IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

DAVID DIXON, et al.,	)	
	)	
	)	
Plaintiffs,	)	
	)	Case No. 4:19-cv-00112
v.	)	
	)	
CITY OF ST. LOUIS, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A CLASS-WIDE PRELIMINARY INJUNCTION

INTRODUCTION

This case addresses urgent and unlawful practices: members of the putative class[1] are imprisoned solely because they are unable to pay a money bail amount[2] required by a judge after a recommendation from the City Bond Commissioner and enforced by Defendant Commissioner Glass and Defendant Sheriff Betts. Because of Defendants' practices, jailed class members have no opportunity to challenge their financial conditions of release for an average of five weeks following their arrest. Rather, the judges who set financial conditions of release—including Defendants here—do so unilaterally, without providing the jailed individual an opportunity to be heard, without making any inquiry into or findings concerning the person's ability to pay, and

[1] The putative class as defined in Plaintiffs' Motion for Class Certification is "all arrestees who are or will be detained in the Medium Security Institution (referred to as "the Workhouse") or the City Justice Center ("CJC"), operated by the City of St. Louis, post-arrest because they are unable to afford to pay a monetary release condition." ECF No. 3, at 2.

[2] In the 22nd Judicial Circuit and other jurisdictions, various terms are used to refer to conditions of release. For the purposes of this memorandum, the phrases "money bail," "secured money bail," "monetary bail" or "financial conditions of release" refer to the requirement that an amount of money be paid upfront for a person to be released. The term "unsecured bail" refers to release upon a promise to pay an amount of money at a later date if they do not appear in court, and "recognizance release" refers to release without any financial obligation.

without determining whether detention is necessary or alternative conditions of release exist to serve the government's interests. When those judges announce financial conditions of release at individuals' first appearances, individuals are told not to speak and do not have counsel.

Defendants' practices violate class members' constitutional rights in several ways. First, they infringe on two overlapping but distinct substantive constitutional rights: their equal protection and due process right against wealth-based detention and their fundamental due process interest in physical bodily liberty before trial. Neither of these constitutional rights is absolute, but infringement on either requires the government to meet heightened scrutiny by demonstrating that the wealth-based pretrial detention of a person is necessary to serve a compelling government interest in court appearance or public safety. Defendants' failure to make any inquiry into or findings about a person's ability to pay a financial condition of release, and their failure to consider whether alternative conditions of release would reasonably protect the government's interests, violate these fundamental constitutional rights.

Second, Defendants' practices violate class members' procedural due process rights by denying them any opportunity at all—let alone a constitutionally adequate hearing with notice and counsel—to contest their jailing. Bedrock constitutional law requires that, before an individual's right to pretrial liberty or against wealth-based detention may be infringed, the government must provide adequate procedural safeguards to ensure the accuracy of any finding that a person must be detained prior to trial to advance a compelling government interest. These minimal safeguards include an individualized hearing on the record with notice of the purpose of the hearing; representation by counsel; an opportunity to be heard, present evidence, and confront evidence; and on-the-record findings about ability to pay and alternative conditions of release. If the government seeks unaffordable money bail that will result in *de facto* pretrial detention, then—

just as in the case of a transparent pretrial detention order—there must be a finding on the record by clear and convincing evidence explaining why no alternative conditions of release will reasonably assure court appearance or public safety.

Absent intervention by this Court, class members will remain unlawfully confined to jail cells for weeks or months with no opportunity to challenge their conditions of release. Because of their poverty, they will languish in jail cells notorious for miserable conditions, including black mold, cockroaches, and extreme temperatures, and will be subject to widespread misconduct by guards. This Court should issue a preliminary injunction enjoining Commissioner Glass from continuing to enforce orders that result in pretrial detention against class members unless those orders include a finding, made after the required procedural safeguards have been provided, that pretrial detention is necessary.[3]

[3] This case presents a prototypical example of why the class action vehicle was created. *See, e.g.*, *Daves v. Dallas Cty., Texas*, No. 3:18-CV-0154-N, 2018 WL 4537202, at *1 (N.D. Tex. Sept. 20, 2018); *Caliste v. Cantrell*, No. CV 17-6197, 2018 WL 1365809, at *3 (E.D. La. Mar. 16, 2018). Because Plaintiffs' class certification motion was filed prior to this preliminary injunction motion, *see* ECF No. 3, this Court can certify the class prior to ruling on this motion. But doing so is not necessary. It is settled that a court need not formally certify a class in order to issue preliminary injunctive relief. *See, e.g.*, *Howe v. Varity Corp.*, 896 F.2d 1107, 1112 (8th Cir. 1990) (affirming preliminary injunction issued for conditionally certified class); *Lee v. Orr*, No. 13-CV-8719, 2013 WL 6490577, at *2 (N.D. Ill. Dec. 10, 2013) ("The court may conditionally certify the class or otherwise order a broad preliminary injunction, without a formal class ruling, under its general equity powers. The lack of formal class certification does not create an obstacle to classwide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons."); *Koss v. Norwood*, 305 F.Supp. 3d 897, 921 (N.D. Ill. 2018) (same); *O.B. v. Norwood*, 170 F.Supp. 3d 1186, 1200 (N.D. Ill. 2016) (same); *N.Y. State Nat. Org. For Women v. Terry*, 697 F. Supp. 1324, 1336 (S.D.N.Y. 1988) (holding that "the Court acted in the only reasonable manner it could under the circumstances, ruling on the continuation of [the] temporary restraining order and leaving the question of class certification for another day"); *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 433 (6th Cir. 2012) ("Simply put, there is nothing improper about a preliminary injunction preceding a ruling on class certification."); *see also, e.g.*, Newberg on Class Actions § 24:83 (4th ed. 2002) ("The absence of formal certification is no barrier to classwide preliminary injunctive relief.").

FACTS

Every day, hundreds of presumptively innocent individuals in the City of St. Louis ("the City") are confined in its jails because they cannot afford to pay a cash bond required by the judges of the 22nd Judicial Circuit—including Defendants here—for their release.[4] These conditions of release are set without any individualized proceedings and people remain incarcerated for weeks without any opportunity to challenge their conditions of release. Courts across the country have held that practices materially identical to those followed by Defendants are unconstitutional and have ordered injunctive or declaratory relief.[5] Until the Stipulated Agreement resolving Plaintiffs' Motion for a Temporary Restraining Order resulted in hearings for the Named Plaintiffs, after which Aaron Thurman and Richard Robards were released, *see* Stipulation of the Parties, ECF No. 19, ¶ 1, and a third-party paid bail for Plaintiffs David Dixon and Jeffrey Rozelle, Plaintiffs' February 6, 2019, *see* Status Report, ECF No. 39, ¶ 13, the Named Plaintiffs were among the many people currently incarcerated in City jails based solely on their inability to pay a financial condition of release, without any of the constitutionally required substantive findings or procedural safeguards. (*See* Ex. 1, Declaration of David Dixon ("Dixon Decl.") ¶ 5; Ex. 2, Declaration of

[4] *See* Division of Corrections, Inmate Population Data, https://perma.cc/VD9R-XX5F (providing data on the daily inmate population at the Workhouse and CJC, which shows an average of over 400 inmates per day in December 2018); Close the Workhouse Campaign, *Close the Workhouse* (2018) at 17 (stating that over 95% of persons in the Workhouse are detained because they cannot afford bond), *available at* https://perma.cc/ZQ74-RK6V.

[5] *See, e.g.*, *McNeil v. Cmty. Prob. Servs., LLC*, 1:18-cv-33, 2019 WL 633012 (M.D. Tenn. Feb. 14, 2019) (granting preliminary injunction); *Schultz v. Alabama*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018) (granting preliminary injunction), *appeal filed sub. nom. Hester v. Gentry*, No. 18-13894 (11th Cir. Sept. 13, 2018); *Caliste v. Cantrell*, 329 F. Supp. 3d 296 (E.D. La. 2018) (issuing declaratory judgment), *appeal filed* No. 18-30954 (5th Cir. Aug. 21, 2018); *ODonnell v. Harris Cty.*, 251 F. Supp 3d 1052 (S.D. Tex. Apr. 28, 2017) (*ODonnell I*) (granting preliminary injunction), *aff'd as modified*, 892 F.3d 147 (5th Cir. 2018); *Rodriguez v. Providence Community Corrections, Inc.*, 155 F. Supp. 3d 758, 761 (M.D. Tenn. 2015) (granting preliminary injunction); *Cooper v. City of Dothan*, No. 1:15-CV-425, 2015 U.S. Dist. LEXIS 78813 (M.D. Ala. June 18, 2015) (granting temporary restraining order).

Jeffrey Rozelle ("Rozelle Decl.") ¶¶ 2-3; Ex. 3, Declaration of Aaron Thurman ("Thurman Decl.") ¶¶ 2, 5; Ex. 4, Declaration of Richard Robards ("Robards Decl.") ¶¶ 2, 4-5). Now, hundreds of similarly situated class members seek relief so that they too may vindicate their constitutional rights. *See supra* note 4.

