No. 18-814

IN THE
Supreme Court of the United States

MAURICE WALKER,
on behalf of himself and others similarly situated,
Petitioner,

v.

CITY OF CALHOUN, GEORGIA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association (the "ABA") is one of the largest voluntary professional membership organizations, and the leading organization of legal professionals, in the United States. Its more than 400,000 members come from all fifty states, the District of Columbia, and the United States territories, and include prosecutors, public defenders, and private defense counsel. Its membership includes attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments. Members also include judges, legislators, law professors, law students, and non-lawyer associates in related fields.[2]

Since its founding in 1878, the ABA has worked to protect the rights secured by the Constitution, including the rights of criminal defendants under the Due Process and Equal Protection Clauses. The *ABA Standards for Criminal Justice* (the "Criminal Justice Standards") is a

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice of *amicus curiae*'s intent to file and consented to the filing of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division or judiciary participated in the adoption or endorsement of the positions in this brief, nor was the brief circulated to any member of the Judicial Division or judiciary before filing.

comprehensive set of principles articulating the ABA's recommendations for fair and effective systems of criminal justice, and reflects the legal profession's conclusions on the requirements for the proper administration of justice and fairness in the criminal justice system. Now in its Third Edition,[3] the Criminal Justice Standards were developed and revised by the ABA Criminal Justice Section, working through broadly representative task forces made up of prosecutors, defense lawyers, judges, academics, and members of the public, and then approved by the ABA House of Delegates, the ABA's policymaking body.

Courts have frequently looked to the Criminal Justice Standards for guidance on the appropriate balance between individual rights and public safety in the field of criminal justice. *See*, *e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 366-67 (2010); *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984). In fact, the Criminal Justice Standards have been either quoted or cited in more than 120 U.S. Supreme Court opinions, 700 federal circuit court opinions, 2,400 state supreme court opinions, and 2,100 law journal articles. Pretrial Justice Institute, *Guidelines for Analyzing State and Local Pretrial Laws* II-ii (2017).

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[3] The *ABA Standards for Criminal Justice: Pretrial Release* (3d ed. 2007) are available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf [hereinafter, *Pretrial Release Standards*].

INTRODUCTION AND SUMMARY OF ARGUMENT

The ABA, a foremost authority on the proper functioning of the criminal justice system—along with a growing number of other organizations and jurisdictions—opposes money-bail systems that do not adequately consider an individual's ability to pay. The ABA's Criminal Justice Standards on pretrial release (the "Pretrial Release Standards") memorialize the ABA's exhaustive study of pretrial release and detention systems designed to secure defendants' rights to a fair trial and the effective assistance of counsel, ensure that persons accused of crimes appear for court dates, and protect the community. As discussed below, the ABA's Pretrial Release Standards and a recent resolution passed by its House of Delegates reflect the ABA's conclusion that, although there may be rare circumstances in which monetary conditions of release are necessary to ensure a defendant's appearance, money-bail requirements that fail to consider defendants' individual circumstances, especially their ability to pay, should be abolished. Such money-bail systems result in the systemic jailing of release-eligible defendants solely because they cannot afford to purchase their freedom, in violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses. In addition, they seriously impair the welfare of the accused and their ability to mount a defense, and provide little, if any, benefit to the public.

Ironically, these harms can fall disproportionately on defendants who, like Petitioner, are charged with low-level offenses and, consequently, face a modest bail

amount. They still likely cannot afford their bail, but their bail amount is often too small to secure a commercial bondsman's services.

Consistent with its well-established interest in bail reform, the ABA submits this brief in support of Petitioner's petition for a writ of certiorari and encourages the Court to examine the money-bail system at issue in this case. The imposition of preset bail amounts derived without regard to a defendant's financial and other circumstances, even for a preliminary period of 48 hours, is an important issue worthy of this Court's consideration, given the practical and constitutional harms that this practice inflicts. Under our system of justice, the right of any individual to liberty, and to effective defense against criminal charges, should not depend on that person's ability to pay. The ABA's Pretrial Release Standards provide guidance on how jurisdictions can protect the constitutional rights of the accused while advancing their legitimate criminal justice interests.

