Nos. 21-12468 & 21-12469

In the

United States Court of Appeals for the Eleventh Circuit

ALDARESS CARTER,
Plaintiff-Appellant,

v.

THE CITY OF MONTGOMERY, *et al.*,
Defendants-Appellees,

– consolidated with –

ANGELA McCULLOUGH, *et al.*,
Plaintiffs-Appellants,

v.

THE CITY OF MONTGOMERY, *et al.*,
Defendants-Appellees.

Appeals from Orders Denying Plaintiffs' Motions for Class Certification by the United States District Court for the Middle District of Alabama
Case Nos. 2:15-cv-00555 & 2:15-cv-00463 (Hon. Royce C. Lamberth)

BRIEF OF *AMICI CURIAE* CIVIL RIGHTS ORGANIZATIONS AND LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned attorney for *Amici Curiae* The Southern Poverty Law Center, Civil Rights Corps, Public Good Law Center, Deborah N. Archer, Suzette Malveaux, Adam N. Steinman and Heather Elliott hereby certifies, pursuant to Eleventh Circuit Rule 26.1-1, that the certificate of interested persons is complete and adds the following interested persons and entities.

1. Archer, Deborah N. – *Amicus Curiae*
2. Bennigson, Tom – Counsel for *Amici Curiae*
3. Civil Rights Corps – *Amicus Curiae*
4. Elliott, Heather – *Amicus Curiae*
5. Lopez, Marco – Counsel for *Amici Curiae*
6. Malveaux, Suzette – *Amicus Curiae*
7. Mermin, Seth E. – Counsel for *Amici Curiae*
8. Public Good Law Center – *Amicus Curiae*
9. Ray, Cristopher – Counsel for *Amici Curiae*
10. Rosenberg, Lauren M. – Counsel for *Amici Curiae*
11. Ryan, Antony L. – Counsel for *Amici Curiae*
12. Southern Poverty Law Center – *Amicus Curiae*
13. Steinman, Adam N. – *Amicus Curiae*

The undersigned attorney further certifies pursuant to Federal Rule of Appellate Procedure 26.1, that *Amici Curiae* have no parent corporations and that no corporation directly or indirectly holds 10% or more of the ownership interest of *Amici Curiae*.

Date: September 16, 2022

/s/ Antony L. Ryan
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STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici are nonprofit civil rights organizations leading the fight against exploitative private probation and other fee-based profiteering schemes in the criminal legal system through litigation and advocacy, and professors who are nationally recognized experts on civil rights and class actions. More specific information about each *Amicus* appears in the Addendum.

Amici have a strong interest in seeing that judges do not misapply Rule 23 by blocking access to relief for indigent victims of civil rights violations in the penal system—victims who often have no recourse other than a class action.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by holding that individual issues predominate for Plaintiffs' *Bearden* class and abuse-of-process class despite common, uncontradicted proof of systemic failures to comply with *Bearden*.

2. Whether the district court abused its discretion by incorporating administrative feasibility concerns into its predominance analysis, contrary to *Cherry*.

3. Whether the district court abused its discretion by holding that class treatment is inferior to other methods based solely on the manageability factor.

4. Whether the district court abused its discretion when it held that the false-imprisonment class lacks commonality, despite the presence of common questions of law and fact and despite holding that the class satisfies typicality.

SUMMARY OF ARGUMENT

This case concerns the Montgomery Municipal Court's practice of routinely jailing traffic offenders for nonpayment of fines without inquiring into their ability to pay, in violation of their constitutional rights under *Bearden v. Georgia*, 461 U.S. 660 (1983), and the Fourteenth Amendment. Due to the systemic nature of Defendants' conduct and the relatively modest size of the damages for any given class member, the case is well-suited to proceed as a class action. Nevertheless, the District Court denied class certification. In so doing, the District Court made multiple errors in analyzing predominance, manageability and commonality under Rule 23 of the Federal Rules of Civil Procedure, errors that led to the wrong conclusion in this case and would have far-reaching impacts if followed by other courts. *Amici* therefore submit this brief in support of the first five issues presented in Plaintiffs-Appellants' ("Plaintiffs") Consolidated Opening Brief ("Pls.' Br.").[2]

[2] *Amici* take no position on the sixth and seventh issues presented, concerning the District Court's findings that Aldaress Carter is not typical of the Kloess subclass and that Kenny Jones is not an adequate representative of the false-imprisonment class.

