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An Absolute Deprivation of Liberty: Why Indigents' Wealth-based Discrimination Claims Brought Under the Equal Protection Clause Should Be Subject to Intermediate Scrutiny

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COMMENT

AN ABSOLUTE DEPRIVATION OF LIBERTY: WHY INDIGENTS' WEALTH-BASED DISCRIMINATION CLAIMS BROUGHT UNDER THE EQUAL PROTECTION CLAUSE SHOULD BE SUBJECT TO INTERMEDIATE SCRUTINY

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INTRODUCTION

Across the United States, roughly 740,000 people are held in local jails, two-thirds of whom have not been convicted of a crime.[1] Those two-thirds represent what is known as pretrial detention,[2] a common practice and direct result of monetary bail used by the United States Criminal Justice system.[3] Pretrial detention and crime rates share an inverse relationship: though crime rates are at historic lows, pretrial detention has expanded.[4] Between 1970 and 2015, the number of people held in pretrial detention increased from 82,922 to 441,790, a 433% increase.[5]

The purposes of pretrial detention are to ensure both public safety and court appearances by the accused individual.[6] But in practice, pretrial detention especially for misdemeanor crimes is often a result of a person's financial inability to pay their bail, without regard for either of its intended purposes.[7] This means that pretrial detention disproportionately affects already marginalized communities—poor people, women, and people of color.[8] The disproportionate effect of pretrial detention on poor people raises Equal Protection claims, begging the question of whether pretrial detention violates the Equal Protection Clause of the

[1] Leon Digard, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,* VERA INSTITUTE OF JUSTICE, at 1 (April 2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf.

[2] "Pretrial detention refers to detaining of an accused person in a criminal case before the trial has taken place, either because of a failure to post bail or due to denial of release under a pre-trial detention statute." *Pretrial Detention,* U.S. LEGAL, https://definitions.uslegal.com/p/pre-trial-detention (last visited Mar. 3, 2020).

[3] Digard, *supra* note 1, at 2.

[4] *Id.* at 10.

[5] *Id.* at 1.

[6] P.R. Lockhart, *Thousands of Americans are jailed before trial. A new report shows the lasting impact.,* VOX (May 7, 2019), https://www.vox.com/2019/5/7/18527237/pretrial-detention-jail-bail-reform-vera-institute-report.

[7] This Comment, when not referring to a specific person, will use the inclusive "their" plural possessive pronoun, instead of singular gendered pronouns, such as "his" or "her."

[8] Digard, *supra* note 1, at 2.

Fourteenth Amendment because it infringes on the pretrial liberty of the indigent, but never infringes on the liberty of their similarly-situated wealthy counterparts.

Criminal justice reform advocates argue that practical solutions exist.[9] Widely-suggested alternatives to pretrial detention include meaningful bail hearings, court date reminders, the use of unsecured bonds, and pretrial supervision.[10] Other proposed reforms include modest solutions, such as simply not arresting mentally-ill persons, replacing arrests with citations for certain crimes, accelerating the pace of court processes, and placing calls to released people to remind them of their court dates.[11]

Though crime rates have steadily declined, pretrial detention is still being expanded—but only for those who cannot pay.[12] The detriment of the trend toward expanding pretrial detention is that it erodes equal protection for indigents by categorically refusing to grant them the same protections afforded to their similarly-situated wealthy counterparts. Pretrial detention is also incredibly costly compared with alternative measures: the average daily cost of pretrial detention is $74.61, while pretrial supervision averages $7.17.[13] This economic burden is compounded by the fact that pretrial incarceration often breeds recidivism, creating a cycle of crime.[14]

The Supreme Court has long held that detention based on indigency is unconstitutional because it denies indigents equal protection under the law while reserving legal protection for the indigent's wealthy counterpart.[15] In reviewing these claims, the Supreme Court has employed heightened scrutiny.[16]

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[9] *Id.* at 8.

[10] *Id.*

[11] *How to Fix Pretrial* Justice, PRETRIAL JUSTICE INSTITUTE (2018), https://www.pretrial.org/get-involved/learn-more/how-to-fix-pretrial-justice/#replace-money-bail.

[12] Digard, *supra* note 1, at 1.

[13] *How to Fix Pretrial Justice*, *supra* note 11, at 3.

[14] *See* ODonnell v. Goodhart 900 F.3d 220, 232 (5th Cir. 2018) (Graves, Jr., J., dissenting) (citing ODonnell v. Harris Cty., 251 F.Supp.3d 1052, 1121 (S.D. Tex. 2017)) ("[S]tudies of bail systems in the United States have concluded that even brief pretrial detention because of inability to pay a financial condition of release increases the likelihood that misdemeanor defendants will commit future crimes . . . one study found that for misdemeanor defendants, even two to three days of pretrial detention correlated at statistically significant levels with recidivism").

[15] *See, e.g.,* Williams v. Illinois*,* 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971); Bearden v. Georgia, 461 U.S. 660 (1983).

[16] *See, e.g.,* Williams v. Illinois, 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971); Bearden v. Georgia, 461 U.S. 660 (1983); *see generally* Craig v. Boren, 429 U.S. 190, 197 (1976). Under intermediate scrutiny, statutory classifications are constitutional if they serve important governmental objectives and are substantially related to the achievement of those objectives. "Heightened scrutiny" and "intermediate scrutiny" are often used interchangeably; this Comment will so use them.

In 2018, the Fifth Circuit in *ODonnell v. Harris County* followed Supreme Court precedent and employed heightened scrutiny to a claim concerning detention based on indigency.[17] The *ODonnell* court held that the challenged government scheme violated the indigent defendant's equal protection rights and, as such, did not survive heightened scrutiny.[18] At the time of the *ODonnell* opinion, the Fifth Circuit was the only circuit that had decided this issue. That is, until the Eleventh Circuit's opinion in *Walker v. City of Calhoun*.[19] The Eleventh Circuit's decision in *Walker* created a split in the circuit courts by deciding an analogous case the other way.[20] In upholding the City of Calhoun's bail policy, the Eleventh Circuit employed rational basis review[21] instead of heightened strict scrutiny.[22] The Eleventh Circuit held that this was the right standard of review because the petitioner did not suffer an "absolute deprivation" of pretrial release and therefore was not entitled to any form of heightened scrutiny.[23] In April 2019, the Supreme Court denied plaintiff Maurice Walker's petition for writ of certiorari without a statement as to the reason for denial, and solidified the Federal circuit split on the issue.[24]

This Comment argues that wealth-based discrimination claims concerning pretrial detention of indigents should be analyzed under an Equal Protection framework and subjected to intermediate scrutiny. In order to provide an overview of the Supreme Court precedent established for these types of claims, Part I of this Comment will discuss the relevant and historic Supreme Court cases which have analyzed wealth-based incarceration claims in the United States. To further establish how Federal Courts have treated wealth-based incarceration Equal Protection claims, Part II will discuss the Fifth Circuit's relevant opinions. Part III outlines the court's decision in *Walker*, discussing how the Eleventh Circuit panel arrived at its holding and consequently created a split among the federal circuit courts that is yet to be resolved.