The Eleventh Circuit's opinion upholding the City of Calhoun, Georgia's money-bail schedule provides a particularly appropriate vehicle to address the constitutional problems with money bail. Here, Petitioner was arrested for a misdemeanor that could not result in jail time. Yet because he was poor and could not afford bail, he was jailed for days. He was, quite plainly, deprived of liberty solely because of his indigent status. Requiring an indigent defendant, like Petitioner, to wait in jail for up to 48 hours before he or she receives an individualized bail hearing—while those who can afford bail are released immediately—violates both due

process and equal protection principles and significantly harms presumptively innocent defendants in meaningful and lasting ways. The ABA encourages the Court to review the decision below to address these constitutional violations.

ARGUMENT

"[T]he function of bail is limited," and its fundamental purpose is to ensure that a defendant will return to court when necessary. *Stack v. Boyle*, 342 U.S. 1, 5 (1951). If the defendant flees or otherwise fails to appear, he or she forfeits the bail amount, creating an incentive to appear. Thus, the central question presented by this case—and by systems with fixed money-bail schedules more generally—is whether a defendant who otherwise qualifies for pretrial release can be incarcerated for days merely because he or she lacks the wherewithal to pay a preset amount of money that is not calibrated to ensure the particular defendant's appearance in court. Both constitutional imperatives and a pragmatic consideration of the harms wrought by unnecessary pretrial detention counsel that the answer is no.

I. The Court Should Follow the ABA's Lead and Reject Bail Systems That Fail to Consider Adequately a Defendant's Ability to Pay and That Result in Unnecessary Pretrial Detention.

The ABA has consistently advocated for alternatives to money bail and pretrial detention, and has rejected money-bail systems that fail to consider adequately a defendant's circumstances, including the ability to pay, a position formally incorporated into its Pretrial Release

Standards and reinforced by a recent vote of the ABA House of Delegates. The ABA is joined in its opposition to fixed money-bail schedules by a wide array of organizations and jurisdictions.

A. The Current ABA Pretrial Release Standards.

The ABA Criminal Justice Standards are the result of research and analysis by the ABA over the last fifty years. Ever since their adoption in 1968, the Criminal Justice Standards have expressed the ABA's general opposition to money bail. *See* ABA Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release—Approved Draft*, 1968; *ABA Standards for Criminal Justice*, ch. 10, Pretrial Release at 10-5.4(d), 10.78-79 (2d ed. 1979).

The current Third Edition of the ABA's Pretrial Release Standards, adopted in 2007, recognize that pretrial release conditions should be imposed only as necessary to serve their legitimate purposes of ensuring defendants' reappearance and protecting the public; pretrial release conditions should never be imposed to punish or frighten the defendant, or to placate the public's opinion. *Pretrial Release Standards* at 10-5.3(c). And, because a defendant's ability to pay has no rational connection to whether the defendant poses a danger to the community, the Pretrial Release Standards state that monetary release conditions should be used only to ensure reappearance, not "to respond to concerns for public safety." *Id.* at 10-1.4(d). They also advise that jurisdictions should impose monetary release conditions only after considering defendants' individual circumstances, and ensure that defendants' finances

never prevent their release. No release-eligible defendant should remain incarcerated simply because he or she cannot buy this freedom.

The Pretrial Release Standards offer several guidelines in support of these overarching objectives:

First, the Pretrial Release Standards include a presumption that money bail should rarely be used to secure a defendant's appearance in court. They urge jurisdictions to adopt procedures designed to promote the release of defendants on their own recognizance—effectively, a promise to appear in court—or, when necessary, on an unsecured bond. *Id.* at 10-1.4(a) & (c), 10-5.1(a).

Second, if release on personal recognizance would pose a "substantial risk" that a person will not appear for a court proceeding, endanger others' safety, or imperil the judicial system's "integrity" (through, for example, intimidation of a witness), the Pretrial Release Standards still promote release, subject to the "least restrictive" condition or conditions that will "reasonably ensure" the person's later reappearance and deter the person from imperiling others or undermining the judicial process' integrity. *Id.* at 10-5.1(a)-(b), 10-5.2(a).

