UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Margery Freida Mock and Eric Scott Ogden, Jr., *individually and on behalf of others similarly situated,* Plaintiffs, v. Glynn County, Georgia; E. Neal Jump, Glynn County Sheriff; Alex Atwood, Glynn County Magistrate Judge; and B. Reid Zeh, III, Glynn County Misdemeanor Public Defender; Defendants.	Case No. (Class Action) Expedited Hearing Requested

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION
FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

I. INTRODUCTION

This Circuit held nearly 40 years ago that the Fourteenth Amendment is violated if an indigent arrestee is jailed because she is unable to pay a secured monetary bail without any inquiry into or findings concerning the arrestee's ability to pay. *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc).[1] Yet, today, officials in Glynn County, Georgia ("the County") routinely ignore these principles, subjecting indigent persons arrested for crimes to a mandatory bail schedule in which those who cannot afford the predetermined bail are detained.

[1] In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit cases submitted or decided prior to October 1, 1981.

Plaintiffs and the proposed Bail Class[2] are indigent misdemeanor arrestees being held in jail because they are unable to buy their release. Plaintiffs request that this Court issue a temporary restraining order ("TRO") for themselves, and a preliminary injunction on behalf of the proposed Bail Class, preventing the continuation of Defendants' unlawful pretrial detention system. Specifically, Plaintiffs request injunctive relief preventing Sheriff E. Neal Jump and Glynn County from jailing Plaintiffs and the proposed Bail Class on secured money bail unless class members receive individualized hearings with the procedural protections required before the state may lawfully detain a pretrial arrestee.

II. FACTUAL BACKGROUND

Defendants are operating a two-tiered pretrial justice system. Defendants Glynn County and Sheriff Jump condition pretrial liberty on an individual's ability to make an upfront, or secured, payment of money bail. In most cases, Defendants predetermine the amount of secured bail that misdemeanor arrestees must pay based on a schedule authored by Defendant Judge Atwood and enforced by Defendant Jump. The bail schedule specifies a monetary amount based solely on the criminal charge.[3] A person arrested in Glynn County on a misdemeanor charge who can afford to pay the preset bail amount is immediately eligible for release from jail upon payment.

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[2] The proposed Bail Class is described in more detail in Plaintiffs' Motion for Class Certification, filed concurrently with this motion. It is defined as misdemeanor arrestees in Glynn County who have been or will be detained because they are unable to pay the amount of bail required for their release.

[3] Persons accused of misdemeanor offenses involving family violence are not included on the bail schedule, but must wait to have their bail amount set by a judge at a rote proceeding all arrestees receive, known as "rights read." Persons accused of misdemeanor offenses involving family violence, like all persons accused of misdemeanors, have a right to bail and are detained if they cannot afford the bail amount set. *See* Ga. Code Ann. §17-6-1(b)(2)(B). Significantly, persons accused of misdemeanor offenses involving family violence, like all misdemeanor arrestees, have money bail set without consideration of their ability to pay or the possibility of less restrictive conditions.

Plaintiffs and the proposed Bail Class are in jail only because they cannot afford the monetary amount Defendants Atwood and Jump require for their release. They will not be brought to court until a rote proceeding, informally referred to in Glynn County as "rights read,"[4] which may not occur for several days after which they have already been detained under the predetermined bail schedule. When the "rights read" proceeding occurs, Defendant Judge Atwood briefly interviews recent arrestees, informs them of certain rights, and discusses their bail. The "rights read" proceeding does not amount to a true hearing, let alone an adversarial hearing: Atwood does not consider an arrestee's ability to pay the bail amount, nor does he consider less restrictive alternatives to secured money bail. Counsel is not provided, and arrestees are not allowed to present witnesses or other evidence, make arguments for their release, or cross-examine government witnesses. Instead, Atwood typically confirms the bail set in the schedule.

After the "rights read" proceeding, arrestees will wait for days, even weeks, for their next and, most likely, final[5] court date: a weekly proceeding to enter guilty pleas. It is here that most indigent misdemeanor arrestees meet their public defender for the first time. Thus, most class members will never have a meaningful opportunity to contest bail before their cases end.

Plaintiff Margery Freida Mock was arrested on March 7, 2018 on allegations of criminal trespass, a misdemeanor. Upon being booked into the jail, Ms. Mock was informed that her bail was set at $1,256. *See* Mock Decl. Ms. Mock cannot pay this amount, and is left to wait indefinitely for her case to proceed. Currently unemployed and without stable housing, all of her belongings are in a storage unit, and the deadline for retrieval coincided with her arrest. Every

[4] Arrestees are informed of some of their rights at the "rights read" proceeding, but not of their right to appointed counsel.