This Comment further argues that the Eleventh Circuit's decision in *Walker* is erroneous. Part IV will outline why the Eleventh Circuit should have applied intermediate scrutiny to Walker's wealth-based dis-

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[17] ODonnell v. Harris Cty., 892 F.3d 147, 162 (5th Cir. 2018).

[18] *Id.*

[19] Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018).

[20] *Compare Walker*, 901 F.3d 1245, *with ODonnell*, 892 F.3d 147.

[21] Under rational basis review, a law is constitutional if it is rationally related to a legitimate government interest. *See generally* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

[22] *Walker*, 901 F.3d at 1261-62.

[23] *Id.*

[24] *Walker v. City of Calhoun, Georgia*, SCOTUSBLOG (Apr. 1, 2019), https://www.scotusblog.com/case-files/cases/walker-v-city-of-calhoun-georgia/.

crimination claim, and highlights the fallacious logic the court employed in reaching its holding. Additionally, this section will also argue that *Walker* sets a harmful precedent for indigent defendants. Wealth-based discrimination claims concerning an indigent's pretrial liberty are categorically different from other wealth-based discrimination claims which don't concern a liberty right. As such, these claims should be analyzed with a heightened level of scrutiny beyond mere rational basis review.

I. THE UNITED STATES SUPREME COURT HAS ESTABLISHED THAT INDIVIDUALS HAVE A RIGHT AGAINST WEALTH-BASED INCARCERATION

More than fifty years ago, the United States Supreme Court established that individuals have a right to be free from wealth-based discrimination in the context of incarceration.[25] Under the *Williams-Tate-Bearden* Rule, individuals cannot be subjected to imprisonment solely because of their indigency.

In *Williams v. Illinois*, the case from which the rule derives, the Supreme Court held that, under the Equal Protection Clause, a state may not subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because of their indigency.[26] Williams was given the maximum sentence for petty theft under Illinois law: one year's imprisonment and a $500 fine, plus $5 in court costs.[27] The judgment, as permitted by statute, provided that if, when the one-year sentence expired and he did not pay the monetary obligations, he would remain in jail to work them off at the rate of $5 a day.[28] The Court concluded that when the aggregate imprisonment exceeded the maximum cost fixed by statute, and results directly from involuntary nonpayment of a fine or court costs, impermissible discrimination rests on the inability to pay.[29] Because petitioner was imprisoned beyond the one year maximum due solely to his inability to pay the fines and court costs, the court violated his right to Equal Protection under the Fourteenth Amendment.[30]

One year after *Williams,* in *Tate v. Short*, the Supreme Court held that it is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it, but to convert that same fine to

[25] *Williams*, 399 U.S. at 240-241.
[26] *Id.* at 239-245.
[27] *Id.*
[28] *Id.* at 236.
[29] *Id.* at 240-241.
[30] *Id.* at 241.

imprisonment for those who are unable to pay it.[31] Tate, an indigent, was convicted of traffic offenses and fined a total of $425.[32] Texas law provided only fines for such offenses, but it required that persons unable to pay must be incarcerated for sufficient time to satisfy their fines, at the rate of $5 per day.[33] In Tate's case, this meant an 85-day term.[34] Despite minor factual differences between the two cases, the Court extended *Williams*, stating that, "[a]lthough the instant case involves offenses punishable by fines only, petitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency."[35] The court held that Tate's continued imprisonment based on his inability to pay fines was a denial of equal protection of the law.[36]

Next, in *Bearden v. Georgia*, the Supreme Court held that the trial court erred in automatically revoking Bearden's probation and sentencing him to prison for his inability to pay fines, without determining whether the petitioner had made bona fide efforts to pay and whether alternative forms of punishment existed.[37] The Court relied on *Williams* and *Tate* in its analysis.[38]

Petitioner Bearden had a ninth-grade education and an inability to read.[39] As a result, he could not pay fines for his felony burglary and theft convictions because he could not find a job.[40] The Court found that if the petitioner could not pay despite sufficient efforts to do so, the trial court should have considered measures other than imprisonment.[41] The Court held that Bearden could only be imprisoned if alternative measures were not adequate to meet the state's interests in punishment and deterrence.[42] The majority explained that due process and Equal Protection principles converge in an analysis of wealth-based incarceration claims, but the part of the claim that asks whether the state has denied a group of

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[31] *Tate*, 401 U.S. 395.

[32] *Id.* at 397.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 397-98.

[36] *Id.* at 399.

[37] *Bearden*, 461 U.S. at 668-69.

[38] *Id.* at 674.

[39] *Id.* at 662.

[40] *Id.* at 663.

[41] *Id.* at 672.

[42] *Id.*; *see generally* Deterrence, 1 SUBST. CRIM. L. § 1.5(a)(4) (3d ed.) ("punishment and deterrence" being longstanding central tenets of criminal law in the United States). At the core, deterrence is a theory of punishment. As the criminal code explains, "the sufferings of the criminal for the crime he has committed are supposed to deter others from committing future crimes, lest they suffer the same unfortunate fate."

individuals a substantial benefit available to another group is to be reviewed under the Equal Protection Clause.[43]

II. THE FIFTH CIRCUIT HAS REVIEWED WEALTH-BASED INCARCERATION CLAIMS UNDER AN EQUAL PROTECTION ANALYSIS AND APPLIED INTERMEDIATE SCRUTINY

A. *PUGH V. RAINWATER*

In *Pugh v. Rainwater*, the Fifth Circuit held that the government can impose wealth-based incarceration upon a showing that the practice is necessary to assure a defendant's presence at trial.[44] The Fifth Circuit noted that it accepts "the principle that imprisonment solely because of indigent status," that is, without regard for the defendant's appearance at trial, "is invidious discrimination and not constitutionally permissible."[45] Though the court did not find the challenged government scheme unconstitutional, the court noted that in the case of the indigent they have "no doubt. . .that pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint."[46]

Notably, the *Rainwater* court did not explicitly state what level of scrutiny they found appropriate in analyzing the constitutionality of the government scheme in question.[47] Rather, in describing the appropriate analysis, the court *implied* heightened scrutiny is appropriate.[48] The court stated that absent meaningful consideration of other possible alternatives to paying bail, incarceration of indigent defendants infringes on equal protection requirements.[49]

B. *ODONNELL V. HARRIS COUNTY*

More than thirty years later, the Fifth Circuit again reviewed an Equal Protection claim brought by an accused indigent under intermedi-

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[43] *Id.* at 665.