Third, the Pretrial Release Standards make secured money bail a last resort when setting pretrial release conditions, not the first. They permit the imposition of "[f]inancial conditions other than unsecured bond . . . only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court." *Id.* at 10-5.3(a); *see also id.* at 10-5.3(d) (providing that judicial officer imposing financial conditions should

first consider an unsecured bond).

Fourth, the bail system must account for an individual's ability to pay. *Id.* at 10-5.3(a). Consistent with the demands of due process, the Pretrial Release Standards urge that "financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions, and the defendant's flight risk." *Id.* Critically, the ABA's Pretrial Release Standards provide that "the defendant should in no instance be held by police longer than 24 hours without appearing before a judicial officer" to make this individualized assessment. *Id.* at 10-4.1(b).

B. Adopted ABA Resolution 112C.

Consistent with the Pretrial Release Standards, the ABA House of Delegates also adopted a resolution in 2017, urging local jurisdictions to implement procedures that favor pretrial release and prevent the pretrial detention of presumptively innocent defendants who cannot afford to purchase their liberty as their criminal cases are being adjudicated. American Bar Association House of Delegates, Resolution 112C (Aug. 14, 2017) (adopted) ("Resolution"), https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Annual%20Resolutions/112C.pdf. Specifically, the Resolution:

- urges governments to adopt policies and procedures favoring defendants' release upon their own recognizance or unsecured bond, and permitting release on cash bail or secured bond in order to assure defendants' appearances only when "no other conditions will suffice for that purpose";

- recommends that courts not impose financial conditions of release that result in pretrial detention "solely due to the defendant's inability to pay," and that jurisdictions ban the use of bail schedules that determine bail amounts based on the offense charged without any "individualized, evidence-based assessments" of a defendant's personal circumstances; and

- states that a defendant may be held without bail where public safety warrants the defendant's pretrial detention and no other pretrial release conditions would suffice, so long as a court articulates the reasons for the detention.

Id.

The Resolution was the culmination of a tremendous amount of research and is accompanied by a detailed report prepared by experts in the field, addressing the state of the bail system since the ABA's adoption of the Pretrial Release Standards. *See* ABA, *Proposed Resolution and Report* (Aug. 2017) ("Report") http://www.americanbar.org/content/dam/aba/directories/policy/2017_am_112C.docx. The Report confirms that, based on recent research, financial release conditions are not only rarely necessary, but that they have "adverse, and sometimes profoundly harmful, effects." *Id.* at 10. The Report also recognizes that release conditions other than money bail are often as effective, if not more effective, than money bail in "'reasonably ensur[ing] the defendant's appearance in court.'" *Id.* (quoting *Pretrial Release Standards* at 10-5.3(a)).

C. Recognizing the Importance of This Issue, Other Organizations and Jurisdictions Also Reject Money Bail.

Numerous organizations across the spectrum of the criminal justice system have similarly rejected money-bail systems in favor of individualized pretrial release assessments.[4] For example, the U.S. Department of Justice has recommended "[e]liminating the use of the automatic, predetermined money bail." National Symposium on Pretrial Justice, *Summary Report of Proceedings* 39 (2011). Likewise, the National Sheriff's Association recognized that "a justice system relying

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[4] *See, e.g.*, Am. Jail Ass'n, *Resolutions of the American Jail Association* 40 (2017), https://www.americanjail.org/files/About%20PDF/_AJA%20Resolutions%20-%20January%202017.pdf (recognizing that pretrial supervision can be a safe and cost-effective alternative); Nat'l Ass'n of Counties, *The American County Platform and Resolutions 2016-2017*, 102 (July 25, 2016), http://www.naco.org/sites/default/files/documents/2016-2017%20American%20County%20Platform.pdf (recommending that states and localities make greater use of non-financial pretrial release options); Conference of Chief Justices, *Resolution 3*, at 2 (adopted Jan. 30, 2013), https://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx (advocating for the presumptive use of nonfinancial release conditions); Am. Probation and Parole Ass'n, *Resolution – Pretrial Supervision* (enacted June 2010), https://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IB_Resolution&wps_key=3fa8c704-5ebc-4163-9be8-ca48a106a259 (recognizing pretrial supervision as a safe and cost-effective alternative to jail for many defendants awaiting trial); *Model Code of Pre-Arraignment Procedure* § 310.1 (Am. Law Inst. 1975) (providing that, if the first appearance does not occur within a 24-hour period following arrest, the defendant must be released on citation or bail).

heavily on financial conditions of release at the pretrial stage is inconsistent with a fair and efficient justice system." Nat'l Sheriffs Ass'n, Resolution 2012-6, *National Sheriffs' Association Supports & Recognizes The Contribution Of Pretrial Services Agencies To Enhance Public Safety* (2012).

