

**UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION**

MARANDA LYNN O'DONNELL, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 16-cv-01414
	)	(Consolidated Class Action)
HARRIS COUNTY, TEXAS, et al.	)	The Honorable Lee H. Rosenthal
	)	U.S. District Judge
Defendants.	)	
	)	
	)	

**PROPOSED ORDER GRANTING PRELIMINARY INJUNCTIVE RELIEF**

Pursuant to the Court’s instructions, *see* Tr. 3/6/2017 at 91:4–7, Plaintiffs submit the attached long-form alternative version, *see* Exhibit 1, of Plaintiffs’ Amended Proposed Preliminary Injunctive Relief that they previously submitted as Docket Entry No. 188-1.

Plaintiffs continue to propose the order set forth in Docket Entry No. 188-1 because that order satisfies the specificity requirements of Federal Rule of Civil Procedure 65(d) while providing maximum flexibility for Defendant Harris County and Defendant Gonzalez to comply. That proposed relief states the specific acts restrained and required<sup>1</sup> and reflects the fact that there are a variety of ways to comply with a preliminary injunction prohibiting wealth-based post-arrest detention procedures and a number of ways of providing an inquiry into and findings concerning ability to pay and provision of non-financial alternatives whenever secured financial conditions of pretrial release are imposed in misdemeanor cases.

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<sup>1</sup> In contrast, the order issued in *Walker v. City of Calhoun* simply ordered the City to “implement post-arrest procedures that comply with the Constitution.” 2016 WL 361612 (N.D. Ga. Jan. 28, 2016). This language was found to be “the archetypical and unenforceable ‘obey the law’ injunction.” *Walker v. City of Calhoun*, No. 16-1052 (11th Cir. March 9, 2017) (unpublished). *See* Exhibit 2.

Plaintiffs have previously suggested that the parties jointly craft additional proposed procedures that comply with the preliminary injunctive relief within 14 days of the Order's issuance. Docket Entry No. 143-9.

The attached long-form version submitted at the Court's request is a more detailed example of the type of post-arrest procedures that would comply with the preliminary injunctive relief previously described in Plaintiffs' Amended Proposed Order, Docket Entry No. 188-1, and that would be compatible with all of the changes already planned in Harris County in the coming year, based on Plaintiffs' understanding of those planned changes. The new long-form proposed order is attached as Exhibit 1.

Respectfully submitted,

/s/ Neal S. Manne

/s/ Lexie G. White

/s/ Michael Gervais

Neal S. Manne  
Lexie G. White

Susman Godfrey  
1000 Louisiana Street, Suite 5100  
Houston, TX 77002  
Phone: [\(713\) 651-9366](tel:(713)651-9366)  
[nmanne@susmangodfrey.com](mailto:nmanne@susmangodfrey.com)  
[lwhite@susmangodfrey.com](mailto:lwhite@susmangodfrey.com)

Michael Gervais  
1301 Avenue of the Americas, 32nd Floor  
New York, NY 10019  
Phone: [\(212\) 336-8330](tel:(212)336-8330)  
[mgervais@susmangodfrey.com](mailto:mgervais@susmangodfrey.com)

/s/ Rebecca Bernhardt

/s/ Susanne Pringle

Rebecca Bernhardt (Texas Bar No. 24001729)

Susanne Pringle (Texas Bar No. 24083686)  
Texas Fair Defense Project  
314 E. Highland Mall Blvd, Suite 108  
Austin, Texas 78752  
(512) 637-5220  
[rbernhardt@fairdefense.org](mailto:rbernhardt@fairdefense.org)  
[springle@fairdefense.org](mailto:springle@fairdefense.org)

/s/ Alec Karakatsanis  
/s/ Elizabeth Rossi

Alec Karakatsanis (D.C. Bar No. 999294)  
(Appearing *Pro Hac Vice*)  
Elizabeth Rossi  
(Appearing *Pro Hac Vice*)

