United States Court of Appeals, Eleventh Circuit.

Maurice WALKER, on behalf of himself and others similarly situated, Plaintiff-Appellee,
v.
CITY OF CALHOUN, GA, Defendant-Appellant.

No. 16-10521.
June 21, 2016.

On Appeal from the United States District Court for the Northern District of Georgia, No. 4:15-cv-00170-HLM

Brief for Amici Curiae American Bail Coalition, Georgia Association of Professional Bondsmen, and Georgia Sheriffs' Association in Support of Defendant-Appellant and Reversal of the Preliminary Injunction

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STATEMENT OF INTEREST

American Bail Coalition is a non-profit professional trade association of national bail insurance companies that underwrite criminal bail bonds throughout the United States. The Coalition's primary purpose is to protect the constitutional right to bail by bringing best practices to the system of release from custody pending trial. The Coalition works with local communities, law enforcement, legislators, and other criminal justice stakeholders to use its expertise to develop more effective and efficient criminal justice solutions. Coalition member companies currently have 17,368 bail agents under appointment to write bail bonds in the United States.

The Georgia Association of Professional Bondsmen is a non-profit professional trade association dedicated to encouraging professionalism among bondsmen, providing educational opportunities to its members, and promoting cooperation between the bail bonding profession and the criminal justice system. The Association has over 175 members who represent bonding companies and agents throughout Georgia. By Georgia law, the Association is responsible for approving and conducting all mandatory continuing education programs for all bail bond and bail recovery agents operating in Georgia. Ga. Code §§ 17-6-50.1, 17-6-56.1. The Association thus educates and trains approximately 1,500 bail agents in the State of Georgia.

The Georgia Sheriffs' Association is a non-profit professional organization for Georgia's 159 elected sheriffs. Among other things, the Association provides training for sheriffs and related personnel, and it advocates for crime control measures and laws that promote professionalism and enhanced effectiveness in the Office of the Sheriff throughout Georgia.[1]

The outcome of this case will determine the extent to which bond schedules remain a constitutional way

for communities to set bail for defendants when a judge is not present. Amici believe that bond schedules and bail systems like Appellant's are constitutionally permissible and, when set appropriately, allow for the timely and expedited release of defendants.. . .

SUMMARY OF ARGUMENT

Plaintiff would have this Court effectively abolish monetary bail on the theory that any defendant is entitled to *immediate* release based on an unverified assertion of indigency. Nothing in the Constitution supports that extreme position. Instead, the text and history of our founding charter conclusively confirm that monetary bail is constitutional.

Since long before the Founding, bail has enabled communities to protect themselves and secure a defendant's appearance for trial while allowing the accused to avoid pretrial detention. And monetary bail facilitated by the commercial surety industry is the single most effective and efficient way to achieve those goals. Defendants bailed by a commercial surety are far more likely to appear in court and far less likely, if they fail to appear, to remain at large for extended periods of time. Moreover, by enabling defendants to post bail with only a fraction of the required amount, the commercial bail industry allows individuals of all financial means to leverage their social networks and community ties to obtain pretrial release.

The City of Calhoun's monetary bail system is clearly constitutional. The Constitution prohibits only *excessive* bail. Yet, plaintiff has not claimed that his bail was excessive under the Eighth Amendment. Instead, he attacks the City's bail system--and monetary bail in general--alleging that it discriminates against the indigent. But it does no such thing. Under the City's bail schedule, a defendant's bail amount is initially set to match the crime he is accused of committing. And under the City's Standing Order, within 48 hours, each defendant is afforded an individualized hearing where he has the opportunity to demonstrate that his bail should be reduced or eliminated.

Under the Fourteenth Amendment, distinctions based on wealth must only be rationally related to a legitimate government purpose, and the City's bail system is eminently rational. Its bail schedule efficiently serves the twin goals of bail by enabling defendants to obtain pretrial release (often without having to wait for a hearing) while protecting the community. And the City's Standing Order is consistent with the constitutional deadline for holding a probable cause hearing under the Supreme Court's decision in *County of Riverside v. McLaughlin*. No more rapid timeline is required for assessing a claim of indigency. In fact, the Supreme Court expressly contemplated that probable cause and bail hearings would occur in tandem. It thus simply cannot be that *any* defendant arrested for *any* crime must be *immediately* released based on a bare assertion of indigency, as plaintiff's theory would require. The District Court's injunction should be reversed. . .