Several state and local governments have similarly abandoned their money-bail schemes. As of 2015, 21 states expressly provided a presumption in favor of releasing defendants on personal recognizance or an unsecured bond, and 16 required courts to impose the least-restrictive condition on pretrial release. *See* Amber Widgery, Nat'l Conference of State Legislators, *Guidance for Setting Release Conditions* (May 13, 2015); *see also* Declaration of Ed Gonzalez, Sheriff-Elect for Harris County, Texas ¶ 5, *O'Donnell v. Harris Cty.*, No. 16-cv-01414 (S.D. Tex. Nov. 22, 2016), ECF No. 96-1 (stating that "[a] person's access to money should not be a determining factor in whether he or she is jailed or released after arrest and pending trial"). Several states and local jurisdictions have adopted or are also considering alternatives to money bail such as individualized, fact-sensitive tools evaluating appropriate conditions of pretrial release. *See, e.g.*, California Money Bail Reform Act, 2018 Cal. Legis. Serv. Ch. 244 (S.B. 10).[5]

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[5] *See also Holland v. Rosen*, 895 F.3d 272, 279-80 (3d Cir.) (observing that New Jersey's bail system has shifted away from one that "relied heavily on the use of monetary bail," to one that primarily relies "upon pretrial release by non-monetary means to reasonably assure an eligible defendant's appearance in court when

II. This Court Should Review the Decision Below Because a Money-Bail System That Deprives Defendants of Their Liberty Without Individualized Assessments of Their Personal and Financial Circumstances Violates the Constitution.

The ABA and other entities oppose money bail because incarcerating an individual and depriving him or her of liberty solely on the basis of his or her indigence violates essential rights to due process and equal protection. This Court has emphasized that depriving a person of "conditional freedom simply because, through no fault of his own, he cannot pay . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983). Consistent with this basic principle, the Court has rejected a number of government practices in a wide range of contexts for "punishing a person for his poverty." *Id.* at 671 (revocation of probation for inability to pay fine).[6]

An individual's liberty interest is especially strong in the pretrial context, when the presumption of innocence is at its peak. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully

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required" (internal quotation marks omitted)), *cert. denied*, 139 S. Ct. 440 (2018).

[6] *See also Tate v. Short*, 401 U.S. 395, 396-98 (1971) (incarceration for inability to pay traffic fines); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970) (incarceration beyond statutory maximum due to inability to pay fine); *Smith v. Bennett*, 365 U.S. 708, 711 (1961) (inability to pay fee to file petition for writ of habeas corpus).

limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Before overriding a defendant's "strong interest in liberty" prior to trial, jurisdictions must recognize the "importance and fundamental nature" of the right to pretrial release and must carefully consider whether the government has advanced "sufficiently weighty" interests to the contrary. *Id.* at 750-51. Particularly when a defendant, like Petitioner, has been charged with a crime that carries no penalty of jail time, this calculus should weigh even more heavily in favor of the defendant's "strong" liberty interest. Money-bail systems that automatically impose financial conditions of release without examining a defendant's individual circumstances and that incarcerate release-eligible persons based on their inability to buy their freedom, do not satisfy this standard.

III. This Issue Warrants the Court's Consideration Because Money Bail Harms Criminal Defendants and Does Not Serve the Fair and Proper Administration of Justice.

Decades of research and study also show that money bail harms defendants, with little offsetting public benefit. Given the large population of pretrial detainees throughout the United States, the money-bail system poses a harm to hundreds of thousands of criminal defendants and to the criminal justice systems of numerous states and localities across the country. This Court should grant the petition to remedy these nationwide constitutional violations.