The individual circumstances of each Named Plaintiff are set forth in Plaintiffs' Memorandum in Support of Named Plaintiffs' Motion for Temporary Restraining Order. (ECF No. 6-1 at 4-6). All were incarcerated as a result of a financial condition of release that they could not afford, set without any opportunity to be heard. (Ex. 1, Dixon Decl. ¶ 5; Ex. 2, Rozelle Decl. ¶¶ 2-3; Ex. 3, Thurman Decl. ¶¶ 2, 5-6; Ex. 4, Robards Decl. ¶¶ 2, 4-6). All were instructed not to speak before they saw the judge at their first appearance. (Ex. 1, Dixon Decl. ¶ 3; Ex. 2, Rozelle Decl. ¶ 3; Ex. 3, Thurman Decl. ¶ 3; Ex. 4, Robards Decl. ¶ 4). All were denied the opportunity to contest their conditions of release at their first court appearance. (Ex. 1, Dixon Decl. ¶¶ 3, 5; Ex. 2, Rozelle Decl. ¶ 7; Ex. 3, Thurman Decl. ¶¶ 3, 5; Ex. 4, Robards Decl. ¶¶ 4, 6). All suffered serious hardships as a result of their unlawful pretrial detention. (Ex. 1, Dixon Decl. ¶¶ 6-7, 10-16; Ex. 2, Rozelle Decl. ¶ 3; Ex. 3, Thurman Decl. ¶¶ 14-16; Ex. 4, Robards Decl. ¶¶ 10-12). Class members are currently suffering the same unconstitutional detention that was experienced by Named Plaintiffs before this Court intervened.

Following the Stipulated Agreement and this Court's Order, *see* ECF Nos. 19-20, the four Named Plaintiffs were granted hearings on their conditions of release in accordance with the terms set out in the Agreement.

Process for Determining Initial Conditions of Release

Defendants' practice for determining conditions of release includes little to no Duty Judge a complaint with an attached request for a warrant. (Ex. 5, Declaration of Elizabeth Forester

("Forester Decl."), ¶ 4). In conjunction with the request by the prosecutor, the Bond Commissioner, a city employee, recommends to the Duty Judge a dollar sum that he believes is the appropriate amount of money bail. (*See, e.g.*, Ex. 6-A, Pretrial Release Commissioner's Report for David Dixon; Ex. 6-B, Pretrial Release Commissioner's Report for Jeffrey Rozelle; Ex. 6-C, Pretrial Release Commissioner's Report for Aaron Thurman; Ex. 6-D, Pretrial Release Commissioner's Report for Richard Robards). The Bond Commissioner virtually always recommends secured money bail and that recommendation is based solely on the prosecutor's charging decision, the alleged facts of the offense, and the individual's criminal history. (*See, e.g.*, *id.*; Ex. 6-F, Pretrial Release Commissioner's Report for Meredith McGuire; Ex. 6-G Pretrial Release Commissioner's Report for Jonathan M. Brown). Recommendations by the Bond Commissioner do not take into account information crucial to the determination of conditions of release, including an individual's ability to pay money bail, the existence of alternative conditions, and the likelihood a particular person will appear in court or present a danger to public safety. *See, e.g. id.*

If the arrest occurred prior to the issuance of the warrant, then the Bond Commissioner has the ability to conduct an interview with the individual before making a recommendation. In the vast majority of cases, no interview takes place, as was the case for the Named Plaintiffs. (Ex. 6-A, Pretrial Release Commissioner's Report for David Dixon; Ex. 6-B, Pretrial Release Commissioner's Report for Jeffrey Rozelle; Ex. 6-C, Pretrial Release Commissioner's Report for Aaron Thurman; Ex. 6-D, Pretrial Release Commissioner's Report for Richard Robards). Even when the Bond Commissioner conducts a private pre-recommendation interview, he asks only a series of limited questions in order to selectively fill out a boilerplate form. (*See* Ex. 5, Forester Decl. ¶ 5; *see also, e.g.*, Ex. 6-E, Pretrial Release Commissioner's Report for Andrew D. Farrar). Significantly, neither these interviews nor the recommendations by the Bond Commissioner take

into account information crucial to the determination of conditions of release, including a meaningful inquiry into individual's ability to pay money bail and other factors relevant to the likelihood to appear in court or present a danger to public safety. *Id.*

Based on the Bond Commissioner's recommendation, the Duty Judge sets the initial conditions of release in the absence of the individual without making any individualized inquiry into ability to pay, consideration of alternative non-financial conditions, or other relevant factors. The Duty Judge makes no findings concerning ability to pay, no findings concerning whether alternative conditions of release could serve the government's interests, and no findings concerning the necessity of detention. At the time of bail setting, the Duty Judge does not speak to the person, and there is no opportunity for her to be heard or to present or confront evidence. (Ex. 1, Dixon Decl. ¶ 5; Ex. 2, Rozelle Decl. ¶¶ 2-3; Ex. 3, Thurman Decl. ¶ 8; Ex. 4, Robards Decl. ¶¶ 3, 5; Ex. 7, Declaration of Khalil Roy ("Roy Decl."), ¶¶ 3-6; Ex. 8, Declaration of India Carter-Stewart ("Carter-Stewart Decl.") ¶¶ 3-7; Ex. 9, Declaration of Reginald Lee ("Lee Decl."), ¶¶ 5-7; Ex. 10, Declaration of James Bracken ("Bracken Decl."), ¶¶ 9-10). In the vast majority of cases—over 95 percent—the initial bail set by the Duty Judge is a monetary cash-only bond that the individual must pay *in full* in order to be released. *Close the Workhouse*, *supra*, at 17. The role of Duty Judge is occupied by each of the Judicial Defendants (and the rest of the judges of the 22nd Judicial Circuit) on a rotating basis. 22nd Judicial Circuit Local R. 6.12.

Once bail is set—or in the case of arrest on a previously issued warrant, immediately following arrest—if a person can afford to pay, she can immediately be released by Defendant Glass upon payment to the City. *See* Plaintiffs' Status Report, ECF No. 39, ¶¶ 12-13 (explaining that Plaintiffs Dixon and Rozelle were released within hours of posting bond). If a person cannot afford to pay, she remains imprisoned by Defendant Glass at the Workhouse or CJC. (*See, e.g.*,

Ex. 1, Dixon Decl. ¶¶ 5, 10; Ex. 2, Rozelle Decl. ¶¶ 2-4; Ex. 3, Thurman Decl. ¶¶ 5, 16; Ex. 4, Robards Decl. ¶¶ 7, 10; Ex. 7, Roy Decl., ¶¶ 2, 10; Ex. 8, Carter-Stewart Decl. ¶¶ 3, 7, 10; Ex. 9, Lee Decl., ¶¶ 6-7, 12; Ex. 10, Bracken Decl., ¶¶ 6-7).

First Appearance

The first opportunity a class member has to see a judge ordinarily occurs within 48 hours after arrest. Sheriff's deputies employed by Sheriff Betts take custody of individuals who remain in jail and bring them to a dedicated room at the CJC, where they appear by video before a judge in Division 25 or 26 of the 22nd Judicial Circuit.[6] (*See, e.g.*, Ex. 1, Dixon Decl. ¶ 2; Ex. 3, Thurman Decl. ¶ 3).

Before a person sees the judge for her first appearance, it is the policy and practice of the Sheriff's Office to instruct the individual not to speak, and that she is specifically not permitted to request a change in the release condition set, including requesting a lower money bond due to an inability to afford the amount set. (Ex. 1, Dixon Decl. ¶ 3; Ex. 2, Rozelle Decl. ¶ 3; Ex. 3, Thurman Decl. ¶¶ 3, 16; Ex. 4, Robards Decl. ¶ 4; Ex. 10, Bracken Decl. ¶ 5). The first appearance for each individual lasts only 1-2 minutes and frequently less than a minute. (Ex. 3, Thurman Decl. ¶ 3; Ex. 5, Forester Decl. ¶ 6.c). The individual has no counsel at this first appearance, the judge makes no findings of fact, and the first appearance is not recorded in any way. (Ex. 1, Dixon Decl. ¶ 5; Ex. 2, Rozelle Decl. ¶ 3; Ex. 3, Thurman Decl. ¶ 5; Ex. 4, Robards Decl. ¶ 6; Ex. 7, Roy Decl. ¶ 4). The interaction consists only of the judge stating the charges and the amount of her pre-set money bail. *Id.* The judge does not ask the individual any questions about her pretrial release, including

[6] Judge Roither and Judge McCarthy are the current judges assigned to Divisions 25 and 26 respectively, and typically preside over initial appearances. (*See* Ex. 5, Forester Decl. ¶ 7); 22nd Judicial Circuit, *Alphabetical List of Judges*, *available at* https://perma.cc/7KK6-EJRS (last visited Feb. 20, 2019). However, other judges may preside over initial appearances if the assigned judges are unavailable. 22nd Judicial Circuit Local R. 6.6, 6.11

whether she has the ability to pay the amount required. *Id.* If an individual defies the deputies' instruction and attempts to speak to the judge, she is informed by the judge that the first appearance is not the appropriate forum to discuss her conditions of release and she must wait for an attorney to enter an appearance in her case to do so. *Id.*

At the conclusion of the first appearance, individuals are returned to the custody of Commissioner Glass, who enforces the conditions of release and thus detains in jail those who are unable to pay. (*See, e.g.*, Ex. 1, Dixon Decl. ¶¶ 5, 10; Ex. 2, Rozelle Decl. ¶¶ 2-4; Ex. 3, Thurman Decl. ¶¶ 5, 16; Ex. 4, Robards Decl. ¶¶ 7, 10; Ex. 7, Roy Decl., ¶¶ 2, 10; Ex. 8, Carter-Stewart Decl. ¶¶ 3, 7, 10; Ex. 9, Lee Decl., ¶¶ 6-7, 12; Ex. 10, Bracken Decl., ¶¶ 6-7); *see also* Division of Corrections, *Commissioner's Office*, *available* at stlouis-mo.gov/government/departments/public-safety/corrections/commissioner-corrections-office.cfm (explaining that the Division of Corrections is "charged with the custodial care of pre-trial . . . inmates who are confined in" the Workhouse and CJC) (last visited Feb. 20, 2019). Once in jail, people must endure terrible conditions, including extreme temperatures, inadequate sanitation "extreme temperatures, inadequate sanitation, vermin infestations, and violence." *Close the Workhouse*, *supra*, at 2-3, 7.

