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

DAVID DIXON, et al.,
Plaintiffs,

v.

CITY OF ST. LOUIS, et al.,

Defendants.

Case No. 4:19-CV-00112-AGF

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO CITY DEFENDANTS' MOTION TO DISMISS**

## INTRODUCTION

In the City of St. Louis ("the City"), people who cannot afford to pay money bail are incarcerated in the City's jails without an opportunity to contest their detention for four to five weeks after their arrest.[1] While in jail, they are in the custody of Defendant Commissioner Dale Glass ("Commissioner Glass"); when in court, they are in the custody of Defendant Sheriff Vernon Betts ("Sheriff Betts"). Before their first appearance in court—at which the amount of money bail required to obtain their release is announced—Sheriff Betts's deputies instruct these individuals not to speak. If an individual nonetheless attempts to speak about release, the judge presiding over the case interrupts, instructing that the individual cannot contest the conditions of release until counsel is appointed and seeks relief on the person's behalf. Commissioner Glass and Sheriff Betts enforce these unconstitutional *de facto* orders of detention, causing those who cannot afford to pay to be detained in jail for weeks, while wealthier individuals who can post bail walk free.

When this suit was filed, the Named Plaintiffs were detained and faced weeks of detention, without a hearing, because of unaffordable money bail that had been required as a condition of release in their cases. They initiated this class action under 42 U.S.C. § 1983 on behalf of themselves and others similarly situated (collectively, "Plaintiffs"). Plaintiffs seek, among other relief, a declaratory judgment that Sheriff Betts and Commissioner Glass must not enforce any order requiring secured money bail or a monetary release condition imposed without an individualized hearing and an accompanying record showing that the procedures and findings described in the complaint were provided; an order permanently enjoining Defendants from detaining individuals before trial without constitutionally valid findings and process; and an order

[1] The facts discussed in this brief are taken from Plaintiffs' complaint, which must be accepted as true at this stage. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

directing Sheriff Betts not to instruct individuals in his custody to refrain from speaking at first appearances.

In their motion to dismiss, the City Defendants make a series of arguments that conflate Plaintiffs' Complaint with their motion for a preliminary injunction, and generally do not address the merits of Plaintiffs' constitutional claims. For the reasons set forth below, Defendants' arguments are both improper and mistaken.

## LAW AND ARGUMENT

### I. The City Defendants Raise Improper Arguments

A. The Court Should Reject Any Argument Unrelated to the Motion to Dismiss

As an initial matter, the City Defendants have improperly incorporated arguments not relevant to their motion to dismiss into their brief. On March 1, 2019, the City Defendants filed their "Motion to Dismiss," requesting that the Court dismiss Plaintiffs' claims. ECF No. 51. The accompanying memorandum ECF No. 52, however, purports to both support the Motion to Dismiss and oppose Plaintiffs' Motion for a Class-Wide Preliminary Injunction ECF No. 41. These are separate legal issues implicating different legal standards and requirements. Nonetheless, throughout their brief, the City Defendants conflate these arguments and also appear to challenge Plaintiffs' Motion for Class Certification. *See* ECF No. 52 at 2 (arguing that allegations in complaint and motion for preliminary injunction do not support putative class).[2] To the extent that Defendants' brief raises arguments that relate to matters other than its Motion to Dismiss, these arguments are improper. L.R. 7 – 4.01(A) ("[T]he moving party shall file with each

[2] The City Defendants' objection that Plaintiffs have not presented evidence "to show that all of the putative class members are in fact unable, due to indigency, to meet conditions of release . . . ," ECF No. 52 at 2, is in any event meritless, because the putative class is *defined* as "all [St. Louis] arrestees who are or will be detained . . . post-arrest because they are unable to afford to pay a monetary release condition." ECF No. 4 at 1. Whether any individual person who is not a class representative is a member of the putative class has no bearing on certification, and certainly none on a motion to dismiss.

motion a memorandum *in support of the motion*. . . .") (emphasis added). This Court should decline to consider any arguments not in support of City Defendants' Motion to Dismiss.

B. The Court Should Disregard Defendants' Factual Arguments

In a purported recitation of the facts as alleged in Plaintiffs' complaint, the City Defendants criticize the "one-sided presentation" of facts, noting the "self-serving declarations of persons charged with criminal offenses and their family members." ECF No. 52 at 1. Defendants proceed to allege that "[s]ome of the plaintiffs are convicted felons, whose credibility must be suspect." ECF No. 52 at 2. The City Defendants provide no other reasons why the facts alleged by Plaintiffs and the supporting sworn declarations are not credible, or why someone who previously has been convicted of an offense is inherently untruthful.