Civil Rights Corps  
916 G Street NW, Suite 701  
Washington, DC 20004  
[alec@civilrightscorps.org](mailto:alec@civilrightscorps.org)  
[elizabeth@civilrightscorps.org](mailto:elizabeth@civilrightscorps.org)  
*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 13<sup>th</sup> day of March 2017, I electronically filed the foregoing with the clerk of the court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sends a “Notice of Electronic Filing” to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

Elizabeth A. Rossi

Elizabeth A. Rossi  
Civil Rights Corps  
910 17<sup>th</sup> Street NW 5<sup>th</sup> Floor  
Washington, DC 20006  
[Elizabeth@civilrightscorps.org](mailto:Elizabeth@civilrightscorps.org)  
202-681-2721

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MARANDA LYNN O'DONNELL, et al.	)	
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Plaintiffs,	)	
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v.	)	Case No. 16-cv-01414
	)	(Consolidated Class Action)
HARRIS COUNTY, TEXAS, et al.	)	The Honorable Lee H. Rosenthal
	)	U.S. District Judge
Defendants.	)	
	)	

**PROPOSED ORDER**

It is hereby ORDERED that:

Unless the post-arrest procedures set forth below are followed, Harris County and the Harris County Sheriff must not accept into custody or further detain any Class A or B misdemeanor arrestee. The following preliminary injunctive relief applies only to Class A and Class B misdemeanor arrestees.<sup>1</sup>

**Initial Arrest**

- 1) No arrestee may be kept in custody for any period of time solely because the arrestee cannot make a monetary payment imposed as a secured financial condition of release.<sup>2</sup>
- 2) The County must apply a new bail schedule that conforms to the requirements set forth below.

<sup>1</sup> Nothing in this Order will affect the discretion of Harris County or other agencies and officials to implement their own cite and release policies consistent with state law. This order applies only to people who law enforcement officers choose, in their discretion, to take into custody.

<sup>2</sup> Nothing in this Order should be construed to affect the standard post-arrest procedures already in place that do not relate to the setting of bail, including the decision by the District Attorney whether to accept charges and the completion of any necessary standard procedures incident to arrest (i.e. fingerprinting or checking for warrants). This order is targeted to end the differential treatment of detained arrestees based on their financial resources.

### **New Bail Schedule**

3) The current Bail Schedule for Class A and Class B misdemeanors must be replaced with a new bail schedule that provides a range of monetary and non-monetary alternatives for every arrestee. The County may include secured and/or unsecured monetary amounts on the schedule. However, if the County includes secured financial amounts as conditions of release, the bail schedule must also provide in every case for unsecured or non-financial alternatives with the least restrictive non-financial conditions of release appropriate to protect the community and to reasonably assure court appearance.

4) As soon as practicable after arrest, all misdemeanor arrestees must have bail set pursuant to the schedule, except as provided in paragraphs (5), (6), and (7) below.<sup>3</sup> Bail conditions pursuant to the schedule may be affixed automatically by the District Attorney (as is currently the practice), imposed by a Hearing Officer, or determined by other appropriate means in the County's discretion.

5) In the limited instances in which a person is charged with a misdemeanor involving physical violence or threatened physical violence against another person,<sup>4</sup> the bail schedule may provide, in the discretion of the District Attorney or Hearing Officer, that the person can be detained without bail until an adversarial hearing, no later than 48 hours after arrest, for the consideration of appropriate conditions of release consistent with state and federal law. After such a hearing, if a secured monetary bond is imposed, it must be accompanied by written findings that the person has the ability to pay that amount of money. Any setting of secured money bond must

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<sup>3</sup> Although bail must be set in this manner for each misdemeanor arrestee, nothing in this Order requires the immediate release from custody of an arrestee if another valid basis of detention exists, such as a hold relating to probation, parole, other pending charges, or immigration issues. These procedures apply only to the setting of bail with respect to the Class A or Class B misdemeanor charge.