[44] Pugh v. Rainwater, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc).

[45] *Id.* at 1057 (5th Cir. 1978).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*; *see also* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980) (holding that the consideration of "alternative" measures is highly relevant and often dispositive to intermediate scrutiny); Orr v. Orr, 440 U.S. 268, 281 (1979). *Contra* Vance v. Bradley, 440 U.S. 93, 103 n.20 (1979) (holding that under rational basis review, it is "irrelevant to the equal protection analysis . . . that other alternatives might achieve approximately the same result"); Heller v. Doe, 509 U.S. 312, 330 (1993) (holding that under rational basis review, courts "'must disregard' the existence of alternative methods of furthering the objective").

ate scrutiny.[50] In *ODonnell v. Harris County*, the Fifth Circuit applied heightened scrutiny under the Equal Protection Clause to a bail policy that effected wealth-based incarceration of misdemeanor arrestees.[51]

Discussing the appropriate level of scrutiny, the *ODonnell* court acknowledged that, ordinarily, prisoners and indigents do not constitute a suspect class, and therefore would not ordinarily receive a heightened scrutiny analysis.[52] However, the court noted that the Supreme Court's decisions in *Williams* and *Tate* provided that heightened scrutiny is required when a criminal defendant is detained because of their indigence.[53]

Further, the court relied on the Supreme Court's instruction in *San Antonio Independent School District v. Rodriguez*.[54] There, the Court noted that "indigents receive a heightened scrutiny where two conditions are met: (1) because of their impecunity they were completely unable to pay for some desired benefit, and (2) as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[55]

The facts of ODonnell's case met the exception for heightened scrutiny because the two conditions laid out in *Rodriguez* were both satisfied.[56] In Harris County, indigent arrestees were unable to pay for the desired benefit of secured bail.[57] As a consequence, they sustained an absolute deprivation of that benefit."[58] The court found that the bail policy subjected indigent arrestees to an absolute deprivation of their most basic liberty—freedom from incarceration.[59] The court elaborated, "[m]oreover, this case presents the same basic injustice: poor arrestees in Harris County are incarcerated, where similarly-situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond."[60] The Fifth Circuit Court concluded that Harris County's bail policy violated the Equal Protection Clause.[61] Thus, the policy was uncon-

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[50] *ODonnell*, 892 F.3d 147.

[51] *Id.* at 163.

[52] *Id.* at 16; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (describing that a class is considered *suspect* "when the class is [*sic*] saddled with disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

[53] *Id.* at 163 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20 (1973)) (internal quotation marks omitted).

[54] *Id.* at 161.

[55] *Id.* at 162.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 163.

[60] *Id.* at 162.

[61] *Id.* at 163.

stitutional because it detained defendants solely based on their inability to pay bail, resulting in their detention pretrial.[62]

III. THE ELEVENTH CIRCUIT IN *WALKER V. CITY OF CALHOUN* SPLIT FROM THE FIFTH CIRCUIT PRECEDENT THAT WEALTH-BASED INCARCERATION CLAIMS ARE SUBJECT TO INTERMEDIATE SCRUTINY

A. FACTS

On September 3, 2015, Maurice Walker was arrested in the City of Calhoun, Georgia for being a pedestrian under the influence of alcohol.[63] In Georgia, this type of violation carries no possible jail sentence.[64] Despite the statutory punishment of a fine not to exceed $500, Walker was jailed and told by a police officer that he would not be released unless he paid the $160 cash bond.[65] This bond amount was calculated by Calhoun's bail schedule at the time, which allowed pretrial release for arrestees who could pay the fine they would be ordered to pay if found guilty, plus applicable fees.[66] However, neither Walker nor his family had enough money to post the bond.[67] Walker was a fifty-four-year-old unemployed man with a mental health disability.[68] His income was limited to $530 a month from Social Security disability payments.[69] While in jail, Walker was not given his necessary medication and was confined to a single-person cell for all but one hour each day.[70]

Five days after his arrest, while still in jail, Walker filed a suit alleging that the City of Calhoun was violating the Equal Protection Clause of the Fourteenth Amendment by "jailing the poor because they cannot pay a small amount of money."[71] The day after Walker filed the suit, he was released on a personal-recognizance bond[72] in agreement with the City's

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[62] *Id.*

[63] *Walker*, 901 F.3d at 1251.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 1252.

[67] *Id.* at 1251.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 1251-52.

[72] In a personal recognizance bond, an accused person is released without paying a monetary bond. Rather, the accused person must sign a written promise to appear at their scheduled court appearance. Personal recognizance bonds are also subject to other obligations a judge can impose, such as requiring the accused person to refrain from certain activities or to meet with a probation officer. If the accused fails to adhere to these requirements, then they can be arrested. *Release on*

counsel.[73] In response to Walker's suit, the Municipal Court of the City of Calhoun altered its bail policy by issuing a Standing Bail Order.[74]

The main difference between this new bail policy and the previous was the limit on the amount of time an indigent could be detained pretrial.[75] While the previous bail policy subjected Walker to five days in jail, the new policy would subject him and other indigents alike to a maximum of forty-eight hours.[76] "'For those individuals who do not obtain release pursuant to the secured bail schedule,' the Standing Bail Order provides that they 'shall. . .be brought before the [Municipal] Court' within 48 hours from their arrest. . . ."[77] The municipal court would then determine whether accused individuals are unable to post secured bail because they are indigent.[78] If the court finds that the accused is indigent, the accused would be subject to release on recognizance without making a secured bail payment.[79] If no hearing was held within forty-eight hours, the accused would be released on a recognizance bond.[80]

The district court found the city's new bail policy to be unconstitutional and issued a preliminary injunction.[81] Specifically, the district court found that the Standing Bail Order violated the Constitution because it permitted individuals with financial resources to post a bond affording them immediate release, while individuals who do not have those resources must wait forty-eight hours for a hearing.[82] To replace the city's policy, the district court prescribed an affidavit-based process for making a determination of indigency for pretrial arrestees.[83] The process provided that if an arrestee indicates an inability to pay bail, then "arresting officers, jail personnel, or Municipal Court staff must, as soon as practicable after booking verify the arrestee's inability to pay. . . by means of an affidavit sworn before an authorized official."[84] Addition-

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Own Recognizance, JUSTIA, https://www.justia.com/criminal/bail-bonds/release-on-own-recognizance/ (last updated May 2019).

[73] *Walker*, 901 F.3d at 1252.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* at 1253 (quoting Walker v. City of Calhoun (*Walker III*), No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *2-3 (N.D. Ga. June 16, 2017)).

[82] *Id.* (quoting *Walker III*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *2-3 (N.D. Ga. June 16, 2017)).

[83] *Id.* (quoting *Walker III*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *4 (N.D. Ga. June 16, 2017)).

