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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RIANA BUFFIN and CRYSTAL PATTERSON, *et al.*, Plaintiffs, v. VICKI HENNESSY, in her official capacity as the San Francisco Sheriff, et al., Defendants.	Case No. 15-CV-4959 (YGR) (Class Action)

Brief of Amicus Curiae San Francisco Public Defender's Office

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Interest of Amicus Curiae

Amicus curiae the San Francisco Public Defender's Office (SFPD) provides legal representation to indigent persons in criminal and civil proceedings in San Francisco Courts. SFPD represents over 25,000 people charged with crimes each year. SFPD's mission is to protect and defend the rights of indigent clients through effective, vigorous, compassionate, and creative legal advocacy. Every day, SFPD attorneys represent persons detained in the San Francisco County Jail because of their inability to pay money bail.

SFPD is uniquely positioned to provide insight into the functioning of the bail system in San Francisco and can attest that other reasonable methods may be used effectively to ensure court attendance and to minimize risk to the San Francisco community. SFPD's experience leaves no doubt that wealth-based detention, even when brief, causes serious harms to indigent arrestees. Even a few days of post-arrest detention can be devastating to a person and her family. Among other harms, a detained arrestee may suffer loss of employment and a place to live, lack of access to essential medical and mental health, medication, forced separation of parents and children leading to dangerous gaps in child care, and physical trauma in a dangerous jail environment. Because of the inability to purchase release, arrestees face overwhelming pressure to plead guilty, even if innocent. Detention, hampers defendants' ability to participate in their own defense, including communicating with counsel, gathering evidence, and identifying witnesses in the crucial days immediately after arrest. SFPD's indigent clients who are detained are placed "in an inferior position to a defendant who has the means to post bail." Dkt. 136-24, p. 2.

The outcome of this case will have a substantial effect on SFPD's interests and operations. SFPD seeks to ensure that its clients are not disadvantaged in their criminal cases because of their poverty.

Background

In San Francisco County, many indigent persons represented by SFPD are detained until arraignment because of their inability to pay money bail. Nearly every arrestee in San Francisco is offered the option of near-immediate release if the arrestee pays a pre-determined amount of bail. Though San Francisco provides for release on non-financial conditions through its "OR Project," many indigent arrestees are excluded from the OR Project because of the crime charged at arrest.[1] For such individuals, with money bail out of reach, the only "option" is detention. Even those eligible for the OR Project may still be denied non-financial release, leaving them, detained because of their poverty. It is worth emphasizing that all these individuals—whether deemed *per se* ineligible for non-financial release because of their alleged crimes or found ineligible after a hearing—nonetheless would be released if they could pay the amount established by San Francisco County's bail schedule. *See* Penal Code §1270.1(a). Finally, even those who can secure release on non-financial conditions must wait longer than those who can immediately pay the amount on the bail schedule.

Amidst the dueling summary judgment briefs, a critical and undisputed fact stands out: California's statutory scheme, the record, and SFPD's experience all establish that pre-arraignment wealth-based detention in San Francisco regularly lasts four to five days, particularly when arrest occurs before the weekend or a holiday. *See* Cal. Penal Code § 825; Dkt. 136-11, p. 2 (explaining that initial appearance occurs "within two or three business days of arrest (*not counting weekends and holidays*)"). It is undeniable that the existing system results in some arrestees being detained

[1] In theory, release on non-financial conditions can also be obtained through an application pursuant to Cal. Penal Code § 1269c. In SFPD's experience, § 1269c, which allows eligible defendants to apply for reduced money bail is, in essence, a fiction. To start, the same people who are statutorily ineligible for the OR Project because of the nature of their alleged crimes cannot avail themselves of §1269c. And, in any event, there is no reasonably practical way for detained arrestees awaiting arraignment to make a *pro se* application. Even when counsel files a § 1269c motion at some later point after appointment, such motions are, to SFPD's knowledge, rarely, if ever, granted.