<sup>4</sup> Such offenses are defined as any offense that has as an element the use of force or threatened use of force against another person.

also be accompanied by the provision of alternative non-financial conditions of release that are the least restrictive conditions necessary to reasonably assure the safety of the community and the person's appearance. No secured bond may be imposed for any person whose income is at or below 125% of the federal poverty line based on an affidavit of indigence that must be offered to any arrestee for whom secured financial conditions of release are being considered and which must provide the arrestee an opportunity to set forth in detail any relevant income, assets, expenses, and other factors concerning the arrestee's financial circumstances. The arrestee will be informed that the affidavit of indigence will be used to assess her ability to pay a secured money bond.

6) If, based on the use of an empirically validated risk assessment instrument, the County classifies an arrestee as "high risk,"<sup>5</sup> the bail schedule may provide, in the discretion of the District Attorney or a Hearing Officer, that the person can be detained without bail until an adversarial hearing, no later than 48 hours after arrest, for the imposition of appropriate conditions of release. Such a hearing must conform to all of the requirements set forth in paragraph (5).<sup>6</sup>

7) The County may, in the discretion of law enforcement officers, permit the post-arrest detention of an intoxicated person or a person otherwise under the influence of drugs or alcohol without applying the bail schedule for a period of time necessary to allow the person to regain sobriety. This period will not exceed eight hours before application of the bail schedule.

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<sup>5</sup> The Court is aware that jurisdictions implementing risk assessment instruments do so in different ways and pursuant to intentional decisions concerning the jurisdiction's tolerance of various risks (i.e. the risk of non-appearance, the risk of new criminal activity, and the risk of new serious or violent criminal activity). Before implementing such an assessment tool, the County must provide to the Plaintiffs and to this Court detailed information concerning those aspects of the tool that are not empirically derived, including the definition of the term "high risk" as used in Harris County. For example, the County must specifically provide answers to the questions: "risk of what?" and "how much of a risk suffices for a person to be called 'high risk?'"

<sup>6</sup> Nothing in this Order, including paragraphs (5), (6), or (7), should be construed to obviate the other requirements of Texas law, such as the requirement of a valid probable cause determination within 24 hours of arrest for an arrestee in custody.

8) The bail schedule and conditions of release provided therein may be based on any relevant and lawful considerations, including the results of an empirically validated risk assessment instrument. The County is free to make the schedule offense-based, risk-based (using an appropriately validated risk assessment tool), or some combination of both.

9) If, based on the use of an empirically validated risk assessment instrument, the County classifies an arrestee as “low risk,” the arrestee must be released as soon as practicable on her own recognizance or on unsecured personal bond without additional conditions unless the District Attorney or Hearing Officer identifies a specific overriding cause.<sup>7</sup> The factual and legal basis for a finding of such specific cause must be stated in writing on the record, and such instances will be the rare and limited exception.

10) In every misdemeanor case in which a secured financial condition of release is imposed, there must accompany that imposition a finding that the person has the present ability to afford the amount imposed such that the financial condition will not operate to detain the arrestee, and there must also be offered an alternative non-financial condition or set of conditions that allow for release as expeditiously as if the person paid the financial condition. Such non-financial alternatives must be the least restrictive conditions necessary to reasonably assure the future presence of the accused and to address and particularized threat to the safety of anyone in the community.

11) Arrestees may not be charged for the costs of any non-financial condition of release if, upon appropriate inquiry, payment would cause substantial hardship meeting the basic

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<sup>7</sup> A “specific overriding cause” is limited to a clear and articulable threat to any person in the community or to the integrity of the proceedings or an emergency medical or serious mental health issue that would impair the ability of officials to impose conditions of release. A specific overriding cause may provide justification for detention for a limited period of time, not to exceed 48 hours until presentation before a judicial officer, during which period no money bail amount is imposed.

necessities of life. No arrestee with income below 125% of the federal poverty line based on the affidavit of indigence and appropriate inquiry may be charged for the cost of any non-financial condition of release.