[84] *Id.* (quoting *Walker III*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *4 (N.D. Ga. June 16, 2017)).

ally, an official must evaluate the affidavit within twenty-four hours after arrest.[85] Those determined to be indigent would be subject to release on recognizance without having to make secured bail.[86] The City of Calhoun appealed this injunction order with the Eleventh Circuit Court of Appeals.[87]

B. MAJORITY OPINION

The Eleventh Circuit Court of Appeals established that Walker's claim fit into the *Williams-Tate-Bearden* and *Rainwater* line of cases.[88] However, they disagreed with the district court that heightened scrutiny applied and that a traditional Equal Protection analysis was required.[89] Additionally, it disagreed with the district court's contention that wealth-based incarceration is an exception to the application of rational basis review within wealth-based classifications.[90] The majority read the Bearden line of cases to say that claims concerning pretrial bail release should be evaluated under a traditional due process rubric.[91] The majority reasoned that a due process analysis made sense in Walker's case because the relief he sought was "essentially procedural: a prompt process by which to prove his indigency and to gain release."[92] The fundamental requirement in a due process analysis of wealth-based-discrimination cases criminal in nature is "the opportunity to be heard at a meaningful time and in a meaningful manner."[93] A due process analysis is flexible and considers the governmental and private interests that are affected.[94] The Eleventh Circuit Court concluded that the district court should have applied this type of analysis in deciding whether the City of Calhoun's bail policy violated due process guarantees.[95]

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[85] *Id.* (quoting *Walker III*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *5 (N.D. Ga. June 16, 2017)).

[86] *Id.* (quoting *Walker III*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *5 (N.D. Ga. June 16, 2017)).

[87] *Id.* at 1254.

[88] *Id.* at 1265.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* (quoting Matthews v. Eldridge, 424 U.S. 319, 333 (1976)).

[94] *Id.* (quoting *Matthews*, 424 U.S. at 334); *see also* U.S. v. Juvenile Male 670 F.3d 999, 1013 (9th Cir. 2012) (explaining that a procedural due process claim involves two steps: "[T]he first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient").

[95] *Id.*

The disagreement as to the appropriate standard of review was rooted in part by the Eleventh Circuit and the district court's reading of *Rainwater*, respectively.[96] There, the Eleventh Circuit majority stated that the *Rainwater* court "approved the utilization of a master bond schedule without applying any form of heightened scrutiny."[97] The majority further acknowledged that *Rainwater* explained that a bond schedule provided for speedy and convenient pretrial release for those who could pay.[98] The court inferred from this that, "if the bond schedule provided 'speedy' release to those who could meet its requirements, it necessarily provided less speedy release to those who could not."[99] The resulting logic was that *Rainwater* approved the use of a bond schedule that treated arrestees differently based on their ability to pay. The court further noted that the Fifth Circuit in *Rainwater* upheld a bail schedule because it provided a bail hearing for indigent defendants who could not pay the bond "at which the judge could consider all the relevant factors when deciding the conditions of release."[100] This bail hearing was a constitutionally permissible alternative option.[101]

The Eleventh Circuit majority then looked to *San Antonio Independent School District v. Rodriguez* to explain how wealth-based discrimination claims have been analyzed under the Equal Protection Clause.[102] The panel acknowledged that in *Rodriguez*, the Supreme Court held that wealth-based discrimination was impermissible only if it imposes an absolute deprivation of a benefit.[103] The majority read *Rodriguez* to say that the "[m]ere diminishment of a benefit was insufficient to make out an [E]qual [P]rotection claim."[104]Applying this standard to Walker's case, the court held that forty-eight hours of incarceration is not an *absolute* deprivation of the benefit of pretrial release because indigents must merely wait some amount of time to receive the same benefit afforded to the more affluent.[105] The court opined that if they held in favor of Walker, the indigent here would receive preferential treatment by being released from jail without having to pay any money or otherwise provide any security.[106]

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[96] *Id.*

[97] *Id.*

[98] *Id.* at 1260.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 1261.

[103] *Id.* (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)).

[104] *Id.* (quoting *San Antonio Indep. Sch. Dist*., 411 U.S. at 24) ("the Equal Protection Clause does not require absolute equality or precisely equal advantages").

[105] *Walker*, 901 F.3d at 1261.

[106] *Id.* at 1262.

The court next considered Walker's contention that this type of wealth-based discrimination claim requires a heightened scrutiny analysis.[107] The court disagreed, stating that this type of scheme does not trigger intermediate scrutiny under Equal Protection jurisprudence.[108] If Walker was correct in applying heightened scrutiny as courts typically do in cases of race, sex, or religion, then the courts would be flooded with litigation.[109] As a result, the court predicted "innumerable government programs" would be in "grave constitutional danger" by this logic:[110]

> If the Postal Service wanted to continue to deny express service to those unwilling or unable to pay a fee, it would have to justify that decision under the same standard it would have to meet to justify providing express service only to white patrons. The University of Georgia would be unable to condition matriculation on ability to pay tuition unless it could meet the same constitutional standard that would allow it to deny admission to Catholics. In Walker's preferred constitutional world, taxes that are independent of income, such as property taxes or sales taxes, would be the target of perpetual litigation. All that is to say, we do not believe that *Bearden* or *Rainwater* announced such radical results with so little fanfare, and we therefore reject Walker's equal protection theory. The district court was wrong to apply heightened scrutiny under the Equal Protection Clause.[111]

The court turned to the forty-eight-hour holding time which the Standing Bail Order required of the accused before their indigency determination hearing was held.[112] The Eleventh Circuit Court needed to determine what constituted the constitutionally required prompt probable cause hearing for those arrested without a warrant.[113] They relied on the Supreme Court's decision in *County of Riverside v. McLaughlin* regarding the meaning of *prompt*.[114] Thus, the Eleventh Circuit concluded that "indigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest."[115] Accordingly, the court ruled that the Standing Bail Order was constitutional.[116]

In a footnote, the Eleventh Circuit addressed the Fifth Circuit's *ODonnell* opinion, asserting that its views do not break with Fifth Circuit

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[107] *Id.*
[108] *See id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 1265.
[113] *Id.* at 1266.
[114] *Id.* (citing County of Riverside v. McLaughlin, 500 U.S. 44, 55 (1991)).
[115] *Id.* at 1266.
[116] *Id.* at 1269.

precedent because facts between the two respective cases were dissimilar.[117] The court acknowledged that *ODonnell* applied heightened scrutiny under the Equal Protection Clause after concluding that there, the plaintiff suffered an absolute deprivation of his most basic liberty interests.[118] The court maintained, however, that the Fifth Circuit in *ODonnell* ruled this way because the challenged policy there did not provide arrestees *any* opportunity to prove indigency, unlike the City of Calhoun's forty-eight-hour policy.[119]

