes of bail. That system, the Court said, passed constitutional muster. *See id.*

In *Walker*, the plaintiff, alleged that the City of Calhoun, Georgia, followed a policy of using a secured-money bail schedule that, in some cases, would jail people before trial for inordinate amounts of time. 901 F.3d at 1252. Because Walker was arrested on the Monday before Labor Day, for example, he waited eleven days before receiving his bail hearing. *Id.*

Shortly after the lawsuit was filed, the City of Calhoun altered the prevailing bail policy by issuing a new standing bail order that adopted a bail schedule and guaranteed that defendants would be brought to court within forty-eight hours of arrest. *Id.* The new standing order also guaranteed indigent arrestees a public defender at the bail hearing and adopted a standard of indigency that was commensurate with the federal poverty guidelines. *Id.* If the arrestee was found indigent at the bail hearing, he would be released without paying any bail and, if no hearing was held within forty-eight hours, he would be released on a recognizance bond. *Id.* "In summary," this Court noted that

> the Standing Bail Order envisions three forms of release depending on the type of offense charged and the financial means of the arrestee. *First*, arrestees charged with State offenses within the Municipal Court's jurisdiction will be released immediately on a secured bond if they are able and willing to deposit money bail in the amount set by the bail schedule. They can post cash bail themselves or use a commercial surety at twice the amount set by the bail schedule. *Second*, arrestees charged with State offenses who do not post bail imme-

> diately must wait for a bail hearing with court-appointed counsel, to take place within 48 hours from arrest. Those who can prove they are indigent at the hearing will be released on a recognizance bond—meaning no bail amount is set, either secured or unsecured. *Third*, all arrestees charged with violating City ordinances will be released on unsecured bond, meaning that they need deposit no collateral immediately but will be assessed the bail schedule amount if they fail subsequently to appear in court.

Id. at 1252-53.

The *Walker* Court next turned to the appropriate level of scrutiny, summarizing the relevant *Bearden* principles as follows:

> The *sine qua non* of a *Bearden*- or *Rainwater*-style claim, then, is that the State is treating the indigent and the non-indigent categorically differently. Only someone who can show that the indigent are being treated systematically worse "solely because of [their] lack of financial resources"—and not for some legitimate State interest—will be able to make out such a claim.

Id. at 1260 (quoting *Bearden*, 461 U.S. at 661); *see also Rodriguez*, 411 U.S. at 20 ("The individuals, or group of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.").

Citing *Rodriguez*, the *Walker* Court noted that an indigent had to show an *absolute* deprivation of a bene-

fit in order for *Bearden*'s level of heightened scrutiny to apply. 901 F.3d at 1261-62. It concluded that the indigent arrestees did not satisfy that standard; the plaintiffs did not suffer an absolute deprivation because they "merely" had to "wait some appropriate amount of time to receive the same benefit as the more affluent. Indeed, after such delay, they arguably receive[d] preferential treatment, in at least one respect, by being released on recognizance without having to provide any security. *Id.* Such a scheme does not trigger heightened scrutiny." *Id.*; *cf. Jones*, 975 F.3d at 1056 (Lagoa, J., concurring) (noting that a scheme that provides indigents alternative avenues to the attainment of a state-created benefit does not constitute an absolute deprivation).

After concluding that the indigents did not qualify for *Bearden* scrutiny—because they merely had to wait a brief period of time to obtain their release at a hearing and were thus not deprived of it absolutely—the *Walker* Court concluded that

> Walker failed to make the necessary showing that he is likely to succeed on the merits of his claim that the Standing Bail order is unconstitutional. Neither the 48-hour window for a bail determination nor the use of an adversarial bail hearing in lieu of an affidavit-based process runs afoul of the Constitution.

901 F.3d at 1269.

The district court here was not blind to the existence of *Walker* and *Rainwater*. It examined both cases in its analysis and concluded that neither compelled a finding that the bail system in Cullman County was constitutional. It instead found that two salient differences between *Walker* and this case obligated the op-

posite result—that Cullman County operates its bail system in an unconstitutional manner. We turn to those differences now.

First, in *Walker*, the bail order guaranteed a bail hearing to all criminal defendants who could not post bond within forty-eight hours. *Id.* at 1252. This was vitally important to the *Walker* Court, both because the Supreme Court in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), held that forty-eight hours was an appropriate period of time within which to hold probable cause determinations and because the Fifth Circuit, in *ODonnell*, imported that forty-eight-hour rule into the bail context. *See Walker*, 901 F.3d at 1266-67.

Second, and just as important, the bail order in *Walker* guaranteed indigent arrestees release on a recognizance bond immediately upon proving their indigency. *See id.* at 1252 ("If the court finds that the defendant is indigent under that standard, 'then he/she shall be subject to release on recognizance without making a secured bail.' If no hearing is held within 48 hours, 'then the accused shall be released on a recognizance bond.'"). In other words, the only purpose of the bail hearing in the City of Calhoun was to determine whether the arrestee was indigent in reference to federal poverty guidelines.

In this case, however, indigent arrestees in Cullman County are entitled to a hearing within seventy-two hours and they are not released immediately upon a finding of indigency. Rather, at their initial bail hearings, they must show not only that they are indigent, but also that they are not a flight risk or a danger to the community. But neither of these differences—neither the wait of only forty-eight hours rather than seventy-two hours nor the additional considerations of flight

risk and danger—compel a departure from the holdings of *Walker* and *Rainwater*, and the district court was wrong to conclude otherwise.

First, as to the forty-eight-hour requirement, the district court seemed to conclude that *Walker* established a bright-line rule that a bail hearing must be held within forty-eight hours, not seventy-two hours as guaranteed by Cullman County's Standing Bail Order. But *Walker* did nothing of the sort. True, the *Walker* court found a bail system constitutional *because* it provided for hearings within forty-eight hours. But that timeframe was merely because the system under consideration imposed that deadline not because the court mandated it. Thus, the *Walker* decision did not establish a bright-line rule. Instead, the Court concluded that a forty-eight-hour deadline was "presumptively constitutional." *Walker*, 901 F.3d at 1266; *see also id.* at 1267 n.13 ("We are satisfied that *McLaughlin* establishes at least a 48-hour presumptive safe harbor for making bail determinations without deciding if that safe harbor extends longer."). Rather, it was the Fifth Circuit, in *ODonnell*, that concluded federal due process rights guaranteed a bail determination within forty-eight hours. 892 F.3d at 160 ("We conclude that the federal due process right entitles detainees to a hearing within 48 hours.").

But the Eleventh Circuit was no longer part of the Fifth when *ODonnell* was decided,[6] and we are thus free to conclude otherwise. And there are good reasons

[6] As the dissenting opinion recognizes, *ODonnell* is no longer good law in the Fifth Circuit. Dis.Op. at 41. While it is true that the *en banc* Fifth Circuit did not reach the merits of *ODonnell*'s analysis of the challenge to the bail system, *see Daves*, 22 F.4th at 528 ("Our decision today does not reach the merits."), we disagree with that analysis, as explained in our decision.

to do so. In the federal criminal system, for example, a district court is free to delay a bail hearing for arrestees that pose a flight risk or other enumerated factors by three days after an arrestee's initial appearance—and that does not include intervening weekends and holidays. *See* 18 U.S.C. § 3142(f)(2) ("The hearing shall be held immediately … unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion … of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday)."). Upon a showing of good cause, the bail hearing may be scheduled even *more* than three days after the initial appearance. *See id.*

More importantly, the forty-eight-hour window within which the Supreme Court has mandated probable cause determinations to be held, and which the Fifth Circuit imported into the bail context, serves a fundamentally distinct purpose from the setting of bail. A probable cause finding determines whether the government has a basis to hold a criminal defendant in the first instance—i.e., whether the state may detain him *at all*. *See Gerstein*, 420 U.S. at 124-25 ("Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause *as a condition for any significant pretrial restraint of liberty*." (emphasis added)). As a matter of logic, this threshold showing that a State has the ability to arrest and detain a criminal defendant should have to be made before the State determines the terms of pretrial *release*. Though, of course, as a matter of efficiency, it may make sense to hold both at the same time. *See McLaughlin*, 500 U.S. at 58. Ultimately, where the constitutional line must be drawn is a question for a separate case. Here, we simply must determine whether the seventy-two-hour dead-

line before us is facially unconstitutional, and we are satisfied that it is not.

Second, the fact that indigent defendants in Cullman County must show that they are not a flight risk or danger to the community in order to secure release, while the defendants in the City of Calhoun were released immediately upon proving their indigency, is not constitutionally significant. Nowhere in *Walker* did we suggest that this additional showing would somehow result in a constitutional infirmity. In fact, we made clear that the City of Calhoun took it upon itself to subject indigent arrestees to *better* treatment than affluent arrestees. *See* 901 F.3d at 1261-62 (explaining that after delay indigents experienced waiting for their hearing, "they arguably receive preferential treatment, in at least one respect, by being released on recognizance without having to provide any security" and that "[s]uch scheme does not trigger heightened scrutiny under the Supreme Court's equal protection jurisprudence").

It may go without saying, but the Equal Protection Clause does not mandate that the indigent receive preferential treatment. In fact, "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Rodriguez*, 411 U.S. at 24. Cullman County, however, has chosen to place all arrestees on equal footing: all are released as soon as they are able to show that they are not a flight risk or danger to the community. The affluent satisfy this requirement by posting bail; the indigent do so by making what, in the eyes of the County, is an equal showing[7]—appearing at a hearing where

[7] Although we acknowledge that posting bail is not the equivalent of a judge's finding that an arrestee is not a danger to the public, the procedures do account for the danger factor in that law

a judge determines their indigency, their danger level, and flight risk.

We do not believe that the difference between the hearing in *Walker* and the hearing in this case—that, in addition to showing indigency, an arrestee here also has to show that he is not a flight risk or danger to the public—is constitutionally significant. Once the arrestee is temporarily detained pending a hearing to determine indigency, as in *Walker*, it is eminently reasonable to also determine in that same hearing the flight risk and danger issues. Indeed, our *Walker* and *Rainwater* decisions provide strong support for the propriety of the more encompassing hearing provided for in the instant Standing Bail Order. In *Walker*, we described *Rainwater* as holding:

> [T]he court approved the "[u]tilization of a master bond schedule" without applying any heightened form of scrutiny. It explained that a bond schedule "provides speedy and convenient release for those who have no difficulty in meeting its requirements." Of course, if the bond schedule provided "speedy" release to those who can meet its requirements, it necessarily provided less speedy release to those who could not. Nevertheless, the *Rainwater* court upheld the scheme because it gave indigent defendants who could not satisfy the mas-

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enforcement is expected to file a "Bail Request Form" to avoid the release of any arrestee who might be a danger to the public. Although that too is not a precise equivalent of the hearing that the indigent undergo, it is consistent with the laudable goal of promoting prompt release where feasible and consistent with the safety of the public. We therefore conclude that the hearing provided for in the instant Standing Bail Order is a "constitutionally permissible secondary option." *See Walker*, 901 F.3d at 1260.

> ter bond schedule a constitutionally permissible secondary option: a bail hearing at which the judge could consider "all relevant factors" when deciding the conditions of release.

901 F.3d at 1260 (second alteration in original) (internal citations omitted) (quoting *Rainwater*, 572 F.2d at 1057-58). The hearing provided for in the procedures at issue in *Rainwater* were not substantially different from the hearing provided for in the instant Standing Bail Order. Thus, contrary to the position put forth by Hester and the district court, we cannot conclude that the additional consideration of flight risk and danger at the hearing is constitutionally significant.

It is important to reiterate here that bail serves a purpose, and that purpose is not punitive. Bail is a liberty preserving device—it balances the community's interest in security and the defendant's interest in liberty by allowing that defendant to "deposit … a sum of money subject to forfeiture," which serves as "assurance of the presence of an accused" at trial. *Stack*, 342 U.S. at 5. Since before the days of the Magna Carta, society has used the posting of surety as a mechanism for the accused to secure their pretrial release. *See* Brief for Am. Bail Coal. & Ga. Ass'n of Prof'l Bondsmen as Amici Curiae Supporting Appellants at 6-8, *Hester v. Gentry* (No. 18-13894). So those who can post bail, and those who cannot, are separated by more than wealth. Only the former group has shown that the purposes of bail have been satisfied.

We thus will not hold that requiring indigent arrestees to appear for a hearing and make a showing of their flight risk and danger to the community mandates heightened scrutiny under *Bearden*'s framework of equal protection. The indigent may obtain release upon

a showing that they can satisfy the purposes of bail, by allowing a judge to make written findings about their flight risk and danger to the community. Thus, the *Rodriguez* framework mandates that only rational basis review applies to the bail system. *See* 411 U.S. at 17 (providing the "framework for our analysis" requires a court to first determine whether a system "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny," and, if not, to apply rational basis review); *see also McGinnis v. Royster*, 410 U.S. 263, 269-70 (1973) (evaluating a claim that good-time-credit scheme that benefitted the wealthy who were able to afford bail violated equal protection under rational basis); *ODonnell v. Goodhart*, 900 F.3d 220, 226 (5th Cir. 2018) ("An Equal Protection Claim that an indigent 'person spends more time incarcerated than a wealthier person' is reviewed for a rational basis." (quoting *Doyle v. Elsea*, 658 F.2d 512, 518 (7th Cir. 1981))), *abrogated by Daves*, 22 F.4th 522; *Smith v. U.S. Parole Comm'n*, 752 F.2d 1056, 1059 (5th Cir. 1985) (same); *Doyle*, 658 F.2d at 518 (evaluating a claim that indigents spend more time in prison than the wealthy only for rational basis).

Under rational basis review, laws must be rationally related to a legitimate government interest." *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976)). Laws "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification" drawn by the law. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). "[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any com-

bination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance*, 440 U.S. at 97.

Here, we conclude that Cullman County's bail system satisfies rational basis review. As we held in *Rainwater*, states maintain not only a legitimate but a "compelling interest in assuring the presence at trial of persons charged with crime." 572 F.2d at 1056. And Cullman County's bail system is rationally related to that interest— requiring defendants to post surety will result in more of those defendants appearing for trial.

Ultimately, this case falls firmly within the purview of *Rainwater*. Here, as in *Rainwater*, only arrestees who have the means to post bail are immediately released. Those who are not so able are held for a brief time period before appearing at an individualized bail hearing. At both the hearing in *Rainwater* and the hearing here, the judge will consider all relevant factors and *must* impose the least onerous condition of release that will satisfy the purposes of bail—i.e., a secured appearance bond may be imposed on the indigent only if it is the only method that will assure the presence of that criminal defendant at trial.[8] In *Rainwater*,

[8] The Standing Bail Order's explicit memorialization of this "least onerous condition" requirement separates Cullman County's bail system from those which courts have held (or suggested) were constitutionally infirm. For example, in *Rainwater*, we noted that the mechanistic application of a bail schedule, "without meaningful consideration of other possible alternatives," would violate the Supreme Court's wealth-discrimination jurisprudence by automatically imposing money bail on those who are unable to afford it. 572 F.2d at 1057; *see also In re Humphrey*, 482 P.3d 1008, 1018 (Cal. 2021) (collecting cases). Here, however, judges must consider an arrestee's financial situation during his individualized bail hearing and may require money bail only if no less onerous condition of release would ensure his appearance at trial.

we held that this scheme was constitutional, and we reiterate that holding now. And *Walker* likewise supports our holding. Accordingly, we reject this claim.

2. *Due Process*

The district court also concluded that Cullman County's bail procedures violate arrestees' rights of procedural and substantive due process. In this respect, the district court identified four problems with Cullman County's system: (1) the lack of adequate notice of the factors to be considered in setting bail; (2) the lack of a guaranteed opportunity to be heard; (3) the lack of a uniform evidentiary standard to be used in denying bail; and (4) the lack of detailed factual findings. To remedy these supposed deficiencies, the district court directed the Sheriff of Cullman County to immediately release all bail-eligible criminal defendants from pretrial confinement unless it was prepared to submit a bail request for that defendant; if such a request was submitted, to inform the defendant— both orally and in writing—that a judge would have to find by clear and convincing evidence at an initial appearance that he was a flight risk or a danger to the community in order to be detained and to draft a new questionnaire to provide to the defendants, which would elicit further information regarding flight risk and danger to the community; to immediately release all criminal defendants if they did not receive an initial appearance within forty-eight hours of arrest; to provide criminal defendants with liaison deputies who would assist them in filling out the new questionnaire; and to provide criminal defendants with an affidavit form in which the defendants could provide information about their financial means.

Despite nominally resting on the doctrines of both procedural due process and substantive due process, the

district court did not significantly rely on the latter for any of its findings. Indeed, it discussed few substantive due process cases in its analysis, did not identify any fundamental right at issue, and did not seek to provide a remedy for any substantive due process violation.

This is unsurprising, as our precedent makes clear that the substantive due process claim is a nonstarter. Although in *Salerno*, the Supreme Court recognized that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," it also stated that an arrestee may be incarcerated before trial "if he presents a risk of flight or a danger to witnesses." 481 U.S. at 749, 755 (internal citation omitted). And the Supreme Court ultimately permitted even preventive detention if the arrestee "pose[s] a threat to the safety of individuals or to the community which no condition of release can dispel." *Id.* at 755.

In *Walker*, this Court analyzed *Salerno* and concluded that it was a procedural due process case, not a substantive due process case. 901 F.3d at 1262-65. Pretrial detainees have no fundamental right to pretrial release. If they did, bail itself would be unconstitutional. But, of course, it is not—*Salerno* said as much. And Hester cannot "avoid the Supreme Court's holding [in *Salerno*] by smuggling a substantive due process claim into the Equal Protection Clause." *Id.* at 1264-65; *see also Goodhart*, 900 F.3d at 228 ("The grant of automatic release smuggles in a substantive remedy via a procedural harm. That goes too far.").

Each of the district court's findings do, however, fit squarely within the rubric of procedural due process. Procedural due process "encompasses … a guarantee of fair procedure." *Zinermon v. Burch*, 494 U.S. 113, 125

(1990). In due process analyses, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances," but rather is "flexible" and "requires analysis of the governmental and private interests that are affected." *Id.* at 334 (first quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); then quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Thus, a standard analysis under the Due Process Clause proceeds in two steps: "We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). During that second step, we are guided by the balancing test of *Mathews*, in which we look to the nature of the private interest affected, the risk of erroneous deprivation, the value of additional safeguards, and the government's interest, including any burdens. *See* 424 U.S. at 335.

In the pretrial detention context, procedural due process requires that the procedures used be "adequate to authorize the pretrial detention of at least some [persons] charged with crimes," whether or not they might be insufficient in some other circumstances. *Salerno*, 481 U.S. at 751 (alteration in original) (quoting *Schall v. Martin*, 467 U.S. 253, 264 (1984)). Answering that question requires "[t]wo separate inquiries": "First, does preventive detention … serve a legitimate state objective? And, second, are the procedural safeguards … adequate to authorize the pretrial detention[?]" *Schall*, 467 U.S. at 263-64 (citations omitted).

There is no question about the first inquiry. As we said in *Rainwater*, states maintain not only a legitimate, but a "compelling interest in assuring the presence at trial of persons charged with crime." 572 F.2d at 1056. The question thus becomes whether the procedural safeguards used by Cullman County are "adequate to authorize the pretrial detention."

Ultimately, we conclude—as the Supreme Court did in both *Schall* and *Salerno*—that the procedures presented to us pass that test, as "there is nothing inherently unattainable about a prediction of future criminal conduct." *See Salerno*, 481 U.S. at 751 (quoting *Schall*, 467 U.S. at 278). Or, more specifically, that there is nothing "inherently unattainable about a prediction" of flight risk or danger to the community.

Cullman County's procedures are specifically designed to further the accuracy of the danger to the community and flight risk inquiries. Before arrestees in Cullman County have their bail set (or are denied bail), they are presented with two forms that aid the judge in making a bail determination: an "Affidavit of Substantial Hardship," and a "Release Questionnaire." In the Release Questionnaire, the arrestee can provide information about his residence, employment, family situation, health, and criminal history for the purpose of ascertaining information that might be relevant to a pretrial release. It also asks for the contact information of his nearest living relatives, who may vouch for his character. In the Hardship Affidavit, the arrestee can provide information about his employment, assistance benefits, income, expenses, and assets. These two forms, collectively, provide pretrial detainees notice of the hearing to take place and give them an opportunity to present information relevant to the bail determination.

After these forms are filled out, they are presented to the bail-setting judge, who is guided by fourteen statutorily enumerated factors in making his decision on bail. *See* Ala. R. Crim. P. 7.2(a). These factors include inquiries into the defendant's character, criminal record, community standing, and employment history—each directed at ascertaining how likely it is the defendant will take flight before his next appearance. Cullman County's form order—titled, "Order On Initial Appearance and Bond Hearing"—includes these fourteen factors, and also provides the bail-setting judge with a fifteenth factor, "Other," where the judge can enumerate any case-specific consideration that was not adequately represented in the enumerated factors.

At the bail hearing, the judge must give "the Defendant the opportunity to make a statement regarding his/her ability to post the bond currently set in this matter."[9] And if the judge determines, after considering the relevant factors, that the setting of bail is the least onerous condition that will ensure that the pur-

[9] The district court took issue with the Standing Bail Order's pronouncement that the court "*may* elicit testimony about the defendant's financial condition." The district court concluded that this rendered the procedure constitutionally deficient, in that it did not guarantee arrestees the opportunity to be heard at their bail hearings. But this clause is capable of a constitutional construction—i.e., the court *may* elicit testimony if the defendant seeks to offer it. And indeed, the scant evidence presented on the issue is consistent with this interpretation. The form order that judges must complete after the hearing makes clear that they are to give arrestees the opportunity to speak. And as the district court itself ad-mitted, the only judge who testified on the matter—Judge Turner—made clear that he always speaks with arrestees at their bail hearing, and the "record does not indicate whether other judges in Cullman County" deny arrestees that right. Given the forms and record presented, there is simply no basis to presume that arrestees in Cullman County are denied an opportunity to be heard.

poses of bail are satisfied, the judge must notate which of the fifteen factors relevant to the bail determination led him to that conclusion.[10]

After the hearing, arrestees—if unhappy with their bail determination—are entitled to file a motion to reduce their bond, which may be granted upon a showing of mere "good cause." *See* Ala. R. Crim. P. 7.4(b). And indigent arrestees are entitled to the aid of counsel in the filing of that motion.

These safeguards are sufficient, and they are similar to the procedures that the Supreme Court found "extensive" and "more exacting" than necessary in *Salerno*. There, the Supreme Court was tasked with assessing the constitutionality of the Bail Reform Act. *Salerno*, 481 U.S. at 751-52. The Supreme Court noted that detainees had the right to counsel at the detention hearing and were permitted to testify, that the judicial officers were guided by statutorily enumerated factors relevant to the determination and had to find that bail was necessary by clear and convincing evidence and detail their findings in a written order, and, finally, that detainees were entitled to appellate review of the detention decision. *See id.* The Supreme Court deter-

[10] The district court also took issue with the form order used by judges in Cullman County, preferring instead that the judges announce their findings orally on the record. But most of the factors Alabama requires judges to consider refer to binary propositions that either are or are not present in the arrestee's case. Requiring judges to make oral findings, which would require the ordering of a transcript before review, would inject unnecessary procedural complication into the process. *Cf. McLaughlin*, 500 U.S. at 53 (noting that defendants might be disserved by adding procedural complexity into the already complicated pretrial system); *ODonnell*, 892 F.3d at 160 ("We decline to hold that the Constitution requires the County to produce 50,000 written opinions per year to satisfy due process.").

mined that these procedures were "extensive," "more exacting" than necessary, and "far exceed[ed] what [it] found necessary to effect limited postarrest detention" in other cases. *Id.* at 752.

The differences between *Salerno* and this case are not so different as to warrant a departure from that holding. The only salient differences are that detainees in Cullman County are not entitled to counsel at their initial bail hearing and that judges in Cullman County are not required to meet the clear and convincing evidence standard before imposing bail. But both of these differences are mitigated by Cullman County's procedure for obtaining review of the bail determination. Indeed, indigent detainees in Cullman County are entitled to the aid of counsel in obtaining review of their bail determinations and can secure a modification of their detention orders upon a showing of "good cause."

The district court reached the opposite conclusion and found that the procedures in Cullman County were constitutionally infirm by relying on the Fifth Circuit's decision in *ODonnell*. But the facts of that case stand in stark contrast to the case before us. In its now vacated opinion, the Fifth Circuit found that Harris County engaged in an unconstitutional "custom and practice" that resulted in "the *automatic* imposition of pretrial detention on indigent misdemeanor arrestees." *ODonnell*, 892 F.3d at 160-61. The district court in *ODonnell* reached that same finding only after conducting an exhaustive review of, *inter alia*, "nearly 300 written exhibits, in addition to 2,300 video recordings of bail-setting hearings" in Harris County. *ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1061 (S.D. Tex. 2017). The Fifth Circuit, after reviewing that same record, found that the evidence showed that Harris County officers "instructed" indigent defendants "not to speak"

at bail hearings and that the defendants were "not offered any opportunity to submit evidence of relative ability to post bond at the scheduled amount." 892 F.3d at 153-54.

None of these observations are true of this case. Arrestees in Cullman County are given paperwork before their bail hearings that provides them with notice of the upcoming proceeding, and there is no suggestion that officers (or anyone else for that matter) instructs them not to speak. And the district court did not conclude, nor is there any suggestion in the record, that judges "automatically" impose monetary bail conditions on indigent arrestees. To the contrary, the Standing Bail Order makes clear that judges must impose the least onerous condition of release, which will satisfy the purposes of bail.

In short, pretrial detainees in Cullman County are not deprived of due process at their bail determinations. They are provided a hearing before an impartial judge, notice of that hearing, and there is no evidence that they are being denied an opportunity to be heard at the hearing. Furthermore, the judge's bail determination may be modified upon a showing of good cause, and the judge must make written findings of fact specifying which factors he considered in setting the amount of bail. This satisfies the Due Process Clause.

IV. CONCLUSION

Under our plenary de novo review of the facial constitutionality of the current Cullman County bail system, we conclude that the district court erred both in finding that the bail system discriminated against the indigent and in finding that the bail system deprived pretrial detainees of procedural due process. Thus, the district court also erred in concluding that Hester has

shown a substantial likelihood of success on the merits, and the issuance of the preliminary injunction was thus in error.

For all these reasons, we **AFFIRM** the district court's decision not to abstain from hearing this case under *Younger* and **AFFIRM** the court's denial of Sheriff Gentry's motion to dismiss. We **DISMISS** the Judicial Defendants from the present appeal. And we **REVERSE** the district court's entry of a preliminary injunction and **REMAND** for further proceedings consistent with this opinion.

