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 OF *AMICI CURIAE* LAW PROFESSORS OF CRIMINAL, PROCEDURAL, AND CONSTITUTIONAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amici are authors of many scholarly books and articles on criminal, procedural, and constitutional law related to the issues presented by the petition in this case.[2] Several *amici* direct clinics or otherwise participate in criminal litigation at bail hearings and other pretrial proceedings. While *amici* have widely varying views on many constitutional issues relating to pretrial criminal procedure, in this case *amici* agree: Anglo-American legal history and tradition instruct that bail policies resulting in indigency-based detention should be subject to heightened scrutiny. *Amici* seek to assist the Court's consideration of Maurice Walker's petition by providing (1) a short history of legal protections applied to bail and pretrial detention from pre-Norman England to today, and (2) an overview of Supreme Court jurisprudence addressing "whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants." *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).

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[1] *Amici curiae* notified the parties at least 10 days prior to the filing of this brief of their intent and request to file it. All parties have consented to the filing of this brief. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae* and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

[2] The full list of *amici* is provided in the Appendix to this brief.

SUMMARY OF ARGUMENT

The Eleventh Circuit sharply departed from Anglo-American legal tradition when it refused to apply heightened scrutiny to a government policy of detaining pretrial defendants solely on the basis of indigency. Two strains of legal history are relevant here. First, an examination of English and early American law demonstrates that strong procedural protections have long applied in the context of bail and pretrial detention. Second, a line of Supreme Court cases beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956), establishes that rules conditioning a defendant's liberty and access to judicial processes on the defendant's ability to pay are subject to scrutiny that "reflect[s] both equal protection and due process concerns." *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996).

These two strains of legal history and case law converge in the instant case, because the City of Calhoun, Georgia, subjects pretrial defendants to detention solely on the basis of indigency. Adherence to legal tradition requires applying heightened scrutiny to policies such as Calhoun's. This Court should grant the petition for a writ of certiorari in order to clarify that standard of review. In so doing, this Court would correct a significant departure from centuries of solicitude for the liberty rights of pretrial defendants and from the well-established guidelines of *Griffin* and its progeny.

ARGUMENT

I. THE HISTORY OF BAIL SUPPORTS ROBUST PROTECTIONS AGAINST ARBITRARINESS IN PRETRIAL DETENTION PROCEEDINGS

Heightened scrutiny should apply to a bail policy that detains the poor longer than the rich, because centuries of English and American law have provided defendants with extraordinary protections in the context of bail proceedings and pretrial detention. Although the Founders would have been unfamiliar with bail policies making liberty contingent on wealth, the Anglo-American legal tradition calls for careful scrutiny of any such policy to determine whether the policy imposes pretrial detention arbitrarily. English and American law have long provided strict procedural protections for defendants facing pretrial detention.

A. Bail Policies Historically Did Not Condition Pretrial Liberty on a Defendant's Ability to Pay

As a preliminary matter, the Founders would have been unfamiliar with—and thus did not explicitly or implicitly condone—policies that made a defendant's pretrial liberty dependent on the defendant's ability to proffer cash or secured collateral.

The meaning of "bail" in the criminal context at the time of the United States' founding was merely "delivery" of a person to his "sureties" in exchange for some pledge—not an actual deposit. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 294–96 (1769) (describing system). The institution of pretrial bail derived from the system of

amercements in pre-Norman England. Under this system, all crimes were privately prosecuted and all convictions paid in fines, and a defendant could be released from pretrial confinement if a surety pledged to pay the total amount of the defendant's potential liability. The pledge became a payment due only if the defendant absconded before trial. June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 519–20 (1983). After the Normans replaced monetary fines with a system of public blood punishments, the pledge-based bail system continued, except that surety amounts were set not by a schedule of fines, but instead by judicial discretion. *Id.* at 519, 521.

