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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

A divided panel of the Eleventh Circuit held here that heightened scrutiny is not triggered when the government keeps arrestees in jail for up to 48 hours because they are poor, and that the government can engage in such discriminatory jailing for no reason whatsoever. Whether those holdings are correct is enormously important, involving physical freedom (among the most fundamental of all rights) for many thousands of people.

Calhoun offers no sound basis to deny review of these important issues. It does not dispute that the first question presented is important and recurring.

Nor does it contest the petition's assertion that the Eleventh Circuit's holding on that question (that rational-basis scrutiny applies to Calhoun's policy of keeping arrestees in jail because they are indigent) is wrong under this Court's precedent. Indeed, save for one fleeting reference, Calhoun completely ignores the trio of this Court's cases that the petition explained are irreconcilable with the decision below. And while Calhoun does deny that the decision below conflicts with Fifth Circuit precedent, its argument rests entirely on two motions-panel decisions, which a phalanx of circuit precedent makes clear are not binding law. A square circuit conflict on a recurring issue of federal law—and involving the fundamental right of tens of thousands of people not to be locked up for no reason—warrants review, particularly when the decision below is starkly inconsistent with this Court's precedent.

As to the second question presented, Calhoun ignores the petition's arguments about why the decision below is wrong. The Eleventh Circuit held that because the Fourth Amendment generally permits arrestees to be detained for up to 48 hours before a probable-cause hearing, the Fourteenth Amendment permits the government to engage in *discriminatory* incarceration—again, for no reason—for the same period. As the petition explained, however, the two amendments protect against different evils, and the government must comply with both. Calhoun offers no response. Given this implicit concession that the decision below is erroneous, and because this is also an important and recurring question of federal law (here too Calhoun offers no disagreement), certiorari should be granted on it as well.

ARGUMENT

I. THE FIRST QUESTION PRESENTED WARRANTS REVIEW

A. The Circuits Are Divided

1. As the petition explained (*e.g.*, at 3), the Eleventh Circuit's divided holding that heightened scrutiny is not triggered by wealth-based incarceration (i.e., keeping arrestees in jail because they are poor) conflicts with *ODonnell* v. *Harris County*, 892 F.3d 147 (5th Cir. 2018) (opinion on rehearing) ("*ODonnell I*"), and *Frazier* v. *Jordan*, 457 F.2d 726 (5th Cir. 1972). Calhoun's opposition never cites *Frazier*, and it agrees (at 7) that *ODonnell I* "did apply heightened or intermediate scrutiny."

Calhoun argues, however—and again this is virtually its only argument against review of this question—that the Fifth Circuit renounced heightened scrutiny in *ODonnell* v. *Goodhart*, 900 F.3d 220 (5th Cir. 2018) ("*ODonnell II*"), and *ODonnell* v. *Salgado*, 913 F.3d 479 (5th Cir. 2019) (per curiam) ("*ODonnell III*"). In fact, Calhoun upbraids Walker for not mentioning these rulings, stating that in light of them, his claim about Fifth Circuit law is "startling" (Opp. 8).

It is Calhoun's presentation that is "startling." *ODonnell II* and *III* were issued by a motions panel. And *decades* of consistent Fifth Circuit cases—not cited by Calhoun—hold that "a motions panel decision is not binding precedent." *Northshore Development, Inc.* v. *Lee*, 835 F.2d 580, 583 (5th Cir. 1988) (following two other cases so holding); *accord, e.g., Trevino* v. *Davis*, 861 F.3d 545, 548 n.1 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1793 (2018); *Newby* v. *Enron Corp.*, 443 F.3d 416, 419 (5th Cir. 2006) (following two other cases so holding); *Society of Separationists, Inc.* v. *Herman*, 939

F.2d 1207, 1211 n.6 (5th Cir. 1991) (subsequent history omitted). Indeed, the Fifth Circuit called this rule "settled" over twenty years ago. *Cimino* v. *Raymark Industries, Inc.*, 151 F.3d 297, 311 n.26 (5th Cir. 1998). And in the Fifth Circuit (as in all others), a panel does not have the power to overrule a prior panel. *E.g.*, *Society of Separationists*, 939 F.2d at 1211. The *ODonnell* motions panel thus could not abrogate the cases just cited holding that motions-panel rulings are not circuit law.

ODonnell III, however, tried to distinguish those cases on the ground that *ODonnell II* was the Fifth Circuit's "last statement on the matter," because the government officials withdrew their appeal in that case, meaning "there is not, and never will be, a merits panel." 913 F.3d at 482.