C. DISSENTING OPINION

Judge Beverly B. Martin disagreed with the majority's decision to not apply heightened scrutiny.[120] Her dissent was based on a reading that the Supreme Court opinions in *Williams*, *Tate*, and *Bearden* and the Fifth Circuit's *Rainwater* supported the district court's application of heightened scrutiny under the Equal Protection Clause to the city's Standing Bail Order.[121]

The dissent specifically disagreed with the majority's reliance on *Rodriguez* to support a finding that heightened scrutiny did not apply.[122] In Judge Martin's reading of *Rodriguez*, Walker was entitled to make an Equal Protection claim warranting heightened scrutiny because his case satisfied both parts of the test established in *Rodriguez*: (1) whether the challenged scheme uses indigency as a classification because it treats persons totally unable to pay differently, and (2) whether the class has suffered an "absolute deprivation" of a benefit.[123] The dissent asserted that the majority never addressed part one of the test in *Rodriguez*: that is, whether the Standing Bail Order discriminates against indigents.[124]

Judge Martin contended that the Standing Bail Order clearly used indigency as a classification because when two people are arrested for the same crime under identical circumstances, the Standing Bail Order allows the person with money to pay it and walk away while the indigent, unable to pay, goes to jail.[125] She then addressed the majority's claim that reviewing wealth-based discrimination with heightened scrutiny would extend to various kinds of wealth-based interactions.[126] She

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[117] *Id.* at 1266 n.12.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 1273 (Martin, J., dissenting).
[121] *Id*. (Martin, J., dissenting).
[122] *Id.* (Martin, J., dissenting).
[123] *Id.* (Martin, J., dissenting).
[124] *Id.* (Martin, J., dissenting).
[125] *Id*. (Martin, J., dissenting).
[126] *Id.* at 1274 (Martin, J., dissenting).

argued that the majority's claim would never be realized according to the Supreme Court's opinion in *M.L.B. v. S.L.J*: there, the Court distinguished lawsuits seeking to alleviate the consequences of differences in economic status as different from those which vindicate "a person's right to participate in political processes or to have access to the courts in criminal cases."[127] *M.L.B.* precludes wealth-based discrimination claims that do not concern basic fundamental rights which implicate Equal Protection under the law.

Addressing the second prong of the test laid out in *Rodriguez*, Judge Martin called the majority's characterization that forty-eight hours of detention is a "diminishment" of a benefit, rather than an absolute deprivation of a benefit, simply "word play."[128] Forty-eight hours in jail is not a diminishment but *surely* a deprivation of liberty.[129] This characterization, Judge Martin asserts, aligns with *Rodriguez* because there the Court found an "absolute deprivation" of liberty where the challenged state laws subjected indigents to incarceration simply because of their inability to pay their fines.[130] Further, *Rainwater* also described pretrial confinement as a "deprivation of liberty."[131]

Additionally, "[n]either *Rodriguez* nor *Rainwater* qualified how long the confinement had to last before it became a deprivation of liberty."[132] For further support, the dissent cited the recent Supreme Court case *Rosales-Mireles v. United States*.[133] In *Rosales*, the Supreme Court reaffirmed that "any amount of actual jail time is significant, and ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration."[134] The second prong of the *Rodriguez* test, Judge Martin maintained, is satisfied in Walker's favor, because forty-eight hours in jail is an absolute deprivation of liberty.[135]

Next addressing the majority's claim that *ODonnell* is factually distinct from *Walker*, the dissent maintained that the only difference between the two cases is the length of detainment in each respective policy.

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[127] *Id.* (Martin, J., dissenting).

[128] *Id.* (Martin, J., dissenting).

[129] *Id.* (Martin, J., dissenting).

[130] *Id.* (Martin, J., dissenting).

[131] *Id.* (Martin, J., dissenting).

[132] *Id.* at 1275 (Martin, J., dissenting) (citing *San Antonio Indep. Sch. Dist*., 411 U.S. at 20-22 and *Pugh*, 572 F.2d 1053 at 1056).

[133] *Id.* at 1275 (Martin, J., dissenting) (quoting Rosales-Mireles v. United States, 138 S. Ct. 1897, 1907 (2018)) (internal quotation marks omitted).

[134] *Rosales-Mirales*, 138 S. Ct. at 1907 (2018) (quoting Glover v. United States, 531 U.S. 198, 203 (2001) and United States v. Jenkins, 854 F.3d 181, 192 (2d Cir. 2017)) (internal quotation marks omitted).

[135] *Walker*, 901 F.3d at 1274-1275 (Martin, J., dissenting).

In *ODonnell*, the challenged system allowed indigents to be detained longer than the forty-eight hours that the challenged system in *Walker* allowed.[136] The factual difference here in length of detention between the two systems is not a *meaningful* one.[137] Being jailed for forty-eight hours is more than a mere inconvenience, contrary to the majority's claim, because it has "very real consequences for detained indigents."[138] Judge Martin cited the fact that indigents, as a result of detainment, can "lose their homes and transportation. Their family connections can be disrupted. And all this is to say nothing of the emotional and psychological toll a prison stay can have on an indigent person and her family members."[139] These consequences occur and can be just as dire for a short jail sentence, such as two days, as for a longer jail sentence.[140]

Judge Martin rejected the majority's claim that treating wealth-based discrimination the same as race, sex, or religion by applying heightened scrutiny would flood the courts.[141] The reason is because the Supreme Court has "already placed limits on bringing equal protection challenges to wealth-based classifications."[142] These limits consist of the test set out in *Rodriguez* as well as the *M.L.B.* Court's statement that fee requirements are examined only for rationality except when they implicate basic rights to participate in political processes and access to judicial processes in criminal cases.[143] Because of these Supreme Court limitations, Mr. Walker's claim falls into a narrow exception that does not implicate tuition fees or express postal service.[144] The dissent claims that here, the court simply needed to make explicit what was already made implicit by the court in *Rainwater*, "namely that pretrial detention based solely on indigency is subject to heightened scrutiny."[145]

The dissent offers, however, that even if the courts were flooded and the workload increased, the importance of resolving these types of cases outweighs the burden. "[T]he constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience

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[136] *Id.* at 1275 (Martin, J., dissenting) (citing *ODonnell*, 892 F.3d 147 at 154).

[137] *Id.* (Martin, J., dissenting).

[138] *Id.* at 1275-1276 (Martin, J., dissenting).

[139] *Id.* at 1276 (Martin, J., dissenting) (citing Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html).

[140] *Id.* (Martin, J., dissenting) (citing Juleyka Lantigua-Williams, *Why Poor, Low-Level Offenders Often Plead to Worse Crimes*, THE ATLANTIC (July 24, 2016)), https://www.theatlantic.com/politics/archive/2016/07/why-pretrial-jail-can-mean-pleading-to-worse-crimes/491975/.