B. Modern Commercial Sureties Are the Most Effective and Efficient Means to Balance the Interests of Defendants and Communities.

Consistent with its history, the commercial bail industry provides the single most effective and efficient means of allowing defendants to obtain pretrial release while ensuring the protection of local communities and their resources. While pretrial detention imposes burdens on criminal defendants,

pretrial release poses serious risks to communities. Like the historical surety system, the modern commercial bail industry exists to strike the balance between those interests. By enabling defendants to post bond at a fraction of the required amount, the industry facilitates the pretrial liberty of the accused. And by assuming responsibility for the defendant's appearance at trial, the industry protects the community's interest in prosecuting criminals for their offenses.

1. The costs of abandoning monetary bail

The alternatives to monetary bail--uniform release or uniform detention--are both unpalatable. A system of uniform pretrial detention would promote community safety and secure every defendant's appearance at trial, but impose significant burdens on criminal defendants' liberty interests. While in jail, a criminal defendant has less access to his defense attorney and the materials useful in preparing a defense. Pretrial detention can also reduce a defendant's ability to raise money to hire counsel, particularly where incarceration results in job loss. Detained individuals, moreover, suffer in their employment and familial relationships, leaving lasting ramifications even for defendants who are later acquitted. And uniform pretrial detention would impose a significant cost-burden on local communities, while placing additional stress on overcrowded jail facilities.

But releasing all accused on the mere promise to appear would wreak untold consequences on our communities. Released defendants would have significantly less incentive to appear for their court hearings and might commit additional crimes while released. *See, e.g.*, Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. L. & Econ. 93, 94 (2004). When a defendant fails to appear, local courts must reschedule proceedings, wasting the time of court personnel, judges, lawyers, and testifying witnesses, including victims, and inhibiting the community's ability to enforce its laws. *Id.* Studies conservatively estimate that the cost to the public for each failure to appear is approximately $1,775. *See* Robert G. Morris, Dallas County Criminal Justice Advisory Board, *Pretrial Release Mechanisms in Dallas County, Texas* 17 (Jan. 2013), http://bit.ly/1tttqJD. Most communities, quite logically, have no interest in inviting these harms.

A defendant who fails to appear for a scheduled court hearing also incurs an additional criminal charge and an associated warrant, which imposes more costs on law enforcement who must track down missing defendants, diverting scarce community resources from other law enforcement efforts. *The Fugitive*, at 98. This is no trifling concern. To take an example, Philadelphia releases approximately half of its criminal suspects on personal recognizance and for a long time prohibited commercial bail. As of November 2009, Philadelphia's "count of fugitives (suspects on the run for at least a year) numbered 47,801," and in 2007 and 2008 alone, "19,000 defendants each year--nearly one in three-- failed to appear in court for at least one hearing." *Report of the Advisory Committee on the Criminal Justice System in Philadelphia* 19 (Jan. 2013), http://bit.ly/25Y8c8s.

Outlawing monetary bail or commercial sureties would produce similarly high failure-to-appear rates throughout the country. Law enforcement is not staffed or funded to re-arrest defendants who fail to appear. Thus, without monetary bail and the commercial surety system, the community risks encouraging further criminal behavior and losing any incentive for securing appearance, which adds to the public costs of crime--which already total in the hundreds of billions of dollars, *see* National Institute of Health, *The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation* 1-2 (2011)--and further diminishes the rule of law. Surety bonds are the best way of

preventing these risks to the public because the probability of being recaptured while released on a surety bond is 50% higher than for those released on other types of bonds or on their own recognizance. *The Fugitive*, at 113.

Even *with* the protection of bail, 16% of felony defendants in large urban counties are rearrested before trial based on 1996 statistics compiled by the Justice Department. Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts* 8 (2007) (revised Jan. 2008) (overall pretrial misconduct rates of released defendants ranged from 31% to 35% annually between 1990 and 2004). Without any surety to guarantee appearance, these rates are sure to increase. And innocent Americans bear the brunt of these additional crimes, through additional victimization and the deterioration of communities. *See, e.g.*, Philadelphia Inquirer, *Justice: Delayed, Dismissed, Denied*, originally published in four parts from December 13-16, 2009 (describing how Reginald Strickland, free on bail, "went on a rampage, raping or assaulting four women within days of each other").