Regardless, the City Defendant's arguments about the facts are immaterial. At the motion to dismiss stage, the Court "must accept as true all of the complaint's factual allegations and view them in the light most favorable to the plaintiff[s]." *Schaller Tel. Co. v. Golden Sky Sys.*, 298 F.3d 736, 740 (8th Cir. 2002). Doing so includes, in particular, "crediting the plaintiffs' own statements[.]" *Robinson v. Payton*, 791 F.3d 824, 830 n. 4 (8th Cir. 2015). Plaintiffs clearly have alleged violations of their constitutional rights. The fact—as Defendants point out with no apparent argumentative purpose—that the presumptively innocent Named Plaintiffs are charged with felony offenses or have previous criminal convictions does not nullify their allegations. Moreover, this does not diminish their right to be free from jailing because of poverty, their interest in pre-trial liberty, or their right to procedural due process.

**II. Plaintiffs Have Alleged Conduct by the City Defendants That Merits Relief**

In their first legal argument, the City Defendants claim that Plaintiffs have not alleged "an actionable municipal policy or custom that caused the claimed constitutional violation." ECF No. 52 at 5. In particular, the City Defendants argue that they have no control over bail-setting, that

the Bond Commissioner is not an employee of the City, and that the practice of the Sheriff's deputies to instruct individuals in custody not to speak is neither an official policy of Sheriff Betts nor the "moving force" behind Plaintiffs' injuries. The first two points are not germane to Plaintiffs' claims, and the third is mistaken.

As a preliminary matter, Plaintiffs do not seek to hold the City liable for control of bail-setting in the 22nd Judicial Circuit. Although Plaintiffs have alleged that the City sets policy regarding pretrial release, Plaintiffs recognize that individual final decisions regarding conditions of release are made by judges, albeit under the guidance and influence of the City Bond Commissioner.[3] Complaint, ¶ 25 (Duty Judge sets initial release conditions "based solely on information provided by the Bond Commissioner, and the Bond Commissioner's recommendation, without performing any independent inquiry."). But the Bond Commissioner is not a party to this suit, nor are his actions the source of the City's liability.

The City and Sheriff Betts are liable for prospective relief for two independent reasons. First, they are liable because of the Sheriff's "policy and practice of having his deputies direct individuals in their custody not to speak and thereby not to challenge their release conditions during their first appearance before a judge." Complaint, ¶ 20. The Sheriff is sued for this conduct in his official capacity. "A § 1983 action against an individual in her or his official capacity . . . is equivalent to a claim against the entity itself[.]" *Doe v. City of Creve Coeur*, 666 F. Supp. 2d 988, 1000 (E.D. Mo. 2009).

Second, the City's employees Commissioner Glass and Sheriff Betts, whether they act as City or State officials, may be enjoined from enforcing the unconstitutional money bail orders

[3] The City Defendants argue that the Bond Commissioner, who they call "the Court's pretrial release commissioner" is not a City employee, an allegation that they claim to be "wrong as a matter of law[.]" ECF No. 52 at 6. But City Defendants cite no such law, and give no other reason why Plaintiffs' allegation that the Bond Commissioner is a City employee is implausible on its face.

under *Ex parte Young*, 209 U.S. 123 (1908), even if they are not responsible for crafting the illegal orders themselves.

A. Plaintiffs Have Alleged a Custom of Silencing Individuals at Their First Appearances

When people who are arrested in St. Louis come before the court for their first appearance, the Sheriff's deputies—employees of Sheriff Betts and the City—instruct them not to speak or request a change in their release conditions. Complaint, ¶ 26. As a result, Named Plaintiffs and putative class members have been, and continue to be, prevented from being heard on the financial conditions of release that are the cause of their detention or availing themselves of the procedures to which they are constitutionally entitled.

Governmental entities "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). Although Plaintiffs have not alleged that silencing individuals is an official, written policy of Sheriff Betts, they have alleged that it is a custom or practice sufficiently pervasive to have the effect of an official policy. In the Eighth Circuit, the court employs a three-pronged test to establish the existence of an unofficial custom, pursuant to which the court determines if the Plaintiff has alleged

> (1) [t]he existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and (3) that plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was a moving force behind the constitutional violation.