Prolonged Wealth-Based Imprisonment

Individuals who are unable to pay the amount required for their release will have no opportunity to challenge their conditions of release until a public defender is appointed, files a motion for modification of conditions of release, and successfully sets the motion for a hearing. (Ex. 1, Dixon Decl. ¶ 5; Ex. 2, Rozelle Decl. ¶ 3; Ex. 3, Thurman Decl. ¶¶ 5-6; Ex. 4, Robards Decl. ¶¶ 6, 8-9). For those who qualify for a public defender, it takes approximately five weeks from the time of arrest until a hearing is scheduled. (Ex. 5, Forester Decl. ¶ 4); Harvey, T.B. et al., *Right to Counsel in Misdemeanor Prosecutions After Alabama v. Shelton: No-Lawyer-Courts and*

Their Consequences on the Poor and Communities of Color in St. Louis, Criminal Justice Policy Review 29 at 10 (2018). Individuals who do not qualify for a public defender, but cannot afford a private attorney, may be denied a hearing to contest their financial conditions for even longer. Harvey, *supra*, at 10. Thus, individuals are denied all opportunity to challenge their conditions of release and Defendant Judges do not make a determination about whether those individuals are likely to appear as required or present a danger to the community if released or whether alternative conditions of release could mitigate any such risk.

Even when judges eventually hold hearings on written motions by public defenders, the bail-setting practices are constitutionally inadequate. Judges routinely fail to consider an individual's ability to pay or to make substantive findings, in accordance with constitutionally required procedural standards, that no alternatives to financial conditions of release will reasonably assure the individual's future court appearance and public safety.

Individuals impacted by Defendants' practices suffer irreparable harms including, at a basic level a deprivation of their constitutional rights, and at a more specific level long-term economic instability and poverty, harm to families reliant on their support, poor physical and mental health outcomes due to inhumane conditions at the jail, and negative case outcomes. *See infra* Section II.[7]

LAW AND ARGUMENT

In determining whether to grant preliminary injunctive relief, courts consider the following factors: "(1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict

[7] The facts in this motion reflect Defendants' practices at the time of the filing of this lawsuit, and any change in Defendants' practices in response to this lawsuit represent a voluntary cessation of conduct insufficient to moot the controversy.

on the other interested parties; and (4) whether the issuance of an injunction is in the public interest." *Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir. 2000) (citation omitted). District courts have "broad discretion when ruling on requests for preliminary injunctions" which are reviewed "only for clearly erroneous factual determinations, an error of law, or abuse of discretion." *Manion v. Nagin*, 255 F.3d 535, 538 (8th Cir. 2001) (citation omitted).

Although no single factor is dispositive, "the two most critical factors for a district court to consider in determining whether to grant a preliminary injunction are (1) the probability that plaintiff will succeed on the merits, and (2) whether the plaintiff will suffer irreparable harm if an injunction is not granted." *Chicago Stadium Corp. v. Scallen*, 530 F.2d 204, 206 (8th Cir. 1976). As Plaintiffs do not seek to enjoin the operation of a state statute, they need only show a "fair chance of prevailing" on the merits of the case in order to demonstrate a likelihood of success. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008). Plaintiffs easily meet this standard.

I. Plaintiffs Are Likely to Succeed on Their Claims That Defendants' Practices Violate Equal Protection and Due Process

Defendants have violated both class members' substantive rights and their procedural rights. As the Supreme Court has explained, a "substantive issue involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it." *Washington v. Harper*, 494 U.S. 210, 220 (1990). Procedural issues, by contrast, "concern[] the minimum procedures required by the Constitution for determining that the individual's liberty interest is actually outweighed in a particular instance." *Id.* Here, Defendants' practice of detaining individuals who are unable to pay money bail without first establishing that doing so is necessary to advance a compelling government interest violates the individuals' substantive right against wealth-based detention and substantive right to pretrial

liberty. Separately, Defendants' practice of setting conditions of release that result in detention without providing any opportunity to be heard at all violates class members' procedural rights. Constitutionally adequate process must be provided to ensure that class members are not detained in violation of their substantive rights.

A. Defendants' Practices violate the Fourteenth Amendment Right Against Wealth-Based Detention Because They Make No Findings About Class Members' Ability to Pay or the Necessity of Detention Prior to Setting Secured Money Mail

The Supreme Court has long recognized that a person may not be "subjected to imprisonment solely because of his indigency." *Tate v. Short*, 401 U.S. 395, 398 (1971). *See also, e.g.*, *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (right to equal protection violated by imprisonment beyond statutory maximum based solely on inability to pay a fine); *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (invalidating state practice of automatically revoking probation for failure to pay a fine or restitution, without considering probationer's ability to pay or whether other alternative measures meet state's interest in punishment and deterrence); *Douglas v. California*, 372 U.S. 353, 355 (1963) (condemning the "evil" of "discrimination against the indigent"); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.").

The right against imprisonment based on poverty implicates the convergence of equal protection and due process principles. *Bearden*, 461 U.S. at 665, 674; *see also Fant v. City of Ferguson*, 107 F. Supp. 3d 1016, 1031 (E.D. Mo. 2015) ("[J]ailing persons who are unable to pay a court-ordered fine, without first inquiring into their ability to pay and considering alternatives to imprisonment, violates both the Due Process and Equal Protection Clauses.").

The Eighth Circuit has applied this bedrock principle of equal justice, finding that it is "clearly unconstitutional" to jail indigent persons for nonpayment of fines. *Campbell v. Cauthron*,

623 F.2d 503, 506 n.3 (8th Cir. 1980); s*ee also United States v. Mack*, 655 F.2d 843, 947 (8th Cir. 1981) ("[A]n indigent prisoner cannot be subjected to imprisonment for failure to pay a fine for a longer period of time than someone who has ability to pay the fine."); *King v. Wyrick*, 516 F.2d 321 (8th Cir. 1975) (violation of equal protection to deny jail time credit to indigent person who was unable to pay bail).[8]

Although this precedent primarily addressed post-conviction wealth-based jailing, the right not to be imprisoned solely for being poor applies with greater force to individuals being detained pretrial, who enjoy the presumption of innocence and have not had their liberty interests diminished by a criminal conviction. *See Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) ("The incarceration of those who cannot [afford to pay monetary bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."); *accord ODonnell v. Harris Cty.* (*ODonnell II*), 892 F.3d 147, 159 (5th Cir. 2018); *Caliste*, 329 F. Supp. 3d 296, 311 n.5 (E.D. La. 2018); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 528 (Ct. App. 2018). The Fourteenth Amendment requires that, before detaining someone pretrial, with the attendant "deprivation of liberty of one who is accused but not convicted," there must be "meaningful consideration of . . . alternatives" to "incarceration" for those who cannot afford to pay for their freedom pretrial. *Pugh*, 572 F.2d at 1057.

Despite this fundamental constitutional principle, Defendants' policy and practice is to impose financial conditions of release without any consideration of or findings about an individual's ability to pay, or whether there are alternative conditions that would reasonably assure

[8] *See also, e.g. United States v. Hines*, 88 F.3d 661, 664 n. 4 (8th Cir. 1996) ("A defendant may not constitutionally be incarcerated solely because he cannot pay a fine through no fault of his own."); *Lincoln v. United States*, 12 F.3d 132, 133 (8th Cir. 1993) (same); *United States v. Ashland, Inc.*, 356 F.3d 871, 874 (8th Cir. 2004) ("fundamentally unfair" to hold defendant accountable "for actions beyond its control").

the individual's return to court and the safety of the public. This practice was applied against each of the Named Plaintiffs, who had no opportunity to be heard on their ability to pay before unaffordable financial conditions of release were set, and who were not provided any explanation of the reasons for those conditions. (Ex. 1, Dixon Decl. ¶¶ 3-5; Ex. 2, Rozelle Decl. ¶¶ 2-3; Ex. 3, Thurman Decl. ¶¶ 2, 6; Ex. 4, Robards Decl. ¶¶ 5-6).