[5] The only other hearings generally calendared in misdemeanor cases are monthly jail arraignments, which do not involve discussions of bail, and which many arrestees never formally receive due to their infrequency.

hour of wealth-based incarceration furthers the risk that Ms. Mock will lose all of her belongings.

Plaintiff Eric "Scotty" Ogden, Jr., is Ms. Mock's codefendant. Mr. Ogden was arrested on March 7, 2018 on allegations of criminal trespass, a misdemeanor. As he was booked into the Glynn County Detention Center, a booking officer informed Mr. Ogden that he would have to post "around $1,000" bond[6] in order to go free. *See* Ogden Decl. Mr. Ogden does not have $1,000 and remains incarcerated solely for that reason. In the meantime, Mr. Ogden is worried about who will care for his three daughters and his two pets.

III. ARGUMENT

A preliminary injunction and/or TRO is warranted if the movant demonstrates: (1) a substantial likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that an injunction would not disserve the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1273–74 (11th Cir. 2013). As discussed in detail below, consideration of each of these four factors supports Plaintiffs' request for preliminary relief.

A. PLAINTIFFS AND THE BAIL CLASS WILL LIKELY SUCCEED ON THE MERITS ON CLAIMS ONE AND TWO BECAUSE THEY ARE IN JAIL SOLELY BECAUSE THEY CANNOT AFFORD THE AMOUNT OF BAIL DEFENDANTS REQUIRE FOR THEIR RELEASE.

1. Claim One: Defendants Glynn County and Jump Violate Arrestees' Rights to Equal Protection and Due Process by Enforcing a Two-Tiered, Wealth-Based Detention Scheme.

[6] A subsequent call to the Glynn County Detention Center confirmed that Mr. Ogden's bond is $1,256.

In Claim One, Plaintiffs allege that Defendants Glynn County, Atwood, and Jump's wealth-based detention scheme violates equal protection and due process under the Fourteenth Amendment by conditioning pretrial release solely on the basis of a predetermined amount of bail. A well-established line of Supreme Court precedent holding that the Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit "punishing a person for his poverty" squarely governs plaintiffs' claim. *See, e.g., Bearden v. Georgia*, 461 U.S. 660, 671 (1983). These cases establish the bedrock principle that the state may not jail an individual for failing to pay an amount of money without first determining whether the person is *able* to pay the amount, and, if not, then considering possible alternatives to detention that would also achieve the government's interests. *See Tate v. Short*, 401 U.S. 395, 397–98 (1971); *Williams v. Illinois*, 399 U.S. 235, 240–41 (1970).

The Fourteenth Amendment's prohibition on wealth-based detention applies with special force for individuals facing detention prior to trial, who are presumed innocent. *See Pugh*, 572 F.2d at 1056 ("We view such deprivation of liberty of one who is accused but not convicted of crime as presenting a question having broader effects and constitutional implications than would appear from a rule stated solely for the protection of indigents."); *see also ODonnell v. Harris Cty., Tex.*, No. 17-20333, 2018 WL 851776, at *9 n.6 (5th Cir. Feb. 14, 2018) (discussing the "punitive and heavily burdensome nature of pretrial confinement" and "the fact that it deprives someone who has only been 'accused but not convicted of crime' of their basic liberty.") (internal citations omitted). This is because the right to pretrial liberty is fundamental. *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *United States v. Salerno*, 481 U.S. 739, 750 (1987). Any deprivation of this right must therefore satisfy heightened scrutiny. *See Salerno*, 481 U.S. at 750.

These precedents make clear that Plaintiffs Mock and Ogden and members of the proposed Bail Class face unconstitutional wealth-based incarceration. Defendants condition pretrial liberty on the upfront payment of a predetermined amount of money, but they do not even consider, let alone make the required findings of whether arrestees can pay the amount required. Nor do Defendants evaluate the availability of less restrictive alternative forms of pretrial release. Plaintiffs and the proposed Bail Class therefore are being or will be held in jail solely due to their inability to pay secured money bonds set by Glynn County officials. Meanwhile, arrestees with the means to pay bail are able to easily secure their release.

For instance, Ms. Mock is incarcerated on $1,256 bond, an amount she cannot afford. Due to her inability to pay $1,256, she is forced to wait in jail. Mr. Ogden's liberty has also been conditioned on payment of $1,256. Because Mr. Ogden cannot pay this amount, he is incarcerated.