Northshore squarely rejects that distinction. The appellant there argued that the merits panel was bound by the reasoning of a motions panel that had dismissed a prior appeal. *See* 835 F.2d at 835. That dismissal, of course, meant that there was no merits panel in that appeal, i.e., the motions-panel ruling was (in *ODonnell III*'s words) the Fifth Circuit's "last statement on the matter." Judge Wisdom's opinion rebuffed the argument, declaring categorically that "a motions panel decision is not binding precedent," and giving no weight to the motions-panel decision that appellants invoked. *Id.*[1]

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[1] The motions panel rightly did not assert that the rule that motions-panel decisions are not binding applies only with jurisdictional rulings. *See Trevino*, 861 F.3d at 548 n.1 (reviewing habeas petition "unbound by the [motion-panel's] observations *on the merits*" (emphasis added)).

The motions-panel decisions in *ODonnell* are also not Fifth Circuit law because their conclusion that rational-basis review applies to wealth-based incarceration conflicts with *ODonnell I* (despite the motions panel's efforts at distinguishing that decision). *See* Appellee Br. 25-31, 34-47, *ODonnell* v. *Goodhart*, No. 18-20466 (5th Cir. Oct. 24, 2018). And as explained, Fifth Circuit precedent is clear that when two panel decisions conflict, the prior one controls.

Finally, the fact that the *ODonnell* motions panel *declared* that its two decisions were binding precedent (*see* Opp. 10) is irrelevant. As explained, under Fifth Circuit precedent that the panel had no power to overrule, those decisions are not binding. The majority could put any words it wanted into its opinions (just as it could publish them in the Federal Reporter). But it could not make them binding either by labeling them so or by publishing them—any more than it could, for example, make them apply nationwide (or make them take precedence over decisions of this Court) simply by publishing them or declaring it so.[2]

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[2] The foregoing fully answers Calhoun's argument regarding *ODonnell II* and *III*. Walker notes, however, that the reason motions-panel rulings are not binding—they are typically made on an expedited basis and with abbreviated briefing, *e.g.*, *Whole Woman's Health* v. *Cole*, 790 F.3d 563, 580 (5th Cir. 2015) (subsequent history omitted); *EEOC* v. *Neches Butane Products Company*, 704 F.2d 144, 147 (5th Cir. 1983)—applies in spades here. In *ODonnell II*, which involved an emergency motion for a stay pending appeal, the briefing was both abbreviated and highly expedited, and the (divided) opinion issued just three weeks after argument. And *ODonnell III* involved *no* adversarial presentation (or oral argument), and the decision issued six days after the motion was submitted. *ODonnell I*, by contrast, was based on party briefs that ran over 50,000 words, fifteen amicus briefs, and a full hour of oral argument (presented by four different attorneys).

In short, there is a square conflict between Fifth Circuit and Eleventh Circuit law on the first question presented.[3]

B. Calhoun Offers No Defense Of The Eleventh Circuit's Rejection Of Heightened Scrutiny

The petition and Walker's amici explained that certiorari is also warranted because the Eleventh Circuit's refusal to apply heightened scrutiny cannot be reconciled with this Court's decisions in *Williams* v. *Illinois*, 399 U.S. 235 (1970); *Tate* v. *Short*, 401 U.S. 395 (1971); or *Bearden* v. *Georgia*, 461 U.S. 660 (1983). *See* Pet. 15-21; Law Professors Br. 12-14. Calhoun offers no response to these arguments. In fact, its opposition remarkably never even cites *Williams* or *Tate*, and it cites *Bearden* only once (Opp. 6), in describing the decision below as part of the Statement. Calhoun's complete failure to address this Court's relevant precedent is revealing.

The closest Calhoun comes to defending the decision below is its endorsement (Opp. 9) of *ODonnell II*. There the divided motions panel reasoned that—contrary to Judge Clement's unanimous opinion in

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The court, moreover, took over four months to issue its (unanimous) opinion.

[3] Calhoun also argues (Opp. 6-7, 11-12) that both the Fifth and Eleventh Circuits agree on three *different* points: (1) the Fourth Amendment holding of *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), can be imported into the equal-protection context; (2) a bail policy that provides notice, an opportunity to be heard within 48 hours of arrest, and a reasoned decision by an impartial decisionmaker satisfies the Constitution; and (3) an injunction requiring review within 24 hours of arrest must be vacated. But that attacks a strawman, as the petition did not allege any conflict on those points.