ROSENBAUM, Circuit Judge, dissenting in part:

Cullman County justifies setting bonds indigent arrestees can't afford and thereby de facto detaining them under its current bail practices, based on its interests in ensuring arrestees' appearances at trial and in protecting the community from arrestees it deems a danger to the public. No doubt these are valid and compelling interests. And they could justify a bail system where de facto pretrial detention occurred only when no other means could reasonably satisfy these interests, and the same rules applied to the indigent and non-indigent alike.

But that does not describe Cullman County's bail system. Not even close.

Rather, risk of appearance failure and danger to the community have real relevance in Cullman County's bail system, if at all, as they pertain to only the indigent, who can sit in jail for up to a month or more without having a meaningful opportunity to be heard on bond. Meanwhile, within ninety minutes of arrest, the nonindigent bypass both pretrial detention and the County's stated concerns about failure to appear and danger by simply paying a predetermined secured bond that corresponds to the offense for which they were arrested. That secured bond does not even purport to account for any danger to the community the nonindigent arrestees might present. Nor does it consider any actual flight or failure-to-appear risk.[1]

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[1] Risk of flight and failure-to-appear risk are not the same thing. While all risks of flight present failure-to-appear risks, not all failure-to-appear risks qualify as risks of flight. People who have no intention of fleeing may fail to appear for various reasons. For example, Judge Turner of Cullman County testified at the preliminary-injunction hearing that people might miss court because

Put simply, in practice, all things being equal between an indigent and nonindigent arrestee in Cullman County, only the indigent one will undergo de facto detention. That is different treatment concerning effective detention, based solely on indigent status.

Of course, the County has every right to decline to award lower secured bail amounts that arrestees can pay, if the County reasonably determines that those bail amounts are necessary to ensure the defendant's appearance and the safety of the public. But that secured bail must be necessary, and the County cannot choose to apply the appearance and safety criteria to only the indigent.

Nor can it deprive indigent defendants of due process of law in imposing de facto detention. But Cullman County doesn't even appoint counsel for indigent defendants' initial bail hearings, and indigent defendants generally must sit in jail for a month before their appointed counsel can obtain reconsideration of the bond imposed when counsel wasn't present.

Cullman County judges no doubt act in good faith in applying Cullman County bail procedures. But that does not remedy the problems with Cullman County's bail procedures (and practices). On the contrary, compounding the problems I have mentioned, the judge who imposes bond need not apply any particular standard of proof when determining that a given bond is necessary to ensure the defendant's appearance or the

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they don't have transportation or can't miss work because they are on a probationary period such as the first 90 days of employment with a new employer. Though these types of failures to appear may not be acceptable, as Judge Turner also acknowledged, different and more appropriate fixes are available to address them than the solutions used for people who flee.

safety of the community. He also doesn't have to state the reasons for his decision, rendering it even harder for counsel to challenge the determination when the reconsideration motion is finally heard.

In short, Cullman County's current bail system unconstitutionally violates indigent arrestees' Fourteenth Amendment equal-protection and due-process rights. The majority opinion avoids this conclusion only by disregarding the facts that the district court found about how Cullman County's current bail system operates in practice.

Yet the district court held a two-day evidentiary hearing and reviewed evidence that revealed the County's actual practices in implementing the Standing Bail Order. The parties do not so much as suggest that the district court's factual findings are clearly erroneous, and the Majority Opinion does not take that step, either. Nor could it. The record contains no basis to conclude that the district court's factual findings are clearly erroneous.

So we must accept them. And when we apply the law to the facts the district court found, we must conclude that when it comes to setting bail (and thus imposing de facto pretrial detention on indigent arrestees), the County holds indigent arrestees to a different and higher standard than nonindigent arrestees. And it does so based solely on the fact that they are indigent. Not only that, but the processes Cullman County uses to set bond for the indigent fail to provide them due process. Because these deficiencies violate the Fourteenth Amendment, I respectfully dissent.

I divide my discussion into four parts. I begin by explaining in Section I why the Majority Opinion is not at liberty to ignore the district court's factual findings

in its analysis. Section II then catalogs the district court's relevant factual findings. In Section III, I review why pretrial release is important—that is, the significant advantages pretrial release bestows on a defendant. In Section IV, I explain why Cullman County's Standing Bail Order release system violates the Fourteenth Amendment's guarantees of equal protection and due process.

I. The Majority Opinion cannot ignore the district court's factual findings

A. We may disregard a district court's factual findings only if we find them to be clearly erroneous

Here, the district court entered a preliminary injunction, enjoining Cullman County's actual bail practices under the Standing Bail Order. We have always reviewed for clear error a district court's factual findings supporting an order on a motion for preliminary injunction. *See, e.g.*, *S.E.C. v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1198 (11th Cir. 1999).

That standard of review applies whether the district court based its factual findings on live testimony, documentary evidence, or any other type of admissible evidence. *See* Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous … ."). As the Supreme Court has emphasized, the clearly erroneous standard of review governs even "when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). We defer to the original finder of fact not only because she is in a better position to make determinations of credibil-

ity but also because "[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Id.*

A finding of fact is clearly erroneous only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 573 (citation and quotation marks omitted). So long as the district court's account of the evidence "is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 574. So even when "two permissible views of the evidence exist, the factfinder's choice between them cannot be clearly erroneous." *Id.*

B. The Majority Opinion wholly ignores the district court's factual findings without finding them to be clearly erroneous

Hester raised two challenges to the Standing Bail Order. The first—a facial challenge—alleged that the procedures the Standing Bail Order calls for violate the Fourteenth Amendment. But second, Hester also challenged, as the district court explained, "the way in which Cullman County implements [the Standing Bail Order]"—that is, Cullman County's actual practices. For that reason—and without objection by the defendants—after a two-day evidentiary hearing, the district court made factual findings about Cullman County's actual practices under the Standing Bail Order and based its entry of the preliminary injunction here at least in part on those findings.

But nowhere does the Majority Opinion discuss any of those findings. It doesn't find them clearly erroneous. Indeed, no party even argued that they were.

Rather, the Majority Opinion sua sponte just dismisses the district court's factual findings about how Cullman County implements its current bail system. The Majority Opinion does this, contrary to Hester's challenge to Cullman County's actual practices and the district court's treatment of that challenge, by simply deciding that Hester's challenge was necessarily only a facial challenge to the Standing Bail Order. *See* Maj. Op. at 32-33. In support of this determination, the Majority Opinion offers two justifications: (1) "Hester cannot trace his injury to the current operative bail system" because he was released before it went into effect, *id.* at 32; and (2) "the bail scheme at issue here had only been in place for sixteen days before the district court held its preliminary injunction hearing," *id.* at 33 (emphasis omitted).

Upon examination, though, these reasons don't hold up. I address them in reverse order.

To be sure, the bail scheme at issue had been effective for sixteen days before the district court's evidentiary hearing. But as Section II of this dissent—which summarizes the evidence taken at the hearing—shows, that was more than enough time for the County to establish certain uniform practices under the newly adopted Standing Bail Order. In fact, the district judge based her factual findings about Cullman County's actual bail practices on testimony from the Sheriff himself and from one of only two Cullman County district judges who preside over bond hearings—the very Cullman County employees who are responsible for implementing the Standing Bail Order's procedures. It is difficult to imagine that anyone else would have been more qualified to testify to the County's actual practices under the Standing Bail Order.

The district court's factual findings show that certain Cullman County bail practices under the Standing Bail Order do not conform to the Standing Bail Order and never did. But they also show that Cullman County does apply some uniform procedures when it sets bail—those procedures just are not true to the Standing Bail Order.

To be sure, the district court noted that "the defendants were able to offer little evidence concerning the implementation of the new policy," but it also found that the evidence established Cullman County engages in certain uniform practices that diverge from what the Standing Bail Order calls for.

For example, the district court found without qualification that "officials in Cullman County do not handle bail requests in a manner consistent with the new standing order." While I discuss in Section II of this dissent how the two processes differ, the point for now is that the district court made specific factual findings about how some of Cullman County's actual bail practices do not follow the Standing Bail Order.

And conspicuously, no party even suggests that the district court's factual findings about Cullman County's implementation of the Standing Bail Order were incorrect or unfair because they were based on sixteen days of functioning.

That the Standing Bail Order had been in effect for sixteen days when the evidentiary hearing occurred does not somehow void the resulting evidence and corresponding factual findings about how Cullman County uniformly applied the Standing Bail Order to all state-court arrestees throughout that time. And that is especially so when Cullman County has not even argued that the evidence on which the district court relied does

not provide an accurate picture of what Cullman County's actual bail practices are. That a longer period of operation might have allowed for the presentation of evidence about more facets of how Cullman County executes the Standing Bail Order likewise does not provide a reason to dismiss the district court's factual findings about the aspects of Cullman County's bail practices that the evidence did illuminate. These rationales do not even suggest that the district court's view of the evidence before it was not at least "plausible," let alone support a "definite and firm conviction that a mistake has been committed." *See Anderson*, 470 U.S. at 574.

So the mere fact that Cullman County had been operating under the Standing Bail Order for sixteen days at the time of the evidentiary hearing does not excuse the Majority Opinion from its duty to either explain why the facts the district court found are clearly erroneous (a task even the defendants do not ask the Court to engage in) or conduct its analysis by applying the law to the facts the district court found. Yet the Majority Opinion does neither before wholesale jettisoning the district court's factual findings.

As for the Majority Opinion's reasoning that "Hester cannot trace his injury to the current operative bail system" because he was released before it went into effect, Maj. Op. at 32, readers might notice that sounds an awful lot like a reason why Hester lacks standing to challenge the Standing Bail Order at all. We have explained that to establish standing, an Article III jurisdictional requirement, a plaintiff must show an injury in fact that is fairly traceable to the defendant's conduct, and he must demonstrate that the injury will likely be redressed by a favorable decision from us. *Johnson v. 27th Ave. Caraf, Inc.*, 9 F.4th 1300, 1311 (11th Cir. 2021). Here, the Majority Opinion concedes that Hes-

ter can't show that the injury he suffered is related in any way to the Standing Bail Order, which seems to suggest that Hester lacks standing to challenge it.

The Majority Opinion sidesteps this sticky standing stumbling block by viewing Hester's challenge to the current bail system through the lens of mootness as it pertains to Hester's challenge to Cullman County's pre-Standing Bail Order bail system. *See* Maj. Op. at 34-40. As the Majority Opinion's reasoning goes, because Cullman County stopped operating under its pre-Standing Bail Order system when it adopted the Standing Bail Order, Hester's efforts to secure injunction of the pre-Standing Bail Order system are moot. *See id.* at 36 ("Hester's challenge to Cullman County's former bail procedures is now moot."). But, the Majority Opinion concludes, Hester's challenge still survives the County's adoption of the Standing Bail Order under the voluntary-cessation exception to mootness. *See id.* at 38-40.

Under that exception, voluntary cessation of allegedly illegal conduct does not necessarily render a case moot and deprive the court of jurisdiction. *Flanigan's Enters. Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1255 (11th Cir. 2017) (en banc), *abrogated on other grounds by Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021). That's to prevent a defendant from ceasing its allegedly offensive conduct just long enough to obtain dismissal of a lawsuit and then reinstate the complained-of behavior. *See id.*

We have explained that the voluntary-cessation exception does not apply when "the totality of th[e] circumstances persuades the court that there is no reasonable expectation that the government entity will [return to its prior allegedly offending conduct]." *Id.* at

1257. I assume without deciding that the Majority Opinion is right that the voluntary-cessation exception applies here.

But in that case, the entire basis for concluding this matter is not moot is that the County may continue to violate state arrestees' rights under the Standing Bail Order in the same ways Hester alleged it did before it adopted and implemented the Standing Bail Order—mainly by continuing to apply different considerations to the indigent and nonindigent when making release decisions, and by continuing to impose secured bonds indigent defendants cannot meet when less restrictive conditions will satisfy the County's concerns.

Yet the Majority Opinion then just dismisses the district court's factual findings showing that, in fact, in implementing the Standing Bail Order, Cullman County has continued these very practices that Hester complained of when he challenged the original policy. As the district court explained, "[T]he mootness doctrine does not foreclose Mr. Hester's efforts to obtain relief because although the Cullman County Circuit Court has revised its written criminal pretrial procedures, the record demonstrates that the defendants do not fully comply with the new written procedures." In other words, the district court concluded that the voluntary-cessation doctrine saved the case from mootness, based on Cullman County's actual practices under the Standing Bail Order—not on the face of the Standing Bail Order itself.

But on appeal, on the merits, the Majority Opinion ignores the factual findings that establish the very basis for why the case is not moot: that the County uniformly implements the Standing Bail Order not strictly by the Order's terms but in a way that continues some

of the very same practices Hester challenged as unconstitutional before the County adopted the Standing Bail Order.

The Majority Opinion cannot have it both ways. Either the case as it relates to the County's pre-Standing Bail Order procedures is moot because the County ceased all aspects of its challenged pre-Standing Bail Order conduct when it adopted the Standing Bail Order—in which case we lack jurisdiction—or the case is not moot because the County allegedly continued at least some of its challenged pre-Standing Bail Order practices after adopting the Standing Bail Order—in which case we must consider the district court's factual findings about what those continuing practices were.

Instead, though, the Majority Opinion blazes a third and unauthorized path: without finding them to be clearly erroneous, the Majority Opinion, on the merits, simply throws out the facts the voluntary-cessation exception necessarily relies on to establish jurisdiction and skips any review of Hester's claim and the district court's analysis based on those factual findings. I am unaware of anything that allows the Majority Opinion to do that. Nor does the Majority Opinion's citation of *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc), and *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), save the day for it.

C. Contrary to the Majority Opinion's contention, no precedent authorizes the Majority Opinion to wholy dismiss the district court's findings without finding them to be clearly erroneous

In *Rainwater*, the plaintiffs, Florida pretrial detainees, challenged certain aspects of Florida's bail system as it existed when the plaintiff detainees brought

suit. *See Rainwater*, 572 F.2d at 1055. After the district court ruled on the constitutionality of the Florida plaintiffs' claims about that bail system and while the case was pending on appeal before our predecessor Court, Florida's Supreme Court adopted a new bail system. *Id.* The Former Fifth Circuit found that the Florida plaintiffs' claims about the original bail system were moot. *Id.* at 1058-59; *see also id.* at 1059 n.10. But it facially reviewed the constitutionality of the newly adopted bail system. *See id.* at 1059. Our predecessor Court did not explain the jurisdictional basis allowing it to do so.

Rainwater does not justify the Majority Opinion's decision to dismiss the district court's factual findings here. For starters, in *Rainwater*, there were no district-court findings about the way the new Florida rule operated because the new Florida rule was never in effect when *Rainwater* was pending before the district court. So it was impossible for our predecessor Court to have ignored factual findings about the new system. That's very different from the situation here, where Cullman County's new system was operational when the district court held its two-day evidentiary hearing, and the district court heard evidence and made factual findings about the County's actual new practices.

Not only that, but the *Rainwater* Court never went through any jurisdictional analysis before upholding Florida's new bail rule. The Majority Opinion invokes *Rainwater*'s acknowledgment of the mootness of the challenge there to the old bail system to try to bootstrap an imagined holding about why the *Rainwater* Court enjoyed jurisdiction to rule for the first time on the new bail rule. *See* Maj. Op. at 36-37.

But our decision on the merits in *Rainwater* after failing to acknowledge or address the jurisdictional question remaining after the Court declared the challenge to the old system there moot did not create precedent on whether the Court actually enjoyed jurisdiction under the circumstances of the case. *See In re Bradford*, 830 F.3d 1273, 1278 (11th Cir. 2016). As we have said, "when it comes to questions of jurisdiction, we are bound only by explicit holdings." *Id.* So for this reason and because *Rainwater* did not involve any factual findings on the new rule there, *Rainwater* obviously could not have created precedent for the proposition that only a facial challenge to a newer policy can survive the mooting of an old policy, when a district court reviews evidence and makes factual findings about the actual operation of the newer policy.

As for *Walker*, it is similarly uninstructive here. In *Walker*, Georgia arrestees challenged the City of Calhoun's then-existing bail system. *See* 901 F.3d at 1251-52. While the case was pending, the City of Calhoun altered its prior bail policy by issuing a standing bail order. *Id.* at 1252. The district court enjoined the new policy because it found that the standing bail order's stated procedures were unconstitutional. *See Walker v. City of Calhoun*, No. 4:15-CV-170-HLM, 2016 WL 361612, at *11 ("[A]lthough the Standing Order attempts to remedy the deficiencies of the earlier bail policy, it simply shortens the amount of time that indigent arrestees are held in jail to forty-eight hours. As discussed above, however, any detention based solely on financial status or ability to pay is impermissible.") (N.D. Ga. Jan. 28, 2016); *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *3 (N.D. Ga. June 16, 2017) ("[T]he Court rejects Defendant's con-

tention that the Standing Bail Order, as it is presently worded, is constitutional.").

The *Walker* district court never purported to determine, nor did it make any factual findings purporting to determine, whether the way Calhoun implemented its new bail policy complied with the terms of the new policy there. So like the situation in *Rainwater*, the *Walker* record contained no relevant factual findings for us to grapple with on appeal. And that is why *Walker* construed the challenge to the new policy there as a facial one only.

But once again, that is not the situation here. Rather, as I have noted, Hester (on behalf of himself and an uncontested class of "all state-court arrestees who are or who will be jailed in Cullman County who are unable to pay the secured monetary bail amount required for their release") challenged not only the Standing Bail Order itself but also how Cullman County implemented it. And significantly, following a two-day evidentiary hearing, the district court made factual findings about the County's actual practices, which it found did not comply with the letter of the Standing Bail Order.

So *Walker*, which involved no similar challenge to the City's new policy as implemented and no similar factual findings, provides no basis for the Majority Opinion to wholly dismiss the district court's factual findings here and recast the case as one involving a facial challenge only. Put simply, that *Rainwater* and *Walker*—where the district courts made no factual findings about how the bail system at issue actually operated—resolved their challenges as only facial challenges cannot support the Majority Opinion's decision to rid itself of the factual findings the district court

here made about how Cullman County's bail system does actually function and to ignore those facts in its merits analysis.

To sum up, Hester sought to enjoin not only the Standing Bail Order itself but also Cullman County's actual practices under the Standing Bail Order. Then, the district court heard and reviewed evidence about how Cullman County implemented its Standing Bail Order. Ultimately, the district court made factual findings about that and held, based on those factual findings, that Cullman County's actual practices under the Standing Bail Order were unconstitutional. No party alleged on appeal that the district court's factual findings about Cullman County's uniform practices under the Standing Bail Order were clearly erroneous.

And the district court's factual findings about those practices—that, under the Standing Bail Order, the County continued the practices from its old system that Hester challenged—serve as the basis for why we have jurisdiction under the voluntary-cessation doctrine to consider Hester's case on appeal. But when it comes to the merits, the Majority Opinion—at the same time it relies for jurisdiction on the voluntary-cessation doctrine—sua sponte dismisses the district court's factual findings showing that Cullman County's practices under the old policy continued under the Standing Bail Order. And it does so based on reasons that just don't stand up and precedent that can't support its actions.

I respectfully disagree that we have the option of ignoring the district court's factual findings here. *See Otto v. City of Boca Raton*, ___ 4th ___, No. 19-10604, 2022 WL 2824907, *12 (11th Cir. July 20, 2022) (Jordan, J., dissenting) ("From my perspective, what the panel majority did here—ignoring and/or revising the district

court's factual findings and failing to apply the clear error standard—is seemingly becoming habit in this circuit. If this trend continues, the bench and bar will be forgiven for thinking that a district court's factual findings are only inconvenient speed bumps on the road to reversal.") (internal citations omitted). And when we consider those factual findings in our legal analysis, there's no doubt that Cullman County's current bail practices violate the Fourteenth Amendment. Conspicuously, the Majority Opinion does not assert otherwise; it simply (impermissibly) dismisses those inconvenient factual findings.

II. Facts

For that reason, I turn my attention to the relevant facts that the district court found. But to enable a fuller understanding of those facts, I first discuss the relevant Alabama state bail framework.

A. Alabama entitles al individuals (except those charged with a capital felony or a crime that could turn into a capital felony) to "bail as a matter of right"

Alabama's Constitution ensures that "all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great … ." Ala. Const. art. 1, § 16. In line with the Alabama Constitution's decree, Alabama statutory law promises that "[i]n all cases other than those specified in subsection (a) of Section 15-13-3,[2] a defendant is, before conviction, entitled to

[2] Like Alabama's Constitution, § 15-13-3(a) exempts from this right those charged with capital offenses and similar offenses that could result in a capital charge:

bail as a matter of right." Ala. Code 1975 § 15-13-2. Similarly, Rule 7.2, Ala. R. Crim. P., provides for every defendant who is charged with an offense that Alabama has deemed "bailable as a matter of right" to be released before trial on his own personal recognizance or on an appearance bond (meaning an unsecured bond) unless the court finds that his release will not reasonably assure his appearance or that his release "will pose a real and present dangers to others or to the public at large."

When it comes to bail conditions, Alabama law defines "personal recognizance" to mean "release without any conditions of an undertaking relating to, or a deposit of, security." Ala. R. Crim. P. 7.1(a). It defines "appearance bond" as "an undertaking to pay to the clerk of the … court … a specified sum of money upon the failure of a person released to comply with its conditions." Ala. R. Crim. P. 7.1(b). In other words, an appearance bond does not require a person released under it to pay anything to be released. It likewise does not require a person to pay anything ever if he makes all court appearances and otherwise complies with his conditions of release. Sometimes this type of bond is called an "unsecured bond."

> (a) A defendant cannot be admitted to bail when he is charged with an offense which may be punished by death if the court is of the opinion, on the evidence adduced, that he is guilty of the offense in the degree punishable capitally, nor when he is charged with a personal injury to another which is likely to produce death and which was committed under circumstances such as would, if death arises from such injury, constitute an offense which may be punished by death.

Ala. Code. 1975 § 15-13-3(a).

In contrast to an "appearance bond," a "secured appearance bond," sometimes called simply a "secured bond," means "an appearance bond secured by deposit with the clerk of security equal to the full amount thereof." Ala. R. Crim. P. 7.1(c). So a person whose conditions of release include a secured bond must pay money (to the clerk directly or to a third party who then pays money to the clerk) to obtain release.

Alabama law imposes no standard of proof by which an Alabama judicial officer must find that a defendant's release conditions will not reasonably assure his appearance or that the defendant "pose[s] a real and present danger[] to others or to the public at large" if he is released on his own recognizance or on an unsecured bond.

If a defendant cannot pay a scheduled bail amount upon his arrest and must later appear before an Alabama judicial officer for a determination of release conditions and if that officer concludes that a defendant does not qualify for release on his own recognizance or an unsecured bond, "the court may impose the least onerous condition or conditions contained in Rule 7.3(b) that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm … ." *Id.* In so doing, the Alabama judicial officer "may take into account" the fourteen considerations set forth at Rule 7.2(a), Ala. R. Crim. P., and repeated in the Majority Opinion at 5-6.

Alabama law defines "indigent" under the Alabama Rules of Criminal Procedure as meaning "a person who is financially unable to pay for his or her defense." Ala. R. Crim. P. R. 6.3. But it states no objective criteria for evaluating whether any given defendant qualifies as "indigent." Rather, the definition of "indigency" is a

relative one dependent on the circumstances. In particular, to assess indigency, Alabama law requires the judge to "recognize ability to pay as a variable depending on the nature, extent and liquidity of assets, the disposable net income of the defendant, the nature of the offense, the effort and skill required to gather pertinent information and the length and complexity of the proceedings." Ala. Code 1975 § 15-12-5(b).

B. *The district court found that Culman County's actual bail practices after it adopted the Standing Bail Order imposed two altogether different bail standards on the indigent and nonindigent, resulting in the detention of indigent defendants when similarly situated nonindigent defendants were not detained*

With this general understanding of Alabama law as it governs pretrial release in mind, I turn now to the facts here. Hester alleged he was arrested on July 27, 2017, on a misdemeanor charge of possession of drug paraphernalia and was held on a $1,000 secured bond under Cullman County's pre-Standing Bail Order system. He asserted his bond was set according to the then-existing bail schedule, with no inquiry into his ability to pay or the necessity to detain him.

Four days after his arrest, on August 1, 2017, Hester filed his original intervenor complaint in this case. Sometime before the Standing Bail Order went into effect on March 26, 2018, Hester was released from jail.

After that happened, in April 2018, over two days, the district court held an evidentiary hearing on Hester's motion for a preliminary injunction. During that hearing, the district court heard testimony from four witnesses, including Stephen Demuth, Hester's expert witness in statistical analysis and quantitative research

methods, particularly as those methods relate to pretrial detention and release processes; Judge Truman Morrison, a Superior Court judge for the District of Columbia and Hester's expert witness in bail-setting practices; Sheriff Kevin Gentry; and Judge Wells Turner, a district judge for Cullman County. The parties filed nearly sixty exhibits in conjunction with the motion. Among these were the expert reports of Demuth and Judge Morrison; several reports and studies on bail and pretrial detention; the declarations of several individuals who have studied pretrial release; and the declaration of the Vice President of the National Association of Pretrial Services Agencies.

After reviewing the evidence and hearing the witnesses' testimony, the district court made several factual findings about how the post-March 25, 2018, Standing Bail Order system works. As I have mentioned, Hester was released before that system went into effect and did not allege that he was ever subjected to it. But the district court enjoined the County's practices under that system, and the Majority Opinion reviews the Standing Bail Order facially. So I describe the district court's relevant factual findings.

First, I explain how the system works for the nonindigent defendants. Those arrested without a warrant (which includes most people arrested in Cullman County) receive a bail set by the Sheriff, according to a bail schedule that specifies the amount for each crime. Using the same schedule, a magistrate (who generally is neither a member of the Alabama Bar nor a lawyer[3]) presets the bail for those arrested with a warrant. So bail is based on only the charge and the charge alone. Neither

[3] In Cullman County, magistrates are court specialists and perform important functions, but they are not lawyers.

the Sheriff nor the magistrate considers the particular facts underlying the charge, the individual's criminal history, past failures to appear, employment status, financial resources, ties to the community, age, health, or any other information. Indeed, Sheriff Gentry conceded that, under the Standing Bail Order, "there's no leeway in … what your bond is going to be." The money bail required is also always secured, meaning it must be paid through a surety or a property bond.[4]

Theoretically, if a law-enforcement officer believes a person poses "an unreasonable risk of flight or danger to the public," then the officer can submit a bail request form to a magistrate requesting that bail be denied until the person is brought before a judge. But in reality, if this happens at all, it happens virtually never. And that was also the case under the pre-Standing Bail Order system. So while Sheriff Gentry characterized these bail-denial requests as "very few and far between," Judge Turner—one of only two district judges in Cullman County—admitted he had never seen one in conjunction with a warrantless arrest. In other words, before those who can pay the scheduled bail are released, no one makes a danger assessment of any type or an individualized failure-to-appear assessment.