An overwhelming and rapidly growing body of lower court decisions confirms Plaintiffs are likely to succeed on the equal protection component of their first claim for relief. Over the last two years, federal district courts in Alabama, Mississippi, Louisiana, Missouri, Tennessee, Kansas, Georgia, and Texas have reached the same conclusion.[7] In *Walker v. City of Calhoun,*

[7] *See, e.g.*, *Jones v. City of Clanton*, No. 2:15CV34-MHT, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015) (it violates the Fourteenth Amendment to detain a person after arrest who cannot pay a monetary amount "without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail[.]"); *Cooper v. City of Dothan*, No. 1:15-CV-425-WKW, 2015 WL 10013003, at *1(M.D. Ala. June 18, 2015) (granting TRO after surveying "long standing case law" establishing "the unconstitutionality of a pretrial detention scheme whereby indigent detainees are confined for periods of time solely due to their inability to tender monetary amounts"); *Rodriguez v. Providence Cmty. Corr.*, 155 F. Supp. 3d 758, 766-69 (M.D. Tenn. 2015) (enjoining a policy of detaining probationers who could not pay a predetermined amount of bail); *Thompson v. Moss Point*, No. 1:15CV182LG-RHW, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015) ("If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond."); *see also Martinez v. City of Dodge City*, No. 15-CV-9344-DDC-TJJ, 2016 WL 9051913 (D. Kan. Apr. 26, 2016) (granting permanent injunction requiring city to release arrestees as soon as practical after booking without requiring arrestees to post any type of monetary bond); *Snow v. Lambert*, No. CV 15-567-SDD-

Ga., the Northern District of Georgia has twice condemned wealth-based incarceration prior to trial, noting that "keeping individuals in jail solely because they cannot pay for their release, whether via fines, fees, or a cash bond, is impermissible." No. 4:15-CV-0170-HLM, 2016 WL 361612, at *10 (N.D. Ga. Jan. 28, 2016), *vacated sub nom.* 682 F. App'x. 721, No. 16-10521, 2017 WL 929750 (11th Cir. Mar. 9, 2017) (order entering first preliminary injunction); *see also Walker v. City of Calhoun, Ga.*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *2 (N.D. Ga. June 16, 2017) (on remand, order granting second preliminary injunction) (observing that due to defendants' automatic imposition of secured bail "non-indigent arrestees may obtain immediate release, while indigent arrestees must wait . . . forty-eight hours . . . simply because of those arrestees' financial condition. This is impermissible."), *appeal granted*, *Walker v. City of Calhoun*, No. 17-13139 (11th Cir.). And in *ODonnell v. Harris Cty., Texas*, the Fifth Circuit recently confirmed that officials violate equal protection when "[o]ne arrestee is able to post bond, and the other is not," and thus "[t]he poor arrestee . . . must bear the brunt" of all of the deprivations incident to incarceration. No. 17-20333, 2018 WL 851776, at *10 (5th Cir. Feb. 14, 2018) (affirming the need for preliminary relief but remanding for modification of preliminary injunction order). The 5th Circuit invoked *Pugh v. Rainwater*—also binding precedent in this Circuit—to confirm that such wealth-based discrimination is unconstitutional. *Id.* at *9 (citing *Pugh*, 572 F.2d at 1056-57).

The constitutional violations in Glynn County are comparable to, and arguably more extreme than those found in *Walker* and *ODonnell*. In *Walker*, the Northern District of Georgia granted a preliminary injunction based on wait times of "up to seven days" prior to bail being

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RLB, 2015 WL 5071981 (M.D. La. Aug. 27, 2015) (issuing TRO and holding that Plaintiff was likely to succeed on the merits of her claim that defendant's money bail schedule violated due process and equal protection); *Pierce v. City of Velda City*, No. 4:15-CV- 570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015) (issuing declaratory judgment that the use of a secured bail schedule is unconstitutional as applied to the indigent and enjoining its operation).

reviewed. *Walker v. City of Calhoun, Georgia*, No. 4:15-CV-0170-HLM, 2016 WL 361612, at *1 (N.D. Ga. Jan. 28, 2016), *vacated sub nom. Walker v. City of Calhoun, Ga.*, 682 F. App'x 721, No. 16-10521, 2017 WL 929750 (11th Cir. Mar. 9, 2017). Most misdemeanor arrestees in Harris County, Texas proceed to a bail-setting hearing within a day of their arrest, then wait "days" until a meaningful opportunity to review bail. *ODonnell*, 2018 WL 851776, at *2. Arrestees in Glynn wait far longer to receive considerably less process. Those who cannot afford their bail are routinely detained for a week or more, and then only receive a hearing to collect guilty pleas. Glynn County never provides appointed counsel to assist indigent arrestees with their bail determination, and never inquires into what an arrestee could afford in setting bail.