For hundreds of years thereafter in common-law jurisdictions, a "sufficient" surety might include nonfinancial pledges of good behavior, or a surety's unsecured pledges of property or money, conditioned on a defendant's appearance at trial. Timothy R. Schnacke, *A Brief History of Bail*, 57 No. 3 Judges' J. 4, 6 (2018). The personal surety was not to be purchased; in fact, the United States today is almost completely alone among common law countries (save for the Philippines) in permitting indemnification of sureties. F. E. DEVINE, COMMERCIAL BAIL BONDING 6–8 (1991) (discussing court disallowance of such arrangements in England and elsewhere).

Only in the last century has the term "bail" commonly incorporated upfront transfers intended to secure an appearance. Schnacke, *Brief History*, at 6–7 (contrasting older practices of pledges and promises with modern "upfront payments"). Modern bail policies that require upfront payment are therefore

substantially more likely to result in pretrial detention for the indigent than the bail systems reflected in early English and American case law. *See Holland v. Rosen*, 895 F.3d 272, 293–95 (3d Cir. 2018) (discussing the transition from a surety system to secured cash bonds in the "mid-to-late Nineteenth Century," and subsequent efforts by "federal and state governments to reform their bail laws to deprioritize monetary bail" in light of, *inter alia*, concerns about discrimination against the poor). The Founders would not have recognized the bail system as it exists today—and never condoned bail policies that condition liberty on a defendant's ability to pay.

B. The Anglo-American Legal Tradition Provides Special Protections to Prevent Arbitrary Pretrial Detention

While the form of bail has changed recently and dramatically, the Anglo-American tradition of imposing strict procedural protections against arbitrary pretrial detention is longstanding. Indeed, the tradition was well-established long before the drafting of the U.S. Constitution.

The tradition finds its clearest post-Norman expression in Magna Carta, which enshrined the principle that imprisonment was only to follow conviction by one's peers. Magna Carta ch. 32 (1216) ("No free man shall be arrested or imprisoned . . . except by the lawful judgment of his peers or by the law of the land."); *accord* Magna Carta ch. 39 (1215). From that principle, English legislators and jurists over time derived the presumption of innocence, the right to a speedy trial, and the right to bail—that is, a defendant's right to bodily liberty on adequate

assurance that he or she would reappear to stand trial. *See, e.g.*, *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (speedy trial "has its roots at the very foundation of our English law heritage" dating to Magna Carta and earlier); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963) (expounding on trial right "[d]ating back to Magna Carta"); *Sistrunk v. Lyons*, 646 F.2d 64, 68 (3d Cir. 1981) ("Bail was a central theme in the struggle to implement the Magna Carta's 39th chapter which promised due process safeguards for all arrests and detentions.").

As the English Parliament gained power through the 1500s and 1600s, its signal acts of constitution-making[3] aimed to constrain executive and judicial discretion in the administration of pretrial imprisonment. For example, "the Petition of Right in 1628, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689" all "grew out of cases which alleged abusive denial of freedom on bail pending trial." Caleb Foote, *The Coming Constitutional Crisis in Bail I*, 113 U. PA. L. REV. 959, 966 (1965). *See generally* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 34–66 (1977); ELSA DE HAAS, ANTIQUITIES OF BAIL (1940); Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966 (1961).

Each such act sought to limit arbitrariness and increase fairness in the processes of determining

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[3] "The English Constitution is sought, not in any single written documents, as in the United States, but from acts of Parliament, [and] quasi-acts of Parliament, such as the Magna Charta [*sic*], the Petition of Rights (1627) . . . ." William D. McNulty, *The Power of "Compulsory Purchase" Under the Law of England,* 21 YALE L.J. 639, 641 (1912).