When the financial condition imposed is one the individual cannot afford because of poverty, the result is a *de facto* detention order. *See* Plaintiffs' Response to the Court's Order for Supplemental Briefing, ECF No. 28, at 1-2. Again, the Named Plaintiffs' experiences are representative: because financial conditions of release in their cases were beyond what they could pay, they remained in jail for weeks, resulting in, among other harms, an inability to care for sick family members and children. (Ex. 1, Dixon Decl. ¶ 6; Ex. 2, Rozelle Decl. ¶ 6; Ex. 3, Thurman Decl. ¶ 14; Ex. 4, Robards Decl. ¶¶ 11-12; *see also*, *e.g.*, Ex. 7, Roy Decl. ¶¶ 9, 11 (explaining that high financial condition of release resulted in prolonged detention, inability to care for a disabled sibling, and risk of two missed job interviews)). If these same individuals could afford to pay, however, they would have been set free. Within the past year, the Fifth Circuit summarized the constitutional implications of this exact set of circumstances:

> [T]ake two . . . arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice . . . both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

ODonnell II, 892 F.3d at 163. Numerous other courts have agreed that these practices—which are materially indistinguishable from the Defendants' in this case—are unconstitutional.[9]

Because Plaintiffs are detained based solely on their inability to pay, that detention is constitutional only if it satisfies heightened scrutiny. *ODonnell II*, 892 F.3d at 161 (heightened scrutiny is required when criminal laws "detain poor defendants *because of* their indigence.") (citing *Tate*, 401 U.S. at 397-99, and *Williams*, 399 US. at 241-42); *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (holding that a requirement to pay a fine or serve time in jail violates equal protection and due process unless it is "necessary to promote a compelling governmental interest" (quotation and citation omitted)).[10] Defendants' practices, which jail poor people based

[9] *See McNeil v. Cmty. Prob. Servs., LLC*, 1:18-cv-33, 2019 WL 633012, at *10 (M.D. Tenn. Feb. 14, 2019); *Schultz v. Alabama*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018), *appeal filed sub. nom. Hester v. Gentry*, No. 18-13894 (11th Cir. Sept. 13, 2018); *Daves v. Dallas Cty.*, No. 3:18-CV-0154-N, 2018 U.S. Dist. LEXIS 160741, at *12-13 (N.D. Tex. Sep. 20, 2018), *appeal filed*, No. 18-11368 (5th Cir. Oct 23, 2018); *ODonnell v. Harris Cty.* (*ODonnell I*), 251 F. Supp 3d 1052 (S.D. Tex. Apr. 28, 2017), *aff'd as modified*, 892 F.3d 147 (5th Cir. 2018); *Edwards v. Cofield*, No. 3:17-cv-321, 2017 WL 2255775 (M.D. Ala. May 18, 2017); *Walker v. City of Calhoun*, No. 4:15-CV-0170, 2017 WL 2794064, at *3 (N.D. Ga. June 16, 2017), *vacated in part by* 901 F.3d 1245 (11th Cir. 2018); *Rodriguez v. Providence Cmty. Corr.*, 155 F. Supp. 3d 758, 768-69 (M.D. Tenn. 2015); *Thompson v. Moss Point*, No. 1:15-cv-182, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); *Martinez v. City of Dodge City*, No. 15-cv-9344, 2016 U.S. Dist. LEXIS 190884, at *1-2 (D. Kan. Apr. 26, 2016); *Jones. v. City of Clanton*, No. 2:15-cv-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); *Cooper v. City of Dothan*, No. 1:15-cv-432, 2015 WL 10013003 (M.D. Ala. June 18, 2015); *Snow v. Lambert*, No. 15-cv-567, 2015 WL 5071981 (M.D. La. Aug. 27, 2015); *Pierce v. City of Velda City*, No. 4:15-cv-570, 2015 WL 10013006 (E.D. Mo. June 3, 2015).

[10] *See also Bearden*, 461 U.S. at 666 (wealth-based detention requires "careful inquiry"); *Buffin v. City & Cty. of San Francisco*, No 15-cv-04959-YGR, 2018 U.S. Dist. LEXIS 6853, at *21 (N.D. Cal. Jan. 16, 2018) ("[A]n examination of the *Bearden-Tate-Williams* line of cases persuades the Court that strict scrutiny applies to plaintiffs' Due Process and Equal Protection claims."). Although the Eleventh Circuit in *Walker v. City of Calhoun* held in a divided opinion that heightened scrutiny did not apply to the use of a money bail schedule during the 48-hour period prior to a hearing on conditions of release because it only implicated a "marginal increase in the length of detention" for indigent defendants, 901 F.3d 1245, 1263 (11th Cir. 2018), its reasoning, even if adopted, would not apply to the Plaintiff class members, who have been jailed beyond 48 hours, and potentially face weeks of wealth-based detention before they may be heard on bail. *See id.* at 1277 n.6 ("[E]ven under the Majority's view, challenges to indigency-based jail stays warrant heightened scrutiny so long as they show that the challenged system, *in practice*, results in

solely on inability to pay, cannot survive heightened scrutiny because they are not narrowly tailored to achieve the State's two compelling interests related to pretrial detention: protecting public safety and ensuring defendants appear for their court dates. *See United States v. Neal*, 679 F.3d 737, 741 (8th Cir. 2012).

Defendants do not make any findings that would allow them to determine whether class members will be able to pay the money bail set for them. Defendants often do not interview individuals at all, and consistently fail to question individuals on their financial situation. Thus, Defendants in the vast majority of cases do not know, when setting financial conditions of release, whether those conditions will result in *de facto* detention.[11] And because Defendants never make any finding concerning ability to pay, they never engage in the constitutionally mandated analysis of alternatives to detention. If a court determines that an individual lacks the ability to pay money bail, it may not set a financial condition of release that the individual cannot afford without making the finding under *Bearden* that alternatives to jailing are not sufficient to serve the government's interests. *See Bearden*, 461 U.S. at 669-70. This substantive requirement ensures that the right to be free from wealth-based detention cannot be bypassed by merely jumping through the procedural hoop of bringing the individual before the court to announce release conditions. *See* Plaintiffs' Supplemental Brief, ECF No. 28, at 2; *see also Harper*, 494 U.S. at 220 (explaining that a "substantive issue involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it," and is

indigents being detained longer than 48 hours.") (Martin, J., dissenting). Moreover, the majority in *Walker* erred by "treat[ing] 48 hours in jail as a mere delay or 'diminishment' of the benefit of being released, instead of the deprivation of liberty it surely is." *Id.* at 1274 (Martin, J., dissenting).

[11] In the unusual case where an individual defies instructions not to speak and attempts to explain that he cannot afford the financial condition of release, that explanation is ignored. (*See, e.g.*, Ex. 1, Dixon Decl. ¶ 5).

distinct from what "minimum procedures" must be afforded to accurately determine that an "individual's liberty interest is actually outweighed in a particular instance"); *Caliste*, 329 F. Supp. 3d at 312-15 (*Bearden* line of cases requires substantive finding); *Schultz*, 330 F. Supp. at 1373 (same); Br. of the United States as *Amicus Curiae* 19, *Walker v. City of Calhoun*, No. 17-13139 (11th Cir. Sept. 13, 2017) (finding that under cases like *Bearden* and *Pugh*, money bail may only be imposed on an indigent individual after an "individualized assessment of risk and a finding of no other adequate alternatives").

Defendants' policy and practice of requiring financial conditions of pretrial release without any inquiry or findings cannot pass any scrutiny, let alone heightened review. Poverty alone does not demonstrate a likelihood to miss a court date or present a threat to public safety that no alternative conditions could mitigate, just as wealth alone does not show that a person is more likely to appear or is not a danger to the community. *See Bearden*, 461 U.S. at 671 (discrediting the "naked assertion that a [defendant]'s poverty by itself indicates he may commit crimes in the future and thus that society needs for him to be incapacitated.").

Plaintiffs are likely to prevail on their claim that Defendants violate class members' right to be free from wealth-based detention.

B. Defendants Violate Substantive Due Process Because They Detain Plaintiffs In Violation Of Their Fundamental Right To Pretrial Liberty Without Findings That Such Detention Is Necessary

"In our society," the Supreme Court has explained, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. This norm reflects longstanding foundational principles: As the Supreme Court has repeatedly said, "[f]reedom from bodily restraint has *always* been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (emphasis added) (citing *Youngberg*

v. Romeo, 457 U.S. 307, 316 (1982)); *accord Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Consistent with these other cases, *Salerno* recognized 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. In *Salerno*'s words, the "interest in pretrial liberty" is "fundamental." *Id.*

Salerno recited that rule in the context of a facial challenge to the Bail Reform Act of 1984, a law that authorizes the pretrial confinement of dangerous individuals if a judge finds that pretrial detention is necessary to protect public safety. *See* 481 U.S. at 742; 18 U.S.C. §3142(e)-(f), (i).[12] The Supreme Court deemed the statute consistent with the Due Process Clause, but only—given the "fundamental nature of th[e] right" at stake, 481 U.S. at 750—after concluding that the law's provisions satisfied heightened scrutiny, *see id.* at 750-751 (describing the government interest in preventing pretrial crime by those charged with "extremely serious" federal felony offenses as "compelling" and "overwhelming" and the statute as "careful[ly] delineat[ing] . . . the circumstances under which detention will be permitted"). In particular, *Salerno* upheld pretrial detention only where a "'judicial officer finds that no condition or combination of conditions'" of release will satisfy the government's interests. *Id.* at 742 (quoting 18 U.S.C. § 3142(e)). Absent such a "sharply focused scheme," the Court has since stressed, a state may not detain a presumptively innocent person. *Foucha*, 504 U.S. at 81; *see id.* at 83 (striking down Louisiana's practice of detaining insanity acquittees who were no longer mentally ill because it, unlike the Bail Reform Act, was not a "carefully limited exception[] permitted by the Due Process Clause").