First, the District Court misapplied the predominance element of Rule 23(b)(3) in determining that common questions did not predominate over individual questions in this case, despite the systemic nature of Defendants' conduct. The District Court erred by failing to consider the common evidence Plaintiffs have put forward showing that no class member received the process required by *Bearden* in the Municipal Court during the relevant time period. Common questions predominate due to the classwide nature of the proof of Defendants' conduct. The District Court also misunderstood the nature of the *Bearden* right, and incorrectly characterized Plaintiffs' arguments as shifting the burden of proof onto Defendants. These errors led the District Court erroneously to deny class certification for Plaintiffs' *Bearden* and abuse-of-process claims.

Second, the District Court misapplied Rule 23(b)(3) by allowing difficulties of determining class membership to affect its predominance analysis. The District Court erroneously concluded that a fact-finder could not determine class membership without resorting to mini-trials to answer individualized questions. This was error because (1) this Court has held that administrative feasibility concerns affect at most the manageability factor of the superiority element, not the predominance element; and (2) the identification of class members is not an issue for the jury at all, and instead can be addressed by the district court in the claims-administration phase of the class action.

Third, the District Court misapplied the manageability element of Rule 23(b)(3)(D) in determining that a class action is not a superior method to resolve this case. The District Court did not recognize that cases of this kind, *i.e.*, small-value claims concerning the violation of constitutional rights, are typically well-suited for class treatment. The District Court also erred in identifying what it believed was an alternative method of adjudication—a so-called "quasi-bellwether"—that would not be superior to a class action in this case. And the District Court erred in giving dispositive weight to its administrative feasibility concerns in the manageability analysis, without weighing any of the benefits of class treatment against alternative methods.

Fourth, the District Court misapplied the commonality element of Rule 23(a)(2) by concluding that Plaintiffs did not identify common issues for their false-imprisonment claims, even though the District Court itself identified in the typicality section of its opinion five issues that were common across the class. In reaching this result, the District Court appears to have incorrectly applied the heightened requirements of the predominance analysis under Rule 23(b)(3) to its commonality analysis under Rule 23(a)(2).

If the District Court's analysis were to be followed by other courts, plaintiffs seeking redress for systemic constitutional violations would have great difficulty obtaining the class certification that is practically essential to the

vindication of their rights. *Amici* therefore respectfully ask this Court to correct the District Court's errors and reverse.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT INDIVIDUAL QUESTIONS PREDOMINATED FOR THE *BEARDEN* AND ABUSE-OF-PROCESS CLASSES.

The District Court erred in finding that Plaintiffs' *Bearden* and abuse-of-process classes failed Rule 23(b)(3)'s predominance requirement. The District Court did not recognize the common proof of systemic rights violations Plaintiffs have put forward in this case, which affected its analysis of both the *Bearden* and abuse-of-process claims.

The District Court denied class certification on the ground that individual issues predominated over common questions. But Plaintiffs showed that their *Bearden* and abuse-of-process claims are capable of common proof due to Defendants' systemic violations of class members' constitutional and civil rights. Indeed, elsewhere in its opinion, the District Court acknowledged that "[t]he record contains enough evidence for a reasonable jury to find that the Municipal Court systemically ignored *Bearden*." (Memorandum Opinion, *McCullough, et al. v. City of Montgomery*, *et al.*, No. 2:15-cv-463-RCL (M.D. Ala. May 21, 2021), ECF No. 374, at 30 ("Op."); *see also In re Armstead Lester Hayes III*, No. 49 (Ala. Ct. Jud., filed Jan. 5, 2017), *McCullough* ECF No. 252-2, at 2-6; *Carter v. City of*

Montgomery, 473 F. Supp. 3d 1273, 1298-99 (M.D. Ala. 2020).) Because this Court has held that predominance can be satisfied based on evidence of a common course of conduct, *Klay v. Humana, Inc.*, 382 F.3d 1241, 1258-59 (11th Cir. 2004), the District Court should have found that Plaintiffs satisfied Rule 23(b)(3)'s predominance requirement.

That Plaintiffs' *Bearden* claims admit of common proof also follows from the categorical nature of the *Bearden* right. The Supreme Court has explained the basic protections that a government must provide before jailing a person for non-payment: in addition to "notice to the defendant that his 'ability to pay' is a critical issue", the elicitation of relevant financial information, and "an opportunity at the hearing for the defendant to respond to statements and questions about his financial status", the required safeguards include "*an express finding* by the court that the defendant has the ability to pay." *Turner v. Rogers*, 564 U.S. 431, 447-48 (2011) (emphasis added).[3] Failure to hold an indigency hearing is itself a constitutional violation, even if the incarcerated person had the ability to make the payment at issue. *Doe v. Angelina Cnty.*, 733 F. Supp. 245, 254 (E.D. Tex. 1990). Thus, whether Defendants violated class members' rights is a simple, binary question—

[3] Alabama courts have also held that a *Bearden* hearing must be accompanied by specific factual findings regarding indigency. *See Taylor v. State*, 47 So. 3d 287, 289-90 (Ala. Crim. App. 2009); *Snipes v. State*, 521 So. 2d 89, 90-91 (Ala. Crim. App. 1986); *cf.* Ala. R. Crim. P. 26.11(i).

the Municipal Court either held *Bearden* hearings or not—and as such is appropriately "suited for class review". *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1325-26 (11th Cir. 2008).