whether to impose pretrial imprisonment. In 1554, for instance, Parliament required that the decision to admit a defendant to bail be made in open session, that two justices be present, and that the evidence weighed be recorded in writing. *See* TIMOTHY R. SCHNACKE *ET AL.*, PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 3 (2010). In 1628, responding to perceived abuses by the Stuart kings and their justices and sheriffs, who detained defendants for months without bail or charge, Parliament passed the Petition of Right prohibiting imprisonment without a timely charge. *See* JOHN HOSTETTLER, SIR EDWARD COKE: A FORCE FOR FREEDOM 138 (1997). In the Habeas Corpus Act of 1679, Parliament "established procedures to prevent long delays before a bail bond hearing was held," responding to a case in which the defendant was not offered bail for over two months after arrest. SCHNACKE ET AL., BAIL AND PRETRIAL RELEASE, at 4. Undeterred, Stuart-era sheriffs and justices shifted tactics to require impossibly high surety pledges that no surety could responsibly pledge, leading to defendants' pretrial detention. Parliament responded again in 1689 with the English Bill of Rights and its prohibition on "excessive bail," a protection later incorporated into the Eighth Amendment to the U.S. Constitution. Carbone, *New Clothes*, at 528–29.

In sum, by the time of the United States' founding, pretrial release on bail was a fundamental part of English constitutionalism, with procedural protections enshrined in Magna Carta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights. Together, these statutes required bail determinations to be made in open court sessions,

with an evidentiary record, and in a timely manner. They ensured that accused defendants were not detained without charge or without a court's consideration of release on bail. All of these constraints were designed to ensure a fair, prompt consideration of each defendant's case for release.

American practice expanded the right to bail. Even before the English Bill of Rights, in 1641 Massachusetts made all non-capital cases bailable (and significantly reduced the number of capital offenses). Foote, *Constitutional Crisis in Bail*, at 968. Pennsylvania's 1682 constitution provided that "all prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great." *See* Carbone, *New Clothes*, at 531 (quoting 5 AMERICAN CHARTERS 3061 (F. Thorpe ed. 1909)). The vast majority of American states copied Pennsylvania's provision in one form or another at different times; many state constitutions still contain that language. Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 920 (2013). The Judiciary Act of 1789 likewise made all non-capital charges bailable, 1 Stat. 91 ("And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death," in which cases judges had discretion to admit a defendant to bail), as did the Northwest Ordinance, 1 Stat. 52 ("All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great.").

Thus, while adopting the English procedural protections regulating pretrial detention, early American constitutions also provided additional guarantees of pretrial liberty. English practice often

required a full hearing to determine whether the defendant was to be admitted to bail; by contrast, Americans *categorically* established—in their state constitutions and in the statute founding the federal judiciary and territorial courts—that defendants facing non-capital charges would be eligible for bail. The only determination left to judicial discretion was the sufficiency of the sureties, that is, *how* to bail, not *whether* to bail. *See* TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, FUNDAMENTALS OF BAIL 29–36 (2014).

Though the federal government and some states later granted the discretion or authority to allow "preventive" pretrial detention in some cases, *see* Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1490 (1966), that grant of authority was accompanied by explicit protections long identified with due process in the English constitutional tradition, and ordinarily has been limited to circumstances where a strong government interest requires such detention. The federal Bail Reform Act of 1984, for instance, permits detention only in serious felony cases and only upon a judicial finding by clear and convincing evidence, after a full adversary hearing, that the accused presents an unmanageable flight risk or risk to public safety. Pub. L. No. 98–473, § 202, 98 Stat. 1837, 1976 (1984) (codified at 18 U.S.C. §§ 3141–50). States that have expanded courts' authority to order pretrial detention have generally also included such constraints. *See, e.g.*, N.M. CONST. art. II, § 13; VT. CONST. art. II, § 40; WIS. CONST. art. I, § 8.

As this brief history illustrates, bail policies have been constrained for centuries by procedural

protections that go well beyond a prohibition on excessiveness. Laws protecting a defendant's right to bail "have consistently remained part of our legal tradition." *Jennings v. Rodriguez*, 138 S. Ct. 830, 864 (2018) (Breyer, J., dissenting). They safeguard "the individual's strong interest in liberty," and this Court has refused to "minimize the importance and fundamental nature" of that interest. *United States v. Salerno*, 481 U.S. 739, 750 (1987).