When a person can post bond, his stay in the Cullman County jail generally lasts between forty-five and ninety minutes from when he is booked until when he is released.

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[4] As I have noted, people charged with murder or manslaughter must wait to see a judge at their first appearance before they know if they will receive a bond. Hester's challenge to the Standing Bail Order does not include a challenge to this aspect of the system, so I do not discuss it further. And for that same reason, all references to bail in this dissent's legal analysis deal with cases that do not fall into these limited categories.

Now, I turn to the different Standing Bail Order practices and procedures that govern the experience of a person who cannot post bail. Unlike a person who can pay the scheduled bail and who generally spends, at most, ninety minutes in the Cullman County jail, an indigent person who cannot post bond may wait in jail up to 72 hours before he is brought before a judge for an initial appearance and bond reassessment. That is so because Cullman County holds initial appearances only three times a week—on Monday, Wednesday, and Friday afternoons at about 1:30 or 2:00 p.m. So, for example, a defendant arrested on a Friday after the cutoff for Friday initial appearances will not have his bond hearing until the following Monday afternoon. And even when the indigent defendant has his initial appearance—and unlike those who are not indigent and can simply pay the pre-assigned bail—the indigent defendant is not guaranteed to be released.

At the indigent defendant's initial appearance—and again, unlike for a person who can pay the scheduled bail and does not have a bond hearing—an indigent person like Hester must undergo a danger assessment and an individualized failure-to-appear assessment before his bond is set. And he might never be able to satisfy the resulting conditions the presiding judge decides to impose. But an arrestee on the same charge as Hester, for example, who can pay the $1,000 scheduled bail will undergo neither a danger assessment of any type nor an individualized failure-to-appear assessment and will instead be released from jail automatically within ninety minutes of his arrest.

To show the difference even more starkly, while Hester had to sit in jail because he could not afford his bond for misdemeanor possession of drug paraphernalia, Judge Turner confirmed, if a deputy sheriff were to

arrest an individual on a charge of first-degree rape, the Sheriff's Office would release the individual—with no danger inquiry or individualized failure-to-appear assessment—as soon as he could post a $20,000 property or surety bond.

Returning to how the judge sets the bond for the indigent defendant at the initial appearance, the judge considers the defendant's written answers to questionnaires that seek information about the defendant's life, family, health, criminal history, employment, and personal finances. These questionnaires are provided to the defendant before his hearing.

But notably, Judge Turner testified and the district court found that many defendants cannot effectively complete the forms. As Judge Turner explained, most people arrested in Cullman County do not have a high-school education, many have learning disabilities, and "[a] lot of them" struggle with reading comprehension. So their efforts to respond to the questionnaires are not always helpful.

Compounding these problems, indigent defendants have no counsel present at the bond hearing to assist them. While the judge may appoint counsel during the hearing, the indigent defendant will be unable to meet with that attorney until about a week later.

Meanwhile, at the initial appearance, the judge determines whether to adjust the secured bond that was required by the bail schedule when the defendant was arrested. The Standing Bail Order provides that, in making this determination, the judge "may elicit testimony about the defendant's financial condition." But a form called "Order on Initial Appearance and Bond Hearing" states that the judge must "[give] the Defendant the opportunity to make a statement regarding

his/her ability to post the bond currently set in this matter."

After considering the indigent defendant's individualized circumstances, the judge may release the defendant on his own recognizance or with an unsecured bond, or the judge may again impose a secured-bond requirement. If the court requires a secured bond, the Standing Bail Order states that "[t]he Court will make a written finding [on the Order on Initial Appearance and Bond Hearing and the Release Order] as to why the posting of a bond is reasonably necessary to assure the defendant's presence at trial in such a case."

But neither the Order on Initial Appearance and Bond Hearing nor the Release Order provides space for a written finding. Rather, the Order on Initial Appearance and Bond Hearing requires a judge to check boxes next to fifteen listed factors to identify the factors the judge took into "consideration" in requiring a secured bond. Fourteen of the factors come from Rule 7.2(a), Ala. R. Crim. P., and the fifteenth simply says, "Other," which the judge may specify in writing. The Release Order requires only that the judge check a box if the court imposes a secured bond.

Although the Standing Bail Order provides that the court may "require the posting of a secured appearance bond if that is the least onerous condition that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or the public at large," the district court found it is not uncommon for a judge to set a bond at the uncounseled initial appearance in an amount she knows the defendant cannot afford. Indeed, Judge Turner testified that under the Standing Bail Order system, he sets secured bonds for indigent defendants at their initial appear-

ances about half the time. In setting bonds for indigent defendants, Judge Turner does not inquire "much past the defendant's income or indigency status [because he does not] want to get involved with … the facts on their case until [he has] appointed them counsel."

If the defendant cannot pay the bond the judge imposes at the initial appearance, typically, up to a month will pass before a judge hears the indigent defendant's counseled motion for bond reduction. That is so because it takes some time for the appointed attorney to file the motion for bond reduction, and then the court hears those motions only every other Monday. Even if the County does not oppose an indigent defendant's motion for bond reduction, it takes at least 15 days and up to 30 for the district judge to grant the motion. While the indigent defendant's motion remains pending, of course, he sits in jail.

If no initial appearance occurs within 72 hours of the indigent defendant's arrest, though, the Sheriff must release the defendant on an unsecured bond. But that rule does not guarantee an indigent defendant will have an initial appearance and bond reassessment before a judge within 72 hours. Rather, a magistrate may conduct the hearing.

Cullman County asserted that three compelling interests justify the need for secured bonds: (1) providing pretrial release as quickly as possible for all who can afford it; (2) ensuring that defendants appear for court proceedings, and (3) protecting the community from dangerous defendants.

Working backwards, on the County's interest in protecting the public, the district court concluded that data and empirical evidence in the record revealed no significant difference in public-safety rates between de-

fendants released on secured bonds and those given unsecured bonds. Based on these facts, the district court found that the County's stated interest in using secured bail to promote public safety was illusory.

As for the County's interest in ensuring the defendant's appearance for court proceedings, given the unrebutted evidence, the court determined that money bail is not more effective than nonmonetary conditions of release in reducing the risk of failures to appear. As the district court noted, Dr. Demuth explained that several recent empirical studies comparing the effectiveness of pretrial release conditions found "no difference in the effectiveness of secured and unsecured bonds." For example, the average court-appearance rate for defendants in Jefferson County, Colorado, which was studied, did not differ significantly for defendants whose bond was set by judges who imposed more secured bonds and those who set more unsecured bonds. According to Dr. Michael Jones, one of the study's authors, this finding was consistent with the fact that "both bond types carry the potential for the defendant to lose money for failing to appear."

Besides this, the district court noted that Dr. Jones relied on research studies that show that court date reminders, "which can be delivered through in-person meetings, letters, postcards, live callers, robocalls, text messages, and/or email," are the "single most effective pretrial risk management intervention for reducing failures to appear," improving court appearances by about 30% to 50%. In fact, the district court stated, the public defender in Richmond, California, was able to reduce failure-to-appear rates among its clients from 20% to less than 4% after implementing text-message court-date reminders. And the failure-to-appear rate of low-income defendants in Luzerne County, Pennsylva-

nia, decreased from 15% to less than 6% when that county started using text-message court-date reminders.

The court also relied on the declaration of Insha Rahman, a senior planner at a nonprofit criminal-justice organization that develops pretrial services. She stated that, in New York City, 95% of nearly 2,300 criminal defendants whose bail was paid by charitable organizations—meaning they had no "skin in the game"—made all their court appearances.

Besides these evidentiary sources, the district court pointed to statements from Judge Morrison's declaration that supported the same conclusion. Judge Morrison attested that, in 2017 (the last full year for which statistics were available when he prepared his declaration), 94% of arrestees in Washington, D.C., were released, and 88% of released defendants "made *all* scheduled appearances during the pretrial period." And, the court observed, Judge Turner effectively agreed that unsecured bail can be effective when he opined that a defendant would have just as much "skin in the game," whether he had unsecured or a secured bond. Another study the court cited, which analyzed data on 153,407 defendants, revealed that when secured bonds result in the extension of a defendant's pretrial detention, secured bonds make it *less* likely that a defendant appears in court.

In response to these many studies and related testimony, Cullman County offered no empirical evidence or research studies to rebut Hester's evidence. Based on the record, then, the district court found that "the plaintiffs' evidence demonstrates that Cullman County likely would not see an increase in failures to appear with unsecured bonds."

As for the County's interest in securing pretrial release as quickly as possible for all who can afford it, the district court concluded that unsecured bonds for those who cannot afford secured bonds would continue to allow all who can afford secured bonds to be released immediately. But they would also allow those who cannot afford secured bonds to obtain immediate release, while still protecting against failure to appear.

Ultimately, the court concluded that "[n]one of the interests that [the County] identified relating to Cullman[] County's secured bail procedures finds support in the current record." Yet although the district court found, as a matter of fact, that Cullman County's implementation of its Standing Bail Order does not further the County's stated interests for the policy, under that Order, the indigent are still de facto pretrial detained, while the nonindigent are not.

III. Unnecessary pretrial detention can significantly harm the defendant, his family, and the community

Before I get into why Cullman County's bail system violates the Fourteenth Amendment, I think it's worth explaining the reasons, including the less obvious ones, why pretrial release is important. Not that pretrial detention is never appropriate. It is—in cases that involve true and serious risks of flight or real threats to the community (or both) that cannot be mitigated through reasonable non-detaining measures.

But many state-court defendants—including several who are arrested on non-violent misdemeanor offenses—do not present those types of risks. Rather, as the trial court found, based on the evidence, any risks most state-court defendants raise may be suitably addressed by measures short of pretrial detention. And there are important reasons why defendants whose

risks can otherwise be addressed should be released unless they are convicted and sentenced to jail or prison time.

More than three decades ago, the Supreme Court declared that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). The fundamental right to pretrial liberty began with the first days of our nation. *See Stack v. Boyle*, 342 U.S. 1, 4 (1951) (explaining that there is a "traditional right to freedom before conviction" going back to the Judiciary Act of 1789). That right is animated by the "bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law"—the presumption of innocence. *In re Winship*, 397 U.S. 358, 363 (1970) (quotation marks omitted).

Put simply, before an arrestee is convicted (if he ever is), he is presumed innocent. And we don't punish innocent people with jail time. Yet we have acknowledged the "punitive and heavily burdensome nature" of pretrial detention. *Rainwater*, 572 F.2d at 1056. Because pretrial detention involves the "deprivation of liberty of one who is accused but not convicted of crime," we have recognized that it "present[s] a question having broader effects and constitutional implications than would appear from a rule stated solely for the protection of indigents." *Id.* Among other things, pretrial release "prevent[s] the infliction of punishment prior to conviction." *Id.* at 1056-57.

People who are jailed—even for just a day or two—can lose their jobs, homes, and vehicles; and their bonds with family members, who may be relying on them for support or care, can often be deeply affected. *See Ger-*

stein v. Pugh, 420 U.S. 103, 114 (1975) ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."); Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1334, 1356-57 (2014) ("Many detainees lose their jobs even if jailed for a short time, and this deprivation can continue after the detainee's release. Without income, the defendant and his family also may fall behind on payments and lose housing, transportation, and other basic necessities.") (footnotes omitted); Cherise Fanno Burdeen, *The Dangerous Domino Effect of Not Making Bail*, The Atlantic (Apr. 12, 2016), https://www.theatlantic.com/politics/archive/2016/04/the-dangerous-domino-effect-of-not-making-bail/477906/ ("Even short-term incarceration can have dire consequences. People can lose their jobs, housing, even custody of their kids if they're in jail.").

Jail can also have lasting and irreversible consequences on a person's psychological and physical health. Some who have been detained when they couldn't pay bail have committed suicide or have otherwise died in custody. In a tragic example, a teenager in Michigan accused of stealing a bottle of wine committed suicide after spending three days in jail because he could not afford bail. *See* Ted Roelofs, *The Price of Michigan's Cash Bail System*, The Bridge (Nov. 15, 2016), https://www.bridgemi.com/michigan-government/price-michigans-cash-bail-system. In another case, Sandra Bland was arrested after failing to signal while changing lanes. Three days later she was found dead from an apparent suicide in her jail cell. Abby Ohlheiser & Sarah Larimer, *What We Know About Sandra Bland, Who Died This Week in a Texas Jail*, Washington Post (July 17, 2015), https://www.washingtonpost.com/news/

morning-mix/wp/2015/07/17/what-we-know-about-sandra-bland-who-died-this-week-in-a-texas-jail/.

While fortunately not common, sadly, these cases are not flukes, either. Before the pandemic, roughly 1,000 people died in local jails each year—almost a third by suicide. Martin Kaste, *The 'Shock of Confinement': The Grim Reality of Suicide in Jail*, NPR (July 27, 2015), https://www.npr.org/2015/07/27/426742309/the-shock-of-confinement-the-grim-reality-of-suicide-in-jail; E. Ann Carson & Mary P. Cowhig, U.S. Dep't of Justice, Bureau of Just. Stat., *Mortality in Local Jails, 2000-2016* (February 2020), https://bjs.ojp.gov/content/pub/pdf/mlj0016st.pdf. Suicide rates in jails are almost five times higher than they are in prison and three times worse than they are in the general public.

And the COVID-19 pandemic has added problems. Prisons and jails have been hotbeds for the spread of COVID-19, where incarcerated people "have been infected at rates several times higher than those of their surrounding communities." Eddie Burkhalter et al., *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. Times (Apr. 10, 2021), https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html.

In fact, the pandemic further exacerbated conditions in Alabama jails because the State halted the transfer of inmates from county jails to state prisons. Ashley Remkus, *Alabama Inmates Sleep on Floors as Jails Overcrowded: 'It's Inhumane'*, AL.com (Dec. 18, 2020), https://www.al.com/news/2020/12/alabama-inmates-sleep-on-floors-as-jails-overcrowd-its-humane.html. As a result, Alabama jails have been overcrowded, leading to shortages in basic supplies and forcing inmates to sleep on mats for weeks at a time. *Id.*

Alabama continued for months to see surges in COVID-19 cases, mainly because of new variants and low vaccination rates. Ramsey Archibald, *New COVID Surge Begins in Alabama, Hospitalizations Double in July, Positivity Rate Climbing*, AL.com (July 20, 2021), https://www.al.com/news/2021/07/new-covid-surge-begins-in-alabama-hospitalizations-double-in-july-positivity-rate-climbing.html. Three days of pretrial incarceration during the current pandemic could have life-altering consequences.

That's not all. Individuals detained pretrial are also more likely to be convicted or plead guilty—even if they are not guilty. The district court found, based on empirical evidence and studies, that pretrial detention boosts the likelihood that an arrestee is convicted. For example, the court relied on a Harris County, Texas, study that concluded that "defendants who are detained on a misdemeanor charge are much more likely than similarly situated [defendants who are released pretrial] to plead guilty and serve jail time. Compared to similarly situated [released defendants], detained defendants are 25% more likely to be convicted … ." And it pointed to a study from Pittsburgh that found that "pretrial detention leads to a 13% increase in the likelihood of being convicted, an effect largely explained by an increase in guilty pleas among defendants who otherwise would have been acquitted or had their charges dropped." The district court also relied on "data from New York City [that] shows that 92% of people detained pretrial pleaded guilty, while only 24% and 32% of the cases in which the defendant's bail was paid by the Bronx Freedom and Brooklyn Community Bail Fund, respectively, resulted in a criminal conviction."

Those findings are unsurprising given that pretrial release "permits the unhampered preparation of a de-

fense" and gives arrestees better bargaining positions for plea deals. *Stack*, 342 U.S. at 4. Conversely, those who are detained often feel added pressure to plead guilty: each additional hour in jail ratchets up the pressure to cut a deal to get out as quickly as possible. Wiseman, *Pretrial Detention*, at 1356 ("In some cases, the periods that defendants spend in jail awaiting trial is comparable to, or even greater than, their potential sentences, thus substantially incentivizing quick plea deals regardless of guilt or innocence.") (footnotes omitted).

The pressure to plead out is even greater for those (like Hester) accused of misdemeanors. For them, "the worst punishment may come before conviction" because misdemeanor defendants are routinely given "'time served' or probation," so misdemeanor arrestees are incentivized to plead guilty and get out of jail as soon as possible. Paul Heaton *et al.*, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 715 (2017) (footnotes omitted).[5] The research backs this up: A study on misdemeanor defendants in Harris County, Texas, found that defendants who were detained pretrial were 25% more likely to plead guilty than non-detained defendants. *Id.* at 717, 747.

Plus, the district court here concluded that "pretrial detention is associated with harsher sentences upon conviction." It cited the Harris County, Texas, study as finding that "detained individuals were 43% more likely than similarly situated released individuals to be sentenced to a term of incarceration." And the court similarly pointed to the conclusion of a study of Phila-

[5] Hester submitted this article as empirical evidence during the preliminary injunction hearing. See ECF No. 129-19.

delphia's pretrial procedures that "defendants detained pretrial generally end up owing $129 more in non-bail court fees and are sentenced to an additional 124 days [in jail] on average upon conviction."

These costs do not rest solely on the arrestee's shoulders; society also pays for them. In a literal sense, taxpayers pay exponentially more to detain individuals pretrial than it would if the detainees were released pretrial. For example, studies have found that detaining an arrestee costs $80 to $150 per day, "while monitoring a defendant released pretrial costs between $5 and $15 a day." Nicole Hong and Shibani Mahtani, *Cash Bail, a Cornerstone of the Criminal-Justice System*, is Under Threat, Wall Street Journal (May 22, 2017). So we should make sure that those we detain really do need to be detained.

But it is not just our pocketbooks that unnecessary pretrial detention hurts; the district court cited a study showing those who are detained pretrial are more likely to commit a crime in the future. And other studies reach the same conclusion. *See*, *e.g.*, Heaton et al., *Downstream Consequences*, at 718; *see also* ECF No. 129-12 at 5 (a study of detainees in Kentucky found that individuals who were detained for 2 or 3 days were 1.39 times more likely to engage in new criminal activity than those who were released within a day).

In short, the district court found that unnecessary pretrial detention has both deep and rippling consequences—for the defendant, his family, and the community.

IV. The district court correctly determined that Cullman County's actual bail practices violate the Fourteenth Amendment

Hester argues that Cullman County subjects indigent state-court defendants to effective pretrial detention when it releases similarly situated nonindigent defendants. In other words, Hester contends Cullman County detains indigent defendants just because they are indigent. And that, he asserts, violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. I agree.

The Supreme Court has long recognized that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Bearden v. Georgia*, 461 U.S. 660, 664 (1983) (quoting *Grifin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion)). And our predecessor Court has acknowledged "that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Rainwater*, 572 F.2d at 1056.

Due-process and equal-protection concerns animate this principle of "equal justice." *See Bearden*, 461 U.S. at 664-65. As the Court has explained, we consider "whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause." *Id.* at 665. And we also evaluate "the fairness of relations between the criminal defendant and the State under the Due Process Clause." *Id.*

If a defendant is detained just because of his indigent status and without "a meaningful opportunity to enjoy" pretrial release, we apply heightened scrutiny in reviewing the scheme. *Walker v. City of Calhoun*, 901 F.3d 1245, 1261 (11th Cir. 2018) (quoting *San Antonio*

Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20 (1973)). Indeed, our predecessor Court has explained that "[t]he demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail." *Rainwater*, 572 F.2d at 1057 (citation and quotation marks omitted).

Rainwater's use of the phrase "to a greater extent than necessary" reflects heightened scrutiny, as rational-basis scrutiny would uphold a scheme as long as it is "rationally related to a legitimate government purpose," *Leib v. Hilsborough Cnty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009)—no matter if the scheme deprives pretrial detainees of the rights of other citizens more than necessary to achieve the government's legitimate interests. *Rainwater*'s use of heightened scrutiny follows Supreme Court precedent in cases involving the state's use of wealth-based incarceration. In *Bearden*, for example, the Court held that a state can imprison an indigent probationer "[o]nly if the sentencing court determines that alternatives to imprisonment are not adequate" to meet the state's interest. 461 U.S. at 672. In other words, jailing must be the only adequate option—not just a rational one.

A. Rainwater requires the conclusion that Culman County's bail system violates the Fourteenth Amendment

In *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018), *abrogated by Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022) (en banc), the Fifth Circuit applied these principles—and *Rainwater* in particular—in evaluating a Fourteenth Amendment challenge to the bail system of Harris County, Texas.

Before addressing *ODonnell*'s analysis of the Fourteenth Amendment issues at stake here, I pause to explain the status of *ODonnell*. *ODonnell* involved a challenge to Harris County, Texas's actual bail practices in connection with a bail schedule. As I explain below, the Fifth Circuit concluded that Harris County's bail practices violated the Fourteenth Amendment. Separately, in *Daves v. Dallas County*, 22 F.4th 522, another group of plaintiffs challenged Dallas County's bail practices, which were allegedly similar to the bail practices of Harris County in *ODonnell*. The district court and a panel of the Fifth Circuit therefore applied *ODonnell*'s substantive analysis to whether Dallas County's bail practices violated the Fourteenth Amendment and found that they did. *See id.* at 530-31.

The Fifth Circuit then took *Daves* en banc solely on issues of justiciability. *See id.* at 528. And while the Fifth Circuit vacated the district court and panel decisions in *Daves* in their entirety because it concluded, in part, that the plaintiffs lacked standing to sue some defendants in *Daves* (similar defendants are not enjoined in Hester's case) and it directed the district court to address abstention, it was careful to note that its decision did "not reach the merits." *Id.*

As the panel decision in *Daves* was vacated because the Fifth Circuit concluded it did not suitably address justiciability concerns, and it, in turn, was based on *ODonnell* and its similar treatment of justiciability concerns, *ODonnell* is no longer good law in the Fifth Circuit. But as I've mentioned, the Fifth Circuit's en banc decision in *Daves* did not reach or criticize *ODonnell*'s merits analysis in any way. And the four Fifth Circuit judges who dissented from the *Daves* justiciability-based en banc decision and who did comment on the *ODonnell* merits analysis reaffirmed it. *See id.* at 551-

52 (Haynes, J., dissenting); *cf. also id.* at 570 ("The bail system at issue in this case blatantly violates arrestees' constitutional rights.").

So while *ODonnell* is no longer good law, its Fourteenth Amendment analysis remains instructive. And that is especially so because that analysis is based on our mutually binding precedent in the form of *Rainwater*, since like we are, the Fifth Circuit is bound by *Rainwater*.[6] I therefore review *ODonnell*.

The *ODonnell* district court found that, under Harris County's bail system as it was implemented, all misdemeanor arrestees had hearings where bail amounts were set. *See ODonnell*, 892 F.3d at 153-54. But these hearings, in practice, "did not achieve any individualized assessment in setting bail." *Id.* at 153. At the hearings, bail amounts were set in accordance with a bail schedule and on a secured basis most of the time, and hearing officers knew that, by imposing a secured bail on indigent arrestees, they were ensuring that those arrestees would remain detained. *Id.* at 154. Yet (as here) the evidence before the court reflected that "release on secured financial conditions does not assure better rates of appearance or of law-abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision." *Id.* In sum, the district court concluded that Harris County's bail "custom and practice resulted in detainment solely due to a person's indigency because the financial conditions for release are based on predetermined amounts

[6] *Rainwater* is a Fifth Circuit precedent from 1978. Because it is Fifth Circuit precedent, it binds the Fifth Circuit. It also binds us because the Fifth Circuit issued it before October 1, 1981, and we have adopted as precedential all such Fifth Circuit opinions. S*ee Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

beyond a person's ability to pay and without any 'meaningful consideration of other possible alternatives.'" *Id.* at 161.

In conducting its analysis on appeal, on the due-process side of the equation, the Fifth Circuit observed that the Texas Constitution provided that "[a]ll prisoners shall be bailable by sufficient sureties." *Id.* at 158 (quoting Tex. Const. art. 1, § 11). Based on that, the Fifth Circuit concluded that "Texas state law creates a right to bail that appropriately weighs the detainees' interest in pretrial release and the court's interest in securing the detainee's attendance." *Id.* That right, in turn, means that judicial officers cannot "impose a secured bail solely for the purpose of detaining the accused." *Id.* Rather, decisions on conditions of release must "reflect a careful weighing of the individualized factors" Texas law set forth. *Id.* As the Fifth Circuit explained, this right was a state-created liberty interest. *See id.*

After hashing this out, the Fifth Circuit turned its attention to evaluating whether Harris County's bail practices adequately protected the arrestees' right to such a bail. To conduct this analysis, the Fifth Circuit employed the *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), three-part balancing test that considers "the private interest … affected by the official action; the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and the Government's interest, including the function involved and the fiscal and administrative burdens that new procedures would impose." *ODonnell*, 892 F.3d at 158-59 (citation and quotation marks omitted).

After weighing these interests, the Fifth Circuit determined that Harris County's bail practices were "inadequate" "when applied to … the liberty interest at stake." *Id.* at 159. In particular, the court noted that the district court's factual findings showed that "secured bail orders [we]re imposed almost automatically on indigent arrestees," even though officials knew the indigent could not afford such bail. *Id.* Based on this fact, the court concluded, Harris County's bail practices did "not sufficiently protect detainees from [officials] imposing bail as an 'instrument of oppression.'" *Id.*

That said, the court declined to require factfinders to issue a written statement of their reasons for the selected pretrial release conditions. *Id.* at 160. As the court explained, the arrestees' liberty interest—"the right to pretrial liberty of those accused (that is, presumed innocent) of misdemeanor crimes upon the court's receipt of reasonable assurance of their return"—was "particularly important." *Id.* at 159. But so was "the government's interest in efficiency." *Id.* And the court was concerned that requiring Harris County to produce 50,000 written opinions per year would impose too great a burden. *Id.* at 160. Rather, it reasoned, requiring officials "to specifically enunciate their individualized, case-specific reasons" for imposing release conditions they knew indigent individuals could not meet was "a sufficient remedy." *Id.*

The Fifth Circuit also determined that "the federal due process right" as recognized in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-58 (1991), "entitles detainees to a [bond] hearing within 48 hours." *ODonnell*, 892 F.3d at 160.