2. Claim Two: Defendants Violate Misdemeanor Arrestees' Due Process Rights by Detaining People without an Individualized Release Hearing and Adequate Procedural Protections

Plaintiffs' likelihood of success on Claim One, in combination with the other preliminary injunction factors described below, is sufficient for this Court to grant Plaintiffs' requested relief, because their immediate detention pursuant a wealth-based, predetermined bail schedule is itself repugnant to the Constitution and requires their immediate release or, at a minimum, an immediate individualized hearing.

But Plaintiffs are also likely to succeed on Claim Two, which charges that Defendants Glynn County and Sheriff Jump violate the due process of Plaintiffs and members of the proposed Bail Class because the minimal "process" that they do provide—sometimes many days after they have already been unconstitutionally detained—is utterly inadequate.

Prior to detaining an arrestee, due process requires that Defendants provide true, adversarial, individualized release hearings with counsel, wherein the government has the burden to prove, by sufficiently reliable evidence, that detention is necessary. *See United States v.*

Salerno, 481 U.S. 739 (1987). But as discussed above, Defendants routinely jail pretrial arrestees by mechanically imposing secured money bail irrespective of ability to afford bail. Setting a financial condition of release beyond what a person can afford is the functional equivalent of a detention order.[8] Under *Salerno* and *Mathews v. Eldridge*, 424 U.S. 319 (1976), such orders trigger robust constitutional protections that Defendants fail to provide.

a. Glynn County's Pretrial Scheme Fails Under *Salerno*

In *Salerno*, the Supreme Court articulated the minimum procedural protections that "must attend" any order of pretrial detention. *Salerno*, 481 U.S. at 755. The Court held that the Bail Reform Act of 1984 satisfied due process in part because it limited a judicial officer's discretion to impose detention by requiring that officer to consider factors such as the nature and seriousness of the charges, the substantiality of the government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release. *Id.* at 742–43. The Court emphasized that, under the Act, arrestees were provided counsel at their detention hearing, and they were permitted to present witnesses, proffer evidence, and cross-examine witnesses. *Id.* at 751–52. Further, under *Salerno*, a court violates due process by issuing a de-facto detention order unless the court affords an arrestee these safeguards and makes written findings that the unaffordable financial conditions are an

[8] *See ODonnell v. Harris Cty., Tex.*, 251 F. Supp. 3d 1052, 1111 (S.D. Tex. 2017), aff'd as modified, 882 F.3d 528 (5th Cir. 2018) ("In Harris County, secured money bail is not just a de facto pretrial detention order; it is literally a pretrial detention order."); *see also United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) ("[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all."); *State v. Brown*, 338 P.3d 1276, 1292 ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."); United States Statement of Interest, *Jones*, No. 2:15-cv-34-MHT, at 8 ("Fixed-sum bail systems . . . are based solely on the criminal charge. Because such systems do not account for individual circumstances of the accused, they essentially mandate pretrial detention for anyone who is too poor to pay the predetermined fee. This amounts to mandating pretrial detention only for the indigent" in violation of the Fourteenth Amendment); *see also Bandy v. United States*, 81 S. Ct. 197, 198 (1960) (Douglas, J., in chambers) ("It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release.") (internal citation omitted).

"indispensable component of the conditions for release." *United States v. Mantecon-Zayas*, 949 F.2d 548, 551 (1st Cir. 1991); *United States v. McConnell*, 842 F.2d 105, 110 (5th Cir. 1988) ("When no attainable conditions of release can be put into place, the defendant must be detained pending trial. In such an instance, the court must explain its reasons for concluding that the particular financial requirement is a *necessary* part of the conditions for release.") (emphasis added); *see also Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001) ("[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections.").

Defendants provide none of the protections required by *Salerno* when they detain misdemeanor arrestees, since Defendants predetermine bail without an individualized hearing. For that reason alone, Plaintiffs are likely to prevail on their second claim. But even at the "rights read" proceeding, which usually occurs several days after the accused has already been languishing in jail simply for being poor; the procedural protections are constitutionally inadequate. Arrestees are not permitted to present or confront witnesses, introduce evidence, or otherwise assert their suitability for release. Counsel is not provided for indigent arrestees, thus ensuring the proceeding is not truly adversarial. Finally, Defendant Judge Atwood does not require the government to establish that detention is necessary because an arrestee cannot be released on affordable conditions or non-financial conditions of release. In fact, the government is not required to establish any facts by any evidentiary standard, as no prosecutors attend the "rights read" proceeding.

b. Defendants' Policies Fail the Balancing Test Set Forth in *Mathews v. Eldridge*.