For these reasons, the District Court's reliance on *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000), and *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997), was misplaced. In both of those cases, discrimination had to be determined on a case-by-case basis. *Rutstein* involved allegations that a car rental company refused to rent cars to Jewish customers. 211 F.3d at 1231. This Court reversed the district court's grant of class certification, finding that "[e]ach plaintiff will have to bring forth evidence demonstrating that the defendant had an intent to treat him or her less favorably because of the plaintiff's Jewish ethnicity." *Id.* at 1235. The plaintiffs in *Jackson* alleged that a motel either denied or provided substandard accommodations to black and other non-white patrons on the basis of their race. 130 F.3d at 1001. Similar to *Rutstein*, *Jackson* held that the plaintiffs' "claims will require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination". *Id.* at 1006. That is not the case here, where Plaintiffs have come forward with common evidence, recognized by the District Court, that they were systemically denied *Bearden* hearings. The kinds of fact-specific, individualized inquiries required in

intentional racial discrimination cases are not present where, as here, there are systemic violations of the *Bearden* right.

The District Court's errors in its predominance analysis were influenced by its misunderstanding of the requirements of *Bearden*. The District Court held that "the lack of *written* findings" could not constitute "evidence that no findings were made". (Op. at 31 n.9.) This holding relied on the Court's erroneous premise that "nothing in *Bearden* requires written findings". (*Id.*) As explained above, that is a misreading of *Bearden*, which requires that an ability-to-pay hearing be accompanied by specific findings on the record (in a written order or transcribed hearing) regarding the individual's indigency. *See Turner*, 564 U.S. at 447-48, *Taylor*, 47 So. 3d at 289-90; *see also* Pls.' Br. at 28-30.

Moreover, a lack of records required to be maintained can constitute circumstantial evidence that such records do not exist. Federal Rule of Evidence 803(7)(A) provides that "[e]vidence that a matter is not included in a record [of a regularly conducted activity]" may be used to establish "that the matter did not occur or exist". And this Court has held that a lack of records that should exist is powerful circumstantial evidence that no such records actually exist. *See United States v. Parker*, 302 F. App'x 889, 892 (11th Cir. 2008).

Finally, the District Court appears not to have recognized that "[i]t is often the case that class action litigation grows out of *systemic failures of*

administration, policy application, or records management that result in small monetary losses to large numbers of people. To allow that same systemic failure to defeat class certification would undermine the very purpose of class action remedies." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 540 (6th Cir. 2012) (emphasis added). That is the case here. Defendants' failure to apply constitutional requirements, combined with their failure to keep the required records, subjected Plaintiffs to systemic violations of their constitutional right to a hearing and express findings that they had willfully refused to pay. Though these constituted constitutional harms, for many class members, the "small monetary loss" would make individual litigation impractical. Allowing Defendants to avoid responsibility on this basis would defeat "the very purpose of class action remedies", which is to facilitate the vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all". *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quotation marks and citation omitted).

For these same reasons, the District Court erred in finding that individualized issues predominated over common issues for the abuse-of-process claim. As with the *Bearden* claim, Plaintiffs identified common proof of Defendants' routine abuse of process through Judicial Correction Services' ("JCS") training manuals, coercive collection practices, form documents and electronic

records. As with the *Bearden* claim, the "very gravamen" of the abuse-of-process claim in this case is that JCS *systemically* abused the issuance of probation orders to enhance its own profits, making class treatment of these claims particularly appropriate. *See Klay*, 382 F.3d at 1257.

Given the evidence of classwide impact presented by Plaintiffs, the District Court's own acknowledgment of that evidence, and the nature of the *Bearden* and abuse-of-process claims, the District Court should have found that Plaintiffs established predominance.

II. THE DISTRICT COURT ERRED BY INCORPORATING ITS CONCERN WITH CLASS MEMBERSHIP FEASIBILITY ISSUES INTO ITS PREDOMINANCE ANALYSIS.

The District Court erred in allowing its concern with the feasibility of determining class membership to affect its predominance analysis. This was error because this Court has held that administrative feasibility issues are relevant only to superiority, and the jury does not have to—and indeed usually does not—determine class membership.