Then the Fifth Circuit considered the equal-protection part of the challenge to Harris County's bail

practices. It determined that those practices warranted heightened-scrutiny review under Rodriguez. *Id.* at 162; *see also Daves*, 22 F.4th at 552 (Haynes, J., dissenting) ("We determined that the district court did not err in applying intermediate scrutiny."). That is, under Harris County's bail practices, indigent arrestees could not pay secured bail, "and, as a result, sustain[ed] an absolute deprivation of their most basic liberty interests—freedom from incarceration." *ODonnell*, 892 F.3d at 162. And, the court continued, indigent arrestees were "incarcerated where similarly situated wealthy arrestees [we]re not, solely because the indigent cannot afford to pay a secured bond." *Id.* And, invoking *Rainwater*, 572 F.2d at 1057, the *ODonnell* Court noted that the district court's factual findings showing that Harris County's bail practices resulted in wealth-based detainment "without any 'meaningful consideration of other possible alternatives'" meant that Harris County's bail practices were unconstitutional. *ODonnell*, 892 F.3d at 161 (quoting *Rainwater*, 572 F.2d at 1057).

The Fifth Circuit concluded that Harris County's bail practices flunked heightened scrutiny. *Id.* at 162. It acknowledged that the County enjoyed a "compelling interest in the assurance of a misdemeanor detainee's future appearance and lawful behavior." *Id.* But the court held that Harris County's bail practices were "not narrowly tailored to meet that interest." *Id.* In support of this conclusion, the Fifth Circuit explained that Harris County did not show a "link between financial conditions of release and appearance at trial or law-abiding behavior before trial." *Id.* Indeed, the County did not present data showing that secured bail was more effective than unsecured bail in ensuring an arrestee's future appearance. *Id.* But meanwhile, the plaintiffs submitted data suggesting that using secured

bail might increase the likelihood of unlawful behavior. *Id.*

At the end of the day, the Fifth Circuit explained, under Harris County's bail practices, "two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent," "would almost certainly receive identical secured bail amounts." *Id.* at 163. The wealthy arrestee could post bond, while the indigent one would not. *Id.* And as a result, "the wealthy arrestee [would be] less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration." *Id.* Meanwhile, the indigent arrestee would not enjoy those same advantages. *Id.* The Fifth Circuit concluded that, under Rainwater and Supreme Court precedent, this violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*

Hester's case presents the same problems as *ODonnell*. I begin with the due-process analysis.

First, the liberty interest: there is no meaningful distinction between Texas's constitutional promise that "[a]ll prisoners shall be bailable by sufficient sureties," Tex. Const. art. 1, § 11, and Alabama's constitutional guarantee that "all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great … ." Ala. Const. art. 1, § 16. And Alabama courts "have consistently construed" the Alabama Constitution and § 15-13-2, Code of Alabama 1975, "as ensuring to an accused an absolute right to bail." *Shabazz v. State*, 440 So. 2d 1200, 1201 (Ala. Crim. App. 1983) (citing *Brakefield v. State*, 113 So. 2d 669 (Ala. 1959); *Holman v. Williams*, 53 So. 2d 751 (Ala. 1951); *Sprinkle v.*

State, 368 So. 2d 554 (Ala. Crim. App. 1978)). So those arrested in Alabama must enjoy the same liberty interest under the Alabama Constitution that Texas's Constitution created in "a right to bail that appropriately weighs the detainees' interest in pretrial release and the court's interest in securing the detainee's attendance," *ODonnell*, 892 F.3d at 158.

As for the *Mathews* balancing test, as in the factual findings in *ODonnell*—where the district court determined that "secured bail orders [we]re imposed almost automatically on indigent arrestees," *id.* at 159, even though officials knew the indigent could not afford such bail—the district court here found that "Cullman County mechanically applies a secured money bail schedule to detain the poor and release the wealthy," and "[i]t is not uncommon for a judge to set a bond in an amount he knows the defendant cannot afford." Just as these circumstances in *ODonnell* led the Fifth Circuit to conclude that Harris County's actual bail practices (rather than its written bail framework) did "not sufficiently protect detainees from [officials] imposing bail as an 'instrument of oppression,'" *id.*, the district court here found that "Cullman County's actual procedures are significantly less individualized and protective than due process requires."

In further support of this conclusion, the district court here noted other deficiencies in Cullman County's practices, including that Cullman County "do[es] not provide constitutionally adequate notice to indigent criminal defendants before an initial appearance"; that judges "do[] not have to give a criminal defendant an opportunity to be heard or present evidence"; that "neither the Cullman County Sheriff nor a Cullman County judge must satisfy an evidentiary standard before entering an unaffordable secured bond that serves as a *de*

facto detention order"; and that judges "do not actually make 'findings'" when they require a bond to be posted.

As for notice—which relates directly to the opportunity to be heard—the district court explained that the only evidence of notice in the record was the notice statement in the Release Questionnaire. As for that statement—"FOR THE PURPOSE OF DETERMINING CONDITIONS OF PRE-TRIAL RELEASE IN THIS CASE, THE COURT MAY TAKE INTO ACCOUNT THE FOLLOWING,"—the district court found it "does not communicate the most crucial piece of information, namely, that a judge may enter a *de facto* detention order by setting unaffordable secured money bail even after considering the information provided by the defendant." The district court also noted that Judge Turner testified that he does not inform criminal defendants of the fourteen factors he uses to set secured bail, so a defendant may not know what information may be important to share at the hearing. Not only that, but the form is only offered to arrestees, and some don't take it. Plus, the district court found that many arrestees cannot read or write, rendering the information on the Questionnaire "tantamount to no notice at all."

Even Judge Turner admitted that he had "no idea" whether arrestees were ever advised of the fourteen factors that are supposed to be considered to determine arrestees' release conditions. But the Supreme Court has explained that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970). And "at a minimum, the Due Process Clause requires notice and the opportunity to be heard incident to the deprivation of … liberty … at the hands

of the government." *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003).

As for the lack of an opportunity to be heard, the district court found that Cullman County "impermissibly leave[s] a criminal defendant's opportunity to be heard, a 'fundamental requirement of due process,' up to the judge's discretion." (quoting *Mathews*, 424 U.S. at 333). And the district court also observed that the Standing Bail Order likewise does not require the judge to give the defendant the chance to present evidence.

Turning to the lack of an evidentiary standard, the district court noted that the Standing Bail Order did not identify any standard of proof by which the fact-finder must find the defendant to be a failure-to-appear or danger risk.

And on the lack of factual findings, the district court found that "Cullman County judges do not actually make 'findings.'" Rather, they "merely check[] a box for any of fourteen factors [they] 'considered.'" So, for example, a judge might simply check the box next to "age, background and family ties, relationships and circumstances of the defendant" without explaining what he learned or how it influenced his decision. Comparing that to the *ODonnell* hearing officers' insufficient "jotting [of] abbreviated factors such as 'safety' or 'criminal history,'" the district judge found Cullman County's practice to be "just as inadequate."

The problem with this practice, the district judge explained, arises most significantly when "an indigent defendant finally obtains the assistance of appointed counsel [to move for reconsideration of a bond], but the record affords appointed counsel no information regarding the rationale for her client's bond, making the

task of identifying error and challenging the bail amount unreasonably—and potentially insurmountably—difficult." As the district court cogently reasoned, "Checking boxes for factors 'considered' is tantamount to providing counsel with a copy of Rule 7.2(a) of the Alabama Rules of Criminal Procedure; checkboxes for factors 'considered' provide no meaningful information to indigent defendants or their appointed counsel." To correct these problems, the district court required judges to state on the record their reasons for determining that a secured money bond above a defendant's financial means was necessary to ensure the defendant's appearance at trial or protect the community.

Compounding all these deficiencies, the district court found, was the lack of counsel at the bail hearing. As the court explained, most of these other deficiencies could be addressed by having counsel present to ensure the defendant understood the purpose of the proceeding and the court provided the other requisite procedural protections.

But the first opportunity for counsel's involvement in the bail process for indigent defendants does not occur until the appointed attorney files a motion for reconsideration of bail and the court hears the motion—a process that generally takes up to a month or more. In other words, an indigent defendant can sit in jail for up to a month or more—a month!—before he receives his first meaningful opportunity to be heard. To be clear, that's a month in jail—without conviction—before the indigent defendant even has his first meaningful opportunity to be heard on bail. That's a long time for someone who is presumed innocent. Yet "[t]he fundamental requisite of due process of law is the opportunity to be heard … at a meaningful time and in a meaningful manner." *Goldberg*, 397 U.S. at 267 (cleaned up).

In sum, the district court found in Cullman County's bail practices the same process deficiencies the Fifth Circuit found in Harris County's bail practices in *ODonnell*. For the same reasons the Fifth Circuit concluded Harris County's bail practices violated the due-process rights of indigent arrestees, then, Cullman County's bail practices do.

Moving to the equal-protection analysis, first, just as Harris County's bail practices in *ODonnell* did, Cullman County's bail practices trigger heightened scrutiny under *Rodriguez*. In Cullman County, as in Harris County, indigent arrestees are absolutely deprived of pretrial release just because they are too poor to pay for it. We know this for at least two reasons.

First, the district court found that the Standing Bail Order "does nothing to secure public safety." That finding is not clearly erroneous. In fact, the Standing Bail Order itself favorably cites precedent for the proposition that "[t]he bond schedule represents an assessment of what bail amount would ensure the appearance of the average defendant facing such a charge and is therefore aimed at assuring the presence of a defendant." Standing Bail Order at 2 (cleaned up). Judge Turner similarly characterized the purpose of the secured-bail schedule as being "[t]o secure the return of the defendant, to meet their court dates."

And although the Standing Bail Order calls for bail request forms to seek release conditions other than the scheduled bail for nonindigent defendants when danger or failure-to-appear risk exists, the district court also found that the Sheriff just about never uses them in warrantless arrests. That means Cullman County makes no inquiry into risk of danger before releasing nonindigent defendants arrested without a warrant.

Meanwhile, Cullman County requires all indigent defendants to undergo a danger assessment and then imposes bond based on that. So two similarly situated arrestees with the same arrest offense, the same criminal history, and the same offense circumstances—but one of whom is indigent and the other not—will have two different pretrial-release statuses. The indigent defendant will remain in jail pretrial on a secured bond set too high for the defendant to afford, but the nonindigent defendant who represents the same safety risk will stay in jail for no more than about ninety minutes after his arrest. And since the only difference between these two defendants is that one is indigent and the other isn't, it's clear that any alleged danger risk is not driving the difference in release status. Rather, as far as risk of danger is concerned, the indigent defendant is, in fact, incarcerated just because of his indigence.

Second, Cullman County asserts that its bail schedule is meant to address risk of flight, and since the indigent by definition can't pay their scheduled bail, their bail hearings and resulting bail or other release requirements are intended to take the place of the scheduled bail amounts. But Cullman County's bail-schedule procedure makes no individualized inquiry into failure-to-appear risk that nonindigent arrestees might present. And the County could identify no empirical evidence showing that the scheduled secured bail amounts in fact reasonably ensure nonindigent defendants' appearances or if they do so, that they do so more than unsecured bonds would.

In this respect, the district court favorably cited "several recent empirical studies that compare the effectiveness of different kinds of bonds in assuring appearance in court … [and] [found] no difference in the effectiveness of secured and unsecured bonds." (quota-

tion marks omitted) (first bracketed alteration added). As the district court noted, one study found that "regardless of a criminal defendant's pretrial risk category, unsecured bonds offer decision-makers the same likelihood of court appearance as do secured bonds." (internal quotation marks omitted). In fact, the district court found that "secured money bail actually may undermine the government's interest in court appearance because money bail results in longer periods of pretrial detention for those who cannot easily afford bail, which, in turn, is associated with higher failure to appear rates." And as the district court found, even Judge Turner "acknowledged that an individual would have just as much 'skin in the game' with an unsecured bond [as with a secured bond]."

No one argues that the district court's factual finding that unsecured bond is at least as effective as secured bond in ensuring a defendant's presence for court proceedings is clearly erroneous. Nor, on this record, could they succeed in such an argument. So we must accept this factual finding. Because unsecured bond would reasonably ensure a defendant's presence as much as secured bond, the imposition of secured bonds on the indigent functions solely to keep indigent defendants detained.

Overall, under Cullman County's bail practices, just like under Harris County's bail practices, indigent arrestees cannot pay secured bail, "and, as a result, sustain an absolute deprivation of their most basic liberty interests—freedom from incarceration." *See ODonnell*, 892 F.3d at 162. And they are "incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond." *See id.* Also as in *ODonnell*, as the due-process analysis here shows, because of their indigency, Cullman Coun-

ty indigent defendants do not receive a meaningful opportunity to enjoy pretrial release.

For these reasons, again, as in *ODonnell*, heightened scrutiny applies when we perform an equal-protection analysis of Cullman County's bail practices. Cullman County's bail practices fare no better than did Harris County's.

There's no question that Cullman County has legitimate interests in its stated concerns for minimizing the risks of failure to appear and danger to the community. But for the reasons the district court found and I've just described, Cullman County's bail practices, like Harris County's in *ODonnell*, are "not narrowly tailored to meet th[ose] interest[s]." *Id.* Again echoing Harris County's situation in *ODonnell*, Cullman County did not establish a "link between financial conditions of release and appearance at trial or law-abiding behavior before trial." *See id.* Nor (like Harris County in *ODonnell*) did Cullman County submit data showing that secured bail was more effective than unsecured bail in ensuring an arrestee's future appearance. *See id.* But like the *ODonnell* plaintiffs, Hester and the putative class did present data indicating that using secured bail might increase the likelihood of unlawful behavior. *Id.*

As for Cullman County's claimed interest in "providing pretrial release as quickly as possible for all who can afford it," part of Cullman County's equal-protection problem stems from this very mindset. While it is admirable that Cullman County seeks to provide speedy release, its legitimate interest relating to this concern must follow its legitimate interests in minimizing the risks of failure to appear and danger to the community. Or releasing those who can afford bail,

without considering whether their scheduled secured bail minimizes failure-to-appear and danger risks, could easily work at cross-purposes with those stated interests. And so Cullman County's third interest more specifically lies in providing pretrial release as quickly as possible for all whose failure-to-appear and danger risks can be reasonably minimized through adequate release conditions—no matter if that is by secured money bond or other conditions. But as I've explained, Cullman County's bail practices are not narrowly tailored to further that interest.

Given these facts, it is no surprise that the district court found that "Cullman County's stated interests [justifying its use of secured bonds] are illusory and conspicuously arbitrary." In fact, it concluded that "[n]one of the interests that the defendants have identified relating to Cullman County's secured bail procedures finds support in the current record."

So at bottom—and again, as in *ODonnell*—under Cullman County's bail practices, "two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent," "would almost certainly receive identical secured bail amounts." *See id.* at 163. The wealthy arrestee could post bond, while the indigent one would not. *See id.* And as a result, "the wealthy arrestee [would be] less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration." *See id.* Meanwhile, the indigent arrestee would not enjoy those same advantages. *See id.* Like the Fifth Circuit, I conclude that, under *Rainwater* and Supreme Court precedent, this violates the Equal Protection Clause of the Fourteenth Amendment. *Id.*

B. Contrary to the Majority Opinion's conclusion, our caselaw does not "amply support[] the conclusion that Culman County's bail scheme does not unconstitutionally discriminate against the indigent," Maj. Op. at 46

The Majority Opinion reaches the opposite determination, holding that "[o]ur caselaw amply supports the conclusion that Cullman County's bail scheme does not unconstitutionally discriminate against the indigent." Maj. Op. at 46. The Majority Opinion relies specifically on *Rainwater* and *Walker*. *See* Maj. Op. at 46-61. Neither helps the Majority Opinion's case.

I begin with *Rainwater*. To be sure, the general legal principles *Rainwater* articulates do govern our analysis here. As we said in *Walker*, "[t]he *sine qua non* of a *Bearden*- or *Rainwater*-style claim … is that the State is treating the indigent and the non-indigent category differently. Only someone who can show that the indigent are being treated systematically worse solely because of [their] lack of financial resources—and not for some legitimate State interest—will be able to make out such a claim." 901 F.3d at 1260 (internal citation and quotation marks omitted). As I've explained in Section IV.A. of this dissent, Hester and the putative class can show that they satisfy this test, so *Rainwater*'s legal principle requires the conclusion that Cullman County's bail practices violate the Fourteenth Amendment.

But the Majority Opinion's efforts to avoid this conclusion by shoehorning the facts of Hester's case into the pattern of the facts in *Rainwater* to conclude that Cullman County's bail practices are like Florida's rule and are therefore constitutional are another story.

The problem is that shoe is too small for Hester's facts to fit.

In *Rainwater*, as I've discussed, the former Fifth Circuit considered only a facial challenge to Florida's then-new rule establishing the pretrial bail system. 572 F.2d at 1055. Florida's bail system's sole purpose was "to reasonably assure defendant's presence at trial." *Id.* at 1057. It did not purport to seek to minimize danger to the community. *See id.* at 1055 n.2. And Florida's rule required the court to impose simply what was "necessary to assure the defendant's appearance." *See id.*; *see also id.* at 1058.

Hester's case is distinguishable for a few reasons. First, as I have discussed in Section I, unlike the facial challenge at issue in *Rainwater*, Hester's case is based on Cullman County's actual bail practices; it is not solely a facial challenge to the Standing Bail Order. So unlike in *Rainwater*, we must consider the district court's factual findings about Cullman County's actual bail practices; it is not enough to look simply and solely at the Standing Bail Order.

Second, unlike Florida's rule, Cullman County asserts as a justification for bail an interest in reasonably ensuring that the defendant will not present a risk of danger to the community or himself. Yet when we look at Cullman County's actual bail practices, we find that Cullman County does not, in fact, account for this interest when it comes to nonindigent defendants. As I have noted, the bail schedule does not purport to be directed at reasonably ensuring that a defendant is not a danger. And the district court found that Cullman County pretty much never uses its bail-request-form tool to seek for nonindigent defendants release conditions or re-

strictions geared towards Cullman County's claimed interest in reasonably ensuring the safety of the public.

The Majority Opinion ignores this factual finding without finding it clearly erroneous and instead concludes, contrary to the record, that Cullman County "do[es] account for the danger factor in that law enforcement is expected to file a 'Bail Request Form' to avoid the release of any arrestee who might be a danger to the public." Maj. Op. at 56 n.7. Only by failing to reckon with Cullman County's actual bail practices, as found by the district court, is the Majority Opinion able to conclude that Cullman County "place[s] all arrestees on equal footing [because] all are released as soon as they are able to show that they are not a flight risk or danger to the community." Maj. Op. at 56. Because that conclusion requires us to impermissibly ignore the district court's factual findings that nonindigent defendants are never assessed for danger, it cannot bring Hester's case within the factual pattern on which *Rainwater* was decided.

Third, unlike in the facial challenge in *Rainwater*, here, the district court made factual findings that "secured money bail is not more effective than unsecured bail or non-monetary conditions of release in reducing the risk of flight from prosecution" and that "unsecured bonds offer decision-makers the same likelihood of court appearance as do secured bonds." It also found that "secured bail is not necessary to secure a criminal defendant's appearance."

The Majority Opinion has not determined those findings to be clearly erroneous. So on this record, a secured bond cannot be the least onerous way of reasonably ensuring the defendant's appearance. Yet Judge Turner testified that under the Standing Bail

Order system, he sets secured bonds for indigent defendants at their initial appearances about half the time. And the district court found that "[i]t is not uncommon for a judge to set a bond in an amount he knows the defendant cannot afford." In other words, as a practice, Cullman County sets indigent defendants' bonds in secured amounts it knows they cannot pay, thereby keeping them in jail pretrial, even though that is unnecessary to reasonably ensure their appearances in court.

But in *Rainwater*, where we looked to only the bail rule at issue there (not to actual court practices), we assumed the judges' compliance with the language of the rule, requiring judges not to impose any more bail than was "necessary" to secure the defendants' appearances there. For that reason, we found the rule did not violate Fourteenth Amendment concerns. Because the factual findings here show that the district court imposes secured bonds that indigent defendants cannot afford when such bonds are unnecessary to obtain their appearances in court, *Rainwater*'s conclusion that the Florida rule did not violate the Fourteenth Amendment does not determine the outcome here. The district court's factual finding in this respect further shows, on the appearance-risk assessment, that Cullman County's bail practices do not "place all arrestees on equal footing," Maj. Op. at 56, since Cullman County sets secured bonds, knowing the indigent will be unable to afford them and obtain release, when unsecured bonds would equally secure the indigent defendants' court appearances and similarly situated nonindigent defendants are released.

For these reasons—and contrary to the Majority Opinion's conclusion—*Rainwater* does not support the Majority Opinion's determination here that Cullman

County's bail practices comply with the Fourteenth Amendment. To the contrary, it shows why Cullman County's bail practices are not constitutional.

Walker likewise fails to support the conclusion that Cullman County's bail practices do not violate the Fourteenth Amendment. In *Walker*, as in *Rainwater* but unlike here, we were faced with only a facial challenge to Calhoun County's standing bail order. 901 F.3d at 1267 n.13. We applied rational-basis scrutiny to Calhoun County's standing bail order because the provisions of that order did not cause the *Walker* plaintiffs to suffer "an absolute deprivation on account of wealth." *Id.* at 1266 n.12.

But we were careful to distinguish the circumstances in *Walker* from the facts of *ODonnell*, where the Fifth Circuit applied heightened scrutiny to Harris County's bail practices. *See id.* In fact, we emphasized that the Fifth Circuit, unlike the *Walker* Court, had "extensive factual findings from the district court, resulting from a lengthy evidentiary hearing" about Harris County's actual bail practices. *Id.* As we explained in *Walker*, the *ODonnell* district court's factual findings caused the Fifth Circuit to conclude that Harris County's practices "resulted in [indefinite] detainment solely due to a person's indigency." *Id.* (quoting *ODonnell*, 892 F.3d at 161). We said that "[w]ere the facts of this case the same, Walker would have a much stronger argument that indigents in the City face an absolute deprivation on account of wealth that would trigger the *Rodriguez* exception." *Id.*

Hester's case, for reasons I've explained in Sections I and IV of this dissent, is like *ODonnell*. As in *ODonnell*, the district court here held an extended evidentiary hearing and received and reviewed many exhibits.

And as the district court in *ODonnell* did about Harris County's bail practices, the district court here, based on the evidence from the hearing, made factual findings about Cullman County's actual bail practices. As I've discussed, the district court's findings here—which are not clearly erroneous—require the conclusion that Cullman County's bail practices, like those of Harris County, "result in [indefinite] detainment solely due to a person's indigency." *See ODonnell*, 892 F.3d at 161.

The Majority Opinion asserts that we never said in *Walker* that requiring indigent defendants to show that they are not a flight risk or danger to the community to secure release "would somehow result in a constitutional infirmity." Maj. Op. at 55. That's true; we didn't. But that misses the point. It's not that requiring indigent defendants to show that they are not a flight risk or a danger to the community by itself is unconstitutional. Of course, bail systems can require indigent defendants to do that before releasing them.

But bail systems cannot require indigent defendants to make those showings when they don't require the same thing of nonindigent defendants. And they cannot refuse to release indigent defendants when they release similarly situated nonindigent defendants and have ways to release indigent defendants in a way that equally satisfies the government's interests in bail.

As for other aspects of *Walker*, the Calhoun County bail system was different from Cullman County's bail practices in other significant ways as well. Though Calhoun County allowed those defendants who could meet the bail schedule to be released immediately and required indigent defendants to undergo a hearing before they could be released, Calhoun County's system included several procedural guarantees that made

those hearings meaningful—procedural guarantees that are not present in Cullman County's bail practices. For example, an indigent defendant had a right to be represented by court-appointed counsel at his bail hearing, *Walker*, 901 F.3d at 1252; his hearing (where he was represented) was held within 48 hours of his arrest, *id.*; the sole purpose of the hearing was to determine whether the defendant met the indigency standard—that is, that he earned less than 100 percent of the federal poverty guidelines (unless there was evidence he had other resources that might reasonably be used), *id.*; and if the court found he met that standard, the court had to release him on his own recognizance, without a secured bond, *id.*

None of these circumstances apply in Cullman County. In contrast, in Cullman County, an indigent defendant generally does not receive a bail hearing where he is represented by counsel for a *month* from his arrest. Instead, he has an *unrepresented* appearance before a district judge (or possibly a magistrate) within 72 hours of his arrest. The purpose of the hearing is not only to determine his indigency (by a nonspecific standard) but also to determine what his bail should be (based on an unidentified standard of proof). The defendant very well may not receive notice of the purpose of that hearing. In addition, by design, the presiding judge may not ask many questions or receive much information before determining what bond or other conditions to impose. And the judge may impose a bond that he knows the defendant cannot afford to pay, effectively detaining the defendant. The judge need not state his reasons for his decision on the record, so even when the defendant receives his counseled hearing on his motion to reduce bond a month later,

counsel may not know why the judge imposed the bond he did.[7]

These circumstances—which contrast significantly with the procedural protections Calhoun County's bail system provided— violate "[t]he fundamental requisite of due process of law," which is "the opportunity to be heard … at a meaningful time and in a meaningful manner." *Goldberg*, 397 U.S. at 267. Part of that guarantee means that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Id.* at 269. So indigent defendants who do not receive proper notice of the purpose of the uncounseled bond hearing and of their rights at the bond hearing—and who do not receive a counseled bond hearing for up to a month—do not enjoy an opportunity to be heard at a meaningful time and in a meaningful manner.

For all these reasons, *Walker* does not support the conclusion that Cullman County's bail practices don't violate the Fourteenth Amendment.

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[7] The Majority Opinion opines that "[r]equiring judges to make oral findings … would inject unnecessary procedural complication into the process." Maj. Op. at 66-67 n.10. In support of this conclusion, the Majority Opinion cites *ODonnell* for the proposition that the Fifth Circuit "decline[d] to hold that the Constitution requires the County to produce 50,000 written opinions per year to satisfy due process." *Id.* (quoting *ODonnell*, 892 F.3d at 160). Ironically, though, *ODonnell* did not impose a written-opinion requirement because it concluded that "requiring magistrates to specifically enunciate their individualized, case-specific reasons for [imposing *de facto* detention] is a sufficient remedy." In other words, the Majority Opinion cites *ODonnell*'s determination that oral statements of reasons for bail determinations satisfy due process to hold that oral statements of reasons for bail determinations are unnecessary to satisfy due process. I do not see how one follows the other.

Finally, I want to address the Majority Opinion's contention that Cullman County's 72-hour period within which it provides initial, uncounseled bond hearings is constitutionally permissible because "[i]n the federal criminal system, … a district court is free to delay a bail hearing by three days after an arrestee's initial appearance." Maj. Op. at 54. I do not believe that the Bail Reform Act, codified at 18 U.S.C. § 3142, necessarily establishes that Cullman County's 72-hour period is constitutional.