The Supreme Court and lower courts have repeatedly confirmed that *Salerno* applied heightened scrutiny. In one case, for example, the Supreme Court cited *Salerno* as part of its "line

[12] The federal Bail Reform Act also allows for pretrial detention where the Court concludes after a hearing that no condition or combination of conditions will reasonably assure the appearance of the person as required. 18 U.S.C. § 3142 (e)(1).

of cases which interprets . . . 'due process of law' to forbid[] the government to infringe certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-302 (1993). And in another case, the Court stated that the statutory scheme *Salerno* addressed was "narrowly focused on a particularly acute problem in which the government interests [were] overwhelming." *Foucha*, 504 U.S. at 81. Not surprisingly in light of these cases, the en banc Ninth Circuit has squarely held that "*Salerno* applied heightened scrutiny." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780-781 (9th Cir. 2014) (en banc). The State Supreme Courts to consider the question have agreed. *See, e.g.*, *Simpson v. Miller*, 387 P.3d 1270, 1276-1277 (Ariz. 2017) ("heightened scrutiny" applies where, as in *Salerno*, the "fundamental" "right to be free from bodily restraint" is implicated), *cert. denied sub nom. Arizona v. Martinez*, 138 S. Ct. 146 (2017); *Brangan v. Commonwealth*, 80 N.E. 3d 949, 964-65 (Mass. 2017) (when financial conditions of release will likely result in an individual's pretrial detention, the judge must provide "findings of fact and a statement of reasons for the bail decision," including consideration of the individual's financial resources, "explain how the bail amount was calculated," and state why "the defendant's risk of flight is so great that no alternative, less restrictive financial or nonfinancial conditions will suffice to assure his or her presence at future court proceedings").

Heightened scrutiny is required here, too. That is because in practice, an order requiring an unattainable financial condition of release is—as every appellate court to consider the question has held—an order for pretrial detention. As the Eighth Circuit explained, for example, "the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all." *United States v. Leisure*, 710 F.2d 422, 425 (8th Cir. 1983) (quoting *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) (per curiam)); *see also id.* ("[T]he amount of bail should not be

used as an indirect, but effective, method of ensuring continued custody."); *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (per curiam); *Brangan*, 80 N.E.3d at 963; *Humphrey*, 19 Cal. App. 5th at 1015. The district court in *ODonnell I* reached the same conclusion, stating that when secured-money bail is set "at unpayable amounts," it operates "as [a] de facto pretrial detention order." 251 F. Supp. 3d at 1150. Indeed, the court found that Harris County had a "policy and practice of imposing secured money bail *as* de facto orders of pretrial detention." *Id.* at 1059-1060 (emphasis added). Under these cases, Defendants (like the government in *Salerno*) must establish that their use of secured financial conditions of release to detain an indigent individual is "narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. at 302.

Making that constitutionally required substantive showing is neither novel nor unmanageable. It has been required in federal court since the Bail Reform Act's enactment in 1984, and is likewise the law in other jurisdictions. *See, e.g.*, D.C. Code §23-1321; N.M. Const. art. II, §13; N.J. Stat. Ann. §2A:162-15-21. To justify pretrial detention, in short, the government must demonstrate that there are no other alternatives sufficient to mitigate a specifically identified risk posed by the individual.

Defendants in St. Louis come nowhere close to meeting this requirement. They fail to make any findings whatsoever before ordering class members detained on unattainable financial conditions of release. In particular, they do not make findings about whether class members pose any danger to the community or risk of non-appearance and do not make any findings concerning whether alternative conditions of release could mitigate those risks. The result is that class members are routinely detained without any determination that such detention is necessary to serve any government interest.

Accordingly, Plaintiffs have demonstrated they have more than a "fair chance of succeeding" on their claim that Defendants' detention of Plaintiffs on *de facto* detention orders violates Plaintiffs' fundamental right to liberty.

C. Defendants Violate Class Members' Procedural Due Process Rights

In addition to violating class members' substantive rights, Defendants have violated their procedural rights: Defendants infringe on class members' right against wealth-based detention and right to pretrial liberty not only by failing to make the substantive findings described above, but also by failing to provide the necessary procedural safeguards that would ensure that any such findings are accurate. *See Harper*, 494 U.S. at 220 (distinguishing between substantive rights and the procedural rights that protect them).

A procedural due process claim proceeds in two steps. The first asks whether the person claiming a constitutional violation has asserted a protected liberty or property interest. *See, e.g.*, *Kroupa v. Nielsen*, 731 F.3d 813, 818 (8th Cir. 2013). Here, as explained above, class members have a liberty interest against wealth-based detention and in their personal freedom from pretrial incarceration.

At the second step, a court must determine what process is due. *Id*. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). What constitutes sufficiently "meaningful" procedures to satisfy the Due Process Clause varies depending on context. *See Riggins v. Bd. of Regents of Univ. of Nebraska*, 790 F.2d 707, 712 (8th Cir. 1986). To make that context-specific determination, courts weigh (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute

procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

1. Defendants Have Violated Class Members' Procedural Due Process Rights By Providing No Process At All

As an initial matter, no elaborate analysis is necessary to determine that Defendants have violated class members' procedural due process rights. Defendants provide absolutely no mechanism for class members to challenge their detention for weeks after incarceration begins. Although class members appear in front of a judge at a first appearance during which a judge announces their conditions of release, class members are affirmatively told not to speak at the appearance and are interrupted if they do. That appearance, therefore, cannot be deemed a "meaningful" "opportunity to be heard" under any analysis. *Mathews*, 424 U.S. at 333. Class members must, instead, wait on average five weeks until counsel is appointed, counsel files a motion, and a hearing is scheduled.[13]

This is plainly unconstitutional. A comparison to the Eighth Circuit's treatment of the impoundment of automobiles shows just how straightforward the violation of procedural due process is in this case. In *Coleman v. Watt*, the Eighth Circuit held that "a *seven*-day delay between the seizure of [the plaintiff's] car and the first hearing" is "clearly excessive." 40 F.3d 255, 261 (8th Cir. 1994) (emphasis added). In so holding, the court took into account that seizure of a car deprives a person of ease of "access to jobs, schools, and recreation as well as to the daily necessities of life." *Id.* at 260-61. Incarceration, of course, effectuates a complete deprivation of access to these

[13] These bond modification hearings are also constitutionally problematic, but not at issue in the present motion.

activities and to much more. There can be no serious dispute that if one week is too long for a hearing on automobile impoundment, five weeks is too long when a person's liberty is eliminated.

2. To Satisfy the Due Process Clause, Defendants Must Provide an Inquiry into Ability to Pay and, If Warranted, an Adversarial Hearing, at Which Counsel Is Made Available and a Heightened Evidentiary Standard Is Applied

The only question, then, is precisely what procedures Defendants must provide going forward to remedy the procedural due process violation in this case. This determination must be informed by the substantial private interest at stake—the first *Mathews* factor. Here, not only are class members incarcerated in violation of their fundamental liberty interest in freedom from detention and their right against wealth-based detention, but these deprivations occur for *weeks or months*. *See Mackey v. Montrym*, 443 U.S. 1, 12 (1979) ("The duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved."). Moreover, the collateral consequences of detention are grave: loss of employment; loss of physical or legal custody of children; loss of housing or property due to inability to work; increased physical and mental illness; restricted access to counsel; decreased opportunity to prepare a defense; a resulting increased risk of a finding of guilt, and resulting longer sentences, among others.

Proper attention to the seriousness of this private interest demands that rigorous procedures be provided. *See, e.g.*, *Zadvydas*, 533 U.S. at 690-91 ("[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and *subject to strong procedural protections*.") (emphasis added); *Turner v. Rogers*, 564 U.S. 431, 445 (2011) (discussing the importance of robust procedural protections to ensure "accurate decisionmaking" before a person is jailed); *Neal*, 679 F.3d at 742 (invalidating pretrial commitment order because district court failed to "conduct a hearing, require the government to present evidence to justify the

inpatient commitment, seriously consider the defendant's alternative request for an outpatient evaluation, or make findings of fact concerning the need for commitment"). Specifically, application of the *Mathews* factors establishes that, before imposing a financial condition of release, the government must provide notice and an inquiry into and findings regarding ability to pay. If the financial condition is unaffordable and will result in *de facto* detention (or if pretrial detention is sought), the government must also provide an adversarial hearing on the record at which the individual is represented by counsel and has an opportunity to be heard, to present evidence, and to confront evidence offered by the government; and findings on the record by clear and convincing evidence that pretrial detention is necessary to serve a specific government interest.

a. <u>There must first be an inquiry into ability to pay and findings on the record concerning ability to pay</u>

Before imposing a financial condition of release, the procedures employed must allow the court to determine whether such financial condition will result in *de facto* detention. As the Supreme Court has held, if the government seeks to condition physical liberty on a monetary payment, procedural due process requires notice of the nature and significance of the financial information to be provided; an inquiry into the person's ability to pay; and findings on the record as to whether the person has the ability to pay. *See Turner*, 564 U.S. at 447–48 (applying the *Mathews* test and holding that, before the state may jail a person for not paying child support, the government must provide notice that ability to pay is a critical issue, an opportunity to be heard on the issue, and "an express finding by the court that the defendant has the ability to pay"); *Bearden*, 461 U.S. at 673 (holding that the state must inquire into whether nonpayment is willful before revoking probation); *see also ODonnell I*, 251 F. Supp. 3d at 1161 (requiring an inquiry into ability to pay and notice to individuals about the significance of the financial information they are asked to provide).