II. EQUAL PROTECTION AND DUE PROCESS PRINCIPLES REQUIRE HEIGHTENED SCRUTINY OF BAIL POLICIES THAT DISCRIMINATE BASED ON INDIGENCY

The Eleventh Circuit dismissed a defendant's pretrial detention pending bail as mere "delay" that "does not trigger heightened scrutiny." Pet. App. 23a. But, as demonstrated above, the right to timely bail is *fundamental*. And, as demonstrated below, any policy denying such a significant criminal-procedure right solely due to a defendant's indigence is subject to heightened scrutiny. Indeed, this Court prohibits the government from "invidiously den[ying] one class of defendants a substantial benefit available to another class of defendants." *Bearden*, 461 U.S. at 665.

A. The Government May Not Condition a Substantial Benefit on a Defendant's Ability to Pay, Unless the Government Has No Available Alternative

This Court has long been attuned to the danger that, without vigilance, core aspects of liberty and judicial process might become a function of resources rather than of personhood. In a line of cases beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956),

this Court established that the government cannot condition a defendant's liberty from detention or access to judicial processes on a payment that the defendant cannot afford, unless no alternative means can meet the state's needs.

In *Griffin*, indigent prisoners lacked the funds to procure necessary transcripts for a direct appeal. This Court held the Fourteenth Amendment prohibited Illinois from conditioning practical access to a direct appeal on wealth. As Justice Black wrote: "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Id.* at 17 (plurality) (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)); *see id.* at 24 (Frankfurter, J., concurring in the judgment) ("If [Illinois] has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity.").

The Court expanded upon *Griffin* in *Douglas v. California*, 372 U.S. 353 (1963). In cases where an indigent defendant requested appellate counsel, California law directed a state appellate court to conduct "an independent investigation of the record" and appoint counsel only if it judged that counsel would be "helpful" to the presentation of the case. *Id.* at 355 (internal quotation marks and citation omitted). The appellate court was thus "forced to prejudge the merits [of an indigent defendant's appeal] before it can even determine whether counsel should be provided," whereas people who could afford counsel were not "forced to run this ga[u]ntlet of a preliminary showing of merit." *Id.* at 356–57. This

Court held that a such a system violates the Fourteenth Amendment: "[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Id.* at 357 (emphasis removed).

Soon thereafter, this Court applied the logic of *Griffin* and *Douglas* to wealth-based deprivations of physical liberty. In *Williams v. Illinois*, the petitioner was held in prison after the expiration of his one-year term pursuant to an Illinois law that permitted continued confinement in lieu of paying off a fine. 399 U.S. 235, 236–37 (1970). Although the law offered "an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment," this Court held that this was "an illusory choice for Williams or any indigent[.]" *Id.* at 242. This Court concluded that the Fourteenth Amendment prohibits the state from "making the maximum confinement contingent upon one's ability to pay." *Id.* The following year, in *Tate v. Short*, this Court held that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." 401 U.S. 395, 398 (1971) (quoting and adopting the reasoning of the concurrence in *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970) (White, J., concurring)).

Bearden v. Georgia, 461 U.S. 660 (1983), synthesized this line of cases. The petitioner in *Bearden* challenged the revocation of his probation for failure to pay a fine. *Id.* at 662–63. This Court explained that "[d]ue process and equal protection

principles converge in the Court's analysis" of cases where the state treats criminal defendants differently on the basis of wealth: "[W]e 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. With appeal to both principles, this Court required "a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose.'" *Id.* at 666–67 (quoting *Williams*, 399 U.S. at 260 (Harlan, J., concurring)).

Considering the relevant factors, this Court concluded that the Fourteenth Amendment prohibits revocation of probation solely on the basis of nonpayment when alternate measures suffice to meet the state's interests. *Id.* at 672–73. "Only if alternate measures are not adequate to meet the State's interests . . . may the court imprison a probationer who has made sufficient bona fide efforts to pay." *Id.* at 672. To hold otherwise, this Court reasoned, "would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine." *Id.* at 672–73.