*Mick v. Raines*, 883 F.3d 1075, 1079-80 (8th Cir. 2018) (quoting *Corwin v. City of Independence, Mo.*, 829 F.3d 695, 700 (8th Cir. 2016)).

Plaintiffs easily meet the first prong by alleging that this is something that Sheriff's deputies do as a matter of course, which is all that is required to surpass a motion to dismiss. But

beyond that, Plaintiffs attached to the Complaint declarations from 11 different people recently presented for their first court appearances in St. Louis, including the Named Plaintiffs, who were all told in some fashion not to speak to the judge about their conditions of release by Sheriff's deputies. *See* Complaint Exs. A, ¶ 3; B, ¶ 3; C, ¶ 3; D, ¶ 4; G, ¶ 5; H, ¶ 3; I, ¶ 4; J, ¶ 5; K, ¶ 3; O, ¶ 7; and Q, ¶ 3.

Defendants' claim that "plaintiffs' various declarations show that some arrestees have been told nothing at all" is wrong. ECF No. 52 at 9. Although five declarations are silent as to whether a deputy told the declarants not to speak at their first appearances, *see* Complaint, Exs. E, F, L, M, & N, these declarations do not establish that it is not a practice of the Sheriff's office to instruct people not to speak, much less that such instructions are the result of "random and unauthorized acts." ECF No. 52 at 9. Even if one or two of these persons were not told to be silent by the Sheriff's deputies, "a single deviation" from a practice "does not prove a conflicting custom," *Wedemeier v. City of Ballwin*, 931 F.2d 24, 26 (8th Cir. 1991). For the purposes of stating a claim, Plaintiffs have alleged "a continuing widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees." *Thelma D. ex rel. Delores A. v. Bd. Of Educ. of City of St. Louis*, 934 F.2d 929, 932-33 (8th Cir. 1991).

Although Plaintiffs have not alleged that Sheriff Betts himself instructed deputies to tell individuals in their custody not to speak, it is clear from the allegations in the complaint and the supporting declarations that these are not isolated acts of individual employees. Absent proof of actual knowledge of constitutional violations, "as the number of incidents grows, and a pattern begins to emerge, a finding of tacit authorization or reckless disregard becomes more plausible." *Howard v. Adkison*, 887 F.2d 134, 138 (8th Cir. 1989). Here, Plaintiffs have alleged that deputies regularly attempt to prevent putative class members from speaking at their only opportunity to see a judge in the first weeks after arrest. And as illustrated in the declarations submitted, the variety

of these orders, on different dates, by different deputies, establishes that the practice has Sheriff Betts's tacit authorization or, at the very least, is the product of his deliberate indifference. *See, e.g.*, Complaint Exs. A, ¶ 3 ("[T]he sheriff told me 'you're going to see a judge, just nod and say yes, sir and then come back out here.'"); C, ¶ 3 ("The sheriff told us that we could not speak to the judge and that if we did, they didn't want to hear us."); G, ¶ 5 ("They said, 'Nobody talk or ask questions. We are just trying to get it done.'"); H, ¶ 3 ("[A] sheriff deputy told me not to ask for a bond reduction and to let the judge do all the talking."); Q, ¶ 3 ("Prior to my hearing with TV judge, the sheriff said 'This is not a bond hearing.'"). The pattern alleged is more than sufficient to bypass a motion to dismiss.

Finally, Plaintiffs have sufficiently alleged that the Sheriff's deputies' instructions not to speak or raise bail conditions with judges is a "moving force" behind a constitutional injury. Presumptively innocent arrested people have a right to be heard at an individualized bail hearing before they may be detained prior to trial, and a government agent's order forbidding them from speaking is unlawful. The deputies' instructions inhibit individuals' ability to fully and freely participate in a hearing. It is not surprising that, in many cases, including that of Named Plaintiff Aaron Thurman, people followed those orders and did not contest their release conditions because a Sheriff's deputy told them not to speak. *See* Complaint Ex. C, ¶ 4 ("I went off what the sheriff was saying and thought 'don't say nothing to the judge.'"); *see also* Complaint Exs. H, ¶ 5 ("During my video hearing, I tried to speak, but the sheriff told me to stop."); K, ¶ 3 ("[T]he sheriff said to everyone not to talk. If I had the chance, I would have asked the judge why the bond was so high.").