In *Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2021), this Court held that "administrative feasibility is not a requirement for certification under Rule 23" and, "aside from its limited relevance to Rule 23(b)(3)(D), administrative feasibility is entirely unrelated to either Rule 23(a) or (b)". *Id.* at 1304. This Court recently reiterated this holding in *Rensel v. Centra Tech, Inc.*, 2 F.4th 1359 (11th Cir.

2021). "Administrative feasibility may be relevant to 'the manageability criterion of Rule 23(b)(3)(D),' but that provision requires a 'comparative' analysis that is incompatible with a threshold, standalone administrative feasibility requirement." *Id.* at 1369 (quoting *Cherry*, 986 F.3d at 1304).

But the District Court still considered administrative feasibility issues as part of its predominance analysis. The District Court identified three questions that would have to be answered by each claimant to establish class membership: "[1] whether the Municipal Court sentenced class members to probation with JCS; [2] whether JCS petitioned the Municipal Court to revoke probation; and [3] whether the Municipal Court commuted their fines to jail time." (Op. at 30.) The District Court acknowledged that common evidence in the form of the Probation Tracker and Benchmark files could answer these questions for some class members, but it asserted that "for others the question will be much harder". (*Id.*) The District Court expressed its belief that "the fact-finder must determine individually whether the evidence supports class membership" and concluded on this basis that these three issues posed individualized questions. (*Id.*)

This was error because under *Cherry* and *Rensel*, any difficulties in identifying class members go only to the manageability factor of the superiority analysis. As such, the District Court's administrative feasibility concerns have no bearing on the predominance analysis. While the District Court discussed these

issues in predominance-related terms (as "individualized questions"), its discussion centers on the administrative feasibility of identifying class members. The District Court reasoned that for some class members, whether the evidence supported class membership would "be an *easy* determination", whereas "for others the question will be much *harder*". (*Id.* (emphasis added).) The District Court's emphasis on the difficulties of answering that question reflect how administrative feasibility infected its predominance analysis.

Cherry and *Rensel* make clear how the District Court's misplaced consideration of administrative feasibility taints its predominance inquiry. Since administrative feasibility is only "relevant to the manageability criterion of Rule 23(b)(3)(D)" and that provision "requires a 'comparative' analysis", difficulties of determining class membership should not be incorporated into the predominance inquiry because doing so would inject a "threshold, standalone administrative feasibility requirement" into Rule 23(b)(3). *Rensel*, 2 F.4th at 1369. But "administrative difficulties—whether in class-member identification or otherwise—do not alone doom [class] certification". *Cherry*, 986 F.3d at 1304; *see also Rensel*, 2 F.4th at 1369. As the District Court's opinion shows, including class membership questions as part of the predominance analysis risks transforming predominance into

the kind of standalone administrative feasibility requirement that this Court rejected in *Cherry* and *Rensel*.[4]

Indeed, the District Court's analysis is contrary to routine practice in federal court damages actions, in which a jury returns a verdict based on a clear class definition and the district court resolves class membership in subsequent claim proceedings. *See Allapattah Svcs. Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258-61 (11th Cir. 2003) (approving the resolution of individualized questions of class membership in a post-trial, contested claims process); *Bouaphakeo v. Tyson Foods, Inc.*, 214 F. Supp. 3d 748 (N.D. Iowa 2016) (employing similar procedure on remand from Supreme Court). Placing undue emphasis on proof of class membership at the certification stage "puts the class action cart before the horse and confuses the class certification process". *Byrd*, 784 F.3d at 174 (Rendell, J., concurring). After all, "[i]t is the trial judge's province to determine what proof may be required at the claims submission and claims administration stage. It is up to the judge overseeing

[4] For similar reasons, appellate courts have warned district courts not to conflate the ascertainability and predominance analyses. This is because "the ascertainability requirement focuses on whether individuals fitting the class definition may be identified without resort to mini-trials, whereas the predominance requirement focuses on whether *essential elements of the class's claims* can be proven at trial with common, as opposed to individualized, evidence". *Byrd v. Aaron's Inc.*, 784 F.3d 154, 164 (3d Cir. 2015) (citation omitted, emphasis added); *see also In re Petrobras Sec.*, 862 F.3d 250, 264 n.15 (2d Cir. 2017). Predominance should not be concerned with potential post-certification difficulties of identifying each member of the proposed class.

the class action to decide what she will accept as proof when approving the claim form." *Id.* at 173-74. The District Court here should have reserved identification of issues of proof of class membership for the claims-administration stage.