for multiple days because they lack access to money, without recourse to any form of individualized consideration or pre-arraignment release. Arraignment does not actually cure the harms of San Francisco's bail system. In SFPD's experience, judges routinely fail to inquire into ability to pay at arraignment and resort by default to the bail schedule, eviscerating the artificial line that the parties have drawn between pre- and post-arraignment. Any challenge to such perfunctory determinations then often cannot be challenged for weeks. *See, e.g.*, *People v. Jason McKenna*, (Super. Ct. San Francisco County, 2017, No. 17004358); *People v. Steven Flowers*, (Super. Ct. San Francisco County, 2017, No. 17013241); *People v. Yousif Aljaberi*, (Super. Ct. San Francisco County, 2017, No. 17011995); *People v. David Sanchez*, (Super. Ct. San Francisco County, 2017, No. 17013355); *People v. Angel Sevilla*, (Super. Ct. San Francisco County, 2017, No. 17013970).

Argument

San Francisco's system is unconstitutional. Its automatic reliance on predetermined financial conditions of pretrial release creates de facto orders of wealth-based pretrial detention for presumptively innocent indigent arrestees—many of whom are SFPD clients—and clearly cannot satisfy the scrutiny longstanding precedent requires. Wealth-based detention has no place in American law, and the Sheriff, City, and State have rightly refused to defend it.

SFPD submits this brief to: (1) clarify that the analysis that governs liability is settled and straightforward; and (2) demonstrate that the Court would benefit greatly from allowing further submissions, including the participation of interested stakeholders, when crafting a remedy.

1. San Francisco's automatic use of predetermined secured financial conditions of release infringes two separate substantive constitutional rights

San Francisco's bail system infringes two constitutional rights. First, it offends the right not to

be detained based solely on indigence, a right grounded in both equal protection and due process principles. *Bearden v. Georgia,* 461 U.S. 600 (1983). Second, it infringes the "fundamental" substantive due process right to pretrial liberty. *United States v. Salerno*, 481 U.S. 739, 750 (1987).[2]

A. The right not to be detained solely based on indigency

The right not to be detained based solely on wealth is well-established. The Supreme Court held over 45 years ago that a person may not be "subjected to imprisonment solely because of his indigency." *Tate v. Short*, 401 U.S. 395, 397-398 (1971). This principle has led the Court to strike down state and local practices jailing indigent persons solely due to their inability to pay a fine three times,: in *Tate*, in *Williams v. Illinois*, 399 U.S. 235 (1970), and in *Bearden v. Georgia*, 461 U.S. 660 (1983). In the last of these cases, the Court reiterated the core principle on which this substantive right rests, namely the "impermissibility of imprisoning a defendant solely because of his lack of financial resources." *Id.* at 661.

Intervenors California Bail Agents Association (CBAA) misunderstand this precedent when arguing that wealth is not a "suspect class." The Supreme Court has explained that the right not to be detained based on indigence is distinctive because it "reflect[s] both equal protection and due process concerns." *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996). When the Court held that poverty generally is not a "suspect class," it exempted the *Tate-Bearden-Williams* line of cases because

[2] In its recent litigation around the country, representatives of the commercial bail industry misrepresent the history of American bail by conflating the term "bail"—the general conditions of a person's release, monetary or otherwise—with "commercially secured money bail." But the notion of for-profit secured bail was (and is) unlawful in England, and did not even exist in America until 1898. Department of Justice, National Institute of Corrections, Fundamentals of Bail (2014) at 40. For over a millennium, "bail" conditions were based on an "individualized assessment of what the arrestee or his surety could pay." *ODonnell v. Harris Cty*., 251 F. Supp. 3d 1052, 1069 (S.D. Tex. 2017); *see also* Amicus Br. for Center for Legal and Evidence-Based Practices, *Walker v. City of Calhoun*, No. 16-10521 (11th Cir. 2016), 2016 WL 4376539, at *7-8 (citing William Blackstone, Commentaries on the Laws of England, at 291, 295-97 (Chitty ed., 1857)). San Francisco's predetermined *secured* schedule is therefore a radical departure from centuries of thought and practice in the English and American legal traditions. "Bail" historically served to *release*, not detain, as the automatic use of secured financial conditions of release does for the indigent. Fundamentals of Bail at 13.

they involved an "absolute deprivation" of a benefit to a "class . . . composed only of persons who were totally unable to pay the demanded sum." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 21-22 (1973). Similarly, such cases are not limited by the ordinary equal-protection rule excluding disparate-impact liability. *See M.L.B.*, 519 U.S. at 125-127 (distinguishing *Washington v. Davis*, 426 U.S. 229 (1976), which adopted that rule).