A. Money Bail Unfairly Harms Criminal Defendants and Undermines the Criminal Justice System.

Extensive evidence reflects that money bail adversely affects criminal defendants and their families in numerous ways and undermines the fairness, effectiveness, and credibility of our criminal justice system.

First, money-bail systems result in pretrial detention for large numbers of defendants for no reason other than their inability to pay. This includes Petitioner, who was detained for days solely because he could not afford bail. In theory, money bail exists to facilitate a defendant's release pending trial; any defendant for whom bail is set is, by definition, release-eligible. Yet for many defendants, such as Petitioner, there is no option other than to wait in jail. Defendants and their families are frequently unable to afford a fixed monetary bond or a nonrefundable 10% or 20% commercial surety fee. Data show that many defendants are unable to meet even relatively small bond amounts. In New York City, for example, only 26% of criminal defendants made bail set at less than $500, and only 7% made bail set at $5,000 (the median amount for a felony). Mary T. Phillips, New York City Criminal Justice Agency, Inc., *A Decade of Bail Research in New York City*, 51 tbl. 7 (Aug. 2012). According to a 2012 study of New Jersey county jails, "38.5% of the total jail population had the option to post bail but were in custody due only to their inability to meet the terms of bail." *Holland*, 895 F.3d at 279. That same study found that 12% of inmates were in custody because they could not pay bail of $2,500 or less. *Id.*

Even for those defendants who are ultimately able to secure the necessary resources, the process of doing so may take days or weeks.

For that matter, a commercial surety is not always an option; many bail bondsmen will not even offer small bonds. This means that, ironically, indigent defendants who are charged with the least serious offenses may be more likely to stay in jail. *See* Brian Montopoli, *Is the U.S. Bail System Unfair?*, CBS News (Feb. 8, 2013).

Second, the consequences of pretrial detention for indigent defendants are profound. Even a few days in jail can disrupt a defendant's life, leading to long-term negative consequences. Pretrial detainees cannot work or earn income while incarcerated and may lose their jobs while waiting for a hearing, making it even more difficult to make bail. *See* Criminal Justice Policy Program at Harvard Law School, *Moving Beyond Money: A Primer on Bail Reform* 7 (Oct. 2016) ("*Moving Beyond Money*"); *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972). Detainees who live in shelters may lose housing for missing curfews or for prolonged absences. *See* Nick Pinto, *The Bail Trap*, N.Y. Times, Aug. 13, 2015; Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 202 (2018). Given indigent defendants' already-precarious financial situation, pretrial detention may trigger a debilitating downward spiral, even if they are ultimately acquitted. And those negative consequences are not limited to just the detainees: children may be left unsupervised, and elderly or sick relatives may have no one to take care of them while a defendant is detained

for not making bail.

Detention can have additional, non-pecuniary ill effects. Incarcerated persons are more likely to be sexually victimized, contract infectious diseases, and be exposed to unsafe and unsanitary living conditions. *See* Allen J. Beck et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, at 9 (2013); *Moving Beyond Money*, at 6-7. Alarmingly, pretrial detainees also commit four-fifths of jail suicides, a risk that is highest during the first seven days of incarceration, Margaret Noonan et al., U.S. Dep't of Justice, *Mortality in Local Jails and State Prisons, 2000-2013 – Statistical Tables* 3, 10, 12 (2015), when detainees are experiencing the initial "shock of confinement," *The "Shock of Confinement": The Grim Reality of Suicide in Jail*, NPR: All Things Considered (July 27, 2015).

Third, needless pretrial detention frustrates detainees' legal rights and leads to inequitable outcomes, undermining the fairness, efficacy, and credibility of the criminal justice system. For more than fifty years, researchers have found that pretrial detention leads to worse case outcomes for indigent defendants. *See generally* Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641 (1964). Compared to those released before trial, pretrial detainees are more likely to be convicted, more likely to receive jail or prison sentences, and, when convicted, are more likely to receive a longer jail or prison sentence. Phillips, *supra* at 115-21; Christopher T. Lowenkamp et al., Arnold Found., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (2013) ("*Investigating the*

Impact").