As relevant here, *Salerno*, 481 U.S. 739, the case involving the constitutionality of the Bail Reform Act, considered only whether the Act's provisions permitting pretrial detention based on future dangerousness were constitutional. *See id.* at 746. It did not address or have reason to contemplate whether the 72-hour period set forth in the Act is always (or even ever) permissible under due-process requirements. And resolving the issue before it did not require it to determine whether the 72-hour period satisfied due process.

But assuming for the purposes of this opinion that *Salerno* did establish that a 72-hour period does not always violate due process, I do not think it can be fairly read for the proposition that a 72-hour period never violates due process. This is so because the Bail Reform Act contains several procedural safeguards that are not always built into every bail system, and that may render the 72-hour period under the circumstances of the Bail Reform Act more constitutionally palatable than a 72-hour period might be in other circumstances. To put a finer point on it, the safeguards that the Bail Reform includes are not a part of Cullman County's bail practices.

For starters, the Bail Reform Act does not purport to generally authorize all arrestees to be held for 72 hours while awaiting their bond hearings. Rather, setting aside circumstances when the defendant seeks additional time to prepare for a hearing, a defendant may be held for 72 hours before his pretrial-detention hearing only in limited circumstances. First, either the government must affirmatively move for pretrial detention, 18 U.S.C. § 3142(f)(1), (2), or the court sua sponte must determine it should consider pretrial detention, *id.* at 3142(f)(2). Second, if the government moves for pretrial detention, one of four circumstances must exist: (1) the defendant must be charged with a crime to which Congress has attached a presumption of serious risk of flight or danger to the community (or both), *see*, *e.g.*, *id.* § 3142(f)(1)(A), (B), (C) (E); (2) the defendant must be charged with a felony after conviction of at least two offenses delineated by Congress, *see id.* § 3142(f)(1)(D); (3) the government must conclude that the defendant presents "a serious risk that [he] will flee," *id.* § 3142(f)(2)(A); or (4) the government must conclude that the defendant presents "a serious risk that [he] will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror," *id.* § 3142(f)(2)(B). If the judicial officer decides a detention hearing is necessary, she must find that either the third or fourth circumstance applies. *See id.* § 3142(f)(2). Notably, these requirements apply equally to indigent and nonindigent defendants alike.

The upshot of this is that, unlike in Cullman County, where all indigent arrestees—regardless of the failure-to-appear or danger risk they present—are subject to up to a 72-hour period of jail confinement before their bond hearings, only those who satisfy specific cri-

teria that make them more likely to need to be held in pretrial detention are authorized under the Bail Reform Act to be held for 72 hours before their bail hearings.

Let me put this in further context. If, loosely translated, the Bail Reform Act's requirements applied in Cullman County, before an indigent defendant could be required to wait up to 72 hours for his bond hearing, the Sheriff would have to affirmatively seek pretrial detention for specific indigent defendants because he determined that they represented a serious risk of flight or a serious risk of danger (assuming that he also did so for nonindigent defendants—which, the facts here show he does not). That is so because—except for murder and offenses that could be charged as murder—Alabama law, unlike federal law, creates no presumptions that pretrial detention may be appropriate.

The meaningful differences between the Bail Reform Act and Cullman County's bail practices do not end there. Under the Bail Reform Act, a defendant has a right to be represented by counsel (appointed if necessary), 18 U.S.C. § 3142(f)(2)(B), at the hearing that occurs within 72 hours. As I've noted, though, Cullman County holds its bond hearings within 72 hours without appointing counsel to represent indigent defendants at those hearings.

The Bail Reform Act also provides defendants at their hearings "an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise." *Id.* Though Cullman County's practices involve asking indigent defendants some limited questions at their bond hearings, Cullman County forms do not require judges to allow defendants to make state-

ments and present information by proffer or otherwise. Nor do they provide for indigent defendants to present (or cross-examine) witnesses at the hearing.

Other ways the Bail Reform Act safeguards differ from Cullman County's practices include the requirements that (1) to pretrial detain a defendant based on a finding that "no condition or combination of conditions will reasonably assure the safety of any other person and the community," the judicial officer must make her finding by "clear and convincing evidence," *id.*; and (2) the Bail Reform Act requires judges who detain defendants to issue detention orders that "include written findings of fact and a written statement of the reasons for the detention," *id.* § 3142(i)(1). In contrast, Cullman County has no standard by which the judge must find a defendant to be a danger or flight risk, and it does not require its judges to announce in any form (written or oral)—or even make, for that matter—findings of fact or reasons for the detention.

These differences in safeguards are significant—especially the right to counsel. And even setting aside the independent constitutional violations Cullman County's practices might represent, these Bail Reform Act safeguards could affect the length of the period for which a person may be constitutionally held before he has a bail (or detention) hearing. In other words, when some legislative presumption or individualized determination that a defendant may present a serious risk of flight or danger to the community exists, and the government provides all (or some constitutionally significant combination of) the procedural protections the Bail Reform Act affords, perhaps due process is better able to tolerate the delay in the bail proceedings. Due-process-safeguard-wise, the delay may be "worth it." After all, the *Mathews v. Eldridge* balancing test has

also been described as a "sliding scale." *See*, *e.g.*, *Walsh v. Hodge*, 975 F.3d 475, 483 (5th Cir. 2020). And if the procedural safeguards available affect how long due process allows for an arrestee to be held before his bond hearing, Cullman County's lacking protections mean due process may not tolerate a 72-hour period.

Our precedent supports the district court's conclusion here that Cullman County's bail practices violate the Fourteenth Amendment.

V.

The Majority Opinion incorrectly concludes that the district court erred in finding a constitutional violation here. It does this because it baselessly throws out the district court's factual findings, even though no party asserts that they are clearly erroneous and the Majority Opinion does not make that finding, either. Analyzing this case based on its factual record requires the conclusion that Cullman County's bail practices violate the Fourteenth Amendment. Cullman County's practices deprive indigent defendants of pretrial release when they allow similarly situated nonindigent defendants to enjoy pretrial release, and they do not contain adequate procedural protections before depriving indigent defendants of pretrial release without a meaningful opportunity to be heard for up to a month or more. For these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Case No. 5:17-cv-00270-MHH
[Filed September 4, 2018]

RAY CHARLES SCHULTZ, et al.,
Plaintiffs,

v.

STATE OF ALABAMA, et al.,
Defendants,

RANDALL PARRIS, on behalf of himself and those similarly situated, et al.,
Plaintiff-Intervenor,

v.

MARTHA WILLIAMS, et al.,
Defendants.

BRADLEY HESTER, on behalf of himself and those SIMILARLY situated,
Plaintiff-Intervenor,

v.

MATT GENTRY, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

Bradley Hester was arrested and jailed in Cullman County. He was, and others similarly situated are, detained in the Cullman County jail following arrest because they cannot afford to post a surety bond or a property bond as a condition of pretrial release. Mr. Hester asks the Court to preliminarily enjoin the Cullman County Sheriff from detaining indigent defendants who cannot afford to post a property bond or a surety bond as a condition of pretrial release. Mr. Hester argues that Cullman County's procedures for setting a secured bond as a condition of pretrial release are constitutionally flawed, and he argues that the way in which Cullman County implements those procedures is inequitable. (Doc. 102).[1] For the following reasons, the Court finds that Mr. Hester is entitled to a preliminary injunction.

I. BACKGROUND

A. Procedural Background

On March 8, 2018, Mr. Hester intervened in this action. (Doc. 94). The following day, Mr. Hester filed his intervenor complaint against Cullman County Sheriff Matt Gentry, Circuit Clerk Lisa McSwain, Magistrate

[1] As will be discussed in greater detail below, when Mr. Hester filed his motion for preliminary injunction, Cullman County followed pretrial procedures different from the procedures in place as of the date of this opinion. Therefore, the language of Mr. Hester's motion pertains to the old version of Cullman County's pretrial procedures. Two weeks after Mr. Hester filed his motion for preliminary injunction, Cullman County revised its pretrial procedures. The parties have conformed their evidence, and the Court conforms its analysis, to Cullman County's new pretrial procedures. The Court considers whether Mr. Hester and the proposed plaintiff class have demonstrated a substantial likelihood of success on their constitutional claims as those claims pertain to Cullman County's new pretrial procedures.

Amy Black, Magistrate Joan White, District Court Judge Kim Chaney, and District Court Judge Wells R. Turner III. (Doc. 95). In his first claim for relief, citing the Fourteenth Amendment, Mr. Hester alleges that the defendants violate the "fundamental rights" of indigent criminal defendants arrested in Cullman County "by enforcing against them a post-arrest system of wealth-based detention" pursuant to which indigent defendants "are kept in jail because they cannot afford a monetary amount of bail." (Doc. 95, p. 18, ¶ 80). In his second claim for relief, Mr. Hester alleges that the defendants do not provide counsel for bail hearings, give arrestees an adequate opportunity to testify or present evidence at bail hearings, apply a uniform evidentiary standard to determine whether a person should be detained prior to trial, or "require a [judicial] finding that no affordable financial or non-financial condition of release will ensure appearance or public safety before jailing pretrial arrestees on monetary bail amounts that they cannot afford." (Doc. 95, p. 19, ¶ 85).[2] Mr. Hester asserts that the defendants create *de facto* detention orders that apply to only indigent criminal defendants in Cullman County. Mr. Hester seeks declaratory relief from the judicial defendants—Circuit Clerk McSwain, Magistrate Black, Magistrate White, Judge Chaney, and Judge Turner—and injunctive relief from Sheriff Gentry. (Doc. 95, pp. 20-21, ¶¶ c-f).

Mr. Hester has asked the Court to certify this lawsuit as a class action and "certify a class consisting of all state-court arrestees who are or who will be jailed in Cullman County who are unable to pay the secured

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[2] Mr. Hester brings a third claim concerning the promptness of the release hearing. (Doc. 95, p. 20). Mr. Hester does not pursue early relief for that claim.

monetary bail amount required for their release." (Doc. 101, p. 2). The defendants do not oppose class certification should this case proceed. (Doc. 144, p. 8; Doc. 145, p. 1). Mr. Hester also has asked the Court to preliminarily enjoin Sheriff Gentry "from prospectively jailing arrestees unable to pay secured monetary bail." (Doc. 102, p. 2).

The judicial defendants filed opposition to Mr. Hester's motion for preliminary injunction. (Doc. 122). In addition to arguing that Mr. Hester has not satisfied the standard for a preliminary injunction, the judicial defendants contend that Cullman County's recent adoption of new bail procedures moots Mr. Hester's claims for injunctive relief. (Doc. 122, p. 32). Sheriff Gentry has asked the Court to dismiss Mr. Hester's claims for injunctive relief. (Doc. 123).[3]

On April 12 and 13, 2018, the Court held a hearing on the motion for preliminary injunction. (Docs. 136, 143). Dr. Stephen Demuth, whom the Court admitted as an expert in statistical analysis and quantitative research methods related to pretrial detention and release processes, testified for Mr. Hester. (Doc. 136, pp. 36-40). Judge Truman Morrison of the Superior Court of the District of Columbia, whom the Court admitted as an expert in bail setting procedures, also testified for Mr. Hester. (Doc. 136, pp. 118-21). Sheriff Gentry and Judge Turner testified for the defendants. (Doc. 136, pp. 187, 268). The parties provided additional evidence via affidavit and stipulated to certain facts relevant to Mr. Hester's motion for preliminary injunction. (Docs. 132-135, 138-140, 146, 148, 153). On this record, the Court considers Mr. Hester's request for a preliminary injunction.

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[3] The Court will resolve Sheriff Gentry's motion to dismiss by separate order.

B. Factual Background

In Cullman County, individuals charged with crimes are taken into custody either pursuant to a probable cause warrantless arrest or pursuant to an arrest warrant issued by one of the county's magistrates. Most arrests in Cullman County are warrantless probable cause arrests. (Doc. 136, pp. 235-36; Doc. 143, p. 194).[4]

Under Alabama law, absent a capital murder charge, arrestees have a statutory right to bail. (Doc. 136, p. 285; *see generally* Ala. Code §§ 15-13-106, -108).[5] In Cullman County, bail initially is set as a condition of pretrial release for every arrestee. The staff of Cullman County's Sheriff's Office selects the initial bail amount for individuals jailed for warrantless probable cause arrests; magistrates select the initial bail amount

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[4] By way of example, in February 2018, Cullman County took 159 individuals into custody pursuant to warrantless arrests, and the county took 61 individuals into custody pursuant to arrest warrants. (Doc. 143, p. 191).

[5] Alabama Code § 15-13-106 states: "Except in capital cases where there is no right to release on bail, no person or defendant shall be committed to any jail in the State of Alabama on a warrant unless there is an amount of bail affixed to the warrant. No person or defendant shall remain in jail anywhere in this state for more than 24 hours for any felony or misdemeanor case without an order of bail, unless bail is not authorized by law." Alabama Code § 15-13-108 states: "In all cases of misdemeanors and felonies, unless otherwise specified, the defendant is, before conviction, entitled to bail as a matter of right. All sheriffs and police chiefs of this state shall ensure that one of their officers or themselves are available to approve and accept bail 24 hours each day, seven days a week, except during the hours the clerks of the courts provide personnel for bail acceptance and approval."

in arrest warrants. (Doc. 136, pp. 206, 275).[6] Because most of the arrests in Cullman County are warrantless arrests, the Sheriff's Office sets most of the initial bail amounts in the county. Both the sheriff and the magistrates use a bail schedule to determine the bail amount. On an average day, there are ten arrests in Cullman County, and six of those arrestees are immediately bail eligible. (Doc. 136, p. 193).[7]

Cullman County primarily uses property bonds and surety bonds to meet the bail condition for pretrial release of arrestees. In the case of a property bond, a criminal defendant's relative or neighbor may post property (typically real property, but occasionally a vehicle) to secure the defendant's release. (Doc. 136, pp. 190-92, 224). By state statute, Cullman County must assess a $35 bond fee for property bonds. (Doc. 136, p. 192).[8] Bonding companies provide surety bonds. Cull-

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[6] In Cullman County, magistrates are court specialists, but they are not lawyers. They are not members of the Alabama State Bar. (Doc. 136, p. 270). Magistrates make probable cause determinations on warrantless arrests within 48 hours of arrest. A criminal defendant typically does not attend a probable cause determination; only the arresting officer attends that proceeding. (Doc. 136, pp. 269-71).

[7] Even if they can afford to post bond, the sheriff cannot immediately release the following categories of defendants: defendants arrested for failure to appear or on charges that, by statute, require detention for a period of time; defendants who are intoxicated; defendants who are in need of medical attention; or defendants who have holds on their detention from other jurisdictions. (Doc. 129-36, p. 3; Doc. 136, p. 276).

[8] Sheriff Gentry testified that he encourages family members of arrestees to post property bonds because his office can quickly assess the value of the property using the county's tax records, and a property bond can be obtained with the payment of a $35 fee. (Doc. 136, pp. 224-226). Sheriff Gentry explained that his office can

man County advertises the telephone numbers for bonding companies in its jail cells. An arrestee may call a bonding company, "work out an agreement … on a set price for that bonding company" to post bond, and secure her release from jail. (Doc. 136, p. 191).[9]

Sheriff Gentry testified that he has two primary interests in the pretrial process: getting defendants to appear for court proceedings and ensuring the safety of the community. (Doc. 136, pp. 235-36). Those interests are consistent with Alabama law. Pursuant to Rule 7.2(a) of the Alabama Rules of Criminal Procedure, conditions of pretrial release are imposed to "reasonably assure the defendant's appearance" at court proceedings and to protect "the public at large" from "real and present danger." Ala. R. Crim. P. 7.2.

1. Pre-March 26, 2018

Until March 26, 2018, Cullman County used a bail schedule that identified a range of bail for various state criminal offenses. (Doc. 129-34; Doc. 132, p.1, ¶ 1). For each individual arrested, Sheriff Gentry set bail based on the crime charged and then released criminal defendants who could post a secured bond for the bail

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use the contact information provided with a property bond to contact family members if a defendant fails to appear for a hearing. He acknowledged that he would have the same ability if a defendant identified a third-party custodian in conjunction with an unsecured bond. (Doc. 136, pp. 225-28).

[9] Cullman County also uses cash bonds and ROR (release on recognizance) bonds. By law, the sheriff cannot accept cash bonds; only the clerk of court may accept cash bonds. There is no financial obligation for ROR bonds. The arrestee "just promise[s]" that she will return for court dates. If she does not appear as promised, then a judge will issue an arrest warrant for the individual. (Doc. 136, pp. 189-90).

amount and detained criminal defendants who could not afford to post bond. (Doc. 132, p. 2, ¶¶ 7-8).

Cullman County magistrates conducted initial appearances for arrestees who could not afford to post bond. (Doc. 132, pp. 2-3, ¶¶ 10, 12). The initial appearance was conducted by video conference, and the state did not offer counsel for the appearance. (Doc. 132, pp. 2-3, ¶¶ 10, 13). At the initial appearances, the magistrates informed the arrestees of their bail amount but did not evaluate the bail amount to determine whether the bail amount exceeded the amount necessary to satisfy the statutory purposes of bail. (Doc. 132, p. 3, ¶ 14). Arrestees who could not afford to post a secured bond had to remain in jail and file a motion to reconsider their bail amount. (Doc. 132, p. 2, ¶ 9). Typically, a district judge would not consider such a motion until several weeks after arrest. (Doc. 132, p. 2, ¶ 9).

The parties dispute the number of arrestees who were detained each month solely because they could not afford to post bail under this system. According to Alacourt records, Alabama's electronic trial management system, during the month of February 2018, 85 of 235 arrestees (i.e. 34%) who were eligible to secure their release by posting a secured bond were unable to post bond within 72 hours after arrest. (Doc. 129-9, p. 3, ¶¶ 3-4; Doc. 136, pp. 262-63). Of those 85 arrestees, 36 (i.e. 42%) never received an initial appearance. (Doc. 129-9, pp. 3-4, ¶ 5). Two arrestees received an initial appearance more than 72 hours after arrest. (Doc. 129-9, p. 4, ¶ 5). The remaining 47 arrestees received an initial appearance within 72 hours of arrest. (Doc. 129-9, p. 3, ¶ 5).

The defendants contend that Alacourt records are not necessarily reliable because the records do not con-

tain all relevant information, and the Alacourt system experiences lag time between entering and displaying data. (Doc. 136, p. 262; Doc. 143, p. 65). According to a Cullman County detention data sheet that Sheriff Gentry submitted, of the 220 new arrests made in February 2018, 167 arrestees (i.e. 76%) were released without need for an initial appearance within 72 hours of arrest. (Doc. 139-2; *see* Doc. 143, pp. 190-93; 210-13). Of those 220 new arrests, 159 arrests were made without a warrant, all but 14 of which (i.e. 91%) posted bond within 48 hours after arrest without having to wait for an initial appearance. (Doc. 139-2; *see* Doc. 143, pp. 194-95). Sheriff Gentry testified that the 14 arrestees who did not post bond may have been detained because they had a new probable cause arrest or a warrant for failure to appear during the month. (Doc. 143, pp. 194-95).

2. March 26, 2018 Revisions to Bail Procedures

On March 26, 2018, the presiding circuit judge in Cullman County signed a "Standing Order Regarding Pre-Trial Appearance and the Setting of Bond" which established new pretrial detention and bail policies for the Cullman County. (Doc. 129-36). The Court first describes the procedures that the new Standing Order dictates. The Court then describes the evidence concerning the way in which Cullman County has implemented the new Standing Order.

a. March 26, 2018 Standing Order and Initial Appearance Procedures

Pursuant to the March 26, 2018 Standing Order, the Cullman County Sheriff still uses a bail schedule, but the new bail schedule provides specific amounts of bail for specific criminal charges. (Doc. 129-36, p. 3; Doc. 129-37; *compare* Doc. 129-34, p. 2). Some of the bail amounts listed in the new schedule are lower than the

bail amounts in the previous schedule. (*Compare* Doc. 129-34 *with* Doc. 129-37). As with the former bail procedures, absent a capital murder charge, eligible defendants arrested without a warrant are released when they post a secured bond in the amount that Sheriff Gentry's staff sets per the bail schedule, regardless of the nature of the crime charged, the arrestee's criminal history, or the arrestee's prior record of failures to appear. (Doc. 129-36, p. 3; Doc. 136, p. 206). When the sheriff sets a bond amount for a warrantless arrest, "there's no leeway in … what your bond is going to be." (Doc. 136, p. 206; *see also* Doc. 136, pp. 221-22).

The Sheriff's Office releases a defendant arrested pursuant to a warrant when the defendant posts bond in the amount set in the warrant. (Doc. 129-36, p. 4; Doc. 143, p. 141). Magistrates set bond in arrest warrants in the amount listed in the bail schedule. (Doc. 129-36, p. 4; Doc. 136, p. 199; Doc. 143, p. 142).

For those who can afford to post a secured bond, ordinarily between 45 and 90 minutes elapse from the time an arrestee is booked in the Cullman County jail until the time she is released from jail on a secured bond. (Doc. 136, p. 206).

According to the Standing Order, if a law enforcement officer believes that a defendant poses "an unreasonable risk of flight or danger to the public," then the officer may complete a bail request form and ask that bond be set in an amount different from the amount listed in the bail schedule. (Doc. 129-36, pp. 3-4). Under the terms of the Standing Order, if an officer completes a bail request form for a defendant, then a magistrate may either grant the request and order the sheriff to detain the defendant until a district judge, within 72 hours of arrest, conducts an initial appearance

and makes "an individualized determination of conditions of release, including the setting of bond," or deny the bail request "in which case the defendant shall be immediately released upon posting a bond on the terms contained in the schedule." (Doc. 129-36, pp. 3-4).

The Standing Order provides that defendants who are unable to post a secured bond in the amount listed in the bail schedule are entitled to a judicial determination of the conditions of their release by a district judge held no later than 72 hours after arrest. (Doc. 129-36, p. 5, n. 3; Doc. 143, pp. 48, 63). A circuit judge must determine the conditions for release for a defendant who is arrested pursuant to a warrant issued upon an indictment. (Doc. 129-36, p. 5, n.3). The judicial determination of conditions for release takes place at an initial appearance. If a defendant cannot pay the bond amount set by Sheriff Gentry or a magistrate, and the defendant does not receive an initial appearance within 72 hours of arrest, then Sheriff Gentry must release the defendant on an unsecured appearance bond in the amount set in the bail schedule. (Doc. 129-36, p. 8).[10]

Before an initial appearance, a member of the Sheriff's Office meets with a defendant in jail and offers two forms to the defendant.[11] A defendant may complete a "Release Questionnaire," and a defendant who indicates

[10] Defendants who post bond at the time of their arrest later have to attend an initial appearance. At that proceeding, a judge informs a defendant of his court date, and the judge may appoint counsel to represent the defendant if the defendant demonstrates financial need. (Doc. 136, pp. 300-01).

[11] Sheriff Gentry testified that he has two court liaisons on his staff. These staff members offer a release questionnaire and an affidavit of financial hardship to an indigent defendant and, when necessary, the staff members will help a defendant complete the forms. (Doc. 143, p. 177).

that she needs an attorney also may complete an "Affidavit of Substantial Hardship." (Doc. 129-39; Doc. 129-41; Doc. 143, pp. 176-77; *see also* Doc. 136, pp. 216, 272, 277-78). Defendants may refuse the forms. (Doc. 139-1, p. 1).

The release questionnaire states: "FOR THE PURPOSE OF DETERMINING CONDITIONS OF PRE-TRIAL RELEASE IN THIS CASE, THE COURT MAY TAKE INTO ACCOUNT THE FOLLOWING." (Doc. 129-41, p. 2). The release questionnaire asks the defendant to supply information about her residence, employment, family situation, health, and criminal history, including prior failures to appear. (Doc. 129-41, pp. 2-3; Doc. 136, p. 279). The questionnaire also asks the defendant to identify and provide contact information for nearest living relatives not living with the defendant and for as many as four individuals who can vouch for the defendant's "character, reputation and reliability." (Doc. 129-41, pp. 2-3; Doc. 136, p. 279). The affidavit of substantial hardship asks the defendant to identify her employment, assistance benefits, monthly gross income, monthly expenses, and liquid assets. (Doc. 129-39, pp. 2-3). The sheriff's court liaison deputy delivers the completed forms to court, so that the forms are available to the judge at the initial appearance. (Doc. 122-1, p. 3, ¶ 7; Doc. 136, p. 281).

Cullman County does not have a pretrial services department, so there is no one who independently gathers information for an initial appearance. (Doc. 136, p. 288). The information that arrestees provide on the bail forms is not always accurate, often because arrestees may have difficulty understanding the forms. (Doc. 136, pp. 288-89). As Judge Turner explained, the majority of the people who "come in contact with [] the criminal justice system" in Cullman County do not have

"even a high school education." (Doc. 136, p. 289). "A lot of them are going to have learning disabilities. A lot of them are going to have inability to read and comprehend." (Doc. 136, p. 289). Therefore, the examination of defendants during an initial appearance is an important source of information for the determination of the conditions of bond. (Doc. 136, p. 289).

The initial appearance typically is held remotely by video conference. (Doc. 136, pp. 272-73). At the initial appearance, the judge ensures that the defendant is aware of the charges against her, the right to be represented by counsel, and the right to remain silent. (Doc. 129-40, p. 2; Doc. 136, p. 282). The judge reviews the affidavit of substantial hardship, if the defendant has submitted one, to determine whether the defendant is indigent. (Doc. 136, pp. 277-78). If the judge determines that the defendant is indigent, then the court appoints counsel for the defendant, but under the Standing Order, appointed counsel is not available to a defendant during an initial appearance. (Doc. 122-1, p. 5, ¶ 11; Doc. 129-36, pp. 2-8; Doc. 129-40, p. 2).

During an initial appearance, the judge determines the conditions of the defendant's release. (Doc. 122-1, pp. 3-4, ¶ 8). Pursuant to Rule 7.2(a) of the Alabama Rules of Criminal Procedure, the judge must consider releasing the defendant on the defendant's own recognizance or on an unsecured appearance bond unless the judge "determines that such a release will not reasonably assure the defendant's appearance as required, or the defendant's being at large will pose a real and present danger to the public at large." (Doc. 122-1, p. 4, ¶ 9; Doc. 136, pp. 282-83m 286). Rule 7.2(a) states:

> (a) BEFORE CONVICTION. Any defendant charged with an offense bailable as a matter of

right may be released pending or during trial on his or her personal recognizance or on an appearance bond unless the court or magistrate determines that such a release will not reasonably assure the defendant's appearance as required, or that the defendant's being at large will pose a real and present danger to others or to the public at large. If such a determination is made, the court may impose the least onerous condition or conditions contained in Rule 7.3(b) that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large. In making such a determination, the court may take into account the following:

1. The age, background and family ties, relationships and circumstances of the defendant.

2. The defendant's reputation, character, and health.

3. The defendant's prior criminal record, including prior releases on recognizance or on secured appearance bonds, and other pending cases.