The Sheriff can be enjoined from ordering people not to speak even if the judges also routinely deny people the opportunity to contest bail conditions, because the acts of other intervening actors or events that also contribute to an injury do not immunize government agents

who commit constitutional violations. The "moving force" requirement has been equated to proximate cause. *See Harris v. Pagedale*, 821 F.2d 499, 507-08 (8th Cir. 1987) (finding that municipality's policy of ignoring reports of misconduct "proximately caused" subsequent assault, and therefore constituted the "moving force" behind the injury under *Monell*). And "[t]he possibility of an intervening cause does not generally defeat an inference of proximate cause as a matter of law." *Audio Odyssey, Ltd. v. Brenton First Nat'l Bank*, 245 F.3d 721, 739 (8th Cir. 2001).

This may also be understood under principles of joint tortfeasor liability. In *Tilson v. Forrest City Police Department*, although the majority denied relief on other grounds, Judge Lay writing in dissent described the relevant legal principle here: "The Civil Rights Act does not replace the law of joint tortfeasors. The mere fact that others . . . may have contributed to Tilson's unlawful detention does not relieve other tortfeasors who substantially contributed to that detention." 28 F.3d 802, 815 (8th Cir. 1994) (citing *Malley v. Briggs*, 475 U.S. 335, 345 n. 7 (1986) ("§ 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'")); *see also Wilson v. Town of Mendon*, 294 F.3d 1, 15 (1st Cir. 2002) ("[W]e do not agree with appellees' argument that 'joint tortfeasor liability does not appear to exist under [§] 1983.'").

These rules apply for good reason. Assume this Court ordered relief against the Judge Defendants but not the Sheriff. The Sheriff would then become the *sole* moving force behind the putative class's injuries by continuing to allow deputies to instruct class members not to speak. The law does not require this kind of piecemeal relief. The Sheriff's actions are sufficiently causative to form a basis to enjoin him from continuing to play a substantial role in the process that directly causes constitutional harm to putative class members.

B. Commissioner Glass and Sheriff Betts May Be Enjoined Under *Ex parte Young*

Because Defendants Glass and Betts enforce unconstitutional bail orders, Plaintiffs need not show that they played any role in the creation of those orders. Over a century ago, the Supreme Court held that government officials who are "clothed with some duty in regard to the enforcement of the laws of the state, who threaten and are about to . . . enforce . . . an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court." *Ex parte Young*, 209 U.S. 123, 155-56 (1908). Although *Young* is also famous for its holding on Eleventh Amendment immunity, it has long been followed for its more basic rule: that defendants who have "some connection with the enforcement" of unlawful state laws or orders may be enjoined, regardless of whether they issued the order themselves. *Id.* at 157; *see also, e.g.*, *Calzone v. Hawley*, 866 F.3d 866, 869-70 (8th Cir. 2017) (suit against Highway Patrol Superintendent to enjoin enforcement of unconstitutional vehicle inspection law appropriate under *Ex parte Young* even though the creation of the law was not the Superintendent's decision); *Moore v. Urquhart*, 899 F.3d 1094, 1104 (9th Cir. 2018) (enjoining sheriff from executing unconstitutional eviction orders even though the sheriff did not issue those orders).

The rule in *Ex parte Young* allows this Court to enjoin the Sheriff and Jail Commissioner from enforcing unconstitutional orders issued by state judges, just as it may enjoin officials from enforcing unconstitutional statutes. For example, in *Moore*, the plaintiffs sought declaratory and injunctive relief against a sheriff who enforced eviction orders issued by the state court without conducting a hearing. The Ninth Circuit held that under *Ex parte Young*, the plaintiffs could bring suit against the sheriff to enjoin enforcement of those orders, even where an injunction would not be available against the judges who issued them. 899 F.3d at 1103-04. In *Due v. Tallahassee Theaters, Inc.*, the Fifth Circuit similarly held that "one accepted way of testing the validity of a court order is to enjoin its enforcement." 333 F.2d 630, 632 (5th Cir. 1964). The court there

concluded that if a court order was issued in violation of constitutional rights, the public official who gave the order effect "could be tested out in a suit seeking to enjoin such conduct." *Id.*; *see also Strawser v. Strange*, 105 F. Supp. 3d 1323, 1329 (S.D. Ala. 2015) (issuing preliminary injunction ordering clerk not to enforce Alabama Supreme Court order prohibiting the issuance of same-sex marriage licenses).