By issuing pretrial orders of detention without any procedural protections, Defendants' policies also fail the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The three factors of the *Mathews* test are (1) the private interest at stake; (2) the risk of an erroneous deprivation of that interest through the challenged procedures, and probable value of additional procedural safeguards; and (3) the government's interest, including the potential burden of additional procedures. *Id.* at 335.

First, as previously discussed, the potentially affected interest is the fundamental right to pretrial liberty. A person's interest in pretrial liberty is "vital," *United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990), and courts may "not minimize the importance and fundamental nature of this right." *Salerno*, 481 U.S. at 750. As the Supreme Court has noted, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690; *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

Second, the risk of erroneous deprivation of the fundamental right to liberty through the Defendants' two-tiered wealth-based detention scheme is great. In using secured money bail alone to determine eligibility for release, Defendants deprive lower-income arrestees of their liberty rights regardless of their potential for success on pretrial release. This system necessarily detains far more individuals than is warranted by any concern for ensuring court appearance or protecting public safety. In fact, the overwhelming majority of people released pending trial make their court appearances[9] and refrain from dangerous conduct.[10] Empirical evidence

[9] *See* Thomas H. Cohen and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts* (2007), https://www.bjs.gov/content/pub/pdf/prfdsc.pdf (Noting the rarity of true flight; only 6% of all released felony defendants still had not appeared after one year), attached as Ex. to Woods Decl.; *see also* Pretrial Services Agency for the District of Columbia, *Research and Data, Performance Measures*, www.psa.gov, *available at* https://www.psa.gov/?q=data/performance_measures (last visited Mar. 8, 2018) (noting high rates of court appearance in Washington, D.C. where 88 percent of arrestees

undermines any claim that the exclusive use of secured money bail mitigates potential harms on pretrial release since, at the aggregate level, secured money bail has little to no relationship with court appearance rates or public safety outcomes.[11] Given this evidence, Glynn County is almost certainly using an ineffective and unnecessary money bail requirement to erroneously detain people it otherwise could have released successfully.

By contrast, the probable value of additional procedural safeguards to Plaintiffs and class members is high. For instance, providing counsel at an individualized release hearing before an arrestee may be detained is critical to protecting Plaintiffs' fundamental liberty interests. Indeed, one study of bail hearings concluded that legal representation at that stage often makes the difference between an accused regaining freedom and remaining in jail prior to trial, while delaying an appointment was the most powerful cause of lengthy pretrial detention. *See* Douglas L. Colbert et. al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719, 1720, 1773 (2002).[12] Moreover, an individualized

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are released on non-financial conditions).

[10] Marie VanNostrand, Ph.D. and Gena Keebler, *Pretrial Risk Assessment in the Federal Court,* 22–23 (2009), https://www.pretrial.org/download/risk-assessment/Pretrial%20Risk%20Assessment%20in%20the%20Federal%20Court%20Final%20Report%20(2009).pdf, attached as Ex. M to Woods Decl. (data from the federal system showing that only 3.6% of released persons across risk level had a "pretrial outcome" constituting "danger to [the] community").

[11] *See, e.g.*, Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, 10 (2013), http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf, attached as Ex. K to Woods Decl. ("Whether released defendants are higher or lower risk or in- between, unsecured bonds offer the same public safety benefits as do secured bonds."); *see id.* at 11 (same conclusion, but with regard to court appearance); Arpit Gupta, Christopher Hansman, & Ethan Frenchman , *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 21 (2016), http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf, attached as Ex. I to Woods Decl. ("Our results suggest that money bail has a negligible effect or, if anything, increases failures to appear."). Moreover, under Georgia law, current secured money bail practices bear no rational relationship to public safety, as any bail amount posted may *only* be forfeited in the event of a failure to appear for court. Ga. Code Ann. § 17-6-70.

[12] *Available at* http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1290&context=fac_pubs.

hearing is indisputably superior to bail schedules as a means of tailoring release conditions to a particular arrestee.

The probable values of requiring a heightened evidentiary and providing counsel have been confirmed by the Supreme Court. In *Addington v. Texas*, in which the Court applied *Mathews* to evaluate the process required prior to civil commitment, the Court stressed the importance of a heightened evidentiary standard of proof—particularly in criminal cases—as necessary 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." 441 U.S. 418, 423 (1979). The Court ultimately imposed "clear and convincing" evidentiary standard prior to civil commitment. Notably, *Addington* dealt with civil commitments, not criminal cases. *Id.* at 424. The *Addington* Court acknowledged that even more heightened procedural protections are warranted in the criminal context. *Id.* at 423–24.