4. The identity of responsible members of the community who will vouch for the defendant's reliability.

5. Violence or lack of violence in the alleged commission of the offense.

6. The nature of the offense charged, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance.

7. The type of weapon used, e.g., knife, pistol, shotgun, sawed-off shotgun.

> 8. Threats made against victims and/or witnesses.
>
> 9. The value of property taken during the alleged commission of the offense.
>
> 10. Whether the property allegedly taken was recovered or not; damage or lack of damage to property allegedly taken.
>
> 11. Residence of the defendant, including consideration of real property ownership, and length of residence in his or her place of domicile.
>
> 12. In cases where the defendant is charged with a drug offense, evidence of selling or pusher activity should indicate a substantial increase in the amount of bond.
>
> 13. Consideration of the defendant's employment status and history, the location of defendant's employment, e.g., whether employed in the county where the alleged offense occurred, and the defendant's financial condition.
>
> 14. Any enhancement statutes related to the charged offense.

Ala. R. Crim. P. 7.2. The Standing Order requires the judge to consider the fourteen factors in Rule 7.2(a). (Doc. 129-36, pp. 5-7).

In weighing the factors that bear on a defendant's eligibility for release, the judge considers the information that the defendant provided in the release questionnaire and in the affidavit of substantial hardship, if the defendant submitted one. (Doc. 136, pp. 277-81). Judge Turner testified that when he is "considering factors to consider to release" a defendant, it is helpful

for him to know whether a defendant "[is] employed or if they're not employed" and whether the defendant is "living where they say they are at that address or is that just where they get their mail." (Doc. 136, p. 280). With respect to the address information, Judge Turner stated: "We have a lot of people that move from place to place wherever they can find to lay their head. And [] keeping track of them can be difficult at times." (Doc. 136, p. 281). Judge Turner also considers "the circumstances" of "the most recent arrest." (Doc. 136, p. 285). For example, in setting the conditions for a 26-year-old male defendant charged with unlawful possession of a controlled substance, Judge Turner considered the fact that the defendant previously served time in prison, and he considered the fact that the defendant was found hiding in a closet with a 14-year-old girl, "a factor to go with contributing to the delinquency of a minor." (Doc. 136, p. 287). Had that 26-year-old arrestee been able to afford bond, he would have been released as soon as he posted bond without regard to his criminal history or his association with a 14-year-old girl.

In addition to the questionnaire and the affidavit of substantial hardship, in the case of a warrantless arrest, the judge may consider the form that contains the arresting officer's statement of why the officer believed that she had probable cause to arrest the defendant. (Doc. 136, p. 281). According to the Standing Order, the judge "may elicit testimony about the defendant's financial condition," (Doc. 129-36, p. 7), but according to the Order on Initial Appearance and Bond Hearing form, the form that the judge completes during or following an initial appearance, the judge must "[give] the Defendant the opportunity to make a statement regarding his/her ability to post the bond currently set in this matter." (Doc. 129-40, p. 2).

The Standing Order provides that after considering the fourteen factors, the defendant's ability to post a secured bond, testimony from the defendant, and forms submitted to the Court, the Court "may release a defendant on his or her own recognizance, require the defendant to post an unsecured appearance bond, or require the posting of a secured appearance bond if that is the least onerous condition that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or the public at large." (Doc. 129-36, p. 7). If there is "no less onerous condition for securing the defendant's appearance or protecting the public, then the Court may require a secured appearance bond in an amount less than, equal to, or greater than that contained in the bond schedule," even if the defendant cannot afford to post bond. (Doc. 129-36, p. 7). If the Court requires a secured bond, then the Standing Order states that "[t]he Court will make a written finding as to why the posting of a bond is reasonably necessary to assure the defendant's presence at trial in such a case" in "Section 6 of Form C-80 (Local), Order on Initial Appearance and Bond Hearing, and in Form C-52(g), Release Order." (Doc. 129-36, pp. 7-8).

Under the Standing Order, if a judge appoints counsel for an arrestee at an initial appearance, appointed counsel must meet with a defendant within seven days. (Doc. 136, pp. 290-91). It is not uncommon for a judge to set a bond in an amount he knows the defendant cannot afford. (Doc. 136, pp. 291-294). Following her initial appearance, if a defendant still cannot afford to post bond, then the defendant may file a motion for bond reduction, and her appointed attorney may assist her. (Doc. 122-1, p. 5, ¶ 11; Doc. 136, pp. 293, 295). A judge typically hears the motion within a month. (Doc. 136, pp. 297-98; Doc. 143, p. 97).

b. Implementation of the March 26, 2018 Standing Order

The presiding judge of the Cullman County Circuit Court entered the new Standing Order two weeks after Mr. Hester filed his motion for preliminary injunction in this case. (Docs. 102, 129-36). Therefore, at the hearing on Mr. Hester's motion, the defendants were able to offer little evidence concerning the implementation of the new policy, but the limited evidence that the defendants did offer indicates that officials in Cullman County do not always comply with the written requirements in the new Standing Order.

For example, officials in Cullman County do not handle bail requests in a manner consistent with the new standing order.[12] Law enforcement officers rarely use this tool. Sheriff Gentry testified that bail requests from law enforcement officers "are very few and far between." (Doc. 136, p. 207). Judge Turner testified that he has never seen a bail request from a law enforcement officer in conjunction with a warrantless arrest. Judge Turner and Judge Chaney handle all bail requests tied to warrant arrests. (Doc. 136, pp. 275-76). In practice, a magistrate will not deny a bail request submitted with an application for an arrest warrant; magistrates refer all bail requests to a district judge. (Doc. 143, p. 143).

In addition, although Cullman County has instituted a system purportedly designed to ensure that all arrestees who require an initial appearance see a judge

[12] As will be discussed later in this opinion, law enforcement officers had the option of submitting bail request forms before Cullman County adopted the March 2018 Standing Order. The bail request tool is not new, but the Standing Order mandates new procedures concerning bail request forms.

within 48 hours, the system does not always work. For example, on April 8, 2018, PEB was arrested on a charge of domestic violence third degree, harassment. (Doc. 136, pp. 217, 219; Doc. 139-1, p. 1). The sheriff's staff set PEB's bond at $1,500 per Cullman County's bail schedule. (Doc. 122-1, p. 16; Doc. 136, p. 219). PEB completed a release questionnaire and received an initial appearance on April 9, 2018. (Doc. 136, pp. 217, 220; Doc. 139-1, p. 1). The sheriff testified that this initial appearance took place before a magistrate; the Standing Order calls for an appearance before a judge. As of April 11, 2018, PEB was still in jail, and he had not received a bail hearing within 48 hours. (Doc. 136, p. 220). PEB was released on a property bond on April 13, 2018. (Doc. 136, p. 221).[13]

With respect to written findings concerning a *de facto* detention order, when a judge, based on the information that he reviewed in an initial appearance, decides to require secured bond as a condition for release, the Standing Order says that the judge must make "a written finding as to why the posting of a bond is reasonably necessary," but neither the Order on Initial Appearance and Bond Hearing nor the Release Order provides space for a written finding with respect to secured bond. (*See* Doc. 129-40, p. 3; Doc. 129-42, p. 2). Instead, the Order on Initial Appearance and Bond Hearing requires a judge to check boxes beside 15 factors to identify the factors the judge took into "consideration" in requiring a secured bond. (Doc. 129-40, p. 3). Fourteen of the factors listed come from Rule 7.2(a) of the Alabama Rules of Criminal Procedure, and the fifteenth factor is "Other," which the judge may specify

[13] The arrestee's initials are PEB.

in writing. (Doc. 129-40, p. 3).[14] The Release Order simply requires the judge to check a box if the court requires a secured bond. (Doc. 129-40, p. 2).

II. ANALYSIS

A. The March 26, 2018 Standing Order does not moot Mr. Hester's motion for preliminary injunction.

The defendants argue that the March 26, 2018 Standing Order ends the procedures that Mr. Hester challenges and therefore moots his claims. (Doc. 122, p. 32). The Court disagrees.

The legal principle on which the defendants' mootness argument rests is sound: events that occur after a plaintiff files a lawsuit may "deprive the court of the ability to give the plaintiff … meaningful relief," so that the plaintiff's claims become moot and the case "must be dismissed." *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (citation omitted). "When government laws or policies have been challenged, the Supreme Court has held almost uniformly that cessation of the challenged behavior moots the suit." *Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1283 (11th Cir. 2004) (citations omitted).

Here, the mootness doctrine does not foreclose Mr. Hester's efforts to obtain relief because although the Cullman County Circuit Court has revised its written criminal pretrial procedures, the record demonstrates that the defendants do not fully comply with the new written procedures. And even if the defendants did

[14] The bottom of the Order on Initial Appearance and Bond Hearing contains a few blank lines beside the statement "9. Other:". (Doc. 129-40, p. 3). If he chose, a judge presumably could write findings concerning a secured bond in that section of the order.

comply, as discussed in greater detail below, the new procedures, though an improvement over the old, still are constitutionally deficient.

On the record before the Court at this early stage of the proceedings, there is a substantial likelihood that Mr. Hester will be able to prove that Cullman County's new criminal pretrial procedures violate putative class members' constitutional rights. Therefore, this case remains a live controversy in which the Court may give meaningful relief.

B. Preliminary Injunction

"A party seeking a preliminary injunction bears the burden of establishing entitlement to relief." *Scott v. Roberts*, 612 F.3d 1279, 1289 (11th Cir. 2010). "To obtain such relief, the moving party must show: (1) a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury unless the injunction is issued; (3) that the threatened injury outweighs possible harm that the injunction may cause the opposing party; and (4) that the injunction would not disserve the public interest." *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 788 F.3d 1318, 1322 (11th Cir. 2015) (citing *Burk v. Augusta–Richmond Cnty.*, 365 F.3d 1247, 1262-63 (11th Cir. 2004)). "A preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant clearly carries its burden of persuasion on each of these prerequisites." *Id.* (alteration and internal quotation marks and citation omitted). Mr. Hester has satisfied all four elements.

1. Substantial Likelihood of Success on the Merits

a. Fourteenth Amendment Right to Pretrial Liberty and Freedom from Wealth-Based Detention

Mr. Hester argues that "[t]his case implicates two overlapping but distinct constitutional rights: the right against wealth-based detention and the right to pretrial liberty." (Doc. 108, p. 3). Mr. Hester contends that Cullman County's bail system cannot withstand constitutional scrutiny because it creates one standard of pretrial release for wealthy defendants and another for indigent defendants. The Court agrees.

Criminal defendants have a constitutional right to pretrial liberty. The law presumes that defendants are innocent until the State proves otherwise. Absent extenuating circumstances like flight risks or dangers to the community, the State may not incarcerate a defendant pretrial. As the United States Supreme Court held in *United States v. Salerno*, 481 U.S. 739 (1987), the "interest in liberty" is "fundamental." 481 U.S. at 749-50.

Liberty is prohibitively expensive for indigent criminal defendants in a jurisdiction where secured bond is a condition of liberty, and judges set unattainable bond amounts that serve as *de facto* detention orders for the indigent. Pretrial "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh v. Rainwater*, 572 F.2d 1053, 1056-57 (5th Cir. 1978) (en banc) (citing *Tate v. Short*, 401 U.S. 395 (1971) and *Williams v. Illinois*, 399 U.S. 235 (1970)). "The demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and

security of the jail." *Pugh*, 572 F.2d at 1057 (quoting *Rhem v. Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974)) (internal marks omitted). When a jurisdiction like Cullman County creates a criminal process pursuant to which "those with means avoid imprisonment" and "the indigent cannot escape imprisonment," the jurisdiction violates the Fourteenth Amendment. *Frazier v. Jordan*, 457 F.2d 726, 726, 728 (5th Cir. 1972).[15]

The majority in *Walker v. City of Calhoun* described the confluence of equal protection and due process concepts in the constitutional analysis of pretrial release procedures:

> The Supreme Court synthesized that law in *Bearden v. Georgia*, which considered 'whether the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution." 461 U.S. 660, 661, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). The Court explained that '[d]ue process and equal protection principles converge in the Court's analysis' of cases where defendants are treated differently by wealth, observing that 'we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause." *Id.* at 665, 103 S.Ct. 2064.

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[15] Per *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), decisions that the former Fifth Circuit Court of Appeals issued before October 1, 1981 are binding authority for courts in the Eleventh Circuit. *Id.* at 1209.

Walker v. City of Calhoun, -- F.3d --, 2018 WL 4000252, *7 (11th Cir. Aug. 22, 2018). The *Walker* majority explained: "The sine qua non of a Bearden- or Rainwater-style claim, then, is that the State is treating the indigent and the non- indigent categorically differently." *Walker*, 2018 WL 4000252 at *8. The majority in *Walker* held that an indigent criminal defendant "who can show that the indigent are being treated systematically worse 'solely because of [their] lack of financial resources,'—and not for some legitimate State interest—will be able to make out" a claim of a violation of the Fourteenth Amendment. *Walker*, 2018 WL 4000252 at *8 (quoting *Bearden*, 461 U.S. at 661).[16]

The majority in *Walker* held that the plaintiff in that case did not demonstrate a substantial likelihood of success on his claim of wealth-based discrimination in the setting of municipal bail because the Standing Bail Order that the City of Houston adopted delayed but did not deprive indigent criminal defendants of pretrial release. In fact, as the *Walker* majority held, the City of Calhoun's Standing Bail Order "guarantees release to indigents within 48 hours." 2018 WL 4000252 at *14, n. 12. Indigent defendants in Cullman County receive no such guaranty; Cullman County affords that guaranty only to criminal defendants who have the financial means to post a bond at the time of arrest in an amount set in the county's bail schedule.

Unlike Cullman County, the release process in the City of Calhoun is fairly simple. First, defendants arrested for a violation of a municipal law are released

[16] The rights examined in *Pugh* and *Bearden* are quantitatively different because a defendant's pretrial rights—a presumption of innocence and a fundamental right to pretrial liberty—are broader that a defendant's rights following conviction.

immediately on an unsecured bond. 2018 WL 4000252 at *1. Those defendants are assessed the amount in the bail schedule only if they failed to appear for a court proceeding. *Id.* at *2. For defendants charged with a violation of a state law, the bail schedule lists bail in an amount equal to the fine that defendant later would have to pay if she were adjudged guilty of the crime charged. The defendant may satisfy the bail obligation by paying cash, posting a property or surety bond, or using a driver's license as collateral. *Id.* at *1. At the time of arrest, if a defendant cannot provide any of these types of security, then a defendant must receive a hearing before a municipal judge within 48 hours. That hearing has a single purpose: using a uniform standard of indigency to evaluate evidence of indigency supplied to the court by a court-appointed attorney, a judge determines whether a defendant is, in fact, indigent. A defendant who "has other resources that might reasonably be used" to secure release must provide the security that a judge orders to obtain release. All defendants adjudged indigent under the city's uniform standard are released on a recognizance bond, "meaning no bail amount is set, either secured or unsecured." *Id.* at *1-*2.

Thus, as the *Walker* majority found, the City of Calhoun releases all indigent defendants, just as the city releases all defendants who can afford to pay a cash bond, post a surety or property bond, provide a driver's license as collateral, or provide some other form of collateral. The *Walker* majority found that delay of up to 48 hours in securing release for indigent defendants was presumptively constitutional. *Id.* at *14. The *Walker* majority held that the indigent in the City of Calhoun "must merely wait some appropriate amount of time to receive the same benefit as the more afflu-

ent" and that an appropriate period of delay, without more, does not offend the Constitution.

Cullman County's bail process differs significantly from the process in the City of Calhoun because indigent defendants cannot secure their release merely by proving that they are indigent according to a uniform standard of indigency. Instead, within 72 hours of arrest, to obtain pretrial release in Cullman County, an indigent criminal defendant, without the assistance of counsel, must prove not only that he is indigent but also that he is not a flight risk or a threat to himself or the community. If a judge, applying no particular legal standard, decides that a defendant is indigent but that the defendant is a danger to himself or his community or a flight risk, then the judge may set bail at a level that the defendant cannot afford, creating a *de facto* detention order. (*See* Doc. 129-36, p. 37).

In the section that follows, the Court discusses the procedural deficiencies in Cullman County's bail system, but the Court first examines the inequitable treatment of arrestees on basis of wealth. Under Cullman County's pretrial procedures, a dangerous arrestee who can post bond immediately returns to the community to which she is a threat, suffering only the inconvenience of detention of no more than two hours. For example, Judge Turner confirmed that if a deputy sheriff were to arrest an individual on a charge of first degree rape, the Sheriff's Office would release the individual as soon as he could post a $20,000 property or surety bond. (Doc. 143, p. 143). If that same arrestee could not post bond, then he would have to participate in an initial appearance before a district judge, and the judge would consider the conditions for release including the bond amount. (Doc. 143, p. 144). The bail order that a judge would enter likely would include a bond

amount that the indigent defendant could not satisfy, completely depriving the defendant of the benefit of pretrial liberty that would have been available to him hours after his arrest, had he been able to afford a bond immediately. The Standing Order permits this result, and the record shows that it is not unusual for a judge to set bond for an indigent defendant in an amount the defendant cannot afford. (Doc. 129-36, p. 7; Doc. 136, pp. 291-294).

Judge Turner acknowledged that if every arrestee in Cullman County had to go through the pretrial process that indigent defendants must follow, "drastically" higher numbers of defendants would be detained pretrial. (Doc. 143, p. 67). Judge Turner estimated that the number of pretrial detainees would quadruple. (Doc. 143, pp. 67-68). Judge Turner agreed with counsel for the judicial defendants that detaining non-indigent arrestees would not be a good thing because doing so would mean that many more people would suffer the deleterious consequences of pretrial detention. (Doc. 143, pp. 67-68).[17]

Those harmful consequences are significant. Mr. Hester's unrebutted evidence shows that deprivation of pretrial liberty takes a high toll on a criminal defendant, and the negative effects of pretrial incarceration compound each day that a defendant is detained. Dr. Demuth explained that research literature increasingly "shows quite robustly that pretrial detention has deleterious consequences for the detained, the community at large, and the criminal justice system itself." (Doc.

[17] Judge Turner expressed his desire to learn about bail systems in other jurisdictions and to replicate systems that work well. Judge Turner is receptive to alternative systems in Cullman County. (Doc. 143, pp. 148-50).

129-1, pp. 9-10). As discussed in greater detail below, pretrial detention hampers a defendant's ability to participate in his defense. Prolonged pretrial detention increases the likelihood that the pretrial detainee will enter a guilty plea, receive a harsher sentence, and recidivate. (Doc. 129-1, pp. 11- 12; Doc. 129-19, p. 8; Doc. 129-20, pp. 2, 4; Doc. 136, pp. 73-74). And detention for even 24 hours can cause a defendant to lose a job, a consequence an indigent defendant cannot afford. In Cullman County, these harmful consequences appear to be unacceptable for all but the indigent.

Mr. Hester is substantially likely to prove that Cullman County's discriminatory bail practices deprive indigent criminal defendants in Cullman County of equal protection of the law because the challenged distinction does not rationally further a legitimate state purpose. *McGinnis v. Royster*, 410 U.S. 263, 270 (1973). Instead, Cullman County's stated interests are illusory and conspicuously arbitrary.

The defendants argue that three compelling interests warrant secured bonds in Cullman County: providing pretrial release as quickly as possible for all who can afford it (Doc. 143, pp. 125, 168), ensuring that criminal defendants appear for trial (Doc. 122-1, p. 6, ¶ 14; Doc. 143, pp. 171, 173), and protecting the community from dangerous criminal defendants (Doc. 143, pp. 413-14, 521). Mr. Hester is likely to demonstrate that the defendants' secured money bail procedures are not necessary to serve any of these interests.

With respect to efficient pretrial release of criminal defendants, the defendants have demonstrated that the bail schedule enables the defendants to quickly release criminal defendants who can afford a bond. Sheriff Gentry testified that at the pretrial stage of a criminal

proceeding, it is important to release individuals from as jail early as possible because pretrial release reduces the demands on the county's jail and returns people to their families as soon as possible. (Doc. 143, p. 168). The sheriff generally releases defendants who can afford a secured bond within two hours of booking. The sheriff must detain defendants who cannot afford a secured bond but are otherwise eligible for release at least until those defendants have an initial appearance. (Doc. 129-1, pp. 8-9, ¶¶ 14-15). An unsecured bond system would allow wealthy and indigent defendants to be released at the same rate and on the same basis, thereby *increasing* the efficiency of pretrial release in the county by freeing additional jail space and returning all defendants, not just the wealthy, to their families as quickly as possible. Cullman County has not examined or tested an unsecured bond system. (Doc. 136, p. 210).

With respect to the issue of pretrial appearance, the plaintiffs' evidence demonstrates that Cullman County likely would not see an increase in failures to appear with unsecured bonds. Mr. Hester offered expert testimony and empirical studies to demonstrate that secured money bail is not more effective than unsecured bail or non-monetary conditions of release in reducing the risk of flight from prosecution. For example, Dr. Demuth testified that "several recent empirical studies that compare the effectiveness of different kinds of bonds in assuring appearance in court … [found] no difference in the effectiveness of secured and unsecured bonds." (Doc. 129-1, p. 5, ¶ 11).[18] One of

[18] Dr. Demuth testified that another study "provides mixed findings" and another "problematic study finds that secured bonds are more effective." (Doc. 129-1, p. 5, ¶ 11). According to Dr. Demuth, the "mixed findings" study did not consider unsecured money bail or non-financial release with restrictions and

those studies concluded that regardless of a criminal defendant's pretrial risk category, "unsecured bonds offer decision-makers the same likelihood of court appearance as do secured bonds." (Doc. 129-10, p. 13).[19] Dr. Michael Jones, the study's author, considers this finding unsurprising "given that both bond types carry the potential for the defendant to lose money for failing to appear." (Doc. 129-10, p. 13). A study conducted by Claire M. B. Brooker, Dr. Jones, and Timothy R. Schnacke found that the average court appearance rate for criminal defendants in Jefferson County, Colorado did not differ significantly between judges who set more secured bonds and judges who set more unsecured bonds. (Doc. 129-11, p. 9).[20]

Mr. Hester's evidence shows that secured money bail actually may undermine the government's interest

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therefore does not provide a meaningful analysis of whether non-financial conditions or unsecured money bail are as effective as secured money bail. (Doc. 129- 1, p. 6). According to Dr. Demuth, the "problematic study" analyzed "insufficient underlying data," used questionable and unreliable shortcuts to approximate data, and employed a statistical technique that did not overcome bias in the dataset. Therefore, the problematic study fails "to inform our understanding of the relative effectiveness of secured and unsecured bonds." (Doc. 129-1, pp. 6-7).

[19] Dr. Jones analyzed the appearance rates of 1,309 criminal defendants in Colorado and assigned to each criminal defendant one of four categories of risk for failure to appear. (Doc. 129-10, p. 8).

[20] Ms. Booker, Dr. Jones, and Mr. Schnacke assigned 1,122 criminal defendants to one of two groups: those whose bonds were set by a judge who ordered many unsecured bonds and those whose bonds were set by judges who ordered many secured bonds. (Doc. 129-11, pp. 6-7). The researchers compared the pretrial appearance rates of both groups and found no meaningful statistical difference. (Doc. 129-11, p. 8).

in court appearance because secured money bail results in longer periods of pretrial detention for those who cannot easily afford bail, which, in turn, is associated with higher failure to appear rates. (*See* Doc. 129-1, pp. 5, 11-12, ¶¶ 11, 18-19; Doc. 129-4, p. 5, ¶ 17). For example, a study conducted by Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger found that criminal defendants who eventually are released after arrest are more likely to fail to appear for court the longer they are detained pretrial. (Doc. 129-12, pp. 11-12).[21]

And evidence suggests that most defendants released without financial incentives to appear in court still appear at a very high rate. For example, Judge Morrison testified that in 2017, in Washington, D.C., where "financial conditions are almost never used" for pretrial release, 88% of criminal defendants released pretrial made all scheduled court appearances. (Doc. 129-2, p. 5, ¶¶ 22, 25). Dr. Jones stated that many research studies show that court date reminders, "which can be delivered through in-person meetings, letters, postcards, live callers, robocalls, text messages, and/or email," are the "single most effective pretrial risk management intervention for reducing failures to appear;" they improve court appearance by approximately 30% to 50%. (Doc. 129-4, p. 14, ¶ 43). Jacob Sills, the co-founder and CEO of a company that uses technology and behavioral research to help criminal defendants appear for court, testified that the failure to appear rate of public defender clients in Richmond, California decreased from 20% to under 4% after implementing

[21] Dr. Lowenkamp, Dr. VanNostrand, and Dr. Holsinger analyzed data on 153,407 defendants booked into a jail in Kentucky during one year. (Doc. 129-12, p. 7).

text-message court date reminders. (Doc. 129-7, p. 4, ¶ 11). The failure to appear rate of low-income defendants in Luzerne County, Pennsylvania decreased from 15% to under 6% after implementing text- message court date reminders. (Doc. 129-7, p. 4, ¶ 12). Insha Rahman, a senior planner at a non-profit criminal justice organization that develops pretrial services, testified that in New York City, 95% of nearly 2,300 criminal defendants whose bail was paid by charitable organizations, i.e. who had no "skin in the game," made all court appearances. (Doc. 135-3, p. 4, ¶¶ 14-15).

The defendants have not offered empirical evidence or research studies to rebut Mr. Hester's considerable evidence. Judge Turner testified that he has no empirical evidence concerning or experience with unsecured bail to demonstrate that unsecured bail would increase failure to appear rates. (Doc. 143, pp. 116, 128-29). Instead, the defendants argue, without an evidentiary basis, that by requiring a criminal defendant or a third party to put "skin in the game," the criminal defendant is more likely to appear in court. (*See, e.g.*, Doc. 143, pp. 62, 69-70). Sheriff Gentry and Judge Turner testified that because family members or a commercial bondsman often pay a criminal defendant's bond, a secured money bail system encourages those third parties to hold a criminal defendant accountable for appearing in court. (Doc. 136, pp. 225-27; Doc. 143, pp. 367-68).

Other testimony from Sheriff Gentry and Judge Turner undermines the defendants' argument that secured money bail is necessary for court appearance. Sheriff Gentry acknowledged that a court-appointed third-party custodian would hold an individual just as accountable to appear in court as a family member who posted secured bond. (Doc. 136, p. 226). And Judge Turner acknowledged that an individual would have

just as much "skin in the game" with an unsecured bond. (Doc. 143, pp. 69-70). Thus, the evidence demonstrates that secured bail is no more effective than other conditions to assure a criminal defendant's appearance at court proceedings, and secured bail is not necessary to secure a criminal defendant's appearance.