The District Court was also incorrect to suggest that questions of class membership are for the jury to resolve. The text of Rule 23 is explicit: "Whether or not favorable to the class, the judgment in a class action must . . . for any class certified under Rule 23(b)(3), include and specify or describe those . . . whom *the court* finds to be class members." Fed. R. Civ. P. 23(c)(3)(B) (emphasis added). This Court in *Cherry* recognized the district court's role in managing the class after certification. "A plaintiff proves administrative feasibility by explaining how *the district court* can locate the remainder of the class *after* certification." 986 F.3d at 1303 (citation omitted, emphasis added).

Indeed, the rationale for the implied ascertainability requirement arises out of the requirements of Rule 23(a)—not Rule 23(b), where predominance is found. As this Court explained in *Cherry*, "[w]ithout an adequate class definition, *a district court* would be unable to evaluate whether a proposed class satisfies Rule 23(a)", including the commonality and numerosity requirements. 986 F.3d at 1303 (emphasis added). For this reason, at the class certification stage, all a plaintiff needs to show is that "a proposed class . . . is capable of determination", even if membership is not "capable of convenient determination". *Id.* at 1303, 1304.

Further "a district court[] ha[s] discretion to insist on details of the plaintiffs' plan for notifying the class and managing the action" if "unusually difficult manageability problems" arise at the class certification stage. *Id.* (quotation marks and citation omitted); *see, e.g.*, *Tardiff v. Knox Cnty.*, 365 F.3d 1, 6 (1st Cir. 2004) ("If a large number of class members turn out to present non-common issues as to liability, the court may have to consider narrowing or de-certifying the class."). The District Court should therefore have certified the class, secure in the knowledge that the District Court itself could assess and manage any difficulties in determining class membership later in the litigation.

The District Court's emphasis on the administrative task of assessing class membership would routinely defeat certification in complex damages classes. Again, this would "undermine the very purpose of class action remedies". *Young*, 693 F.3d at 540.

III. THE DISTRICT COURT ERRED IN FINDING THAT A CLASS ACTION WAS NOT A SUPERIOR METHOD TO RESOLVE THIS CASE.

The District Court also erred in finding that a class action would not be a superior means of resolving this dispute. Rule 23 requires courts to consider four factors in evaluating whether a class action is "superior to other available methods" of adjudication: (1) class members' interests in individually controlling the action; (2) the extent and nature of any litigation concerning the controversy already begun

by class members; (3) desirability of concentrating the litigation in the particular forum; and (4) difficulties managing the class. *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1358 (11th Cir. 2009). No single factor is dispositive. *See Cherry*, 986 F.3d at 1304-05. Here, the District Court agreed with Plaintiffs that the first three factors support certification, but found that the fourth factor—manageability—made class treatment inferior in this case.

The District Court erred in three interrelated ways. *First*, the District Court did not acknowledge that a class action is typically superior for resolving small-value claims for violations of constitutional rights. *Second*, the District Court's suggestion for an alternative method of resolving this dispute—a "quasi-bellwether"—is without basis and inappropriate for this case. *Third*, the District Court did not weigh the benefits of a class action against the alternatives—the possibility of trying thousands of individual actions, or even its suggested "quasi-bellwether".

A. A Class Action Is Typically the Superior Method To Resolve Claims of Violations of Constitutional Rights.

The Supreme Court has long acknowledged that the purpose of Rule 23(b)(3) is to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all". *Amchem*, 521 U.S. at 617. The District Court, however, did not take into account that a class action is usually the superior method to resolve small-damages actions that are

typical for these kinds of constitutional rights claims. As this Court has explained, "[c]lass actions often involve an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually." *Dickens v. GC Servs. Ltd. P'ship*, 706 F. App'x 529, 538 (11th Cir. 2017) (reversing denial of class certification in part because "the district court failed to give due weight to—or, for that matter, meaningfully consider—the ways in which the high likelihood of a low per-class-member recovery militates in favor of class adjudication"). As one district court in this Circuit has put it, "[i]n undertaking the superiority analysis in a small claims case, a court can typically fulfill its entire function simply by stating that the case involves small claims. That implies that there is no alternative form of litigation, and when no viable alternative to a class action is available, the class action is necessarily the superior method of adjudication." *Arnold v. State Farm Fire & Cas. Co.*, No. 2:17-cv-00148-TFM-C, 2020 WL 6879271, at *10 (S.D. Ala. Nov. 23, 2020). *Accord Rutstein*, 211 F.3d at 1240 n.21 ("[T]he most compelling justification for a Rule 23(b)(3) class action [is] the possibility of negative value suits.").