Additionally, in *Turner v. Rogers*, the Supreme Court applied *Mathews* to consider when due process requires counsel. 564 U.S. 431 (2011). The *Turner* Court held that counsel may be required in civil contempt proceedings for non-payment of child support unless the State itself is not represented by an attorney and if the State fails to provide adequate alternative safeguards, such as (1) notice that ability to pay would be a critical issue at the court proceedings; (2) the use of a form or the equivalent to elicit financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his or her financial status; and (4) an express finding by the court that the defendant has the ability to pay. *Id.* at 447–48.

As compared to the determinations at issue in *Turner*, a detention decision in the bail context is decidedly more complex—requiring a court to weigh multiple competing factors—and often outcome determinative. The pretrial release determination therefore demands experienced

counsel familiar not only with the law but also with local services and alternatives to incarceration who can articulate for the court why, in the circumstances, existing alternative programs and services, such as treatment or monitoring, would suffice to mitigate any risks. Moreover, empirical evidence suggests that access to counsel is necessary to guard against self-incrimination and to marshal evidence necessary to cogently articulate why a defendant should not be detained. *See* Colbert, 23 Cardozo L. Rev. at 1720, 1773.

Third, while providing individualized release hearings with counsel may impose potential administrative burdens, Defendants interests are not served, and are more likely undermined, by conditioning pretrial liberty on wealth. The primary purposes of bail are to assure appearance in court and, secondarily, to protect public safety. *Reynolds v. United States*, 80 S. Ct. 30, 32 (1959) ("The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court."); *Pugh*, 557 F.2d at 1198 ("The sole governmental interest served by bail is to assure the presence of the accused at trial.") As this Circuit held, "in the case of indigents, money bail is irrelevant in promoting the state's interest in assuring appearance." *Pugh*, 557 F.2d at 1200. To the contrary, even a few days of wealth-based pretrial incarceration profoundly disrupt an arrestee's life and—in the aggregate—harms their likelihood of court appearance.[13] Moreover, empirical evidence establishes that those detained pretrial suffer worse outcomes at trial and sentencing than those released pretrial, even when charged with the same offenses.[14]

To the extent Defendants would argue that the administrative burden of providing constitutionally adequate process should tip the balance of the *Mathews* inquiry in their favor,

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[13] *See* Christopher T. Lowenkamp, et al., *The Hidden Costs of Pretrial Detention*, 4 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf, attached as Ex. J to Woods Decl.; Arpit Gupta, Christopher Hansman, & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 21 (2016), http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf, attached as Ex. I to Woods Decl. ("Our results suggest that money bail has a negligible effect or, if anything, increases failures to appear.").

[14] *See* Jones and Gupta, *supra* note 10.

such a position would be contravened by the Supreme Court's outright rejection of invidious wealth-based discrimination against low-income criminal defendants: by comparison, "[t]he State's fiscal interest is . . . irrelevant." *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971).

Because the Defendants' wealth-based detention scheme provides no adequate procedural protections, including counsel and a constitutionally adequate evidentiary standard, this Court should find that Plaintiffs are substantially likely to prevail on their procedural due process claim that Defendants violate due process by jailing them without an individualized hearing with adequate procedural protections.

B. PLAINTIFFS AND THE BAIL CLASS WILL SUFFFER IMMEDIATE AND IRREPARABLE INJURY UNLESS A PRELIMINARY INJUNCTION AND/OR TRO ISSUES.

Without a preliminary injunction and/or TRO, Plaintiffs and the members of the proposed Bail Class will continue to be unconstitutionally jailed. Imprisonment in violation of one's constitutional rights is an irreparable harm. *See Zadvydas*, 533 U.S. at 690; *see also Foucha*, 504 U.S. at 80. Even one additional night in jail is a harm to a person that cannot be later undone. *See, e.g., United States v. Bogle*, 855 F.2d 707, 710–11 (11th Cir. 1988) ("unnecessary deprivation of liberty clearly constitutes irreparable harm"); *Wanatee v. Ault*, 120 F. Supp. 2d 784, 789 (N.D. Iowa 2000) ("[E]very day of unconstitutional incarceration generally constitutes irreparable harm to the person in such custody."); *Lake v. Speziale*, 580 F. Supp. 1318, 1335 (D. Conn. 1984) (issuing preliminary injunction requiring court to inform child support debtors of right to counsel because unlawful incarceration would be irreparable harm); *Cobb v. Green*, 574 F. Supp. 256, 262 (W.D. Mich. 1983) ("There is no adequate remedy at law for a deprivation of one's physical liberty. Thus the Court finds the harm . . . is substantial and irreparable.").