**Access to Counsel**

12) At any proceeding in which conditions of release are being imposed for a person still in custody, the County must ensure that a detained arrestee has access to an attorney to represent her and adequate time to meet privately and confidentially with that attorney prior to the proceeding.

**Delays Implementing Release Orders**

13) When a misdemeanor detainee is ordered released, the release must be effectuated as soon as practicable but in no event may the arrestee be detained for longer than four hours after the entry of such a release order.

**Outstanding Warrants**

14) The terms of this Order apply to all Class A and Class B misdemeanor arrestees, including individuals with currently outstanding misdemeanor arrest warrants that currently have attached to them pre-fixed secured financial conditions of release pursuant to the existing bail schedule. The new bail schedule and procedures must apply to such people upon arrest, and the County may provide a walk-up window or other process for those with outstanding warrants to surrender and to be subjected to the new procedures as appropriate.

Ordered this \_\_\_ day of \_\_\_\_\_, 2017.

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Hon. Lee H. Rosenthal, District Judge



[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 16-10521

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D.C. Docket No. 4:15-cv-00170-HLM

MAURICE WALKER,  
on behalf of himself and others similarly situated,

Plaintiff - Appellee,

versus

CITY OF CALHOUN, GA,

Defendant - Appellant.

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Appeal from the United States District Court  
for the Northern District of Georgia

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(March 9, 2017)

Before WILLIAM PRYOR, JORDAN, and BALDOCK,\* Circuit Judges.

PER CURIAM:

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\* The Honorable Bobby R. Baldock, United States Circuit Judge for the Tenth Circuit, sitting by designation.

The City of Calhoun appeals the preliminary injunction entered by the district court in favor of Maurice Walker. The parties and amici filed briefs on the propriety of that order. We have considered their arguments, reviewed the record, and now, with the benefit of oral argument, vacate the preliminary injunction entered against the City and remand the case to the district court for further proceedings.

## I

An officer with the City of Calhoun police department arrested Mr. Walker on September 3, 2015, and charged him with the misdemeanor offense of being a pedestrian under the influence. The charged offense fell within the jurisdiction of the City's municipal court, which had a standing bail order that set a fixed monetary bail schedule for traffic and misdemeanor offenses. The City released arrestees immediately after booking if they paid the amount corresponding to their offense of arrest, but those who could not pay were held in jail until the next time the municipal court convened (usually the following Monday) for their first appearance.<sup>1</sup>

After his arrest, Mr. Walker was informed that, under the standing bail order, he would have to pay a \$160 cash bond for immediate release from jail. Mr.

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<sup>1</sup> After the lawsuit was filed, but before the district court ruled on the motion for preliminary injunction, the standing bail order was amended to require a first appearance within 48 hours of arrest. Because we do not reach the merits of the preliminary injunction order, we need not decide whether the new 48-hour period affects Mr. Walker's claims.

Walker alleges that he not could afford to pay that amount because he is indigent, so the City kept him in jail to await his first appearance. Only then would he have had the opportunity to seek release on recognizance. Mr. Walker filed this action against the City while he was in custody.

In his complaint, Mr. Walker asserts that the City's bail policy violates equal protection and due process principles by conditioning immediate release from jail on an arrestee's ability to pay a preset amount of cash without providing alternatives to indigent arrestees. *See, e.g.*, D.E. 1 at ¶ 47. Mr. Walker moved to preliminarily enjoin the City from jailing him and other similarly situated indigent arrestees without offering them release on an unsecured bond or their own recognizance. *See* D.E. 4 at 1. The district court granted the motion for preliminary injunction without a hearing, *see* D.E. 40, and this appeal followed.<sup>2</sup>

## II

We review a district court's decision to grant preliminary injunction for abuse of discretion. *See United States v. Alabama*, 691 F.3d 1269, 1281 (11th Cir. 2012). "In so doing, we review the findings of fact of the district court for clear