These consequences are particularly perverse because, as discussed, they may weigh heaviest on the lowest-risk defendants, such as Petitioner, who was arrested for the misdemeanor offense of walking under the influence. One study found that low-risk defendants detained for the entire pretrial period are more than five times more likely to be sentenced to jail compared to low-risk defendants released at some point before trial, and nearly four times more likely to be sentenced to prison—with sentences that, on average, are nearly three times longer. *Investigating the Impact* at 11.

There are many reasons for these disparate outcomes. Pretrial detention impairs detainees' ability to prepare their cases, including their "ability to gather evidence, contact witnesses, or otherwise prepare [a] defense." *Barker*, 407 U.S. at 533. When it comes to sentencing, pretrial confinement prevents defendants from demonstrating their ability to comply with the law and contribute to society, including through employment, schooling, rehabilitation, and family obligations. Phillips, *supra* at 118. Furthermore, the prospect of prolonged pretrial detention may encourage guilty pleas from defendants, even those who are innocent or have meritorious defenses to the charges. *Moving Beyond Money*, at 7. In many cases, the anticipated length of pretrial detention can exceed the length of an actual post-conviction sentence; for some detainees charged with minor crimes, such as Petitioner, post-conviction incarceration is not even an option. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2492 (2004) (noting that

defendants charged with misdemeanors or lesser felonies are more likely to be incarcerated before, rather than after, conviction—exactly like Petitioner was). Thus, when given the choice between immediate release and trial after prolonged detention, many defendants, including *innocent* defendants, reasonably decide to plead guilty. Robert C. Boruchowitz et al., Nat'l Ass'n of Criminal Defense Lawyers, *Minor Crimes, Massive Waste* 32-33 (Apr. 2009).

The adverse consequences described above necessarily affect the City of Calhoun, where pretrial detainees comprise a significant portion of the total inmates in Gordon County jails, and where per-capita income is $21,208 (approximately one-third less of the national per-capita income of $31,177).[7] In December 2018, 60% of all inmates in Gordon County jails were detained awaiting trial—a greater percentage of the total inmate population than both those serving a county sentence (32%) and those sentenced to state prison (7%). Georgia Department of Community Affairs, Office of Research, *County Jail Inmate Population Report*, at 9 (Dec. 6, 2018), https://www.dca.ga.gov/sites/default/files/jail_report_dec18.pdf.

The numbers are even starker when considering Georgia as a whole: 64% of all inmates in county jails across the state in 2018 were imprisoned while awaiting

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[7] *See* U.S. Census Bureau, *QuickFacts: Gordon County, Georgia*, https://www.census.gov/quickfacts/fact/table/gordoncountygeorgia/PST045216 (last visited Jan. 25, 2019); U.S. Census Bureau, *QuickFacts: United States*, https://www.census.gov/quickfacts/fact/table/US/HSG030210 (last visited Jan. 25, 2019).

trial. *Id* at 2. In Fulton County, Georgia (located near Calhoun), defendants who could not afford to post money bail averaged a staggering 101.4 days in pretrial detention—over eight times the average amount of time spent in pretrial detention by defendants eventually released on money bail (11.4 days) or on nonfinancial conditions of release (12.5 days). John Clark, *The Impact of Money Bail on Jail Bed Usage*, American Jails, July/Aug. 2010, 50-51, https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6e29707b-9568-c42a-b676-894c77ae7b7c&forceDialog=0.

B. Money Bail That Results in Pretrial, Wealth-Based Incarceration Does Not Advance the Interests of Justice.

For all of its costs to indigent defendants, money bail—particularly when imposed without regard to a defendant's individual circumstances—often fails to advance the interests of the pretrial release system and imposes substantial negative externalities.