Though *Williams*, *Tate*, and *Bearden* involved post-conviction jailing, the core principles articulated have even greater applicability before trial, when the accused is presumed innocent and the liberty interest is notably higher than after conviction. *See Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."). In *Pugh v. Rainwater*, the Fifth Circuit, sitting *en banc*, explained that the principle that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible" has "broader . . . implications" for those "accused but not convicted of crime." 572 F.2d 1053, 1056 (5th Cir. 1978). The *Pugh* court had "no doubt" about the propriety of applying the principle "in the case of an indigent [suffering] pretrial confinement for inability to post money bail." *Id.* at 1058.[3]

Citing *Graham v. Connor*, 490 U.S. 386 (1989), CBAA argues that, because the Eighth Amendment prohibits "excessive bail," Plaintiffs' constitutional claim must be brought under that provision. But the Supreme Court later clarified that *Graham* reflects only a "reluctan[ce] to *expand* the concept of substantive due process." *County of Sacramento v. Lewis*, 523 U.S. 833,

[3] The Department of Justice—under both President Trump and President Obama—has filed briefs agreeing that, because detention based solely on inability to pay money bail is impermissible, the principle applies to both the convicted and the presumptively innocent alike. *See* Brief for the United States at 11, *Walker v. City of Calhoun*, No. 17-13139-GG (11th Cir. Sept. 13, 2017); Brief for the United States at 12, *Walker v. City of Calhoun*, No. 16-10521-HH (11th Cir. Aug. 18, 2016). The Attorney General of California agrees, *see* Emergency Petition for Writ of Habeas Corpus, Exh. C, Answer to Petition for Habeas Review, *Rodriguez-Ziese v. Hennessy*, No. 5:17-cv-06473 (N.D. Cal. Nov. 7, 2017); The American Bar Association and the Conference of Chief Justices agree. *See* Brief of Conference of Chief Justices, *ODonnell v. Harris County*, 2017 WL 3536467; Brief for American Bar Association, *ODonnell v. Harris County*, 2017 WL 3536469.

842 (1998) (emphasis added). *Graham* is inapplicable for two reasons. *First*, the substantive due process theory (pretrial detention) involves no such expansion, as "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Second, the prohibition of wealth-based detention arises under a convergence of equal protection and due process, not pure substantive due process. *See Pugh,* 572 F.2d at 1057.

B. The "Fundamental" right to pretrial liberty

In *Salerno*, the Supreme Court explained that, because the "individual's strong interest in liberty" is "fundamental," it is a "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial." 481 U.S. at 749, 750. The Ninth Circuit has repeatedly reaffirmed this principle in recent years. *See Hernandez v. Sessions*, 872 F.3d 976, 993 (9th Cir. 2017) ("beyond dispute" that "freedom from imprisonment" is a fundamental right in immigration detention); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014) (*en banc*) (applying strict scrutiny to Arizona bail law because it infringes on the "fundamental" right to pretrial liberty). In accordance with the fundamental nature of this right, any judicial order of pretrial detention requires the closest analysis under the Due Process Clause. *See Salerno*, 481 U.S. at 746-751.

These foundational rules apply. As multiple circuits have recognized, "the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all." *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969); *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (per curiam) ("[O]nce a court finds itself in this situation—insisting on terms in a 'release' order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid *detention* order.") (emphasis in original); *United States v.*

Leisure, 710 F.2d 422, 425 (8th Cir. 1983). An unattainable bail condition is a "de facto order[] of pretrial detention." *See ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1059, 1131 (S.D. Tex. 2017) (enjoining, in a 193-page ruling, Harris County Texas's materially identical secured money bail schedule system). Because San Francisco imposes unattainable financial conditions automatically for all indigent arrestees, it is a de facto pretrial-detention system for those who cannot access sufficient funds to pay bail. This triggers the strict scrutiny required under *Salerno*.