This litigation represents such "negative value" claims. Many class members will have spent too few days in jail to expect sufficient recovery to offset the costs of pursuing an individual action. Contrary to the District Court's

suggestion (*see* Op. at 35), the potential for recovery of attorneys' fees in Section 1983 actions does not diminish this consideration. *See Braxton v. Farmer's Ins. Grp.*, 209 F.R.D. 654, 662 (N.D. Ala. 2002) (finding diminished importance of availability in attorneys' fees in FCRA cases because of the "the cost of investigating and trying these cases individually"), *aff'd sub nom. Braxton v. Fire Ins. Exch.*, 91 F. App'x 656 (11th Cir. 2003).

The District Court acknowledged that the lack of individual actions seeking damages against Defendants supported a superiority finding. (Op. at 35.) But the District Court did not acknowledge that the aggregation of negative value claims is one of the primary purposes of a Rule 23(b)(3) class action and therefore should be one of the primary considerations in the superiority analysis.

B. A "Quasi-Bellwether" Is Not a Viable Alternative to a Class Action in This Case.

The District Court further erred in its superiority analysis by suggesting an alternative to a class action—what the District Court termed a "quasi-bellwether"—and determining that this procedure was a superior way to resolve this case. (*Id.* at 36.) The District Court's further suggestion that the doctrine of non-mutual offensive collateral estoppel after a "quasi-bellwether" would provide Plaintiffs with superior relief is also misplaced. (*Id.*) A "quasi-bellwether" would not be more manageable than a class action in the context of this litigation.

Bellwethers are commonly used in mass tort cases, which ordinarily are ill-suited to class certification because they are "likely to present 'significant questions, not only of damages but of liability and defenses of liability, . . . affecting the individuals in different ways'". *Amchem*, 521 U.S. at 625 (quoting Fed. R. Civ. P. 23 Adv. Comm. Notes, 28 U.S.C. App., p. 697, 1966 rev.). Typically, "[t]he purpose of bellwether trials is to provide information to the parties and court about the strengths and weaknesses of the cases in order to help the parties create a framework for a global settlement of the matter." 4 *Newberg and Rubinstein on Class Actions* § 11:20 (6th ed. 2022). Bellwethers are not usually used to determine individual issues for preclusive purposes in subsequent cases.

In fact, courts often refuse to extend the preclusive effect of bellwether trials to non-participating parties. For example, the Fifth Circuit denied preclusive effects of an early asbestos bellwether trial to non-bellwether defendants under traditional principles of issue preclusion. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338-41 (5th Cir. 1982). The Third Circuit has also refused to extend a summary judgment decision against the plaintiffs in a bellwether trial to the non-bellwether plaintiffs because doing so "absent a positive manifestation of agreement by . . . the non-participating, non-trial plaintiffs" would affect their Seventh Amendment jury trial rights. *In re TMI Litig.*, 193 F.3d 613, 725 (3d Cir. 1999). The Ninth Circuit similarly requires the affirmative consent of non-participating

plaintiffs before allowing the results of a bellwether trial to bind non-participants. *See Dunson v. Cordis Corp.*, 854 F.3d 551, 555 (9th Cir. 2017).

For these reasons, a "quasi-bellwether" is inappropriate for this case. This case involves small damages among a class of plaintiffs who suffered the same harm—a violation of their *Bearden* rights. Accordingly, this case is suited for class certification, and the alternatives developed for mass tort cases are inapplicable. Moreover, there is no indication in the record that any class member not participating in the "quasi-bellwether" would agree to be bound by the results of such a trial, and applying preclusive effects absent consent could affect the non-participating Plaintiffs' right to a jury trial. Indeed, the District Court was unable to state that issue preclusion would definitively apply, only observing that "later plaintiffs *may* be able to rely on non-mutual offensive collateral estoppel to establish *some* elements of their claim (*e.g.*, knowledge, custom)." (Op. at 36 (emphasis added).) Individual plaintiffs should not be compelled each to separately bring suit and then litigate the highly complex and discretionary doctrine of non-mutual offensive collateral estoppel. *See, e.g.*, *Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663, 666 (11th Cir. 1984). Such successive individual actions would be markedly inferior to a single class action.

C. The District Court Erred in Overemphasizing the Manageability Factor in Its Superiority Analysis.

The District Court further erred in its superiority analysis by not comparing the manageability of a class action to the alternatives. This is because the District Court gave dispositive weight to its finding that individual questions about class membership "predominate", and therefore "administrative difficulties in trying this case as a class action would be immense". (Op. at 35-36.) The District Court's conclusion is at odds with Rule 23 and the case law, which require a balancing of the benefits and difficulties a class action poses against viable alternative methods of litigation.