[141] *Id.* at 1277 (Martin, J., dissenting).

[142] *Id.* (Martin, J., dissenting).

[143] *Id.* (Martin, J., dissenting).

[144] *Id.* (Martin, J., dissenting).

[145] *Id.* at 1278 (Martin, J., dissenting).

of the status quo."[146] Because *Rodriguez* required that Walker's claim be reviewed under heightened scrutiny in an equal protection framework, the dissent would affirm the district court decision that the city's pretrial detention of indigents for forty-eight hours is a violation of equal protection.[147]

IV. ANALYSIS

A. THE ELEVENTH CIRCUIT SHOULD HAVE APPLIED INTERMEDIATE SCRUTINY UNDER AN EQUAL PROTECTION ANALYSIS TO WALKER'S WEALTH-BASED INCARCERATION CLAIM

The Supreme Court has "long been sensitive to the treatment of indigents in our criminal justice system."[148] Both the majority and the dissent in *Walker* assert that the *Bearden* line of cases is unclear as to what standard of analysis should be applied to wealth-based discrimination claims, yet they reach different results, respectively.[149] The majority reasons that the relevant Supreme Court cases do not prescribe heightened scrutiny for these cases, and instead require a rational basis review.[150]

Judge Martin reads those same cases to say that some level of heightened scrutiny applies, though the *Bearden* line of cases does not make clear what level of scrutiny applies to wealth-based incarceration claims: intermediate or strict scrutiny.[151] Judge Martin is correct that the *Bearden* line of cases suggests a level of scrutiny beyond a rational basis review, yet the *Walker* majority chose to employ neither level of scrutiny. The application of a rational basis review was an erroneous decision based largely on a misunderstanding of both Supreme Court precedent as the *Bearden* line of cases established, as well as Fifth Circuit precedent which the court in *Rainwater* and *ODonnell* established. Although the relevant Supreme Court and Fifth Circuit decisions may not have been explicit in their decision to employ heightened scrutiny, that these cases discussed "alternatives" in their analysis makes clear that scrutiny was heightened beyond a rational basis.

Alternatives are a distinguishing factor between rational-basis review and heightened scrutiny because only in the case of the latter are "alternatives" relevant to a court's analysis. Under rational-basis review, which the Eleventh Circuit employed instead of heightened scrutiny,

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[146] *Id.* (Martin, J., dissenting) (quoting *Williams*, 399 U.S. 235 at 245).
[147] *Id.* (Martin, J., dissenting).
[148] *Bearden*, 461 U.S. at 664.
[149] *See Walker*, 901 F.3d at 1273-78 (Martin, J., dissenting).
[150] *Id.* at 1264-65 (Martin, J., dissenting).
[151] *Id.* at 1278 (Martin, J., dissenting).

courts "must disregard the existence of alternative methods of furthering the objective."[152] The Supreme Court has articulated that when employing a rational-basis review, "that other alternatives might achieve approximately the same result" is irrelevant to the Equal Protection analysis.[153]

By contrast, the Supreme Court has consistently analyzed whether "alternatives" to the government's challenged system are available in its application of heightened scrutiny. In *Orr v. Orr* the Court found that Alabama could not use gender as a classification for financial need in alimony cases when its alimony laws provided an alternative solution that had already occurred.[154] Similarly, in *Wengler v. Druggists Mutual Ins. Co.*, the Court found that gender-based classification was invalid because an adequate gender-neutral alternative was available.[155] And more recently in *McCullen v. Coakley*, the Court concluded that the challenged law failed heightened scrutiny because the government had a "variety of approaches that appear[ed] capable of serving its interests."[156]

Most relevantly, in *Williams*, *Tate*, *and Bearden*, the United States Supreme Court also looked at alternatives to the challenged government practice. Because alternative means were relevant to the analysis there, it follows that heightened scrutiny applies when a government scheme or law imposes wealth-based incarceration. Since *Walker* "fits squarely" within the *Bearden* line of cases, the majority was wrong to not apply the same level of scrutiny as the Court in those cases applied.[157] That is not to say that wealth-based discrimination claims are always reviewed with heightened scrutiny—and the court in *Rodriguez* held that normally they are not.[158] However, *Rodriguez* further held that when a class is composed of persons who are "totally unable to pay," wealth-based discrimination claims are exempted from rational basis review.[159]

Even if the Supreme Court had not clearly established that heightened scrutiny applies, the high court's two-pronged test for whether to heighten scrutiny of wealth-based discrimination claims as laid in *Rodriguez* should have controlled.[160] Walker's claim would have met both prongs and, consequently, would have fit squarely into a heightened scrutiny analysis. Ultimately, Walker, not the City, would have pre-

[152] Heller v. Doe, 509 U.S. 312, 330 (1993) (quoting Schweiker v. Wilson, 450 U.S. 221, 235 (1981)).

[153] Vance v. Bradley, 440 U.S. 93, 102, n.20 (1979).

[154] Orr v. Orr, 440 U.S. 268, 281 (1979).

[155] *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980).

[156] McCullen v. Coakley, 573 U.S. 464, 493-94 (2014).

[157] *Walker*, 901 F.3d at 1273 (Martin, J., dissenting).

[158] *San Antonio Indep. Sch. Dist*., 411 U.S. at 29.

[159] *See id.* at 22.

[160] *Id.* at 1, 20.

vailed. His claim would have satisfied the first prong because the City of Calhoun's bail policy targets indigent arrestees who, because of their indigency, are completely unable to pay for the desired benefit of freedom from pretrial incarceration. The claim would have also satisfied the second prong because as a consequence of being indigent, and therefore being unable to pay for freedom from pretrial incarceration, indigent arrestees sustain an absolute deprivation of a meaningful opportunity to enjoy freedom from pretrial incarceration.