The defendants' third stated interest, the safety of the community, illustrates that Cullman County's bail procedure is entirely arbitrary. Empirical studies demonstrate that there is no statistically significant difference between the rates at which criminal defendants released on secured and unsecured bail are charged with new crimes. (Doc. 129-1, pp. 7-8, ¶¶ 12-13). Dr. Jones's study found that regardless of a criminal defendant's pretrial risk, "unsecured bonds offer the same public safety benefit as do secured bonds." (Doc. 129-10, p. 12). Dr. Jones noted that his findings are consistent with at least two other research studies. (Doc. 129- 10, p. 12). In addition, the study conducted by Ms. Brooker, Dr. Jones, and Mr. Schnacke found that "there was no significant difference in the overall public safety rate between" criminal defendants released by judges who set many secured bonds and criminal defendants released by judges who set many unsecured bonds. (Doc. 129-11, p. 9).

Significantly, Mr. Hester offered expert testimony and research studies which demonstrate that prolonged pretrial detention is associated with a greater likelihood of re-arrest upon release, meaning that pretrial detention may *increase* the risk of harm to the community. (Doc. 129-1, pp. 7-8, ¶ 13). Citing the study conducted by Dr. Lowenkamp, Dr. VanNostrand, and Dr. Holsinger, Dr. Jones testified that criminal defendants who are released in two to three days are 39% more likely, five to seven days 50% more likely, and 8 to

14 days 56% more likely to re-offend than those who are released within one day. (Doc. 129-4, p. 5, ¶ 16; *see* Doc. 129-12, pp. 11-12, 20). In addition, reviews of pretrial release practices in Washington, D.C., New Jersey, and Kentucky show that defendants released on unsecured bond or non-financial conditions are not more likely to re-offend than defendants released on secured bond. (Doc. 129-2, p. 5, ¶ 25; Doc. 129-16, p. 5; Doc. 129-18, p. 18).

The defendants did not offer evidence to show that criminal defendants who cannot afford to pay secured money bond are more dangerous to the public than criminal defendants who can. Judge Turner testified that he was not aware of empirical data showing that secured money bail ensures public safety more than other forms of pretrial release. (Doc. 143, p. 131). Sheriff Gentry testified that the threat of losing money creates the incentive to not commit new crimes after release. (Doc. 143, p. 168). But release on unsecured bond provides the same incentive because a judge may require a criminal defendant who commits a new crime while on pretrial release to pay the face value of the bond.

As currently implemented, Cullman County's bail schedule does nothing to secure public safety. A defendant with financial means who is charged with assault can go home within two hours of his arrest if he can post a $10,000 bond, while an indigent defendant charged with fourth degree possession of a forged instrument who cannot afford to post a $3,000 secured bond remains in custody awaiting a hearing. (Doc. 122-1, p. 16). More importantly, dangerous defendants charged with identical crimes are treated differently based on their financial status. The Sheriff's Office releases a dangerous defendant with financial means

within two hours of arrest, but the Sheriff's Office detains an indigent defendant who must await an opportunity to convince a judge, who is not required to apply a particular evidentiary standard, that his or her past criminal history and/or current alleged conduct do not warrant an unattainable bond amount that will serve for that defendant as a de facto detention order. The system is discriminatory: not all criminal defendants who pose a real and present danger to the public are indigent, but Cullman County detains only indigent criminal defendants who pose a real and present danger to the public. Dangerous defendants with means enjoy pretrial liberty.

In February 2018, Cullman County had 220 new arrests. Of the 220 individuals arrested, 47 individuals had to await initial appearances, and 167 individuals were able to secure their release immediately. (Doc. 143, pp. 192, 212). None of those 167 individuals had to prove that they were not a danger to the community or a flight risk. With respect to those 167 individuals, Cullman County did nothing to determine whether conditions other than bond were necessary to protect the public or to ensure the defendant's appearance at court proceedings. Cullman County professes concern for the safety of the citizens in the community, but the record demonstrates that that concern is illusory or at least half-hearted in implementation. As Judge Turner stated, if Cullman County were to assess all arrestees for danger to the community, there would be many more individuals held pretrial in the Cullman County jail, just as there would be many additional detentions

if Cullman County assessed all arrestees for flight risks.[22]

The defendants mention that they are open to making additional changes to their pretrial bail system, but they contend that "it's got to come from a state level. Whatever works for Cullman has got to be the same thing that works for Jefferson County, for Mobile County, for Escambia County." (Doc. 143, p. 69). The proposition is not persuasive. Cullman County did not have to wait for the rest of the State of Alabama when it revised its pretrial bail procedures two weeks after Mr. Hester filed his motion for preliminary injunction. And this Court does not have a record before it that would allow it to determine whether the bail systems in other counties in Alabama suffer from constitutional flaws, such that state-wide reform is necessary. For purposes of this litigation, the Court is concerned only with the record concerning Cullman County.

None of the interests that the defendants have identified relating to Cullman's County's secured bail procedures finds support in the current record. Therefore, Mr. Hester has shown a substantial likelihood of

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[22] If the record suggested that Cullman County had a robust practice of using bail requests forms pursuant to which law enforcement officers would ask judges to increase the amount of bail for defendants who the officers believe may be a threat to the community, the record might better support Cullman County's professed concern for the safety of the community. The record contains no such suggestion. Judge Turner explained that the bail request forms were part of Cullman County's pretrial system before the county's chief judge signed the March 2018 Standing Order, and Judge Turner testified that he has never seen a bail request form for a warrantless arrest. (Doc. 136, p. 275; Doc. 143, p. 143). The defendants offered no evidence to establish how often law enforcement officers submit bail request forms for warrant arrests.

success on the merits of his claim that Cullman County's bail procedures violate his right under the Fourteenth Amendment to equal treatment under the law.[23]

b. Substantive and Procedural Due Process—Individualized Release Hearing

There is a substantial likelihood that Mr. Hester will prove that Cullman County's bail procedures violate his constitutional right to substantive and procedural due process. The substantive right to pretrial liberty may not be infringed without "constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). A state's rule of criminal pro-

[23] In her dissenting opinion in *Walker*, Judge Martin explained that she would apply heightened scrutiny to assess the constitutionality of a bail system that discriminates on the basis of wealth. 2018 WL 4000252 at * 24 (Martin, J. dissenting). Because pretrial liberty is a fundamental right to which heightened scrutiny applies, were this Court writing on a clean slate, it would apply heightened scrutiny to assess Cullman County's bail system under the equal protection/due process rubric for wealth-based classifications. *United States v. Salerno*, 481 U.S. 739, 749-50 (1987) (because the "interest in liberty" is "fundamental," it is a "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial."); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (substantive due process "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest") (citing Salerno, 481 U.S. at 746); *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (describing the narrowly tailored and least restrictive conditions on pretrial liberty imposed by the Bail Reform Act as analyzed in *Salerno*). Because Cullman County's bail system does not survive rational basis analysis, it necessarily would not survive heightened scrutiny.

cedure violates the Due Process Clause when "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 445 (1992) (citations and internal quotation marks omitted); *see Nelson v. Colorado*, 581 U.S. ---, 137 S. Ct. 1249, 1255 (2017) ("Medina provides the appropriate framework for assessing the validity of state procedural rules that are part of the criminal process.") (internal quotation marks and alteration omitted).

Mr. Hester's substantive and procedural due process claims are related. (Doc. 108, p. 19). Mr. Hester contends that the defendants do not employ constitutionally adequate procedures at the initial appearance to protect putative class members' substantive right to pretrial liberty in violation of substantive and procedural due process. (Doc. 95, p. 19, ¶ 84; Doc. 108, p. 19). Specifically, Mr. Hester argues that the defendants, in violation of the Due Process Clause, do not provide clear notice to criminal defendants about the purpose of an initial appearance; give criminal defendants a full opportunity to speak and present evidence; require express findings and a statement of reasons for detention; or follow an evidentiary standard for detention. (Doc. 108, pp. 22-26; Doc. 131, pp. 17-23).[24]

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[24] In his complaint, Mr. Hester contends also that the defendants do not "restrict detention to extremely serious offenses." (Doc. 95, p. 19, ¶ 85). Mr. Hester has not raised this allegation in his motion for preliminary injunction. In his motion for preliminary injunction, Mr. Hester has argued that due process requires defendants to have the assistance of counsel at an initial appearance under Cullman County's criminal pretrial procedures. (Doc. 108, pp. 25-26). Recently, Mr. Hester has asked for the opportunity to present additional briefing on this issue. (Doc. 156). Because the Court finds that Mr. Hester is entitled to a preliminary injunction

Cullman County's secured money bail procedures are strikingly similar to the bail procedures at issue in the Fifth Circuit's recent opinion in *ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018). As explained by the district court in that case, following a citizen's arrest for a misdemeanor offense in Harris County, Texas, the district attorney would set a secured money bail amount according to a bail schedule. *ODonnell v. Harris Cty.*, Texas, 251 F. Supp. 3d 1052, 1088 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), *and aff'd as modified sub nom. ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018).[25] Like the Cullman County bail schedule, the Harris County bail schedule listed bail amounts for each potential offense. *Id.* The county released criminal defendants who paid the bond amount. *Id.* The county detained criminal defendants who could not pay the bond amount. *Id.*

According to the "Harris County Criminal Courts at Law Rules of Court," akin to the Standing Order in this case, criminal defendants who could not pay the bond amount were supposed to receive a probable cause hearing before a hearing officer within 24 hours of arrest. *ODonnell*, 251 F. Supp. 3d at 1086-87. A hearing officer was supposed to determine a criminal defendant's bail at the probable cause hearing. *Id.* at 1092. Like the judges in Cullman County, hearing officers at the probable cause hearing had the discretion to release criminal defendants on personal or unsecured bonds, to impose additional conditions of release, or to raise or lower the secured bond amount listed in the

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for other reasons, the Court will delay its consideration of Mr. Hester's right to counsel argument.

[25] The Fifth Circuit affirmed the district court's factual findings. *ODonnell*, 892 F.3d at 166.

bail schedule. *Id.* According to Texas state law, hearing officers had to conduct an individualized review when setting bail using enumerated factors, including the defendant's ability to make bail. *Id.* at 1086.

Harris County's actual practices deviated considerably from these rules. The Fifth Circuit stated:

> Despite these formal requirements, the district court found that, in practice, County procedures were dictated by an unwritten custom and practice that was marred by gross inefficiencies, did not achieve any individualized assessment in setting bail, and was incompetent to do so. The district court noted that the statutorily-mandated probable cause hearing (where bail is usually set) frequently does not occur within 24 hours of arrest. The hearings often last seconds, and rarely more than a few minutes. Arrestees are instructed not to speak, and are not offered any opportunity to submit evidence of relative ability to post bond at the scheduled amount.
>
> The [district] court found that the results of this flawed procedural framework demonstrate the lack of individualized assessments when officials set bail. County officials "impose the scheduled bail amounts on a secured basis about 90 percent of the time. When [they] do change the bail amount, it is often to conform the amount to what is in the bail schedule." The court further found that, when Pretrial Services recommends release on personal bond, Hearing Officers reject the suggestion 66% of the time. Because less than 10% of misdemeanor arrestees are assigned an unsecured

> personal bond, some amount of upfront payment is required for release in the vast majority of cases.

ODonnell, 892 F.3d at 153-54. Moreover, criminal defendants almost never had counsel at the probable cause hearings, and the county did not provide counsel to indigent defendants. *ODonnell*, 251 F. Supp. 3d at 1093. Hearing officers did not make written findings or explain why they set the bail in the type and amount imposed. *Id.* Hearing officers occasionally made abbreviated notes on forms such as "criminal history," "safety of community," or "safety" to indicate the rationale for pretrial bail, but the forms did not otherwise indicate that the hearing officers weighed relevant factors in setting bail. *Id.*

Like Cullman County, Harris County argued that its bail system was necessary to ensure a criminal defendant's appearance at court and to protect the community. The district court rejected Harris County's argument, and the Fifth Circuit affirmed the district court's decision. *ODonnell*, 892 F.3d at 154, 166. The Fifth Circuit explained:

> [t]he [district] court rejected the argument that imposing secured bonds served the County's interest in ensuring the arrestee appeared at the future court date and committed no further crime. The court's review of reams of empirical data suggested the opposite: that "release on secured financial conditions does not assure better rates of appearance or of law-abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision." Instead, the County's true purpose was "to achieve pretrial detention of misde-

> meanor defendants who are too poor to pay, when those defendants would promptly be released if they could pay." In short, "secured money bail function[ed] as a pretrial detention order" against the indigent misdemeanor arrestees.

ODonnell, 892 F.3d at 154.

The Fifth Circuit affirmed the district court's ruling that Harris County violated indigent criminal defendants' due process rights by infringing on the fundamental right to pretrial liberty without constitutionally adequate procedures. *ODonnell*, 892 F.3d at 159. The Fifth Circuit stated:

> As the district court found, the current procedures are inadequate—even when applied to our narrower understanding of the liberty interest at stake. The court's factual findings (which are not clearly erroneous) demonstrate that secured bail orders are imposed almost automatically on indigent arrestees. Far from demonstrating sensitivity to the indigent misdemeanor defendants' ability to pay, Hearing Officers and County Judges almost always set a bail amount that detains the indigent. In other words, the current procedure does not sufficiently protect detainees from magistrates imposing bail as an "instrument of oppression."

ODonnell, 892 F.3d at 159.

The Fifth Circuit found that the "fundamental source of constitutional deficiency in the due process and equal protection analyses is the same: [Harris] County's mechanical application of the secured bail schedule without regard for the individual arrestee's

personal circumstances." *ODonnell*, 892 F.3d at 163. To cure the due process and equal protection violations, the county had to "implement the constitutionally-necessary procedures to engage in a case-by-case evaluation of a given arrestee's circumstances, taking into account the various factors required by Texas state law (only one of which is ability to pay)." *Id.* The Fifth Circuit held that "constitutionally-necessary procedures" specifically included "notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decisionmaker." *Id.*

Although the Fifth Circuit affirmed the district court's conclusion that Harris County's bail procedures violated the Due Process Clause, the Fifth Circuit found that the district court's preliminary injunction was overly broad. *ODonnell*, 892 F.3d at 166. The Fifth Circuit held that hearing officers did not have "to issue a written statement of their reasons." *Id.* at 160. The Fifth Circuit "decline[d] to hold that the Constitution requires the County to produce 50,000 written opinions per year to satisfy due process." *Id.* Instead, because "the constitutional defect in the process afforded was the *automatic* imposition of pretrial detention on indigent misdemeanor arrestees, requiring [hearing officers] to specifically enunciate their individualized, case-specific reasons for so doing is a sufficient remedy." *Id.* (emphasis in original). And the Fifth Circuit "conclude[d] that the federal due process right entitles detainees to a hearing within 48 hours" as opposed to the 24 hour window that the district court required in its injunction. *Id.*

The Fifth Circuit provided the district court with a draft injunction that "represent[ed] the sort of modification that would be appropriate" and left the details to the district court's discretion. *ODonnell*, 892 F.3d at

164. Provisions in the draft injunction most relevant to this case are:

- Harris County is enjoined from imposing prescheduled bail amounts as a condition of release on arrestees who attest that they cannot afford such amounts without providing an adequate process for ensuring that there is individual consideration for each arrestee of whether another amount or condition provides sufficient sureties.
- Pretrial Services officers, as County employees and subject to its policies, must verify an arrestee's ability to pay a prescheduled financial condition of release by an affidavit, and must explain to arrestees the nature and significance of the verification process.
- The purpose of the explanation is to provide the notice due process requires that a misdemeanor defendant's state constitutional right to be bailable by sufficient sureties is at stake in the proceedings …
- The affidavit must give the misdemeanor arrestee sufficient opportunity to declare under penalty of perjury, after the significance of the information has been explained, the maximum amount of financial security the arrestee would be able to post or pay up front within 24 hours of arrest. The affidavit should ask the arrestee to provide details about their financial situation The question is neither the arrestee's immediate ability to pay with cash on hand, nor what assets the arrestee could eventually produce after a period of pretrial detention. The question is what amount the arrestee could reasonably pay within 24 hours of his or her arrest, from any source, including the contributions of family and friends.

- Misdemeanor defendants who are [eligible to secure their release by paying secured bond are] entitled to a hearing within 48 hours of arrest in which an impartial decision-maker conducts an individual assessment of whether another amount of bail or other condition provides sufficient sureties. At the hearing, the arrestee must have an opportunity to describe evidence in his or her favor, and to respond to evidence described or presented by law enforcement. If the decision-maker declines to lower bail from the prescheduled amount to an amount the arrestee is able to pay, then the decisionmaker must provide written factual findings or factual findings on the record explaining the reason for the decision, and the County must provide the arrestee with a formal adversarial bail review hearing before a County Judge. The Harris County Sheriff is therefore authorized to decline to enforce orders requiring payment of prescheduled bail amounts as a condition of release for said defendants if the orders are not accompanied by a record showing that the required individual assessment was made and an opportunity for formal review was provided. …

ODonnell, 892 F.3d at 164-66.

There is no meaningful difference between the bail procedures in this case and the procedures in *ODonnell*; both are equally arbitrary. Like Harris County pre-*ODonnell*, Cullman County mechanically applies a secured money bail schedule to detain the poor and release the wealthy. Like Harris County, Cullman County argues that its written "individualized" release procedures protect indigent defendants' due process rights. And like Harris County, Cullman County's ac-

tual procedures are significantly less individualized and protective than due process requires.[26]

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[26] Recent developments in other jurisdictions support Mr. Hester's due process claim. Notably, the U.S. District Court for the Eastern District of Louisiana recently found that each of the procedural deficiencies alleged by Mr. Hester violates due process at an initial appearance where a defendant is at risk of a *de facto* detention order because of her indigency. *Caliste v. Cantrell*, --- F. Supp. 3d ---, 2018 WL 3727768, at *12 (E.D. La. Aug. 6, 2018). In addition, the governor of California recently signed into law the California Money Bail Reform Act, 2018 Cal. Legis. Serv. Ch. 244 (S.B. 10) (effective date October 1, 2019). The Act appears to eliminate money bail and provide all of the procedural safeguards that Mr. Hester argues the Due Process Clause demands Cullman County to provide at an initial appearance.

Generally, pursuant to the California Money Bail Reform Act, pretrial risk assessment services determine whether an individual booked on a charge other than a misdemeanor is "low risk," "medium risk," or "high risk" of failure to appear or danger to the public. S.B. 10, §§ 1320.7(a)- (c), 1320.9. Pretrial risk assessment services release low risk defendants on their own recognizance without a hearing. S.B. 10, § 1320.10(b). Pretrial risk assessment services may release medium risk defendants on their own recognizance without a hearing or recommend an arraignment hearing. S.B. 10, § 1320.10(c). The court conducts an arraignment hearing for any detained defendant. S.B. 10, § 1320.15. "At arraignment, the court shall order a defendant released on his or her own recognizance or supervised own recognizance with the least restrictive nonmonetary condition … that will reasonably assure public safety and the defendant's return to court unless the prosecution files a motion for preventive detention." S.B. 10, § 1320.17. The court must conduct a hearing on the motion for preventive detention at which the defendant has the right to court-appointed counsel. S.B. 10, § 1320.19(d). The defendant must have the opportunity to be heard and present evidence. S.B. 10, § 1320.20(c). The court may order detention only if the court determines by clear and convincing evidence that no nonmonetary condition of release will reasonably assure public safety and court appearance and must state its reasons on the record. S.B. 10, § 1320.20(d)(1). Otherwise, the

The following procedural deficiencies in Cullman County's bail procedures create a substantial likelihood of success for the plaintiffs on their due process claim.

- **Absence of adequate notice**

The defendants do not provide constitutionally adequate notice to indigent criminal defendants before an initial appearance. "[N]otice is essential to afford the prisoner an opportunity to challenge the contemplated action and to understand the nature of what is happening to him." *Vitek v. Jones*, 445 U.S. 480, 496 (1980) (citing *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974)). The notice must be tailored, "in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case." *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)).

Here, there is no evidence in the record that the defendants inform arrestees of what is at stake at an initial appearance or that the sheriff's court liaison officers explain the initial hearing process to detainees. Those officers offer detainees a release questionnaire, which detainees may refuse. The notice statement in the release questionnaire, "FOR THE PURPOSE OF DETERMINING CONDITIONS OF PRE-TRIAL RELEASE IN THIS CASE, THE COURT MAY TAKE INTO ACCOUNT THE FOLLOWING," is vague and substantively inadequate. (Doc. 129-41, p. 2). The release questionnaire does not communicate the most crucial piece of information, namely, that a judge may enter a *de facto* detention order by setting unaf-

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court must release the defendant on her own or supervised recognizance. S.B. 10, § 1320.20(e)(1).

fordable secured money bail even after considering the information provided by the defendant. *See Caliste v. Cantrell*, --- F. Supp. 3d ---, 2018 WL 3727768, at *11 (E.D. La. Aug. 6, 2018) (granting summary judgment for plaintiff in part because secured money bail procedures did not "provide[] notice of the importance of the issue of the criminal defendant's ability to pay").

The language in the release questionnaire suggests to a defendant that she is entitled to some form of "release," when she really is not because the court may exercise its discretion to enter what amounts to an order of detention. Judge Turner acknowledged that at an initial appearance, a stage at which indigent defendants do not have counsel, he does not inform criminal defendants of the fourteen factors he considers when setting secured bail, so a defendant cannot know what information may be important to share for an assessment of conditions of release. (Doc. 143, p. 91). Judge Turner stated that he asks few questions during an initial appearance, most of the defendants who appear before him lack formal education, and many defendants are illiterate or have learning disabilities. (Doc. 136, p. 289). Having these defendants rely on the information in the release questionnaire for notice is tantamount to no notice at all. These defendants do not receive adequate notice of their constitutional right to pretrial liberty or the evidence they must provide to prove that there are non-monetary conditions of pretrial release that will satisfy the purposes of bail. (Doc. 143, pp. 92-93).

- **Absence of an opportunity to be heard**

Under the March 2018 Standing Order, at an initial appearance, a Cullman County judge does not have to give a criminal defendant an opportunity to be heard or

present evidence. According to the Standing Order, the judge "may" give the defendant an opportunity to speak. (Doc. 129-36, p. 7) ("The Court … *may* elicit testimony about the defendant's financial condition.") (emphasis added). Judge Turner testified that he asks the defendant some questions at the initial appearance, but he "tr[ies] not to ask too many questions." (Doc. 136, pp. 288-89). The record does not indicate whether other judges in Cullman County elicit information from defendants during an initial appearance. Although a check-box on the Order on Initial Appearance and Bond Hearing states, "Bail: Gave the Defendant the opportunity to make a statement regarding his/her ability to post the bond currently set in this matter," there is no evidence that a judge must check this box or that judges give criminal defendants a meaningful opportunity to speak. (Doc. 129-40, p. 2). Under the Standing Order, a judge does not have to provide the defendant an opportunity to present evidence. Accordingly, the defendants impermissibly leave a criminal defendant's opportunity to be heard, a "fundamental requirement of due process," up to the judge's discretion. *Mathews*, 424 U.S. at 333.; *see Caliste*, 2018 WL 3727768, at *9-10 (finding an opportunity to be heard to be an essential requirement of due process at a hearing where a defendant faces pretrial detention because of indigency) (citing *Turner v. Rogers*, 564 U.S. 431, 445 (2011), *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), and *Cain v. City of New Orleans*, 281 F. Supp. 3d 624, 652 (E.D. La. 2017)).

- **Absence of an evidentiary standard**

Under the March 2018 Standing Order, neither the Cullman County Sheriff nor a Cullman County judge must satisfy an evidentiary standard before entering an unaffordable secured bond that serves as a *de facto* de-

tention order. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423 (1979) (internal quotation marks and citation omitted). The Supreme Court has consistently "mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (quoting *Addington*, 441 U.S. at 424 (1979)). The Supreme Court "has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'" *Santosky*, 455 U.S. at 756 (quoting *Addington*, 441 U.S. at 425-26). Pursuant to these concerns, the Supreme Court has established a clear and convincing evidence standard for civil commitment for mental illness, *Addington*, 441 U.S. at 433, deportation of a resident alien, *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 286 (1966), denaturalization, *Chaunt v. United States*, 364 U.S. 350, 353-55 (1960), and parental rights termination proceedings, *Santosky*, 455 U.S. at 768-69. *See Caliste*, 2018 WL 3727768, at *10 ("[T]he Court agrees … 'the government must prove the facts supporting a finding of flight risk by clear and convincing evidence.'") (quoting *United States v. Motamedi*, 767 F.2d 1403, 1409 (9th Cir. 1985) (Boochever, J., concurring in part and dissenting in part)).

The level of certainty that the clear and convincing evidence standard provides is necessary to ensure fundamental fairness in bail proceedings. The detention of a criminal defendant in Cullman County without a specific degree of confidence that detention is necessary offends a fundamental principle of justice. At an initial appearance, an indigent defendant faces a substantial "loss of personal liberty through imprisonment," a penalty which "lies at the core of the liberty protected by the Due Process Clause." *Turner*, 564 U.S. at 445. Accordingly, before ordering an unaffordable secured bond, a judge must find by clear and convincing evidence that pretrial detention is necessary to secure the defendant's appearance at trial or to protect the public.

- **Absence of factual findings**

Although the Standing Order states that "[t]he Court will make a written finding as to why the posting of a bond is reasonably necessary …" (Doc. 129-36, p. 7), Cullman County judges do not actually make "findings." Instead, a judge merely checks a box for any of fourteen factors he "considered." (Doc. 129-36, pp. 6-7; Doc. 129-40, p. 3). This is insufficient.

Checking boxes for factors "considered" is just as inadequate as jotting abbreviated factors such as "safety" or "criminal history," per the hearing officers in *ODonnell*. Cullman County's check-boxes simply restate the factors in Rule 7.2(a) of the Alabama Rules of Criminal Procedure. As a matter of state law, every judge presumably considers these factors when setting a bond amount or imposing other conditions for pretrial release. Aside from the "Other" check-box and the corresponding two blank lines, which a judge does not have to use, no check-box provides individualized information or suggests that the judge actually made a

finding with respect to a particular factor. For example, when a judge sets secured bail and checks "[t]he age, background and family ties, relationships and circumstances of the defendant" or "the defendant's reputation, character, and health," the check communicates no individualized reason for the judge's decision, and a checked box does not indicate whether a factor worked in the defendant's favor or worked against her.