The question is "whether a class action 'will create relatively more management problems than any of the alternatives,' not whether it will create management problems in an absolute sense". *Cherry*, 986 F.3d at 1304 (quoting *Klay*, 382 F.3d at 1273). "Speculative problems with case management" are not grounds to deny class certification, and manageability "will rarely, if ever, be in itself sufficient to prevent certification of a class". *Klay*, 382 F.3d at 1272-73; *see Rensel*, 2 F.4th at 1369 ("Administrative feasibility may be relevant to the manageability criterion of Rule 23(b)(3)(D), but that provision requires a comparative analysis that is incompatible with a threshold, standalone administrative feasibility requirement.").

The District Court did not balance the manageability considerations under this standard. Specifically, it did not weigh the pros and cons of the competing methods for conducting trial. Instead, the District Court assumed some hypothetical benefit achieved through potential collateral estoppel effects of a "quasi-bellwether", with no analysis of the administrative difficulties involved in determining whether issue preclusion should apply in later trials. Relatedly, requiring Plaintiffs to litigate individually would involve the reintroduction of the systemic evidence of the Municipal Court's *Bearden* violations over and over again, thousands of times, instead of once, on behalf of a class. And in a similar vein, the District Court did not take into account that if class members were forced to proceed individually, the District Court could be inundated with thousands of separate actions pursuing the same claims. This would be more than the total number of cases that were filed in the Middle District of Alabama in 2021. *See* United States Courts, *Statistical Tables for the Federal Judiciary, 2021*, https://www.uscourts.gov/statistics/table/c-1/statistical-tables-federal-judiciary/2021/12/31 (last accessed Sept. 16, 2022).

The District Court did not balance the pros and cons of the class action versus the "quasi-bellwether" or versus individual trials. Manageability "must [be] evaluate[d] in comparative terms" because "the superiority requirements . . . turn[] on whether a class action is better than other available methods of adjudication." *Cherry*, 986 F.3d at 1304. A district court is required to determine whether "a class

action [would] create more manageability problems than its alternatives" and "how . . . the manageability concerns compare with the other advantages or disadvantages of a class action". *Id.* The District Court's opinion lacked this necessary analysis.

IV. THE DISTRICT COURT ERRED IN FINDING THAT THE FALSE-IMPRISONMENT CLASS FAILED THE COMMONALITY REQUIREMENT.

The District Court's denial of certification of Plaintiffs' false-imprisonment class was also erroneous. Although the Court identified a number of issues relating to the class representatives that were "the same across the class", it denied certification on commonality grounds, finding that eight separate "issues present[ed] individual questions". Under Rule 23(a)(2), however, there was no need for the District Court to compare the eight individualized questions it identified when it had already identified five common questions.

To satisfy commonality pursuant to Rule 23(a)(2), "even a single common question will do". *Carriuolo v. General Motors Co.*, 823 F.3d 977, 984 (11th Cir. 2016) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011)). Since *Wal-Mart*, courts in this Circuit have held that a showing of systemic practices is sufficient for a finding of commonality. *See, e.g.*, *Braggs v. Dunn*, 317 F.R.D. 634, 657 (M.D. Ala. 2016) (finding commonality requirement to be satisfied by proof of the existence of systemic policies and practices). Moreover, the typicality and commonality requirements in a class certification analysis are closely linked,

see, e.g., *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1278 (11th Cir. 2000), and "a finding of typicality logically presupposes a finding of commonality", 1 *Newberg and Rubinstein on Class Actions* § 3:31 (6th ed. 2022).

The District Court's commonality analysis was mistaken in two fundamental ways. *First*, in the typicality section of its opinion, the District Court identified five issues that were "the same across the class": (1) whether the class member was placed on probation by JCS; (2) whether JCS petitioned for the class member's probation to be revoked; (3) whether JCS withheld material facts about the class member's ability to pay fines; (4) whether JCS acted in bad faith in causing the class member's imprisonment; and (5) whether the class member was jailed without a *Bearden* hearing in the Municipal Court. (Op. at 41.) "[T]he commonality and typicality requirements of Rule 23(a) tend to merge", *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5 (2011) (quotation marks and citation omitted), and a finding of typicality usually requires a finding of commonality. Thus, the District Court should have found that these five questions, which are the "same across the class", satisfied the commonality requirement. For example, as discussed above, the question of whether class members received a *Bearden* hearing was capable of common proof. Because the Supreme Court has held that even one common question will satisfy the commonality requirement, *id.* at 359, the District Court's emphasis on other individualized issues was misplaced.