Having satisfied both prongs of the *Rodriguez* test, the court should have then proceeded to analyze Walker's claim under intermediate scrutiny.[161] The questions then would have been whether the City of Calhoun had a compelling interest in enforcing the new bail policy, and whether that policy was narrowly tailored to meet that interest, or whether other alternatives were better suited to meet the interest. The city's new bail policy would not survive intermediate scrutiny because it was not narrowly tailored to meet this interest since it subjected an arrestee to pretrial incarceration for as long as forty-eight hours before determining indigency.[162]

If the *Walker* majority had subjected the City of Calhoun's bail policy to intermediate scrutiny, the court would have, at a minimum, affirmed the district court's ruling that forty-eight hours of pretrial detention for indigents was a violation of Equal Protection because alternative measures were available.[163] Alternative measures relevant here would have been shorter pretrial detention, such as the twenty-four hours which the district court injunction ordered, or other pretrial reforms suggested by the relevant body of literature.[164]

B. THE ELEVENTH CIRCUIT'S OPINION SETS HARMFUL PRECEDENT FOR INDIGENT ARRESTEES

Though the *Walker* majority entertained application of the *Rodriguez* test, the majority's analysis of the test was misguided at best. As Judge Martin points out in her dissent, in its analysis, the court never addressed whether the City of Calhoun's Standing Bail Order discriminated against indigents.[165] Instead, its analysis started at part two of the *Rodriguez* test, which asks whether the class has suffered an absolute deprivation of a benefit.[166] However, this part of the test was analyzed

[161] *ODonnell*, 892 F.3d at 162.
[162] *Walker III*, WL 2794064 n.2 (N.D. Ga. June 16, 2017).
[163] *Cf. Walker*, 901 F.3d at 1263.
[164] *See* Digard, *supra* note 1, at 2; *see also How to Fix Pretrial Justice*, *supra* note 11, at 3.
[165] *Walker*, 901 F.3d at 1273 (Martin, J., dissenting).
[166] *Id.* at 1274 (Martin, J., dissenting).

incorrectly. In its analysis of the second prong of the *Rodriguez* test, the majority does not refer to the benefit in Walker's case as *liberty* or even *freedom from pretrial incarceration* but rather labels the benefit as "pretrial release."[167] That is, the *Walker* majority relied erroneously—when considering whether there was an "absolute" deprivation of a benefit—on the amount of time that indigent arrestees are detained pretrial. And reliance on forty-eight-hour pretrial detention led it to the conclusion that "pretrial release," the benefit here, is only diminished for the indigent arrestee but not something of which they are absolutely deprived.[168] Judge Martin was correct, though generous in the claim that the majority's faulty analysis here was "word play."[169]

No other federal or circuit court had discussed a diminished benefit in this context prior to *Walker*, and relevant case law does not proscribe the length of time of pretrial detention for indigents as a relevant consideration under this analysis. As Judge Martin points out in her pragmatic dissenting opinion, neither *Rodriguez* nor *Rainwater* qualified how long the confinement had to last before it became a deprivation of liberty.[170] The *Walker* majority simply inferred the concept of a diminished benefit (and its distinction from an absolute deprivation) from the *Rodriguez* court's assertion that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."[171] Further, it reasoned "[t]he duty of the State. . .is not to duplicate the legal arsenal that may be privately retained by a criminal defendant. . .but only to assure the indigent defendant an adequate opportunity to present his claims fairly."[172] To the Eleventh Circuit, the Equal Protection Clause is satisfied with diminished benefits for some, and full benefits for others.

To arrive at the holding that forty-eight-hours is constitutional confinement for indigent arrestees in a pretrial setting, the *Walker* majority relied on *McLaughlin*, a factually distinct case.[173] *McLaughlin* should not have controlled because that case concerned the length of wait-time for probable cause hearings, and challenges to pretrial confinement by accused indigent persons are inherently and categorically different from other claims.[174] Additionally, as the dissent points out, *McLaughlin* asserted that hearings which are delayed for the sake of delay are unconsti-

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[167] *Id.* at 1261.
[168] *Id.*
[169] *Id.* at 1274 (Martin, J., dissenting).
[170] *Id.* at 1275 (Martin, J., dissenting).
[171] *Id.* at 1261 (quoting *San Antonio Indep. Sch. Dist.*, 411 U.S. at 24).
[172] *Id.* (quoting Ross v. Moffitt, 417 U.S. 600, 616 (1974)).
[173] *Id.* at 1266; City of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).
[174] *City of Riverside*, 500 U.S. at 54; *Bearden*, 461 U.S. 660 at 64-65.

tutional, and here, the city of Calhoun did not state a reason as to why indigent arrestees had to wait forty-eight hours before a determination of indigency.[175] The court's decision in *Mclaughlin* should have guided the *Walker* majority toward a ruling for Walker, not the City of Calhoun.

The *Walker* majority also relied on the *ODonnell* opinion for a constitutional time of pretrial confinement, as the *ODonnell* court ultimately concluded that a forty-eight-hour maximum confinement time was appropriate.[176] This reliance is seemingly more appropriate, given the similar pretrial incarceration discrimination claims at issue in each case (though elsewhere in the opinion the *Walker* court also alleged that the facts here were distinguishable from *ODonnell*).[177] But this reliance was misplaced because in *ODonnell*, Harris County alleged that a maximum of 24-hour confinement for indigent arrestees was an administrative burden for them.[178] Here, however, the City of Calhoun offered no reason for the chosen forty-eight-hour maximum, resulting in an arbitrary wait-time, or a delay for the sake of delay.[179] Nevertheless, an arbitrary waiting time was sufficient for the Eleventh Circuit.

The Eleventh Circuit was wrong to uphold this arbitrary time and to not require any justification by the City of Calhoun. This result is ultimately problematic because it sets a new precedent that forty-eight hours is a magic number of sorts, the constitutional length of time that an indigent arrestee can be detained pretrial. Further, the *Walker* court's characterization of forty-eight hours of pretrial detention for indigents as only a "diminishment" of a benefit rather than a deprivation is also problematic. Even the court in *ODonnell* felt forty-eight hours was in some ways not a deprivation.[180] That a benefit, such as the liberty at stake here, changes from a diminishment to a deprivation after forty-eight hours is highly questionable. But at least in *ODonnell*, it is apparent that any time before the forty-eight-hour maximum pretrial incarceration, an indigent's pretrial liberty interests are outweighed by the administrative burdens of the Harris County court system.[181] But what *Walker* presents is more vexing because the liberty interests of indigents are not outweighed by any other stated, competing interests.[182] Forty-eight-hour pretrial detention because of indigency, *Walker* implies, is simply a fact of life; yet another luxury

[175] *Walker*, 901 F.3d at 1279 (Martin, J., dissenting).

[176] *Id*. at 1266 (citing *ODonnell*, 892 F.3d at 160-61).

[177] *Id.* at 1269 n.12.

[178] *See ODonnell*, 892 F.3d at 159.

[179] *Walker*, 901 F.3d at 1279 (Martin, J., dissenting).

[180] *ODonnell*, 892 F.3d at 160.

[181] *Id*. at 159.

[182] *See Walker*, 901 F.3d at 1279 (Martin, J., dissenting).

service indigent people simply cannot afford, such as with express mail service and university tuition.