ODonnell I—rational-basis review applies to the incarceration of arrestees because they are indigent, so long as the government provides a hearing to consider alternatives to monetary bail. 900 F.3d at 226.

That reasoning is fundamentally confused, conflating two distinct concepts: what government conduct *triggers* the application of heightened scrutiny and what circumstances *satisfy* such scrutiny. As this Court has explained, to satisfy heightened scrutiny the government must engage in "good faith consideration of workable … alternatives that will achieve the [compelling objectives] the [defendant] seeks." *Grutter* v. *Bollinger*, 539 U.S. 306, 339 (2003). In other words, what this Court has said is required to satisfy heightened scrutiny is what the motions-panel majority in *ODonnell II* said avoids triggering such scrutiny. But it cannot be that the steps that a jurisdiction takes to satisfy heightened scrutiny are determinative of whether such scrutiny applies in the first place. If that were correct, then courts would apply rational-basis review to a college's use of race-conscious admissions simply because the college considered race-neutral alternatives. That is wrong. *See Fisher* v. *University of Texas at Austin*, 570 U.S. 297, 312 (2013) ("Consideration [of race-based alternatives] … is of course necessary, but it is not sufficient to satisfy *strict scrutiny*." (emphasis added)). Calhoun's reliance on *ODonnell II*'s deeply flawed reasoning does nothing to justify the Eleventh Circuit's ruling on the first question presented. Because that ruling departs from this Court's precedent, review is warranted.

C. Calhoun Does Not Dispute That The Issue Is Important And Recurring

Walker and his amici explained that the question presented here is recurring. Many thousands of people are arrested every year, Pet. 26, and a substantial percentage of them will suffer pretrial incarceration solely because they are poor, *see* ABA Br. 14-15.

Walker and his amici also explained the importance of the question presented, namely that, as this Court has recognized, the consequences of incarceration are "exceptionally severe," *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1907 (2018). Those consequences include disrupting arrestees' lives economically (through loss of housing, employment, and household possessions), socially (by disrupting family relationships), physically (by exposing arrestees to disease and violence), and emotionally. ABA Br. 15-16. The consequences also affect the public at large, via higher costs on judicial systems and a higher likelihood of arrestees failing to appear or committing offenses before trial. Pet. 28-29; Pretrial Services Agencies Br. 16-21. And still another consequence is the erosion of the Sixth Amendment right to a jury trial, as arrestees "are effectively coerced into taking pleas, regardless of the merits of their case." Cato Institute Br. 19 (emphasis omitted). Even if an arrestee does not plead guilty, those subjected to pretrial incarceration are more likely to be convicted and, if convicted, receive longer sentences. ABA Br. 16-18.

Calhoun, yet again, offers no response.

* * *

In sum, the first question presented has divided the circuits and involves a recurring and important issue of

federal law that threatens substantial harm to huge numbers of people—and the Eleventh Circuit's answer to the question is (as Calhoun does not dispute) inconsistent with this Court's precedent. Under those circumstances, review is warranted.

II. The Second Question Presented Merits Review

Unlike with the first question, Calhoun does defend the Eleventh Circuit's holding on the second question, i.e., the holding that a government can—without *any* justification for doing so—detain arrestees for up to 48 hours because they are indigent. Calhoun's defense (Opp. 14-15) is that this Court's Fourth Amendment holding in *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), means there cannot be an equal-protection violation for up to 48 hours of pretrial incarceration.

As the petition explained, however (at 23-26), *McLaughlin*'s holding—that two days of pretrial incarceration before a probable-cause hearing does not violate the Fourth Amendment, 500 U.S. at 56—cannot immunize a jurisdiction from a Fourteenth Amendment challenge to a similar amount of *discriminatory* pretrial incarceration. *McLaughlin* did not involve the Fourteenth Amendment (or discriminatory incarceration). And where a plaintiff invokes more than one constitutional provision, a court must "examine each constitutional provision in turn." *Soldal* v. *Cook County*, 506 U.S. 56, 70 (1992). For example, in *Whren* v. *United States*, 517 U.S. 806 (1996), this Court held that an objectively reasonable traffic stop complies with the Fourth Amendment regardless of purpose but recognized that the Fourteenth Amendment still bars "selective enforcement of the law based on considerations such as race," *id.* at 813. In other words, a discriminatory traffic stop does not violate the Fourth Amend-

ment, but it would violate the Fourteenth. The same is true here: Calhoun's 48 hours of discriminatory pretrial incarceration does not violate the Fourth Amendment, but it does violate the Fourteenth. Calhoun ignores all of these arguments.