Intervenor CBAA attempts to deny the fundamental nature of the right to freedom from bodily restraint before trial by narrowly framing it as the "right to liberty in the brief period between arrest and arraignment[.]" Dkt. 143, p. 9. But there is no support for distinguishing the four-to-five days of detention that occur before "arraignment" from those after for purposes of the fundamental nature of the right. The liberty interest of arrestees is strongest during the period before prosecutors determine that charges may be brought and arraignment takes place, and current state law and local practice guarantee that fundamental right for those wealthy enough to pay. The question is whether the government has demonstrated compelling enough reasons to deny this right to those who cannot. [4]

2. San Francisco's predetermined scheme of automatic financial conditions fails strict scrutiny

Both constitutional rights implicated trigger heightened scrutiny. Under *Bearden, Williams*, and *Tate*, the government must demonstrate that wealth-based detention is "necessary to promote a

[4] CBAA's argument that strict scrutiny is not triggered because the "brief detention between arrest and arraignment" is not sufficiently significant is divorced from the record and misplaced. *See* CBAA Reply Br., Dkt. No. 160, at 9. First, arrestees regularly languish in jail for four to five days without a bail hearing. Second, in citing cases that consider the severity of an infringement to support its position, CBAA conflates the *degree* of the infringement—which CBAA's cases address (albeit not in the context of pre-trial detention)—with the *duration* of infringement—which is what is implicated by the passage of time between arrest and arraignment. Even assuming that a lesser burden on the right to pre-trial liberty (for example, ankle monitoring) might not trigger strict scrutiny, there is no greater infringement on the right to pre-trial liberty than detention. And there is no authority for CBAA's contention that a severe, but "brief," infringement of a fundamental right can escape close scrutiny. *Cf. Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991) (requiring probable cause determinations "*as soon as is reasonably feasible*, but in no event later than 48 hours after arrest") (emphasis added).

compelling governmental interest." *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972). As to pretrial liberty, the *en banc* Ninth Circuit, after closely analyzing *Salerno* and related cases, concluded that the government must demonstrate that any infringement on this "fundamental" right is narrowly tailored to serve a compelling state interest." *Lopez-Valenzuela*, 770 F.3d at 780.

Consistent with this case law, courts review governmental justifications for infringing on these constitutional rights with skepticism. In *Bearden*, the Supreme Court rejected multiple justifications the government offered for imprisoning those unable to pay fines. Securing restitution was rejected because it was inapplicable to the indigent, 461 U.S. at 670-671; rehabilitating the defendant and protecting society was deemed to have no relevance when a person was detained only due to inability to pay, *id.* at 671; and punishment and deterrence was found insufficient because these interests "can often be served fully by alternative means," *id.* at 671-672. In *Frazier*, the government sought to imprison individuals unable to pay fines in order "to coerce defendants with marginal or concealable assets to use those assets to satisfy a fine and stave off imprisonment." 457 F.2d at 728. The court rejected that argument because "far less onerous alternatives will do this job . . . effective[ly]." *Id.*

By contrast, in *Salerno*, the Supreme Court upheld the facial validity of the federal Bail Reform Act, which infringed the fundamental right to pretrial liberty, because the Act "*narrowly* focuse[d] on a particularly acute problem…in which the Government interests are *overwhelming*.": (1) allowing preventive detention only in "a specific category of extremely serious [felony] offenses"; (2) requiring "clear and convincing evidence" of dangerousness; (3) providing a "full-blown adversary hearing"; and (4) requiring a substantive finding that "no conditions" short of preventive detention of a presumptively innocent person could meet the government's interests. *Id.* at 749-50 (emphasis added).

When the government chooses to employ an automatic predetermined secured bail schedule, the government has the heavy burden to demonstrate that wealth-based detention of those who cannot purchase their liberty is the most narrowly tailored way of meeting specific compelling interests. Perhaps the defining feature of this litigation is that CBAA—standing in the shoes of the government, given the Sheriff's agreement, in her official capacity, that the County's bail schedule is unconstitutional—has not come close to justifying the necessity of automatic financial conditions of release.[5]

All parties agree that the government has three compelling interests in the pretrial release and detention context: public safety, appearance in court, and pretrial liberty of presumptively innocent people. CBAA's assertion that San Francisco's use of money bail advances the first two interests, let alone in the least restrictive manner possible, is misplaced.