To obtain her freedom after an initial appearance, an indigent defendant must move the state court to reduce her bond. At this stage of Cullman County's bail proceedings, an indigent defendant finally obtains the assistance of appointed counsel, but the record affords appointed counsel no information regarding the rationale for her client's bond, making the task of identifying error and challenging the bail amount unreasonably—and potentially insurmountably—difficult. Checking boxes for factors "considered" is tantamount to providing counsel with a copy of Rule 7.2(a) of the Alabama Rules of Criminal Procedure; checkboxes for factors "considered" provide no meaningful information to indigent defendants or their appointed counsel.

To cure these deficiencies, at a minimum, a judge must state on the record why the court determined that setting secured money bond above a defendant's financial means was necessary to secure the defendant's appearance at trial or protect the community. *See Goldberg*, 397 U.S. at 271 (due process generally requires the decision maker to "state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law"); *Holley v. Seminole Cty. Sch. Dist.*, 755 F.2d 1492, 1499 (11th Cir. 1985) ("It serves as a bulwark to our procedural due process review, in that a decision without basis in

fact would tend to indicate that the procedures, no matter how scrupulously followed, had been a mockery of their intended purpose—rational decisionmaking."); *Caliste*, 2018 WL 3727768, at *9 (finding that *Salerno*, *Bearden*, and *Turner* demonstrate "the Supreme Court's emphasis on the due process requirements of an informed inquiry into the ability to pay and findings on the record regarding that ability prior to detention based on failure to pay").

In all of these areas—absence of notice, absence of an opportunity to be heard, absence of an evidentiary standard, and absence of factual findings—Mr. Hester has demonstrated a substantial likelihood of success in proving that the defendants violate due process.

The *Walker* opinion does not affect the due process analysis in this case. As discussed above, Cullman County's bail procedures differ significantly from those of the City of Calhoun. Calhoun's Standing Bail Order provided, "'those individuals who do not obtain release pursuant to the secured bail schedule … shall … be brought before the [Municipal] Court' within 48 hours from their arrest, shall 'be represented by court appointed counsel,' and 'will be given the opportunity to object to the bail amount …, including any claim of indigency.'" *Walker*, 2018 WL 4000252, at *1. Calhoun guaranteed counsel and the opportunity to be heard. The availability of counsel made the opportunity to be heard meaningful. Cullman County offers no such opportunity to indigent defendants at an initial appearance.

Notably, the Eleventh Circuit did not address notice, findings, or an evidentiary standard in Walker. Calhoun's Standing Bail Order may have provided those safeguards, but even if the Calhoun Standing Bail

Order lacked certain safeguards, Calhoun's requirement of counsel at an initial bail hearing—perhaps the most significant safeguard—mitigates other constitutional concerns. For example, if a judge did not give a defendant an opportunity to be heard, counsel could request such an opportunity. If a judge did not inform a defendant of the importance of her ability to post bond, counsel could do so. In contrast, the lack of counsel in Cullman County exacerbates each procedural defect in Cullman's bail system. Lack of adequate notice, an opportunity to be heard, findings on the record, and an evidentiary standard raise significantly more concern when an indigent defendant must confront those obstacles by herself. And at the end of the day, in Calhoun, a detainee simply had to prove that she was indigent to secure release within 48 hours. *Walker*, 2018 WL 4000252, at *14 n.12 ("[T]he Standing Bail Order guarantees release to indigents within 48 hours. It therefore accords entirely with *ODonnell's* holding that what the Constitution requires is 'an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decisionmaker.' [*ODonnell*, 892 F.3d] at 163."). Cullman County detainees must satisfy fourteen factors for release, all without the assistance of counsel.

Because the Eleventh Circuit in *Walker* "decide[d] what process the Constitution requires in setting bail for indigent arrestees," 2018 WL 4000252, at *1, the *Walker* opinion is undoubtedly relevant to this case, but based on the considerable differences between Calhoun's Standing Bail Order and Cullman County's procedures, *Walker* does not change the fact that Mr. Hester has demonstrated a substantial likelihood of success on the merits of his due process claim.

2. Irreparable Injury to the Putative Class

The Supreme Court has recognized that the "time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness." *Barker v. Wingo*, 407 U.S. 514, 532 (1972). Imprisonment hinders a defendant's ability to prepare her defense, forces her to live "under a cloud of anxiety, suspicion, and often hostility," and is "simply dead time" that the defendant can never get back. *Id.* at 532-33.

The evidence in this case is consistent with the Supreme Court's observations in *Barker*. Mr. Hester's evidence demonstrates that pretrial detention for three days or less negatively influences a person's employment, financial circumstances, housing, and the wellbeing of dependent family members. (Doc. 129-1, pp. 9-11, ¶¶ 16-17; Doc. 129-4, pp. 6-7, ¶ 23). These detrimental impacts are exacerbated when pretrial incarceration exceeds three days. (See Doc. 129-1, pp. 9-11, ¶¶ 16-17; Doc. 136, pp. 64-65, 112-14).

Four studies in the record show that pretrial detention is associated with a higher rate of conviction because detention hampers a defendant's ability to prepare a defense and induces people to plead guilty to get out of jail. A study from Harris County, Texas found that "defendants who are detained on a misdemeanor charge are much more likely than similarly situated [defendants who are released pretrial] to plead guilty and serve jail time. Compared to similarly situated [released defendants], detained defendants are 25% more likely to be convicted …." (Doc. 129-19, p. 8). A study from Pittsburgh found that "pretrial detention leads to a 13% increase in the likelihood of being convicted, an effect largely explained by an increase in guilty pleas

among defendants who otherwise would have been acquitted or had their charges dropped." (Doc. 129-20, p. 2). A study from Philadelphia and Pittsburg found that "criminal defendants who are assessed money bail are 12% [] more likely to be convicted." (Doc. 129-21, p. 4). And data from New York City shows that 92% of people detained pretrial pleaded guilty, while only 24% and 32% of the cases in which the defendant's bail was paid by the Bronx Freedom and Brooklyn Community Bail Fund, respectively, resulted in a criminal conviction. (Doc. 135-3, pp. 3-4, ¶¶ 11, 14-15).

Two studies in the record show that pretrial detention is associated with harsher sentences upon conviction. The Harris County, Texas study found that detained individuals were 43% more likely than similarly situated released individuals to be sentenced to a term of incarceration. (Doc. 129-19, p. 8). The Philadelphia study found that defendants detained pretrial generally end up owing $129 more in non-bail court fees and are sentenced to an additional 124 days on average upon conviction. (Doc. 129-20, p. 4).

In addition, detention for more than 24 hours before release appears to increase the risk of recidivism. (Doc. 129-1, pp. 11-12, ¶¶ 18-19; Doc. 136, pp. 73-74). The risk compounds as the length of detention increases. (Doc. 129-1, p. 12, ¶ 19; Doc. 129-12, pp. 5, 12). For example, the Philadelphia/Pittsburgh study found that secured money bail is "a significant, independent cause of … recidivism [T]he assessment of money bail increases recidivism in our sample period by 6-9% yearly []." (Doc. 129-21, p. 4). The study conducted by Dr. Lowenkamp, Dr. VanNostrand, and Dr. Holsinger found that "[b]eing detained pretrial for two days or more is related to the likelihood of post-disposition recidivism. Generally, as the length of time in pretrial

detention increases, so does the likelihood of recidivism at both the 12-month and 24-month points." (Doc. 129-12, p. 5). The study also found that "[t]he longer low-risk defendants are detained, the more likely they are to have new criminal activity pretrial (1.39 times more likely when held 2 to 3 days, increasing to 1.74 when held 31 days or more)." (Doc. 129-12, p. 12).

Therefore, individuals who, by law, are presumed innocent suffer irreparable injury when they are detained because they cannot afford to pay secured bond and are deprived of constitutionally adequate procedures for examining potential non- monetary conditions of release.

3. Injury to the Defendants

The threatened harms to the putative class outweigh the harms the preliminary injunction may cause to the defendants. The defendants argue that no alternative systems are workable in Cullman County. The defendants contend that detaining every arrestee until an initial appearance would put considerable strain on the county's resources. (Doc. 136, pp. 230-31; Doc. 143, pp. 66-68).[27] Judge Turner stated that the circuit court's resources already are taxed to handle the 72-hour initial appearances, the county has no government-funded pretrial services staff, and the county needs one more judge just to keep up with the circuit court's current case load. (Doc. 143, pp. 51-53). Accord-

[27] Mr. Hester has not urged the defendants to detain every arrestee until an initial appearance. Cullman County has offered no reason why it could not, at a minimum, use unsecured bond for non-violent arrestees. As noted, individuals released on unsecured bond would have "skin in the game," and unsecured bond would enable Sheriff Gentry to release all non-violent arrestees, not just wealthy arrestees, more quickly.

ing to Sheriff Gentry, funding for the sheriff's department has not increased since 2009. (Doc. 136, p. 254).

But alternative pretrial detention policies are cost effective. Three options are readily available to Cullman County at little or no cost. First, Cullman County could release all defendants on unsecured bond. In a case in which a defendant may pose a significant flight risk or a danger to the community, a judge could hold an initial hearing within 48 hours of arrest and, if necessary based on the evidence collected at the hearing, impose additional conditions for release such as a court-appointed third-party custodian or a requirement that the defendant periodically call one of the sheriff's court liaisons. The defendants acknowledge that an unsecured bail schedule would serve their interests. (Doc. 136, p. 211; Doc. 143, pp. 69-70, 133-34).

Alternatively, Cullman County could adopt the Calhoun model and, within 48 hours of arrest, release on recognizance bonds all indigent defendants who prove their indigency on the basis of an objective standard.

Finally, Cullman County could have all arrestees complete a release questionnaire, updated to conform to the procedural requirements discussed above. The Sheriff's Office could review those questionnaires and release on unsecured bond all low-risk arrestees. The Sheriff's Office would detain all high risk arrestees, wealthy and indigent alike, for an initial appearance at which a judge would assess the necessary conditions for pretrial release.

Holding procedurally sufficient initial appearances consistent with this memorandum opinion would not be overly burdensome. The defendants may be able to provide sufficient notice to arrestees by, for example,

editing the affidavit of substantial hardship and release questionnaire and making sure that arrestees who have difficulty understanding the forms receive assistance. Satisfying an evidentiary standard before setting bail should add no extra cost, and making actual findings when requiring a bond may require very little extra time, if any.

4. Public Interest

A preliminary injunction would prevent continuing deprivation of core constitutional rights by prohibiting detention based solely on predetermined secured money bail amounts without sufficient substantive findings and adequate procedural protections. It would not impair the efficacy of the justice system or endanger the public. Therefore, a preliminary injunction would not disserve the public interest.

5. Security

Because Mr. Hester and members of the putative class are, by definition, indigent, the Court exercises its discretion to waive the security required by Rule 65(c) of the Federal Rules of Civil Procedure. *See Sanders v. Sellers-Earnest*, 768 F. Supp. 2d 1180, 1188 (M.D. Fla. 2010).

III. CONCLUSION

For the reasons stated above, Mr. Hester has demonstrated that he is entitled to a preliminary injunction consistent with the analysis in this opinion. The Court will set a telephone conference to discuss the terms of a preliminary injunction.

DONE and **ORDERED** this September 4, 2018.

Madeline Hughes Haikala
MADELINE HUGHES HAIKALA
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Case No. 5:17-cv-00270-MHH
[Filed September 13, 2018]

RAY CHARLES SCHULTZ, et al.,
Plaintiffs,

v.

STATE OF ALABAMA, et al.,
Defendants,

RANDALL PARRIS, on behalf of himself and those similarly situated, et al.,
Plaintiff-Intervenor,

v.

MARTHA WILLIAMS, et al.,
Defendants.

BRADLEY HESTER, on behalf of himself and those SIMILARLY situated,
Plaintiff-Intervenor,

v.

MATT GENTRY, et al.,
Defendants.

PRELIMINARY INJUNCTION ORDER

On September 4, 2018, the Court issued a memorandum opinion in which it explained why the Court finds preliminarily that Cullman County's bail procedures are unconstitutional. (Doc. 159). In its memorandum opinion, the Court identified a variety of procedural modifications that Cullman County could use to cure the constitutional deficiencies in the county's current bail procedures. (Doc. 159, pp. 62-63).

On September 6, 2018, the Court held a telephone conference with the parties and offered the parties the opportunity to meet and propose terms for a preliminary injunction. (September 6, 2018 docket entry). The Court explained to counsel for the parties that it was willing to consider remedies other than the remedies that the Court described in the memorandum opinion. Mindful of the Eleventh Circuit Court of Appeals' decision in *Walker v. City of Calhoun*, -- F.3d --, 2018 WL 4000252 (11th Cir. Aug. 22, 2018), and conscious of the fact that more than one option is available to the county to cure the constitutional deficiencies in its current bail procedures, the Court recognized the importance of giving Cullman County an opportunity to provide input, so that Cullman County could help select procedures best-suited to the unique demands of its jurisdiction.[1] The defendants declined the Court's invitation to participate in the process of drafting a preliminary injunction. (September 6, 2018 docket entry).

Therefore, the Court **ORDERS** as follows:

1. Subject to the exceptions identified below—and until Cullman County proposes alternative, constitutionally-sound procedures—following arrests, the

[1] *Walker*, 2018 WL 4000252 at *15 ("Indeed, the law cuts the other way and indicates that federal courts should give States wide latitude to fashion procedures for setting bail.").

Sheriff of Cullman County must release all bail-eligible defendants on unsecured appearance bonds using Cullman County's current bail schedule.

2. The Sheriff does not have to immediately release defendants in the following categories who, by law, are not eligible to secure their immediate release by posting bail: defendants arrested for failure to appear or on charges that, by statute, require detention for a period of time; defendants who are intoxicated; defendants who are in need of medical attention; or defendants who have holds on their detention from other jurisdictions. In addition, the Sheriff shall not immediately release a defendant for whom an arresting officer has submitted a bail request form.

3. If an arresting officer submits a bail request form for a defendant, then the Sheriff must detain the defendant for up to 48 hours until the defendant receives an initial appearance before a district judge or a circuit judge. The Sheriff must release on an unsecured appearance bond any such defendant who does not receive an initial appearance within 48 hours of arrest.

4. Before an initial appearance, the Sheriff must notify a defendant in writing and verbally that he or she is entitled to release on an unsecured appearance bond unless a judge determines, based on clear and convincing evidence, that the defendant poses a significant risk of flight or danger to the community.

5. Before an initial appearance, the Sheriff must provide the defendant with a questionnaire eliciting information relevant to flight risk and danger to the community. The questionnaire must notify the defendant of the 14 factors that a judge must consider in setting bail per Rule 7.2(a) of the Alabama Rules of Criminal Procedure. The questionnaire must notify the de-

fendant that the judge may consider other factors. The Sheriff must confirm that the defendant understands the questionnaire and either must have one of his court liaison deputies assist defendants who are unable to complete the questionnaire themselves or provide notice to the judge conducting a defendant's initial appearance that the defendant was unable to complete the questionnaire without assistance.

6. Before an initial appearance, the Sheriff must provide the defendant with an affidavit form on which the defendant may provide information about his or her financial means. The form must notify the defendant that a judge will use the information on the form to assess whether the defendant is entitled to court- appointed counsel. The form must also notify the defendant that the judge may request additional financial information during an initial appearance. The Sheriff must confirm that the defendant understands the affidavit form and either must have one of his court liaison deputies assist defendants who are unable to complete the affidavit form themselves or provide notice to the judge conducting the defendant's initial appearance that the defendant was unable to complete the affidavit form without assistance.

7. Before an initial appearance, the Sheriff must deliver to the Clerk of Court the questionnaire, the affidavit, and any other information relating to the initial appearance that the defendant provided to the Sheriff.

8. The Sheriff may delegate the tasks described above to members of his staff after the Sheriff provides training to his staff concerning the procedures set forth in this order. The Sheriff shall file a notice describing the training provided to his staff per this order.

Absent modification by the Court, this order shall remain in effect until the Court decides the merits of this action or the parties otherwise resolve their claims.

DONE and **ORDERED** this September 13, 2018.

/s/ Madeline Hughes Haikala
MADELINE HUGHES HAIKALA
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13894-DD
[Filed November 18, 2022]

RAY CHARLES SCHULTZ, et al.,
Plaintiffs,

BRADLEY HESTER,
Plaintiff-Appellee,

versus

STATE OF ALABAMA, et al.,
Defendants,

MATTHEW GENTRY, Sheriff of Cullman County, Alabama, in official and individual capacity,
AMY BLACK, in her official capacity as a Magistrate,
LISA MCSWAIN, in her official capacity as a Magistrate,
JUDGE J. CHAD FLOYD, JUDGE RUSTY TURNER,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ROSENBAUM, LAGOA, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

APPENDIX E

IN THE CIRCUIT COURT OF
CULLMAN COUNTY, ALABAMA

[No. 5:17-cv-00270-MHH]
[Stamp: FILED IN OFFICE MAR 26 2018]

STANDING ORDER REGARDING PRE-TRIAL APPEARANCE AND THE SETTING OF BOND

By the authority granted to the Circuit Court pursuant to §§ 12-1-2, 12-1-7, and 12-11-30(4) of the Alabama Code, the Court hereby enters the following standing order regarding a pre- established schedule for bond, the initial appearance for persons arrested for violations of state statutory criminal charges, and the determination of the necessity or amount of bond for those unable to post the bond contained in the schedule or set in an arrest warrant:

I. Establishment of a bail schedule.

Under Alabama law, an individual arrested for a crime has a right to bail except for capital offenses. Ala. Const. art. I, sec. 16; Ala. Code §§ 15-13-2, 15-13-3. The Court is mindful that "[t]he basic test for excessive bail is whether the amount is higher than reasonably necessary to assure the accused's presence at trial," and that, "[a]s long as the primary reason in setting bond is to produce the defendant's presence, the final amount, type, and other conditions of release are within the sound discretion of the releasing authority …." *United States v. James*, 674 F.2d 886, 891 (11th Cir. 1982). The Court finds that, in adopting the bail schedule set forth in Rule 7.2(b) of the Alabama Rules of Criminal Procedure, the Alabama Supreme Court has

set forth a presumptively reasonable set of bail ranges for criminal offenses to guide the trial court's discretion in determining the appropriate amount of bail in a given case. *See Murphy v. State*, 807 So. 2d 603, 605 (Ala. Crim. App. 2001). Since "[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements," *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978), the Court hereby adopts an established schedule setting bond for specific offenses within the presumptively reasonable ranges contained in Ala. R. Crim. P. 7.2(b). *See also Fields v. Henry Cnty., Tenn.*, 701 F.3d 180, 184 (6th Cir. 2012) ("[T]here is nothing inherently wrong with bond schedules … The bond schedule represents an assessment of what bail amount would ensure the appearance of the average defendant facing such a charge" and is "therefore aimed at assuring the presence of a defendant.") A true and correct copy of this bond schedule is attached as **Exhibit A**.

II. Defendants charged with a crime shall generally be entitled to release on a bond in the amount set out in the schedule or in an arrest warrant or on their own recognizance, subject to certain exceptions.

With the exception of defendants arrested for driving under the influence, domestic violence, or other charges that by statute require detention for a certain period of time, and with the exception of defendants who are intoxicated or in need of medical attention, defendants arrested without a warrant and charged with an offense shall generally be entitled to release upon completion of booking and posting of a bond in the amount and type contained in the bond schedule. Where the bond schedule specifies a dollar amount, a secured bond shall be required either in the form of a

property or surety bond.[1] A defendant who fails to appear in answer to a charge and is arrested on a subsequent warrant for failure appear shall not be entitled to automatic release but shall remain in custody until the defendant's initial appearance, at which time the defendant shall receive an individualized determination of conditions of release pursuant to Rule 7.2(a) of the Alabama Rules of Criminal Procedure that takes into account, among other factors, the defendant's previous failure to appear.

If, in the judgment of an officer of the arresting law enforcement agency, it appears that releasing a defendant on the terms set forth in the bond schedule would present an unreasonable risk of flight or danger to the public, the officer shall complete a Bail Request form and deliver it to the Magistrate by e-mail or deliver a hard copy.[2] The Bail Request form shall specify the reasons for requesting a different bond be set for a defendant. Upon a reasonably prompt review of the Bail Request form, the Magistrate may either (1) grant the request for bail and order the defendant held until the defendant receives an individualized determination of conditions of release, including the setting of bond, at an initial appearance conducted by the District Judge under Rules 7.2 and 7.3 of the Alabama Rules of Crimi-

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[1] The Court may require payment of a cash bond but only after an individualized determination of the conditions of release according to the procedures contained in Section IV, *infra*.

[2] Situations in which a la\v enforcement officer may determine a defendant arrested for a misdemeanor presents an unreasonable risk of flight or danger to the public include, but are not limited to, defendants with a past history of failing to appear, defendants who are intoxicated, or defendants who have committed a crime of violence.

nal Procedure no later than 72 hours after arrest; or (2) deny the bail request, in which case the defendant shall be immediately released upon posting a bond on the terms contained in the schedule. A true and correct copy of the Bail Request form is attached as **Exhibit B**.

Defendants arrested for an offense pursuant to a warrant shall be entitled to release upon the execution of a bond in the type and amount set out in the warrant. The Magistrate shall generally set a bond in an arrest warrant in the amount contained in the bond schedule. A law enforcement officer may complete a Bail Request form to request a higher bond than that set in the warrant according to the procedure set out above even if the defendant can afford to pay the bond contained in the warrant. Upon a reasonably prompt review of the Bail Request form, the Magistrate may either (1) grant the request for bail and order the defendant held until the defendant receives an individualized determination of conditions of release, including the setting of bond, at an initial appearance conducted by the District Judge under Rules 7.2 and 7.3 of the Alabama Rules of Criminal Procedure no later than 72 hours after arrest; or (2) deny the bail request, in which case the defendant shall be immediately released upon the posting of bond in the amount and type contained in warrant.

III. Procedures for setting bond for defendants who are unable to post the bond contained in the schedule or the bond required in a warrant.

For defendants who are unable to post the bond contained in the bond schedule or set in an arrest warrant such defendants shall be entitled to a judicial determination of the conditions of their release promptly after arrest, but in any event no later than 72 hours after arrest. *See* Ala. R. Crim. P. 4.3(a)(1)(iii); Ala. R.

Crim. P. 4.3(b)(3). *See also Fields*, 701 F.3d at 185 ("There is no constitutional right to speedy bail."). Initial appearances are authorized to be held by audio-video communications pursuant to §§ 12-1-24 and 15-26-1 of the Alabama Code. At this hearing, the Court[3] shall conduct an initial appearance as required by Rule 4.4 as well as determine the defendant's conditions of release under Rules 7.2 and 7.3 of the Alabama Rules of Criminal Procedure. Prior to the hearing, defendants shall complete an Affidavit of Substantial Hardship, Form C-10A, and a Release Questionnaire, Form C-52(f), true and correct copies of which are attached as **Exhibits C and D**.

At the hearing the Court will determine whether the defendant shall be released on personal recognizance or on a secured or unsecured appearance bond unless the Court determines that such a release will not reasonably assure the defendant's appearance as required, or that the defendant's being at large will pose a real and present danger to others or to the public at large. Ala. R. Crim. P. 7.2(a). In making this determination, the Court may impose the least onerous condition or conditions contained in Rule 7.3(b) of the Alabama Rules of Criminal Procedure that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large. *Id.* In making such a determination, the Court may take into account the following:

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[3] In most cases the initial appearance shall be conducted by the District Judge. In the case of a defendant arrested upon a warrant issued upon an indictment and who cannot post the bond contained in the warrant, the initial appearance shall be conducted by a Circuit Judge as required by the Alabama Rules of Criminal Procedure. *See* Ala. R. Crim. P. 4.3(b)(2)(ii).

l. The age, background and family ties, relationships and circumstances of the defendant.

2. The defendant's reputation, character, and health.

3. The defendant's prior criminal record, including prior releases on recognizance or on secured appearance bonds, and other pending cases.

4. The identity of responsible members of the community who will vouch for the defendant's reliability.

5. Violence or lack of violence in the alleged commission of the offense.

6. The nature of the offense charged, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance.

7. The type of weapon used, e.g., knife, pistol, shotgun, sawed off shotgun.

8. Threats made against victims and/or witnesses.

9. The value of property taken during the alleged commission of the offense.

10. Whether the property allegedly taken was recovered or not; damage or lack of damage to property allegedly taken.

11. Residence of the defendant, including consideration of real property ownership, and length of residence in his or her place of domicile.

12. In cases where the defendant is charged with a drug offense, evidence of selling or pusher

> activity should indicate a substantial increase in the amount of bond.
>
> 13. Consideration of the defendant's employment status and history, the location of defendant's employment, e.g., whether employed in the county where the alleged offense occurred, and the defendant's financial condition.
>
> 14. Any enhancement statutes related to the charged offense.

Id.

As contemplated by Rule 7.2(a)(13), the Court will consider a defendant's ability to post a bond in determining the defendant's conditions of release. The Court will consider the defendant's affidavit of substantial hardship and may elicit testimony about the defendant's financial condition. After considering the defendant's ability to post a bond, as well as the other factors set out in Rule 7.2(a), the Court may release a defendant on his or her own recognizance, require the defendant to post an unsecured appearance bond, or require the posting of a secured appearance bond if that is the least onerous condition that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large. The Court will not require a defendant to post a secured appearance bond that the defendant cannot afford to post or a secured appearance bond in an amount less than that contained in the bond schedule that the defendant can afford to post if there is a less onerous condition that would assure the defendant's appearance or minimize risk to the public. However, if the Court determines that there is no less onerous condition for securing the defendant's appearance or protecting the public, the Court may require a secured appearance

bond in an amount less than, equal to, or greater than that contained in the bond schedule. *See United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988) ("[A] bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement.") (citing *Pugh*, *James*). The Court will make a written finding as to why the posting of a bond is reasonably necessary to assure the defendant's presence at trial in such a case. The written finding will be made in Section 6 of Form C-80 (Local), Order on Initial Appearance and Bond Hearing, and in Form C-52(g), Release Order, true and correct copies of which are attached as **Exhibits E and F**.

In the unlikely event that a defendant arrested for a bailable offense cannot obtain release by posting the bond contained in the bond schedule or set in a warrant and cannot be given a hearing to determine conditions of release within 72 hours after arrest, such a defendant will be released on an appearance bond in the amount of the minimum bond set in Rule 7.2 at the expiration of the 72-hour period. *See* Ala. R. Crim. P. 4.3(a)(1)(iii); 4.3(b)(3).

This standing order hereby supersedes any previous policies or procedures that were in place regarding the posting of bail and any such previous procedures shall no longer be enforced.

DONE this the 26th day of March, 2018.

/s/ Greg Nicholas
GREG NICHOLAS
PRESIDING CIRCUIT JUDGE