Here, Defendants' complete lack of inquiry prior to imposition of financial conditions of release creates an unwarranted risk of erroneous deprivation of class members' right to liberty, as Defendants cannot know whether the condition will result in detention or release.

b. If an Individual Is Unable to Pay, There Must Be Additional Procedural Safeguards to Ensure the Accuracy of the Pretrial Detention Decision

If the financial condition is determined to be unaffordable, it may not be imposed without further procedures—required by *Mathews'* second factor—to ensure that the resulting wealth-based detention is necessary to serve a compelling interest in any particular case. The floor of constitutionally required procedures for a deprivation of liberty similar to that at issue here already has been established. In *Morrissey v. Brewer*, the Supreme Court explained what due process requires at a parole revocation hearing:

(a) "notice" of the critical issues to be decided at the hearing;

(b) "disclosure" of the evidence presented by the government at the hearing;

(c) an "opportunity to be heard in person and to present witnesses and documentary evidence";

(d) "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)";

(e) a "neutral and detached" factfinder; and

(f) findings and reasons on the record of "the evidence relied on."

408 U.S. 471, 488–89 (1972). These procedures are due to persons on parole having a diminished "conditional liberty" interest as a result of their convictions. *Id.* at 480. It necessarily follows that, at the very least, these minimum procedures must be provided to persons constitutionally presumed innocent before trial. And, indeed, because individuals being detained pretrial—and class members

here—retain the presumption of innocence and thus the "absolute liberty" lacking in *Morrissey*, *id.*, some additional protections are due to account for the greater interest at stake. Specifically, the gravity of the pretrial detention decision calls for—in addition to the procedures outlined above—a prompt hearing, a heightened evidentiary burden, the provision of counsel, and a hearing on the record.

Prompt Hearing. Procedural due process requires consideration not just of *whether* to have a hearing (undisputable in light of *Morrissey*), but also *when*: Because a "more expeditious hearing would significantly reduce the harm suffered," too lengthy of a delay gives rise to a due process violation. *Coleman*, 40 F.3d at 261. Consistent with this principle, the Fifth Circuit held that procedural due process requires hearings on conditions of release no later than 48 hours after arrest. *See ODonnell II*, 892 F.3d at 160. The same prompt hearing should be afforded here.

With respect to the third *Mathews* factor, the additional burden on Defendants to provide timely hearings is minimal. In most cases, Defendants already provide first appearances before a judge within 48 hours. Any additional burden imposed by providing the procedures required to convert these appearances into actual hearings is insignificant and cannot outweigh the serious harms posed to the class members who are at risk of prolonged unconstitutional pretrial incarceration. Further, because all judges of the 22nd Judicial Circuit rotate as Duty Judge and have authority to rule on conditions of release, there are numerous judicial actors equipped to share the burden of providing timely hearings. This was demonstrated when four different judges provided hearings for the Named Plaintiffs within 24 hours of the parties' Stipulation in lieu of a temporary restraining order. Moreover, prompt hearings likely will result in a significant number of individuals being released, meaning that Defendants will save the money that otherwise would be spent on unnecessarily incarcerating these individuals. *See Close the Workhouse* at 23 (detailing

the cost of incarcerating people in the Workhouse, including that the City must spend $16,300 to jail a person for one year). Finally, Defendants have an interest in ensuring that only those who merit pretrial detention are actually detained after arrest. Accordingly, procedural due process requires a prompt meaningful hearing for all class members within 48 hours of arrest.

Clear and Convincing Evidence. Procedural due process also requires that pretrial detention, whether *de facto* based on unaffordable financial conditions or transparent based on the government's request, must be justified by "clear and convincing" evidence. Under *Mathews*, this standard is required due to the vital liberty interest at stake, the attendant risk of erroneous imprisonment should a lower standard be employed, and the lack of additional burden on Defendants.

The Supreme Court has never permitted an evidentiary standard lower than "clear and convincing" evidence in any case involving the deprivation of bodily liberty. As the Supreme Court explained in its seminal procedural due process decision in *Addington v. Texas*, the deprivation of the fundamental right to bodily liberty requires a heightened standard of proof beyond a mere preponderance in order to ensure an accurate decision, the concern of the second *Mathews* factor. 441 U.S. 418, 432-33 (1979). *Addington* concerned the level of proof required to detain someone alleged to be mentally ill. The Court reasoned that the heightened evidentiary standard of clear and convincing evidence is necessary given the seriousness of detention as compared to the more minor disputes—such as the "loss of money"—to which the preponderance of the evidence standard applies. *Id.* at 424. The clear and convincing standard, unlike the preponderance standard, "impress[es] the factfinder with the importance of the decision" and reduces the risk of erroneous detention. *Id.* at 427. At the same time, the Court explained, because

the government has "no interest" in wrongly confining individuals—the third *Mathews* factor—it was "unclear" how the state could be harmed by the higher standard. *Id.* at 426.

Since *Addington*, "[i]n cases where physical liberty is at stake in all kinds of situations, the Court consistently applies the clear and convincing standard." *Caliste*, 329 F. Supp. 3d at 313 (collecting cases). In *Foucha*, for example, the Court struck down a scheme for detaining persons who had been acquitted by reason of insanity. 504 U.S. at 80. Critical to the Court's determination that Louisiana's system violated the Due Process Clause was that the State statute placed "the burden on the detainee to prove that he is not dangerous" rather than providing, as is required, an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community." *Id.* at 81-82. *See also Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 286 (1966) (requiring clear and convincing evidence to support a deportation order); *Cruzan by Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 282-83 (1990) (noting clear and convincing evidence required in deportation, civil commitment, denaturalization, civil fraud, and parental termination proceedings).

The rationale underlying these decisions tracks the *Mathews* factors and applies equally to the pretrial context. As explained in Judge Boochever's concurring opinion in *United States v. Motamedi*,

> the consequences to the defendant from an erroneous pretrial detention are certain and grave. The potential harm to society, although also significant, is speculative, because pretrial detention is based on the possibility, rather than the certainty, that a particular defendant will fail to appear. Moreover, society's interest in increasing the probability of detention is undercut by the fact that it has no interest in erroneously detaining a defendant who can give reasonable assurances that he will appear. I conclude therefore that the injury to the individual from an erroneous decision is greater than the potential harm to society, and that under *Addington* due process requires that society bear a greater portion of the risk of error: the government must prove the facts supporting a finding of flight risk by clear and convincing evidence.

767 F.2d 1403, 1415 (9th Cir. 1985) (Boochever, J., concurring in part and dissenting in part).

Lower courts have likewise consistently emphasized the necessity of, at a minimum, a clear and convincing standard in the context of pretrial detention. In *Lopez-Valenzuela*, the Ninth Circuit struck down the Arizona pretrial detention statute in part because the Arizona law, unlike the federal Bail Reform Act, did not require the government to prove by clear and convincing evidence that an individual individual's detention was necessary. 770 F.3d at 784-85.

Because a *de facto* detention order is the functional equivalent of a transparent one, *see supra* at 19-20, these same standards apply when class members are detained as a result of unaffordable money bail. In recent cases presenting nearly identical factual circumstances to the case at bar, federal district courts have concluded that the government must prove detention is necessary by clear and convincing evidence before a court may set unaffordable monetary bail. *See, e.g.*, *Schultz*, 330 F. Supp. 3d at 1372 ("[B]efore ordering an unaffordable secured bond, a judge must find by clear and convincing evidence that pretrial detention is necessary to secure the defendant's appearance at trial or to protect the public."). Doing so, as one court explained, is necessary to account for the "vital importance of the individual's interest in pretrial liberty recognized by the Supreme Court." *Caliste*, 329 F. Supp. 3d at 313. Various state courts have reached the same result. *See Humphrey*, 19 Cal. App. 5th at 1037 ("If [a] court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose."); *Kleinbart v. United States*, 604 A.2d 861, 870 (D.C. 1992) (emphasizing that the constitutional requirement of clear and convincing evidence for pretrial detention applies equally whether such detention is based on risk of flight or dangerousness).

Counsel. Due process also demands that counsel be made available to individuals facing pretrial detention. In evaluating the Bail Reform Act, the Supreme Court expressly identified the "right to counsel at the detention hearing" as a key procedural safeguard against unlawful detention. *Salerno*, 481 U.S. at 751-52. The risk of erroneous pretrial detention—the second *Mathews* factor—is high in the absence of counsel. Empirical evidence has demonstrated that counsel is the single most important factor determining the length of pretrial detention, protecting against self-incrimination, and ensuring that evidence can be marshaled as necessary to cogently articulate why an individual should not be detained. *See* Douglas L. Colbert et. al., *Do Attorneys Really Matter? The Empirical and Legal Case For The Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719, 1720, 1773 (2002) ("legal representation at bail often makes the difference between an accused regaining freedom and remaining in jail prior to trial," while delaying appointment of counsel is the most powerful cause of lengthy pretrial detention); Ernest J. Fazio, Jr. et al., Nat'l Inst. of Justice, U.S. Dep't of Justice, NCJ 97595, *Early Representation by Defense Counsel Field Test: Final Evaluation Report* 208, 211 (1985), https://perma.cc/4882-7CFX (concluding that representation by counsel "had a significant impact on test clients' pretrial release status" in a study of the effect of public defender representation at bail hearings in three counties across the U.S.); *see also* Wayne R. LaFave, et al., 4 Crim. Proc. § 12.1(c) (4th ed. 2016) (finding that 75 percent of represented defendants at bail hearings are released on their own recognizance, compared to 25 percent of non-represented defendants); Worden, A. P. et al., *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, 29 Crim. Justice Policy Rev. 710, 710-735 (2018) (finding that a Counsel at First Appearance in three New York cities led to significant decreases in pretrial detention and bail amounts as well as an increase in the number of people who spent no time in

jail pretrial because of cash bail); *see also, e.g.*, *Caliste*, 329 F. Supp. 3d at 314 ("Considering the . . . vital importance of pretrial liberty, assistance of counsel is of the utmost value at a bail hearing.").