First, the available evidence indicates that money bail is rarely necessary to ensure defendants' later appearance in court, the principal motivation for bail in the first place. *See Pretrial Release Standards* at 10-1.1. Non-high-risk defendants released on unsecured bonds reappeared for court dates at rates slightly *higher* than those posting secured bonds. *See* Michael R. Jones, Pretrial Justice Institute, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* 11 (2013). For example, the District of Columbia does not use money bail and maintains appearance rates for released defendants of 90%, which is higher than the

national average of less than 80%. *Compare* Pretrial Services Agency for the District of Columbia, *Performance Measures*, https://www.psa.gov/?q=data/performance_measures (data as of June 30, 2015), *with* Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics, U.S. Dep't of Justice, *Pretrial Release of Felony Defendants in State Court* 8 (Nov. 2007), http://www.bjs.gov/content/pub/pdf/prfdsc.pdf. Furthermore, research shows that non-financial approaches, such as supervised release or basic reminders of upcoming court dates, result in significant increases in appearance rates by pretrial defendants. *See* Christopher T. Lowenkamp & Marie VanNostrand, Arnold Found., *Exploring the Impact of Supervision on Pretrial Outcomes* 17 (2013); Mitchel N. Herian & Brian H. Bornstein, *Reducing Failure to Appear in Nebraska: A Field Study*, Nebraska Lawyer, Sept. 2010, at 11, 12-13.

Second, even though the rationale behind money bail is not to secure public safety (it is meant to ensure defendants' appearance in court), there is no evidence that money-bail systems improve public safety, in any event. In fact, the opposite is true. Low- and moderate-risk people who are detained for more than a day are significantly *more* likely to engage in a future crime, as compared with low- and moderate-risk defendants who are not. Christopher T. Lowenkamp et al., Arnold Found., *The Hidden Costs of Pretrial Detention* 17-18 (2013). And because innocent people plead guilty to relatively low-level crimes in order to secure release, community safety suffers because any underlying crimes are never fully investigated and the actual

culprits remain free. *See Moving Beyond Money*, at 7.

Third, despite the minimal benefit, excessive use of money bail imposes heavy costs on society. Needless pretrial incarceration bloats an already swollen criminal justice population and costs taxpayers an estimated $9 billion per year. Todd D. Minton & Zhen Zeng, Bureau of Justice Statistics, U.S. Dep't of Justice, *Jail Inmates in 2015* 4-5 (2016); Allen J. Beck, Bureau of Justice Statistics, U.S. Dep't of Justice, *Profile of Jail Inmates, 1989* 2 tbl. 1 (1991); Council of Economic Advisers, Issue Brief, *Fines, Fees, and Bail* 8 (Dec. 2015) (estimating the average daily cost per inmate at between $50 to $500). This is particularly unpalatable where the legislature has decided that there should be no jail time for the underlying offense, as with Petitioner's arrest here. Pretrial detention's superfluous costs are particularly staggering when compared to the modest price of supervised release programs, estimated at only $10 per individual per day. U.S. Gov't Accountability Office, GAO-15-26, *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* 9-12, 18-19 (2014); *see also* Pretrial Just. Inst., *Pretrial Justice: How Much Does It Cost?* 1-7 (2017).

Finally, because poverty strongly correlates with race, cash bail tends to result in the pretrial incarceration of racial minority groups, exacerbating pre-existing racial disparities in the criminal justice system. *Moving Beyond Money*, at 7. For example, a study of defendants accused of drug crimes found that Latinos and Blacks were half as likely to make bail as Whites with the same bail amounts and legal

characteristics. Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Justice Processing*, 22 Just. Q. 170, 183-84 (2005). The study's authors found that "Latino defendants are 67 percent more likely to be denied bail, 29 percent less likely to be granted a non-financial release, and receive bails that are 26 percent higher," and, most alarmingly for this Court's purposes, concluded that "ethnic disparity is most notable during the decision to grant a non-financial release." *Id.* at 183-84, 186. If Black and Latino defendants are less able to post bail, or more likely to receive higher bail amounts or be denied bail altogether, they are more likely to suffer the adverse consequences of pretrial confinement described above.

For these reasons, wealth-based bail schemes impose substantial public costs, deviating from the ABA's policy of "eliminat[ing] unnecessary correctional expenditures, enhanc[ing] cost effectiveness, and promot[ing] justice." Report at 1.