CBAA's claim that the payment of money bail promotes public safety rings hollow. San Francisco would immediately release *every one* of the class members who CBAA alleges poses a "danger"—if only they could pay a pre-set dollar amount. As Chief Judge Rosenthal observed in *ODonnell*: "[a]n arrestee with access to money but with similar present charges, similar prior failures to appear, and similar criminal history could pay the secured bond and be released, despite the risks to public safety." 251 F. Supp. 3d at 1110. Because this case involves only arrestees who San Francisco has deemed eligible for immediate release upon payment of money, using a money bail schedule cannot be justified based on public safety.

It is not an answer to assert that secured money bail deters pretrial crime, as CBAA suggests. CBAA concedes that, under California law, committing a crime while released on money bail *does not result in forfeiture of the bail amount*. Cal. Pen. Code §§ 1269b(h), 1305(a); *see also* Cal. Pen.

[5] As explained in *ODonnell*, many jurisdictions do not automatically require secured financial conditions of release, and some jurisdictions have almost entirely eliminated them, even for the wealthy. 251 F. Supp. 3d at 1078-84.

Code § 1278(a) (surety only guarantees appearance of defendant, not that defendant will be crime-free); Dkt. 143, p. 23. As a matter of law, money bail *cannot* create a financial deterrence against new crimes in California. Though CBAA points out that release on a bail bond may be *revoked* for commission of a new crime, revocation is unrelated to the financial deterrence that money bail allegedly offers—pretrial release could equally be "revoked" for commission of a new crime if its terms were not financial.

CBAA's invocation of the government's interest in ensuring court appearances fares no better. A trial would establish, consistent with the overwhelming empirical evidence, that numerous non-financial alternatives and supervision achieve far higher rates of court appearance than secured money bail. Regardless, even if CBAA were correct that secured financial conditions are superior at achieving appearance in court, that would not justify *San Francisco's system*, which results in detention (not release) of indigent arrestees. If a person remains detained because she cannot pay, the person is never in a position in which that financial incentive could operate, and the supposed benefits of the financial condition cannot exist. A system that assigns predetermined money bail with no inquiry into ability to pay cannot be narrowly tailored to any government interest. Just months ago, the Ninth Circuit explained, "Setting a bond amount without considering financial circumstances or alternative conditions of release undermines the connection between the bond and the legitimate purpose of ensuring the non-citizen's presence at future hearings." *Hernandez*, 872 F.3d at 991.[6]

[6] Plaintiff Crystal Patterson's experience illustrates just how disconnected secured money bail is from the government's interest in ensuring court appearances. After Ms. Patterson contracted with a private bail bond company and was released from jail, the charges against her were dismissed, but her debt was not. To this day, Ms. Patterson remains liable to the bail bond company until she pays $15,000—even though she never had any court appearance to make. *See* Third Am. Compl. ¶ 38-39.

The effectiveness of alternatives to money bail were recently litigated in Harris County, Texas, the nation's third largest local criminal jurisdiction. *See ODonnell*, 251 F. Supp. 3d 1052. The Harris County case included a robust evidentiary record, which soundly refuted the same arguments and industry-backed sources that CBAA advances with misleading, cherry-picked quotations.[7] *See, e.g.*, *id*. at 1151-52.

A trial here would, as the evidentiary hearing did in *ODonnell*, expose the lack of rigor in CBAA's factual presentation, but no trial is necessary. Even if the information offered by CBAA were true, it would be woefully insufficient to establish that the wholesale wealth-based detention of thousands of indigent people every year, most SFPD clients, is the least restrictive way for the government in San Francisco to promote its interests in community safety and court appearance. CBAA has failed to explain why San Francisco would need to use a predetermined money bail schedule rather than having judicial officers set individualized conditions of pretrial release and consider alternatives to pretrial detention shortly after arrest, as happens in Cook County, Illinois, Washington, D.C., and countless other jurisdictions, large and small, across the country.[8] As in *ODonnell*, many other courts have enjoined use of predetermined secured bail amounts. *See, e.g.*, *Walker*, 2017 WL 2794064, at *4; *Rodriguez v. Providence Community Corr., Inc*., 191 F. Supp. 3d 758, 779 (M.D. Tenn. 2016); *Cooper v. City of Dothan*, 2015 WL 10013003, at *1 (M.D. Ala.,