Calhoun instead asserts (Opp. 11) that *ODonnell I* agreed with the Eleventh Circuit's ruling that under *McLaughlin*, governments have a virtual free pass to discriminate in incarcerating arrestees for up to 48 hours. The petition (at 25) already explained why that is incorrect. Calhoun also quotes (Opp. 12 n.2) the Eleventh Circuit's statement that "*ODonnell [I]* held a 24-hour rule too burdensome even though … Harris County … presumably could much more easily provide frequent bail hearings than can [Calhoun's] one-judge municipal court." That "presumption," however, ignores the fact that Harris County's population is over *720* times that of Calhoun. *See* QuickFacts: Calhoun County, Georgia; Harris County, Texas, *at* https://www.census.gov/quickfacts/fact/table/calhouncountygeorgia,harriscountytexas/PST045218 (visited March 12, 2019). In any event, if Calhoun is suggesting that courts should just assume it could satisfy heightened scrutiny, that is meritless. It is a jurisdiction's burden to show it has satisfied such scrutiny. *See United States* v. *Virginia*, 518 U.S. 515, 533 (1996), *quoted in* Pet. 22.

Most striking of all is Calhoun's silence regarding the petition's assertion (at 24-25) that the Eleventh Circuit's divided holding would mean jurisdictions could jail Catholics, blacks, or women for up to 48 hours without any justification, while simultaneously releasing Protestants, whites, and men immediately (or vice-versa). That proposition is untenable, and Calhoun's implicit embrace of it cries out for this Court's review.

III. THIS IS A GOOD VEHICLE

Calhoun contends (Opp. 15-17) that this case is a poor vehicle to address the questions presented. That is not correct.

First, Calhoun notes (Opp. 15) this appeal's "interlocutory posture." But this Court often grants review in similar circumstances. *See Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013); *Pacific Bell Telephone Company* v. *Linkline Communications, Inc.*, 555 U.S. 438 (2009); *F. Hoffman-La Roche Limited* v. *Empagran S.A.*, 542 U.S. 155 (2004). In fact, it has done so even when the Solicitor General opposed review on the same ground. *See Morgan Stanley Capital Group Inc.* v. *Public Utility District Number 1 of Snohomish County*, 554 U.S. 527, 555 (2008) (Ginsburg, J., concurring in part and concurring in the judgment). An interlocutory posture does not preclude review of an "important and clear-cut issue of law that is fundamental to the further conduct of the case … —particularly if the lower court's decision is patently incorrect." Shapiro et al., *Supreme Court Practice* 283 (10th ed. 2013) (collecting authorities). That is the situation here, as Calhoun has offered no factual justification for the challenged policy.

Second, Calhoun argues (Opp. 15) that this case "is hardly the ideal test case for determining the outer boundaries of the Constitution." That argument fails. To begin with, the argument has nothing to do with the first question presented; a different factual scenario would not be any better of a vehicle to decide whether wealth-based discrimination triggers heightened scrutiny. The argument likewise lacks merit as to the second question. To the extent Calhoun is suggesting that its policy would be constitutional under any resolution

of that question, that is false. If *McLaughlin* provides no 48-hour safe harbor (as Walker contends), then Calhoun's policy is unconstitutional.

Third, Calhoun observes that "many state legislatures have recently taken up bail reform." Opp. 17. But that is a reason *not* to wait for another case. Should efforts to abolish cash bail accelerate nationally, fewer cases will raise claims like Walker's, meaning that allowing the issue to percolate in the lower courts may produce little or no benefit, as few if any other courts of appeals will have the opportunity to weigh in on the conflict between the Fifth and Eleventh Circuits. Moreover, states that are undertaking bail reform need this Court's guidance as to what the Constitution requires.

In any event, the real-world extent of the circuit conflict here is ample basis for the Court's intervention. The population of Texas, Florida, and the other states in the Fifth and Eleventh Circuits is well over 70 million people. *See* QuickFacts: Louisiana; Texas; Mississippi; Alabama; Florida; Georgia, *at* https://www.census.gov/quickfacts/fact/table/la,tx,ms,al,fl,ga/PST045218 (visited March 12, 2019). Ensuring uniformity in the equal-protection rights of such a significant portion of the population—and ensuring that many thousands of arrestees do not lose their liberty because of unconstitutional discrimination (imposed by a policy inconsistent with this Court's longstanding precedent)—warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2019