One need not wonder why a federal court such as this one would employ a shallow analysis of an Equal Protection claim to pretrial confinement based on indigency—an analysis that has dire consequences for underprivileged communities.[183] The answer lies in the court's engagement of hypotheticals. Such as the court's suggestion that holding in favor of Walker would result in "preferential treatment" to the indigent.[184] The glaring irony in this logic is that pretrial detention, as it stands in the United States, already affords preferential treatment to the affluent. In this country, those who can afford to post bail are never subjected to pretrial detention simply because of their wealth. The court's conflating of rights with luxuries also serves as a window into the court's faulty logic. The court's suggestion that applying heightened scrutiny to Walker's claim would result in innumerable government programs being in "grave constitutional danger" blatantly ignores, perhaps even feigns ignorance of, Supreme Court case law as well as Fifth Circuit precedent that characterized pretrial confinement based on indigency as categorically different from other claims.[185]

The Eleventh Circuit's radical predictions for what would ensue if they ruled in favor of Walker requires an equating of university tuition and express mail service with freedom from pretrial incarceration. Conflating the right to freedom with luxuries may reveal an elitist worldview: for the wealthy and affluent, freedom from incarceration, express mail service, and university tuition may appear the same because the barriers to affording them simply do not exist. This reading may be further bolstered by the fact that a majority of federal judges cannot identify with people too poor to pay bail: many of them come from elite schools and affluent upbringings, are not from diverse backgrounds, and certainly not from underrepresented communities.[186]

The Eleventh Circuit's hypothesizing about ruling in favor of Walker is dictum, but it should not be any less concerning for two rea-

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[183] *See How to Fix Pretrial* Justice, *supra* note 10, at 3.

[184] *Walker*, 901 F.3d at 1261-62.

[185] *Compare Walker*, 901 F.3d at 1262 *with Bearden*, 461 U.S. at 665 (1983) (explaining that wealth-based incarceration is distinct from other wealth-based classifications because it involves both Equal Protection claims as well as due process claims) *and San Antonio Indep. Sch. Dist*., 411 U.S. at 20 (holding that when a class is composed of persons who are "totally unable to pay," wealth-based discrimination claims are exempted from rational basis review). *See also Walker*, 901 F.3d at 1274 (Martin, J., dissenting).

[186] *See* Danielle Root et al., *Building a More Inclusive Federal Judiciary*, CENTER FOR AMERICAN PROGRESS (Oct. 3, 2019, 8:15 AM), https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/.

sons. One, since dictum by definition means an opinion or belief,[187] we can read this harmful conflation as the opinion or beliefs of federal judges about an indigent's disposition in the criminal justice system, if not their disposition in the world at large. Federal judges are quite literally public servants, who swear an oath to serve justice equally to the poor and to the rich.[188] The belief that access to pretrial incarceration and express mail service are categorically similar is egregious. The former implicates freedom, while the latter concerns a trivial luxury especially by comparison. That this belief is held by a majority of federal judges in a particular circuit, by those who decide the fate of thousands of indigent defendants in multiple states, is incredibly disturbing.

Two, even if we can cast aside the harmful conflation as mere non-controlling opinion, concerns about Equal Protection should still remain because lawyers and judges alike often conflate dicta with holdings.[189] This risk of conflation here compounds the dangerous precedent that *Walker* creates for indigent arrestees. Other lawyers or courts may confuse *Walker'*s dicta with its holding, erroneously citing it to argue that Equal Protection analysis is unwarranted for indigent defendants claiming discrimination under a city's bail policy because this discrimination is no different from innumerable other government programs that discriminate based on wealth. In this unsavory scenario, indigent arrestees would suffer harm nationally.[190]

CONCLUSION

Supreme Court precedent, as well Fifth Circuit holdings, have established that intermediate scrutiny is the appropriate level of scrutiny for claims brought by indigent defendants challenging a government policy that prescribes pretrial incarceration for them but never their similarly-

[187] Dictum is defined as "a statement of opinion or belief considered authoritative because of the dignity of the person making it." *Dictum*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[188] William M. Richman, Comment, *Elitism Expediency and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL. L. REV. 273, 277 (1996).

[189] Judith M. Stinson, Comment, *Why Dicta Becomes Holding and Why it Matters*, 76 BROOK. L. REV. 219, 221 (2010).

[190] *See ODonnell*, 251 F. Supp. 3d at 1158 (S.D. Tex. 2017) ("Pretrial detention of misdemeanor defendants, for even a few days, increases the chance of conviction and of nonappearance or new criminal activity during release," and. . . "[c]umulative disadvantages mount for already impoverished misdemeanor defendants who cannot show up to work, maintain their housing arrangements, or help their families because they are detained"). *See also id.* at 1121 (noting that "[r]ecent studies of bail systems in the United States have concluded that even brief pretrial detention because of inability to pay a financial condition of release increases the likelihood that misdemeanor defendants will commit future crimes or fail to appear at future court hearings," and that one study "found that for misdemeanor defendants, even two to three days of pretrial detention correlated at statistically significant levels with recidivism").

situated wealthy counterparts. Even if a court fails to read the relevant case law to proscribe intermediate scrutiny for pretrial incarceration claims brought by indigents, the two-prong test laid out in *Rodriguez* can help such a claim fall into intermediate scrutiny. To address these wealth-based discrimination claims with a higher standard than rational basis review would be a step toward true Equal Protection for all in the context of pretrial incarceration.

However, the issue still remains as to the specific declaration in *Walker* that forty-eight hours is a constitutionally permissible length of time indigents must wait to receive freedom from incarceration. Why should indigents be discriminated against in a pretrial setting when creative alternative solutions to pretrial incarceration exist, and the harms of pretrial confinement on indigent communities of color are well-documented?

The Eleventh Circuit implicitly answers this question with the rationalization that the Equal Protection Clause does not require "absolute equality" between indigent arrestees and their wealthy counterparts.[191] As long as this type of rationale forms federal circuit precedent of wealth-based discrimination claims brought by indigents, then poor people, women, and people of color will continue to be adversely and disproportionately affected by pretrial incarceration in this country.[192]

The denial of pretrial liberty to indigent arrestees sooner than forty-eight hours "is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law."[193] An absolute deprivation of liberty in the context of indigents' ability to pay versus their similarly-situated wealthy counterparts is *any* length of time, but surely all lengths beyond twenty-four hours. Alternative solutions to pretrial confinement should be required of the counties that detain indigents pretrial for an inability to pay, alternatives which do not concern any amount of jail time, or at a minimum no longer than twenty-four hours. It need not be a radical claim that indigents are entitled to the protections that the law affords their similarly-situated wealthy counterparts, nor that the pretrial liberty interests of indigents should inherently outweigh the administrative burdens on courts. As Judge Martin correctly declared, "[t]he constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo."[194]

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[191] *Walker*, 901 F.3d at 1261 (quoting *San Antonio Indep. Sch. Dist*., 411 U.S. at 24.

[192] Lockhart, *supra* note 6, at 2.

[193] *ODonnell*, 900 F.3d at 228–29 (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).

[194] *Walker*, 901 F.3d at 1278 (Martin, J., dissenting) (quoting *Williams*, 399 U.S. at 245).