Providing counsel is important not only because counsel is critical to an individual's ability to gain release in the short term, but also because there is a demonstrated negative effect of pretrial detention on the chance of a successful outcome in the underlying criminal case. One "rigorous" study credited by the district court in *ODonnell I* found that defendants detained pretrial "were 25 percent (14 percentage points) more likely to be convicted, and 43 percent (17 percentage points) more likely to be sentenced to jail than those who bonded out earlier." 251 F. Supp. 3d at 1106[14]; *see also* Worden, *What Difference Does a Lawyer Make?* at 710–735. A denial of counsel at the time a determination is made on conditions of release thus infects the entire criminal proceeding, increasing the significance of the individual's private interest and the gravity of the harms of an erroneous decision.

The significant risk of erroneous detention rulings in the absence of counsel is a consequence of the complexity of bail decisions. Multiple factors are considered in a rigorous evaluation of a person's likelihood of returning to court or potential risk to public safety, including, among other considerations, unmet needs such as transportation, housing, and healthcare, and whether alternatives to incarceration exist in the particular jurisdiction, such as court appearance reminders, or drug and mental health treatment. Hearings on conditions of release involve specialized knowledge and skill that only counsel can provide, especially in the days immediately

[14] The study controlled for "the defendant's charge, criminal history, or other variables." *ODonnell I*, 251 F. Supp. 3d at 1106.

following arrest, when a person is in crisis, removed from her family and community, and confined to a jail cell. Hence, counsel is necessary to make individualized hearings "meaningful."

Although provision of counsel necessarily presents a financial cost, the third *Mathews* factor nonetheless favors provision of counsel, because, like class members, Defendants have an interest in ensuring that individuals are adequately represented at their first appearances. Courts have recognized that, although it is "a financial burden on [Defendants] to provide attorneys for the indigent . . . this burden is outweighed not only by the individual's great interest in the accuracy of the outcome of the hearing, but also the government's interest in that accuracy and the financial burden that may be lifted by releasing those individuals who do not require pretrial detention." *Caliste*, 329 F. Supp. 3d at 314 (applying *Mathews* to find that "due process requires representative counsel at pretrial detention hearings"). Moreover, the cost to Defendants is alleviated by an attendant reduction in the enormous expense of unnecessarily imprisoning people pretrial. *See Close the Workhouse* at 16.

Recordings. Finally, the prompt hearings at which conditions of release are determined must be recorded. In the context of process afforded to people on parole—who, as already discussed, have a diminished right compared to class members here—the Supreme Court has held that summaries or digests are required to document what occurs at a preliminary hearing, including the parolee's arguments and any evidence or documents presented in favor of revocation. *Morrissey*, 408 U.S. at 487. Here, given the more significant liberty interest—the first *Mathews* factor—recordings are necessary to document the hearings so that they may be reviewed for constitutional sufficiency. The Ninth Circuit reached this conclusion in an analogous case, applying *Mathews* to find that due process requires a recording or transcript at bond hearings for immigrant detainees facing "prolonged detention." *Singh v. Holder*, 639 F.3d 1196, 1200, 1208 (9th Cir. 2011); *see also*

Nguti v. Sessions, 259 F. Supp. 3d 6, 14 (W.D.N.Y. 2017) (following *Singh*); *cf. M.L.B. v. S.L.J.*, 519 U.S. 102, 104 (1996) ("Only a transcript can reveal the sufficiency, or insufficiency, of the evidence to support that stern judgment [terminating parental rights]."). Class members doubtlessly face "prolonged detention" if imprisoned for the duration of their criminal case. The additional burden on Defendants is minimal, as the courtrooms in which first appearances take place already have audio recording equipment. Finally, Defendants have an interest in documenting hearings held in accordance with constitutional requirements to protect against subsequent challenge. All *Mathews* factors favor full recording of all bail hearings.

II. Class Members Will Suffer Irreparable Harm Without a Preliminary Injunction

The deprivation of constitutional rights alone is sufficient to establish irreparable harm. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *Calvert v. Paniagua*, No. 2:17CV2 HEA, 2018 WL 2121508, at *11 (E.D. Mo. May 8, 2018). On that basis, this element is satisfied, as class members face an ongoing violation of their constitutional rights.

Even were this rule not to apply, class members face irreparable harm as a result of their imprisonment. Every additional night in jail causes harm to a person that cannot be later undone. *See, e.g. United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988) ("unnecessary deprivation of liberty clearly constitutes irreparable harm"); *Matacua v. Frank*, 308 F. Supp. 3d 1019, 1025 (D. Minn. 2018) ("loss of liberty . . . is perhaps the best example of irreparable harm"). Depriving persons of their fundamental right to pretrial liberty may cause psychological and economic harm and undermine their ability to prepare a defense. As the Supreme Court eloquently explained, pretrial incarceration

> has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.

Barker v. Wingo, 407 U.S. 514, 532-33 (1972); *see also Pugh*, 572 F.2d at 1056-57; *ODonnell II*, 892 F.3d at 155, 162-63; *Schultz*, 330 F. Supp. 3d at 1375 ("[I]ndividuals who, by law, are presumed innocent suffer irreparable injury when they are detained because they cannot afford to pay secured bond and are deprived of constitutionally adequate procedures for examining potential nonmonetary conditions of release.").

Here, class members are suffering such irreparable harms including:

Long-term economic instability and poverty due to class members' inability to work while incarcerated and risk of losing jobs. For example, Reginald Lee describes: "I had a good job before I was arrested. I have now lost my job because I haven't been able to talk to anyone about being in here. I feel like I am losing everything in here." (Ex. 9, Lee Decl. ¶ 11). Khalil Roy, another individual incarcerated for inability to pay financial conditions of release, stated "I currently have two job interviews lined up. One is today. If I'm not released and miss the interview, I probably won't get the job and will miss the opportunity" (Ex. 7, Roy Decl. ¶ 9; *see also* Ex. 8, Carter-Stewart Decl., ¶ 10; Ex. 10, Bracken Decl., ¶¶ 2, 8; Ex. 11, Declaration of Demyron Anderson ("Anderson Decl."), ¶ 4; Ex. 12, Declaration of Malashia Marcum ("Marcum Decl."), ¶ 8; Ex. 13, Declaration of Maurice White ("White Decl."), ¶ 6; Ex. 14, Declaration of Edna Carter ("Carter Decl."), ¶ 8; Ex. 15, Declaration of Sheneica Johnson ("Johnson Decl."), ¶¶ 4-5; Ex. 16,

Declaration of Martina Lee ("M. Lee Decl."), ¶ 6; Ex. 17, Declaration of Jerry Moorehead ("Moorehead Decl."), ¶ 5; Ex. 18, Declaration of Anthony Williams ("Williams Decl."), ¶ 6).

Harm to families that are reliant on jailed class members for support. For example, Mr. Thurman's family describes how he is an essential part of the care-giving team for his sister who has Stage IV breast cancer, and that their family struggled without his support. (Ex. 3, Thurman Decl. ¶¶ 10, 12-15; Ex. 19, Declaration of Adrianna Thurman ("A. Thurman Decl."), ¶¶ 3-6; Ex. 20, Declaration of Shenee Thurman ("S. Thurman Decl."), ¶¶ 3-8). People in jail miss opportunities to care for and develop bonds with their children, requiring other family members to assume those responsibilities. For example, David Dixon states: "I am the caregiver for my paralyzed stroke-victim Vietnam vet uncle. My family hasn't even told him that I'm incarcerated because he's too sick and can't get bad news like that. I am scared he will die while I am incarcerated." (Ex. 1, Dixon Decl. ¶ 6). Class member India Carter-Stewart describes harm to her entire family: "My son who is 5 years old stays with me. Right now, he is with my mother because I am in jail. She is struggling to care for him. She lives on her SSI and doesn't have enough money to pay for her own food and everything my son needs." (Ex. 11, Carter-Stewart Decl. ¶ 8; *see also* Ex. 2, Rozelle Decl., ¶ 6; Ex. 4, Robards Decl. ¶¶ 7, 11-12; Ex. 7, Roy Decl., ¶ 11; Ex. 9, Lee Decl., ¶¶ 2, 9-10; Ex. 10, Bracken Decl., ¶ 8; Ex. 12, Marcum Decl. ¶¶ 3-5, 7; Ex. 13, White Decl. ¶¶ 3-5; Ex. 14, Declaration of Edna Carter, ¶¶ 3-6; Ex. 15, Johnson Decl., ¶¶ 7-10; Ex. 16, M. Lee Decl., ¶¶ 3-5; Ex. 17, Moorehead Decl., ¶ 4; Ex. 18, Williams Decl. ¶ 5; Ex. 21, Declaration of William Martin ("Martin Decl."), ¶ 7-8; Ex. 22, Declaration of Miqwell Bryant ("Bryant Decl."), ¶ 7; Ex. 23, Declaration of Justin Holman, ¶ 5; Ex. 24, Declaration of Delilah Harris, ¶¶ 3-9; Ex. 25, Declaration of Laura Lehmkuhl ("Lehmkuhl Decl."), ¶¶ 3-4).