Second, the District Court appears to have misapplied the predominance standard of Rule 23(b)(3) to its commonality analysis under Rule 23(a)(2). The "predominance requirement is far more demanding than Rule 23(a)'s commonality requirement". *Sellers v. Rushmore Loan Mgmt. Servs.*, 941 F.3d 1031, 1039-40 (11th Cir. 2019). This is because, for commonality, "even a single common question will do", while predominance requires the court to consider "whether 'the issues in the class action that are subject to generalized proof and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof'". *Id.* at 1040 (quoting *Kerr v. City of W. Palm Beach*, 875 F.2d 1546, 1557-58 (11th Cir. 1989)). Here, the District Court identified eight issues that each class member would have to prove, and determined that "individualized review of the evidence is needed to answer those questions". (Op. at 40-41.) But the commonality provision of Rule 23(a) only requires that "determination of [one central question's] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke". *Wal-Mart*, 564 U.S. at 350. Commonality does not require a showing that no individualized evidence is required to answer any relevant questions.

CONCLUSION

For the foregoing reasons, *Amici* respectfully support Plaintiffs' request for the Court to reverse the District Court's denial of class certification.

Signed this 16th day of September, 2022.

Respectfully submitted,

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ADDENDUM: IDENTITY OF *AMICI CURIAE*

The Southern Poverty Law Center ("SPLC") is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. SPLC has filed litigation with a particular focus on combating privatized probation, debtors' prisons, and other fee-based profiteering schemes in the criminal legal system through litigation and advocacy. *See, e.g.*, *Harper v. Pro. Prob. Servs., Inc.*, 976 F.3d 1236 (11th Cir. 2020).

Civil Rights Corps is a national organization dedicated to landmark litigation and high-impact advocacy that empowers communities to advance justice and equality under the law. It has successfully challenged wealth-based detention and the criminalization of poverty throughout the criminal legal system, including in this Circuit, *see, e.g.*, *Schultz v. State*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018), and including challenges to unconstitutional private probation schemes, *see, e.g.*, *McNeil v. Cmty. Prob. Servs., LLC*, 945 F.3d 991 (6th Cir. 2019).

Public Good Law Center is a public interest law organization specializing in civil and constitutional rights, consumer protection, freedom of speech and public health. Through amicus participation in cases of particular significance, Public Good seeks to ensure that the protections of the law are available to all.

Deborah N. Archer is the President of the American Civil Liberties Union and Professor of Clinical Law and Co-Faculty Director of the Center on Race, Inequality, and the Law at New York University School of Law. She is a nationally recognized expert on civil rights and racial justice, and a frequent public speaker on these topics. Prior to fulltime teaching, Professor Archer worked as an attorney with the American Civil Liberties Union and the NAACP Legal Defense and Educational Fund, Inc., where she litigated in the areas of voting rights, employment discrimination and school desegregation.[5]

Suzette Malveaux is Director of the Byron R. White Center for the Study of American Constitutional Law and the Provost Professor of Civil Rights Law at the University of Colorado Law School. Prof. Malveaux has taught Civil Procedure, Complex Litigation, Civil Rights and Employment Discrimination for the past eighteen years. Prof. Malveaux is also the co-author of *Class Actions and Other Multiparty Litigation: Cases and Materials* (West Group, 3d ed. 2012; 2d ed. 2006), and author of numerous articles exploring the intersection of civil procedure and civil rights.

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Heather Elliott is the Alumni Class of '36 Professor of Law at the University of Alabama School of Law. One of her principal areas of scholarship concerns the role of courts and agencies in a democratic society. Professor Elliott is a former law clerk to U.S. Supreme Court Justice Ruth Bader Ginsburg and to Judge Merrick B. Garland of the U.S. Court of Appeals for the D.C. Circuit.

COMBINED CERTIFICATIONS

The undersigned hereby certifies the following:

1. Independent Authorship. No counsel for any party in this case authored this brief in whole or in part, and no party, party's counsel or any other person, contributed money that was intended to fund preparing or submitting this brief.

2. Type-Volume Limitations. This brief complies with the type-volume limitation set forth in Fed. R. App. P. 29(a)(5). As measured by the word-processing system used to prepare this brief, this brief contains 5,748 words.

3. Typeface and Type-Style Requirements. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(5)-(6). It was prepared using a 14-point, proportionally spaced typeface with serifs and set in a roman style, except as otherwise permitted.

4. Filing. In accordance with Fed. R. App. P. 25(a)(2)(B)(i) and 11th Cir. R. 31-3, on September 16, 2022, this brief was electronically filed with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Also in accordance with 11th Cir. R. 31-3, four copies were dispatched on September 16, 2022 for delivery to the Clerk of the Court via third-party commercial carrier.

5. Service. Service was accomplished on all counsel of record by the appellate CM/ECF system.

Signed this 19th day of September, 2022.

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