Depriving Plaintiffs and the Bail Class of their fundamental right to pretrial liberty may cause psychological and economic harm and may undermine their abilities to prepare a defense. *See Barker v. Wingo*, 407 U.S. 514, 532 (1972). By way of illustration, Plaintiffs Ogden and Mock may lose all of their belongings, currently in a storage unit, due to their incarceration. The members of the Bail Class, also incarcerated on bail they are unable to pay, are suffering similar hardships as those of named Plaintiffs. Additionally, the Plaintiffs and Bail Class are unable to assist with the defense of their criminal cases because while incarcerated, they cannot secure evidence or witnesses.

For these reasons, the Court should find that Plaintiffs and the Bail Class will suffer irreparable injury without a preliminary injunction and/or TRO. *See ODonnell*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017) (issuing preliminary injunction after finding that plaintiffs had demonstrated irreparable injury in the absence of a preliminary injunction), *affirmed in part, reversed in part*, 882 F.3d 528, 546 (5th Cir. 2018) (affirming the need for preliminary relief but remanding for modification of preliminary injunction order); *Rodriguez*, 155 F. Supp. 3d at 771. (irreparable harm from jailing probationers on secured money bonds for probation violations supported injunction); *Walker v. City of Calhoun, Ga.*, No. 4:15-CV-0170-HLM,2016 WL 361612 at *14 (N.D. Ga. Jan. 28, 2016), *vacated sub nom. Walker v. City of Calhoun, Ga.*, 682 F. App'x 721 (11th Cir. 2017) (finding practice of jailing defendant "simply because he could not afford to post money bail" demonstrated irreparable harm); *Cooper*, 2015 WL 10013003, at *2 ("[I]f a temporary restraining order is not entered, Mr. Cooper will remain confined at the City jail pending his initial appearance as a result of his inability to pay the schedule bond amount, Mr. Cooper has sufficiently demonstrated that this threat of injury is immediate and irreparable.").

C. THE THREATENED INJURY TO PLAINTIFF OUTWEIGHS ANY POTENTIAL HARM A PRELIMINARY INJUNCTION AND/OR TRO MIGHT CAUSE.

The threat of injury to Plaintiffs and the proposed Bail Class considerably outweighs any threat of harm to Defendants.

Without immediate injunctive relief, Plaintiffs and members of both proposed classes will be unconstitutionally jailed, without consideration of less restrictive alternatives or the provision of adequate procedural protections or counsel, because they cannot "forthwith pay" the amount required by the bail schedule or hire a private defense attorney. *See Tate*, 401 U.S. at 398 (holding that the Constitution prohibits the State from jailing a person "solely because the defendant is indigent and cannot" pay a monetary amount).

As the Supreme Court has discussed, pretrial detention:

> [O]ften means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no rehabilitative programs. The time spent in jail is simply dead time. Moreover if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally . . . [the] accused is . . . disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.

Barker v. Wingo, 407 U.S. 514, 532–33 (1972). The empirical support for the many harms of pretrial detention—including increased likelihood of conviction, sentences for longer terms of incarceration, and increased likelihood of failure on eventual pretrial release—have been extensively documented.[15]

Balanced against the severe harms Plaintiffs face from wrongful pretrial detention, Defendants cannot credibly claim that releasing Plaintiffs might result in flight risk or danger to the community. This is because they automatically release other pretrial defendants in the exact

[15] *See* Lowenkamp, and Gupta, *supra* note 11.

same position simply because they can afford their release. If anything, unnecessary pretrial detention actually harms *Defendants*. "Unnecessary pretrial detention burdens states, localities, and taxpayers." *Jones v. The City of Clanton*, No. 215CV34-MHT, 2015 WL 5387219, at *3 (M.D. Ala. Sept. 14, 2015). Nationwide, about 70% of jail inmates are pretrial detainees and the majority of those people are charged with nonviolent offenses.[16] Nationally, local governments spend $13.6 billion per year on pretrial detention.[17]

For all of the above reasons, this Court should find that the harm to the Plaintiff effectuated by this system outweighs any harm to Defendants.

D. AN INJUNCTION AND/OR TRO WOULD SERVE THE PUBLIC INTEREST

Issuing a TRO and/or preliminary injunction would serve the public interest and cause minimal, if any, harm to Defendants. Providing Plaintiffs with a robust individualized release hearing is beneficial to the public interest because it protects individual liberty interests and prevents the enforcement of an unconstitutional practice.