Risk of serious physical and mental health problems due to inhumane conditions inside the St. Louis jails. Class members describe inedible food, mistreatment by staff and other inmates, and unsanitary living quarters. Archie Tinyan describes how the impact of the conditions result in "a lot of people want[ing] to commit suicide because they know they can't pay bond. We are treated like animals." (Ex. 26, Archie Tinyan Declaration ("Tinyan Decl."), ¶ 4). Mr. Thurman described the conditions at the Workhouse where they were detained: "There are 40 people in my dorm and only 2 showers that work. . . . The Workhouse is not a livable place." (Ex. 3, Thurman Decl. ¶ 16). Mr. Robards described similarly horrid conditions: "[I]n here, no one wants to do their job. This place is dirty, with black mold everywhere, with rats, and mice. The ceiling fell in upstairs so it is overcrowded downstairs." (Ex. 4, Robards Decl. ¶ 10; *see also* Ex. 1, Dixon Decl. ¶¶ 10-13, 15-16; Ex. 2, Rozelle Decl. ¶ 7; Ex. 3, Thurman Decl. ¶ 16; Ex. 7, Roy Decl. ¶ 2; Ex. 9, Lee Decl. ¶ 12; Ex. 10, Bracken Decl. ¶ 10; Ex. 11, Anderson Decl. ¶¶ 5-6; Ex. 17, Moorehead Decl. ¶ 6; Ex. 18, Williams Decl. ¶ 7; Ex. 22, Bryant Decl. ¶ 4, 9-10; Ex. 25, Lehmkuhl Decl., ¶¶ 7-8; Ex. 27, Declaration of Maurice Dailey, ¶ 7; Ex. 28, Declaration of John Heimberger, ¶¶ 2-5); *Close the Workhouse*, *supra*, at 20-22. People with mental health problems that were being treated before their arrest describe being denied access to their medications and other therapeutic treatments. For example, class member Miqwell Bryant states that "I take medications -- but they didn't give [them] to me for 6 days in here." (Ex. 22, Bryant Decl. ¶ 3, 8; *see also* Ex. 3, Thurman Decl. ¶ 15; Ex. 11, Anderson Decl. ¶ 5; Ex. 26, Tinyan Decl. ¶ 4).

Worse case outcomes and pressure to plead guilty because of the potential for prolonged unconstitutional pretrial detention. For example, Jeffrey Rozelle describes how "it feels like it is all a scheme. I know of many people who just decide to convict themselves because they cannot

wait in jail." (Ex. 3, Rozelle Decl. ¶ 5); *See also, e.g.*, Paul Heaton, et al., The Downstream Consequences of Misdemeanor Pretrial Detention, 69 STAN. L. REV. 711, 786-87 (2017).

For these reasons, Plaintiffs have established that class members will suffer irreparable injury unless this Court enjoins Defendants' actions.

III. Class Members' Injuries Outweigh Any Potential Harm to Defendants Caused by a Preliminary Injunction.

The previously discussed ongoing serious harms to class members as a result of unconstitutional pretrial detention considerably outweigh any potential harm to Defendants. The provision of constitutionally required process to pretrial detainees and substantive determinations regarding the necessity of their detention—the sole relief requested by Plaintiffs in this motion—causes no harm to Defendants. Further, Defendants will save the cost of unnecessarily detaining class members if this Court grants a preliminary injunction. As one federal judge recently explained, "unnecessary pretrial detention burdens States, localities, and taxpayers, and its use appears widespread: nationwide, about 60% of jail inmates are pretrial detainees, and the majority of those people are charged with nonviolent offenses." *Jones*, 2015 WL 5387219, at *3. Class members are part of the unnecessary burden on the City of St. Louis, and ending their wealth-based detention is more likely to benefit Defendants than cause them harm. Thus, the balance of harms weighs substantially in favor of the class members who suffer serious long-term injury from the imposition of unaffordable financial conditions without any finding of necessity, while providing no real benefit to Defendants. *See, e.g.*, *Daves*, 341 F. Supp. 3d at 697 (finding balance of harms weighed in favor of enjoining use of secured money bail without the requisite substantive findings and procedural safeguards); *Schultz*, 330 F. Supp. 3d at 1375-76 (finding balance of harms weighed in favor of an injunction, in part, because "alternative pretrial detention policies are cost effective").

IV. A Preliminary Injunction Serves the Public Interest

"'[I]t is always in the public interest to prevent the violation of a party's constitutional rights.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted); *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012). Accordingly, the public interest would be served by issuance of a preliminary injunction requiring Defendants to provide class members with adequate procedures to vindicate their constitutional rights.

Moreover, as explained throughout this memorandum, the unnecessary detention of indigent individuals has significant negative consequences for the public. Even brief incarceration disrupts employment and family life. *ODonnell II*, 882 F.3d at 155. It leads to worse outcomes at trial, increases poverty, harms families, and causes recidivism. *See supra* at 30-31.

At the same time, detaining indigent people solely because that cannot afford to pay financial conditions of release is expensive, draining public coffers of money that could be spent on other needs. *Jones*, 2015 WL 5387219, at *3. Moreover, there is no evidence that financial conditions of release (even for those who can afford to pay) are more effective than alternative measures for ensuring court appearance and public safety. *ODonnell II*, 892 F.3d at 154 (finding "reams of empirical data" showing that "release on secured financial conditions does not assure better rates of appearance or law-abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision"); *see also McNeil v. Cmty. Prob. Servs., LLC*, 1:18-cv-33, 2019 WL 633012, at *14-15 (M.D. Tenn. Feb. 14, 2019) (finding no evidence that "that arrestees who are able to pay the secured bail amount are more likely to appear for their revocation hearing and less likely to commit crime"); *Schultz*, 330 F.Supp.3d at 1363 ("[T]he evidence demonstrates that secured bail is no more effective than other conditions to assure a criminal defendant's appearance at court proceedings, and secured bail is not necessary to secure

a criminal defendant's appearance."); *Id.* at 1364 (citing "expert testimony and research studies which demonstrate that prolonged pretrial detention is associated with a greater likelihood of re-arrest upon release, meaning that pretrial detention may *increase* the risk of harm to the community.").[15]

These factors amply demonstrate that the public interest is undermined by Defendants' current unconstitutional procedures, and would benefit from a system that grants class members the freedom they could enjoy were they wealthy enough to purchase it.

* * *

Because all of the factors that inform the consideration of preliminary injunctive relief weigh in favor of a preliminary injunction, this Court should grant Plaintiffs' motion for classwide relief and order Defendant Glass to release class members unless they are provided constitutionally adequate procedures.

V. The Court Should Use Its Discretion to Waive the Posting of Security

Federal Rule of Civil Procedure 65(c) provides that courts normally require the moving party to post security to protect the other party from any financial harm that is likely to be caused by a preliminary injunction, if that party is later found to have been wrongfully enjoined. The rule, however, provides district courts broad discretion to determine the amount of bond required or to waive the bond requirement altogether. *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1043 (8th Cir. 2016) (waiver of bond requirement warranted "where the damages resulting from a wrongful issuance of an injunction have not been shown.").

[15] The conclusions regarding likelihood of appearance are further borne out locally by data from The Bail Project of St. Louis, which has a 94.4-percent appearance rate for individuals they have bailed out since December 1, 2017. Ex. 29; s*ee also, e.g.*, Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization* 21 (2016), *available at* https://perma.cc/Q4DR-EVYD ("money bail has a negligible effect or, if anything, increases failures to appear").

Waiver is appropriate in this case because Defendants are unlikely to suffer any harm from an injunction that requires them to follow the constitution and provide class members with relief that vindicates their fundamental constitutional rights. This alone is reason to waive the security requirement. *See, e.g., Council on American-Islamic Rels. v. Graubatz*, 667 F.Supp. 2d 67, 81 (D.D.C. 2009) (requiring no bond where the defendant would not be substantially injured by the issuance of an injunction); 11A Charles A. Wright, Arthur R. Miller, et al., Federal Practice and Procedure § 2954 (2d ed.) ("[T]he court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant."). Plaintiffs are also "engaged in public-interest litigation, an area in which the courts have recognized an exception to the Rule 65 security requirement." *City of Atlanta v. Metro. Atlanta Rapid Transit Auto*, 636 F.2d 1084, 1094 (5th Cir. 1981).

Moreover, Named Plaintiffs and class members are indigent, and their lack of financial resources is a central issue in this case. Many courts have waived bond requirements for indigent litigants in civil rights suits. *See, e.g., Johnson v. Bd. of Police Comm'rs*, 351 F.Supp. 2d 929, 952 (E.D. Mo. 2004) (waiving bond requirement for homeless plaintiffs).

Finally, as explained above, Plaintiffs are likely to succeed on the merits of their claims. The outcome of any trial, if necessary, is likely to reaffirm the well-established principle that a person may not be jailed on a monetary amount that he cannot afford. *See Moltan Co. v. Eagle-Pitcher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) ("no security was needed because of the strength of [Plaintiff's] case and the strong public interest involved").

CONCLUSION

For the reasons stated above, the Court should issue a preliminary injunction to protect the fundamental constitutional rights of the Plaintiff class members.

Dated: February 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of February, 2019, I electronically filed the foregoing with the clerk of the court for the U.S. District Court, Eastern District of Missouri, using the electronic case filing system of the Court.

By: /s/ Seth Wayne