IV. The Decision Below Illustrates the Constitutional Problems with Money-Bail Schedules and Warrants Review.

This case offers a particularly appropriate vehicle for addressing the constitutionality of money-bail systems that result in substantial periods of poverty-based, pretrial incarceration. The City of Calhoun's application of a fixed money-bail schedule through its Standing Bail Order—which results in the detention of individuals who cannot afford to post bail and forces them to wait up to two days for an individualized bail hearing—falls far short of ABA guidelines and violates the Equal Protection and Due Process Clauses. To be sure,

Calhoun's bail schedule permitted the deprivation of Petitioner's pre-trial liberty for multiple days, even though he faced no jail time if convicted, a stark reflection of the harms that inflexible money-bail systems perpetuate on indigent defendants. The Eleventh Circuit incorrectly concluded that this money-bail system comports with constitutional requirements.

Because "the function of bail is limited," it should be set using "standards relevant to the purpose of assuring the presence of that defendant," including "the financial ability of the defendant to give bail." *Stack*, 342 U.S. at 5 & n.3 (citation omitted); *see also Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (concluding that "due process likely requires consideration of financial circumstances and alternative conditions of release"). Indeed, the City of Calhoun's stated "foremost consideration" when establishing bail is "the probability that the accused, if free, will appear at trial[.]" Standing Bail Order, Pet. App. 80a.

The City of Calhoun's money-bail schedule is untethered to this foundational goal, which it has expressly adopted, of ensuring a defendant's appearance. The City's money-bail schedule does not consider an individual's particular finances or alternative conditions of release capable of compelling the defendant's presence in court (or even provide a reasoned explanation for the varying bail amounts imposed). As the District Court found, the Standing Bail Order assesses a blanket bail amount corresponding solely to the offense charged, subjecting indigent defendants—like Petitioner—to immediate, and days-long, detention merely because they lack the financial

resources to pay this arbitrary amount, while their better-heeled peers who are otherwise identically situated can avoid pretrial detention altogether. *See* Pet. App. 70a-71a. In this way, the City's money-bail system impermissibly "punish[es] a person for his poverty" in violation of due process and equal protection principles. *See Bearden*, 461 U.S. at 671.

The Eleventh Circuit incorrectly found this policy to be constitutionally sufficient, in part, because the City of Calhoun requires defendants to receive an individualized bail hearing or be released within 48 hours of arrest. Pet. App. 3a-4a, 31a-34a & nn.12-13.

However, this provision permitting a defendant who is unable to purchase immediate release an opportunity to challenge the bail assessment within 48 hours following arrest does not remedy the constitutional deficiencies in the City of Calhoun's system. The City's use of a uniform money-bail schedule both avoids the necessary inquiry into a defendant's financial circumstances at the outset and inevitably ensures that alternative conditions of release are *never* considered as a primary option. Moreover, as Judge Martin recognized in dissent, 48 hours of incarceration is "surely" a "deprivation of liberty." *Id.* at 49a-50a (Martin, J., dissenting). "[B]eing jailed for 48 hours" results in "very real consequences for detained indigents," *id.* at 50a, many of which are described in Part III, *supra*.

Based on its extensive research of the negative consequences attendant to pretrial detention and its experience regarding the capabilities of local courts, the ABA has determined that "[a] defendant should in no instance be held by police longer than 24 hours without

appearing before a judicial officer" for an individualized bail hearing. *Pretrial Release Standards* at 10-4.1(b). Holding presumptively innocent defendants in jail for double that period—for no reason other than their inability to pay—harmfully and unnecessarily delays the administration of justice and violates the Constitution.

In this case, for instance, it would have been neither difficult nor time consuming for a court to determine within 24 hours of arrest that Petitioner—who is mentally disabled, unemployed, and without other assets—could not afford to post bail of $160, which represented approximately 30% of his total monthly income of $530 in Social Security disability payments. *See Walker v. City of Calhoun*, No. 15-CV-0170-HLM, 2016 WL 361612, at *3 (N.D. Ga. Jan. 28, 2016). That the City of Calhoun permits defendants like Petitioner to languish in jail for up to two days before any such individualized assessment needs to be made highlights the very real dangers posed by money-bail systems. The Eleventh Circuit's determination that the City is entitled to perpetuate such a system cannot pass constitutional muster.

CONCLUSION

This Court should grant the petition and reverse the Eleventh Circuit's decision.

Respectfully submitted,

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