The public interest favors an effective pretrial justice system that promotes the efficient administration of justice and the safety of individuals in the community while also protecting individual arrestees' liberty interests. There is certainly a strong public interest in assuring that arrestees appear for their court dates, and in preventing—where possible—any substantial bodily harm from occurring to individuals in the community at the hands of released arrestees. However, "absent any showing that [a given arrestee] presents a clear risk of flight or threat to the safety [of] the community, there is little doubt that the public interest would be better served

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[16] Peter Wagner and Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, www.prisonpolicy.org, *available at* https://www.prisonpolicy.org/reports/pie2017.html (last visited Mar. 8, 2018).
[17] Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, www.prisonpolicy.org, *available at* https://www.prisonpolicy.org/reports/money.html (last visited Mar. 8, 2018), attached as Ex. N to Woods Decl.

here by protecting the [arrestee's] liberty interest." *Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d 37, 54 (D.D.C. 2002). Defendants have detained Plaintiffs and members of the proposed Bail Class not because they have been deemed to pose a danger to the community or are considered flight risks, but because they are too poor to afford secured money bail. Issuing a TRO with respect to the detention of named Plaintiffs would protect their liberty interest by releasing them from unnecessary detention or, in the absence of release, providing an adequate hearing. See *Cooper v. City of Dothan*, No. 1:15-CV-425-WKW, 2015 WL 10013003, at *2 (M.D. Ala. June 18, 2015) ("The public interest will not be disserved by Mr. Cooper's release from confinement . . .[particularly as the suit] is grounded upon [his] lack of financial resources." Similarly, the issuance of a preliminary injunction with respect to the Bail Class will serve the public interest.

The public interest also strongly favors the prevention of constitutional deprivations. *See Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (Upholding injunction and finding that public interest was served where injunction "will prevent constitutional deprivations."); *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Cento Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) ("Upholding constitutional rights surely serves the public interest.") (internal citation omitted); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.") (internal citation omitted); *Cortez III Serv. Corp. v. Nat'l Aeronautics & Space Admin.*, 950 F. Supp. 357, 363 (D.D.C. 1996) (public has an interest in upholding the Constitution).

III. THE COURT SHOULD NOT REQUIRE PLAINTIFF TO POST A SECURITY

The Court should issue injunctive relief without requiring Plaintiffs to post security. Rule 65(c) permits security to protect the other party from any financial harm caused by a temporary injunction and/or TRO, but under this Circuit's "interpretation of Rule 65(c), the amount of security required by the rule is a matter within the discretion of the trial court," which "may elect to require no security at all." *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981) (quotation and citation omitted).

Plaintiffs are indigent, and their inability to post bond should not prevent them from obtaining a court order to protect their constitutional rights. *See Wayne Chem., Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977) (affirming district court's order of no bond for indigent person). Moreover, Plaintiffs are "engaged in public-interest litigation, an area in which the courts have recognized an exception to the Rule 65 security requirement" because requiring security would deter others from exercising their constitutional rights. *City of Atlanta*, 636 F.2d at 1094. Finally, as explained in detail above, Plaintiffs are likely to succeed on the merits. The outcome of any trial, if necessary, is likely to reaffirm the well-established principle that a person may not be jailed on a monetary amount that she cannot afford. *See Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) ("no security was needed because of the strength of [Plaintiff's] case and the strong public interest involved").

IV. CONCLUSION

Plaintiffs are in jail solely because they cannot purchase their release, in violation of established Supreme Court precedent that is nearly 40 years old. Accordingly, Plaintiffs' motion for temporary and preliminary relief should be granted. Plaintiffs respectfully request that the Court enjoin Defendants Glynn County and Sheriff Jump from jailing Plaintiffs and

members of the proposed Bail Class without an individualized hearing with adequate procedural safeguards, including counsel an inquiry into and findings concerning their ability to pay, and a finding on the record that detention is necessary to achieve public safety and/or court appearance.

Dated: March 9, 2018.

Respectfully submitted,

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Certificate of Service

This motion was filed simultaneously with the complaint in this action. This motion and all accompanying exhibits, along with copies of the summons and complaint, will be served on each Defendant by delivery to Professional Civil process on the same date that the Clerk of Courts issues a summons for that Defendant.

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Certificate of Conference

This motion was filed simultaneously with the complaint in this action. This motion will be opposed, and will confer with Defense counsel as soon as counsel files a notice of appearance. Plaintiffs will notify the Court promptly if Defendants do not oppose this motion.

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