In several recent cases, district courts have addressed this same question under nearly identical factual circumstances to those of this case and have concluded that government officials responsible for enforcing unconstitutional bail orders—i.e., the officials who have custody over people detained pre-trial—may be enjoined by a federal court from enforcing those orders. *See ODonnell v. Harris Cnty.*, 227 F. Supp. 3d 706, 752 (S.D. Tex. 2016) (If "the Sheriff enforces facially valid [bail orders] without actual knowledge of, or deliberate indifference as to whether there is, a constitutional violation, the Sheriff in his official capacity is a proper party as a State actor subject to prospective relief under *Ex parte Young*."), *preliminary injunction against Sheriff upheld on appeal*, 892 F.3d 147 (5th Cir. 2018); *McNeil v. Cmty. Prob. Servs., LLC*, 2019 U.S. Dist. LEXIS 24375, at *44-45 (M.D. Tenn. Feb. 14, 2019) (Sheriff who enforces secured money bail orders, even if not the "moving force" behind the constitutional violations, "is still an appropriate party to be enjoined under *Ex Parte Young* because he has an independent duty to refrain from violating the federal Constitution." (citation omitted)); *Buffin v. City & Cnty. of San Francisco*, No. 15-cv-04959-YGR, 2016 U.S. Dist. LEXIS 142734, at *29-30 (N.D. Cal. Oct. 14, 2016) (Sheriff who "detains a person based on his or her inability to pay the bail amount" may be sued for declaratory or injunctive relief under *Ex parte Young*).

Because this is merely a suit for prospective relief to cease ongoing constitutional violations, this is true whether the Jail Commissioner and Sheriff act on behalf of the City or the

State when they enforce the judges' bail orders. *See Moore*, 899 F.3d at 1103 ("Actions under *Ex parte Young* can be brought against both state and county officials[.]").

Nor would such an order require that the City Defendants "engage in auditing the validity of warrants issued by the state courts[.]" ECF No. 52 at 15.[4] As the court explained in *McNeil*,

> the injunctive relief requested focuses on the [Defendant's] role as *jailer* in detaining . . . arrestees *after* arrest based solely on the individual's ability to pay the secured bail amount written on the arrest warrant. Complying with such injunctive relief does not require the [Defendant], or his employees, to engage in any kind of legal analysis to understand that detaining an arrestee based on such an arrest warrant with a secured bail amount *cannot* be the basis for constitutional detention . . . .

2019 U.S. Dist. LEXIS 24375, at *45 (emphasis in original). The Fifth Circuit recently authorized a similar injunction ordering the official in charge of the jail "to decline to enforce orders requiring payment of prescheduled bail amounts as a condition of release for said defendants if the orders are not accompanied by a record showing that the required individual assessment was made and an opportunity for formal review was provided." *ODonnell v. Harris Cnty.*, 892 F.3d 147, 165 (5th Cir. 2018). Here, as in *ODonnell*, the Court may enjoin the Sheriff and Jail Commissioner from enforcing orders for conditions of release unless they are accompanied by a record showing that the required individualized assessment was made.

Plaintiffs have alleged, and City Defendants do not dispute, that Commissioner Glass and Sheriff Betts have custody over people who are detained in the City's jails and while appearing in court pre-trial and who are unable to pay the financial conditions of release set by judges, thus subjecting them to *de facto* detention orders. *See* Complaint, ¶ 20 ("Defendant Sheriff Vernon

[4] In regard to an injunction against the enforcement of unconstitutional orders, the City Defendants also make a one-sentence argument that "to [require auditing the validity of warrants] would be an indefensible intrusion by this Court into ongoing state criminal proceedings[,]" citing *O'Shea v. Littleton*, 414 U.S. 488 (1974). ECF No. 52 at 15. To the extent the City Defendants seek to raise the potential for abstention, this argument is refuted in Plaintiffs' Memorandum in Opposition to Defendant Judges' Motion to Dismiss, ECF No. 65, Section II.C, where the issue is fully briefed.

Betts . . . has authority over individuals in St. Louis City custody during the time of their first appearance before the court . . . ."); ¶ 22 ("Commissioner Glass . . . enforces the pretrial detention of individuals confined in the City's two jails."). These orders are unconstitutional, and the Commissioner Glass and Sheriff Betts are subject to an injunction under *Ex parte Young*.

**III. This Suit is Properly Brought Under § 1983**

As a final argument, the City Defendants assert that this Court lacks jurisdiction under 42 U.S.C. § 1983 to order the relief requested by Plaintiffs in their Motion for a Classwide Preliminary Injunction because of *Preiser v. Rodriguez*, 411 U.S. 475 (1973). ECF No. 52 at 12. As stated previously, Defendants' arguments in opposition to the preliminary injunction are improperly raised. Regardless, they lack merit, and Plaintiffs will address these arguments to the extent that they are generally directed at Plaintiffs' claims.