[7] In the Harris County case, the government attempted to justify its predetermined secured bail schedule. As a result, Chief Judge Rosenthal held an eight-day evidentiary hearing with live testimony from over a dozen witnesses; took affidavit testimony from several dozen other witnesses; admitted thousands of video-recorded bail hearings; reviewed hundreds of thousands of Harris County case records; examined two years of system-specific data; and heard expert analysis of the local post-arrest process, statistical analysis, and alternatives available in other jurisdictions from five live expert witnesses. The Harris County Sheriff, Harris County District Attorney, and one of the Harris County judges supported and testified on behalf of the Plaintiffs in that case.

[8] Circuit Court of Cook County, Illinois, General Order 18.8A, http://www.cookcountycourt.org/Portals/0/Orders/General%20Order%20No.%2018.8a.pdf; Dkt. 136-19 (Affidavit of Judge Truman Morrison); Pretrial Justice Institute, *The State of Pretrial Justice in America: November 2017*, http://bit.ly/2jgBw6b.

2015); *Jones v. City of Clanton*, 2015 WL 5387219, at *2 (M.D. Ala. 2015). Likewise, SFPD's extensive experience has revealed no inherent structural features that would prevent implementation of a system based on speedy individualized determinations of conditions of release in San Francisco County.

Under the precedent discussed above, this case is straightforward. An order of pretrial detention, whether transparent or de facto (*i.e.*, resulting from unattainable money bail), requires a substantive finding that no alternative to complete pretrial incapacitation of a presumptively innocent person exists. *See ODonnell,* 251 F. Supp. 3d at 1060. San Francisco has not sufficiently justified subjecting indigent arrestees to an initial period of wealth-based pretrial detention. The government does not defend its system and, CBAA effectively concedes that, if anything other than rational basis review applies, the system is unconstitutional. [9]

3. CBAA's remaining arguments fail

CBAA offers just one legal argument against summary judgment: that the "practical compromise" between individual rights and law enforcement realities established in *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), is instructive in analyzing the fundamental right to freedom before trial. Dkt. 143, p. 11 This, CBAA avers, creates a 48-hour period within which the government can detain any arrestee for any reason.

As an initial matter, this argument rests on a false premise. Indigent arrestees in San Francisco are regularly detained significantly longer than 48 hours if they cannot pay the predetermined amount required for their immediate release. CBAA's attempted sleight of hand in labeling the

[9] In light of this concession and the complete absence of record evidence establishing that San Francisco's money bail system advances legitimate governmental aims, plaintiffs would prevail even if "intermediate" scrutiny were applied,. *Cf. ODonnell*, 251 F. Supp. 3d at 1151 (finding Harris County, Texas's money bail system unconstitutional under intermediate scrutiny).

period of detention at issue "pre-arraignment detention" does not change this, which is dispositive even on the terms of CBAA's own argument.

More important, a proper understanding of *Riverside* demonstrates that it is inapposite for multiple reasons. As simply put in *ODonnell,* "The 48-hour probable-cause-hearing standard announced in *Riverside* is not a safe harbor." 227 F. Supp. 3d at 732.

First, *Riverside* is a Fourth Amendment decision. The need for probable-cause hearings within 48 hours of a warrantless arrest is to ensure that the *initial* "search and seizure itself" was not itself "unlawful." *Case v. Eslinger*, 555 F.3d 1317, 1330 (11th Cir. 2009). But the Fourth Amendment is not the only constitutional provision constraining pretrial detention. *See Brooks v. George County, Miss.*, 84 F.3d 157, 166 (5th Cir. 1996). The Fourteenth Amendment, imposes independent limitations on how jurisdictions detain arrestees pretrial.