Monetary bail systems strike an efficient balance between these competing interests. Pretrial release is preferred only so long as courts can assure communities of their safety and ensure the appearance of defendants in court. Thus, through commercial sureties, criminal defendants are able to gain pretrial release, while maintaining a strong incentive to appear for trial and to avoid additional arrest. The accused thus suffer minimal disruption to their family life and employment and maximize their ability to prepare a defense. And local communities can be confident in defendants' appearance at trial without the significant costs of wide-scale pretrial detention or the significant concerns with an unsecured system of pretrial release.

2. The efficacy of commercial sureties

Any attack on the modern bail system thus bears the heavy burden of proposing a workable alternative. But plaintiff has offered none. And the evidence suggests there is none. The modern commercial surety system has statistically proven to be the most effective means of enabling defendants to obtain pretrial release while ensuring they appear in court. . .

II. The City Of Calhoun's Bail System Is Constitutional.

Plaintiff mounts a frontal constitutional attack on monetary bail. He insists that the City release any defendant who says he cannot post bail--and that it do so *immediately*, without any reasonable time for a hearing. But the Constitution requires neither of those demands. The Supreme Court has repeatedly recognized that monetary bail is a constitutional means of protecting society and securing the accused's appearance at trial. Indeed, the text of the Constitution pre-supposes that bail is permissible by prohibiting only *excessive* bail. The Court has likewise held that, to the extent an initial hearing is required, state and local governments need only act within a reasonable amount of time, not immediately upon arrest. And the City's bail schedule and Standing Order fall well within the bounds of reason.

A. Monetary Bail Is Constitutional.

At its root, plaintiff's suit is an assault on the traditional American system of secured monetary bail. Plaintiff demands that anyone arrested in Calhoun who merely states that he cannot afford bail must be

released on his own recognizance. Indeed, the practical effect of the District Court's injunction is to require precisely that system of mandatory unsecured bail. According to plaintiff, an individualized indigency determination within 48 hours is not enough. And this is hardly an isolated case: Plaintiff's attorneys have sought similar injunctions across the country, while touting their goal of "ending the American money bail system." Equal Justice Under Law, Litigation: Ending the American Money Bail System, http://bit.ly/1TXOgJv (last visited June 21, 2016).

But the Constitution clearly permits communities to adopt monetary bail procedures aimed at securing appearance at trial and protecting society from dangerous individuals. As a textual matter, the Eighth Amendment pre-supposes the permissibility of monetary bail. If plaintiff's theory were correct, the Eighth Amendment would read: "no bail shall be required." But instead it provides only that "*[e]xcessive* bail shall not be required." U.S. Const., amend. VIII (emphasis added). And the American criminal justice system has long relied on secured bail to balance the interest of pretrial liberty with the interest in protecting the community.

The Supreme Court's decisions underscore this fact. In *Stack v. Boyle*, the Court emphasized that "[t]he right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." 342 U.S. 1, 4, 72 S. Ct. 1, 3 (1951) (citing *Ex parte Milburn*, 34 U.S. (9 Pet.) at 710); *accord Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978). "[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture" the Court explained, "serves as additional assurance of the presence of an accused." *Stack*, 342 U.S. at 5, 72 S. Ct. at 3. Thus, far from prohibiting monetary bail, the Constitution simply requires that it not be excessive. And that question turns primarily "on standards relevant to the purpose of assuring the presence of th [e] defendant," not on whether the defendant is capable of posting bail at the moment of arrest. *Id.*

Indeed, the mine-run of bail cases take the constitutionality of monetary bail as given. In *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095 (1987), for instance, the Court rejected a facial attack on the federal Bail Reform Act, holding that neither the Due Process Clause nor the Eighth Amendment prohibited the government from detaining especially dangerous defendants, *without bail*, in order to protect the community from danger. The Court's analysis, and the parties' arguments, never questioned that pretrial detention and monetary bail are constitutional, and that "a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants." 481 U.S. at 753, 107 S. Ct. at 2104. The only dispute was whether the government may *also* set bail or insist on pretrial detention based on its desire to protect the community from especially dangerous individuals. As to that question, the Court found there to be no constitutional problem. . .

Thus, as with any other system of monetary bail, bail schedules serve the same well-founded interests in enabling defendants to obtain pretrial release--in many cases even more quickly than in traditional systems--while protecting the community and securing the defendants' later appearance for prosecution and sentencing. That the method begins with a presumption that can be adjusted to meet the needs of unique cases renders it logical and efficient, not unconstitutional.