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<sup>2</sup> The City noticed for appeal the district court's orders granting class certification and denying its motion to dismiss. *See* D.E. 28, 41. In this Court, Mr. Walker filed a motion to dismiss the appeal of those two orders for lack of appellate jurisdiction. That motion was then carried with the case to oral argument. We deny as moot Mr. Walker's motion to dismiss because the City conceded in its response brief that it is not directly appealing these two orders. *See* Br. of Appellant at 14 n.46.

error and legal conclusions *de novo*.” *Scott v. Roberts*, 612 F.3d 1279, 1289 (11th Cir. 2010).

### III

Regardless of whether, substantively, a district court properly issued a preliminary injunction, *see generally GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 788 F.3d 1318, 1322 (11th Cir. 2015) (setting forth the elements of a preliminary injunction), all preliminary injunction orders must comport with Federal Rule of Civil Procedure 65. So, every order granting an injunction must “(A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.” Fed. R. Civ. P. 65(d)(1).

Rule 65’s specificity requirements serve important structural and due process functions. *See Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996) (explaining that Rule 65 protects “those who are enjoined by informing them of . . . exactly what conduct is proscribed” and ensures “informed and intelligent appellate review”) (citations and internal quotation marks omitted). To effectuate them, we have repeatedly vacated injunctions containing only “[b]road, non-specific language that merely enjoins a party to obey the law or comply with an agreement.” *Id.* (quoting *Louis W. Epstein Family P’ship v. Kmart Corp.*, 13 F.3d 762, 771 (3d Cir. 1994)). Additionally, because an injunction carries the

possibility of contempt, our case law demands that an injunction contain “an operative command capable of enforcement.” *Id.* (citations and internal quotation marks omitted).

In this case, the district court ordered that the City:

implement post-arrest procedures that comply with the Constitution, and . . . that, unless and until [the City] implements lawful post-arrest procedures, [the City] must release any other misdemeanor arrestees in its custody, or who come into its custody, on their own recognizance or on an unsecured bond in a manner otherwise consistent with state and federal law and with standard booking procedures. [The City] may not continue to keep arrestees in its custody for any amount of time solely because the arrestees cannot afford a secured monetary bond.

Order Granting Motion for Preliminary Injunction, D.E. 40, at 73 (Jan. 28, 2016).

This order violates Rule 65. First, requiring the City to “comply with the Constitution” is the archetypical and unenforceable “obey the law” injunction. *See Int’l Longshoremen’s Ass’n, Local 1291 v. Philadelphia Marine Trade Ass’n*, 389 U.S. 64, 69, 74 (1967) (reversing decree that ordered party “to comply with [an arbitration award]”). Second, the order does not contain an operative command capable of enforcement or review. It requires the City to fashion constitutionally compliant post-arrest procedures, yet offers no guidance on the minimal standards required by the Constitution. *See Hughey*, 78 F.3d at 1531–32 (vacating injunction that

required the defendant to stop discharges in violation of the Clean Water Act, but failed to explain how to do so).

The rest of the order does not save the injunction from these deficiencies. The proscription against detaining misdemeanor arrestees unless the City offers them release on their own recognizance is an alternative means of compliance that is intertwined with the generalized requirement that the City enact lawful post-arrest procedures. Without any guidance, the district court's order potentially subjects the City to contempt proceedings simply because new post-arrest procedures turn out to be unconstitutional. Rule 65 was meant to prevent such uncertainty. *See Russell C. House Transfer & Storage Co. v. United States*, 189 F.2d 349, 351 (5th Cir. 1951) (explaining that a court should not enjoin a party in general terms such that the party is subject to contempt proceedings "should at any time in the future [it] commit some new violations, unlike and unrelated to that with which it was originally charged"). Accordingly, we do not believe that, as written, the injunction can stand.

**PRELIMINARY INJUNCTION VACATED; AND CASE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.**