Although this Court did not specify a tier of scrutiny by name, the *Bearden* rule is heightened scrutiny in substance. *Bearden* states a narrow-tailoring requirement. Detention for nonpayment must be the only means of achieving the state's

interests; if alternative means of securing those interests are available, detention is impermissible.

B. The Government May Not Condition Release from Pretrial Detention on Indigency, Unless the Government Has No Available Alternative

The *Bearden* rule—that the Fourteenth Amendment prohibits deprivations of liberty on the basis of indigence alone, unless no alternative means exists to meet the government's interests—applies "with special force in the bail context, where fundamental deprivations are at issue and arrestees are presumed innocent." *Buffin v. City & Cty. of San Francisco*, No. 15-cv-4959, 2018 WL 424362, at *9 (N.D. Cal. Jan. 16, 2018); *accord*, *e.g.*, *Pugh v. Rainwater*, 572 F.2d 1053, 1056–57 (5th Cir. 1978) (en banc) ("[Pretrial] imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible."). Timely bail is "a substantial benefit" that may not be "invidiously denied one class of defendants." *Bearden*, 461 U.S. at 665. The substantiality and importance of bail were well-established long before the Constitution was drafted. *See* Part I.B. Thus, "[d]ue process and equal protection principles converge," *Bearden*, 461 U.S. at 665, and the *Bearden* rule applies.

Below, the Eleventh Circuit did not meaningfully attempt to follow the *Bearden* rule, despite acknowledging the case's applicability to Mr. Walker's claim. But application is not difficult. The state's interest in the pretrial context is in ensuring defendants' appearance at future court dates and in protecting public safety. *Stack v. Boyle*, 342 U.S. 1, 5

(1951); *Salerno*, 481 U.S. at 750. *Bearden* thus prohibits a court from conditioning a defendant's pretrial liberty on payment of an unaffordable amount—that is, essentially denying bail—unless no alternative measure can adequately promote those goals. An increasing number of federal courts have recognized this straightforward application of the *Bearden* doctrine. *See, e.g.*, *ODonnell v. Harris Cty.*, 892 F.3d 147, 162 (5th Cir. 2018) (concluding that "although the County had a compelling interest in the assurance of a misdemeanor detainee's future appearance and lawful behavior, its policy [of detaining misdemeanor defendants who could not afford prescheduled bond amounts] was not narrowly tailored to meet that interest").[4]

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[4] *See also Rainwater*, 572 F.2d at 1057; *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 311–12 (E.D. La. 2018); *Schultz v. State*, 330 F. Supp. 3d 1344, 1360–62 (N.D. Ala. 2018), *appeal docketed* (Sept. 13, 2018); *Buffin*, 2018 WL 424362, at *9; *Thompson v. Moss Point,* No. 1:15-cv-182, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); *Jones v. City of Clanton*, No. 2:15-cv-34, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015); *Pierce v. Velda City*, No. 4:15-cv-570, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015); *Cooper v. City of Dothan*, No. 1:15-cv-425, 2015 WL 10013003, at *1 (M.D. Ala. June 18, 2015); *accord* Statement of Interest of the United States Department of Justice at 1, *Varden v. City of Clanton,* No. 2:15-cv-34, ECF Doc. 26 (M.D. Ala. February 13, 2015), https://www.justice.gov/crt/file/761266/download ("Incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment."); OFFICE FOR ACCESS TO JUSTICE, CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER 2 (Mar. 14, 2016), https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf.

This Court should grant the petition for a writ of certiorari in order to confirm and apply the correct standard here. This Court should correct the Eleventh Circuit's departure from centuries of Anglo-American tradition protecting defendants from arbitrary pretrial detention. And this Court should reaffirm that "all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court." *Griffin*, 351 U.S. at 17 (internal quotation marks and citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

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JANUARY 28, 2018

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