Second, CBAA never explains why the 48-hour Fourth Amendment rule should apply here. The Supreme Court offered two rationales for the rule: to allow jurisdictions to combine probable-cause hearings with bail hearings or arraignments, 500 U.S. at 54-55, 58; or to accommodate the jurisdiction's delays in processing arrestees. *Id.* at 57-58. Otherwise, the Court admonished jurisdictions that probable-cause hearings must proceed "promptly," and that "every effort must be made to expedite" them. *Id.* at 58. CBAA has conspicuously not invoked either of the *Riverside* rationales. Despite shouldering the burden, CBAA offers no evidence to support its claim that San Francisco needs two days to incorporate bail determinations with its probable-cause determinations; CBAA does not even disclose when San Francisco conducts constitutionally mandated probable-cause determinations. Nor does CBAA claim that San Francisco needs two full days (let alone the four to five days it commonly takes) to make individualized bail determinations. *Compare* 500 U.S. at 57 (accepting finding that Riverside needed 36 hours even to process

arrests).[10] Though CBAA invokes the 48-hour rule from *Riverside* as a talisman to ward off Plaintiffs' challenge, the actual reasoning in *Riverside* would only allow deferring determining indigence (and release for those automatically given secured bail) for up to 48 hours if, unlike here, the government establishes such delay is necessary.

CBAA adds two further factual arguments for why summary judgment for the Plaintiffs should be denied: (1) Plaintiffs' proposed alternative solution is supposedly "uncertain" and (2) Plaintiffs' proposed alternative, to the extent that it is certain, is purportedly "more restrictive" of liberty than the existing system. Dkt. 143, pp. 15-16. Both points miss the mark: CBAA's arguments concern only what *remedy* the Court should order—an issue SFPD addresses below—not whether *liability* exists. CBAA's confusion appears to stem from Plaintiff's request to enjoin all uses of money bail. But liability here is determined by a more limited constitutional analysis: financial conditions may not be used to *detain* arrestees solely because they cannot make a payment, and any detention caused by inability to pay a financial condition of release must meet strict scrutiny. This more limited legal claim is unassailable as a matter of law. Summary judgment on liability should be granted.

4. The Court should require additional briefing and factual submissions before adopting a remedy

All parties agree, albeit for different reasons, that the Court should not craft a final remedy on the current record. *See* CBAA Br. at 25; Sherriff's Response Br. at 6; Pls.' Reply to Sherriff's Response at 14. SFPD joins this consensus and urges the Court to await a more robust record before issuing a remedy that will affect the daily operations of San Francisco's criminal legal system and profoundly affect the lives of arrestees and their families.

[10] Nothing in Plaintiffs' theory of this case would prohibit a jurisdiction from detaining without bail arrestees eligible for pretrial detention for a limited period *necessary* to prepare for robust adversarial bail proceedings.

Further, SFPD submits that, besides requesting further evidence and briefing from the parties as to a feasible remedy, the Court should seek input from credible local stakeholders, such as SFPD. The Court has the power to seek additional evidence before crafting a remedy *see* Fed. R. Civ. P. 56(e)(1), to call its own witnesses, *see* Fed. R. Evid. 614(a), and to issue interrogatories, *see, e.g.*, *Lucent Techs. Inc. v. Gateway, Inc.*, No. CIV.02CV2060-B(CAB), 2007 WL 925354, at *1 (S.D. Cal. Mar. 6, 2007) (Fed. Cir. 2008) ("After considering the motion [for summary judgment] and Lucent's opposition, the Court issued Special Interrogatories to clarify the issues with regard to application of the doctrine of equivalents."). The Court should wield this authority here to ensure a record sufficient to inform the Court's decision on an appropriate remedy. As described in Section 2 *supra*, in *ODonnell,* the District Court drew from a comprehensive factual record describing local processes, including input from a broad swath of local stakeholders, to craft its preliminary injunction. The stakes are just as high here, and any relief the Court orders, which will be final, should include similar breadth of input. Additional factual development with input from SFPD and other local stakeholders, while unnecessary to establish liability, will allow the Court to craft a tailored remedy to accommodate any unique circumstances facing San Francisco County.

Conclusion

SFPD respectfully requests the Court grant Plaintiffs' Motion for Summary Judgment as to liability, but request additional briefing and factual submissions before ordering relief.

Respectfully submitted,

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