The Supreme Court explained in *Preiser* that "a § 1983 action is barred . . . if success in that action would *necessarily* demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005) (emphasis added). The touchstone of the inquiry is "necessarily." Where an individual does not seek an "injunction ordering . . . immediate or speedier release into the community . . . and a favorable judgment would not necessarily imply the invalidity of their convictions or sentences," he or she may "properly invoke[] § 1983." *Skinner v. Switzer*, 562 U.S. 521, 533-34 (2011) (internal quotation marks, brackets, and citation omitted). In other words, even where plaintiffs advance a § 1983 claim under the hope or belief "that victory . . . will lead to speedier release from prison," *Preiser* does not bar their claim if release will not inevitably result. *Dotson*, 544 U.S. at 78.

In particular, *Preiser* does not bar suits like this one directed at unconstitutional procedures or practices related to release determinations where a remedy would not inevitably entail an entitlement to release. *Compare Otey v. Hopkins*, 5 F.3d 1125, 1131-32 (8th Cir. 1993) (Section

1983 appropriate vehicle for capital defendant challenging procedures involved in the denial of commutation, because plaintiff was "not seeking a determination that he has an entitlement to commutation"), *and Adams v. Agniel*, 405 F.3d 643, 644 (8th Cir. 2005) (suit for changes to factual record underlying parole denial did not implicate *Preiser*), *with Offet v. Solem*, 823 F.2d 1256, 1259 (8th Cir. 1987) (*Preiser* implicated where "a judgment that a . . . decision . . . was rendered in an unconstitutional manner ineluctably would lead to a different outcome in the disciplinary proceeding").

The City Defendants argue that "the pith of the requested preliminary injunction is to compel the release of state pretrial prisoners." ECF No. 52 at 13. This is a misreading of Plaintiffs' claims. Plaintiffs do not challenge the validity of their arrests or ongoing prosecutions. Not a single Plaintiff claims that he or she is entitled to pretrial release. In their complaint, Plaintiffs challenge the imposition of unaffordable money bail in the complete absence of procedures and substantive findings that meet constitutional requirements—in other words, they argue that the government has not made the findings or followed the procedures that would be necessary to order them detained prior to trial. Plaintiffs seek individualized hearings and specific findings as required by the Constitution before they may be detained pretrial, but the relief sought would not "ineluctably" lead to release, *Offet*, 823 F.2d at 1259, nor would it necessarily "demonstrate the invalidity of [any person's] confinement or its duration." *Dotson*, 544 U.S. at 82.[5] These are not

[5] The City's request, in a footnote, to present evidence that an injunction is not in the public interest "if the focus of the preliminary injunction is the potential release of dangerous criminals into the community with no conditions of release[,]" ECF No. 52 at 12 n.3, is illustrative of the problems with Defendants' practices. At the time money bail is set resulting in the detention of those too poor to pay, there have been no procedures or findings regarding who is dangerous and who is not. "Dangerous criminals" who are wealthy are released upon payment without conditions that incentivize public safety, *see State v. Wurtzberger*, 265 S.W.3d 329, 344-48 (Mo. Ct. App. 2008) (forfeiture only normally permitted for violation of bail conditions related to appearance in court, not new arrests), while poor individuals who are not dangerous remain confined. There is no rational argument that such a system is in the public interest.

core habeas claims. *Cf. id.* at 81 ("[T]he prisoner's claim for an injunction barring *future* unconstitutional procedures did *not* fall within habeas' exclusive domain.") (emphases in original).

It appears that the "compelled release" hypothesized by Defendants refers to the potential result that would be required if judges were to refuse to conduct appropriate hearings, rendering their detention orders invalid. ECF No. 52 at 14. The City Defendants present no reason to assume that the Judge Defendants will be unable or unwilling to conduct constitutional bail hearings. The ensuing possibility of release after judicial refusal is both speculative and attenuated from the injunction itself, and not an outcome inevitably required by the relief sought. Accordingly, *Preiser* is inapplicable.

The Supreme Court itself has applied these basic principles in its directly analogous decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975). There, pretrial detainees sought "a judicial hearing on the issue of probable cause," claiming that their detention violated the constitution because they had not been afforded prompt probable cause determinations. *Id.* at 107. The State of Texas, as *amicus curiae*, argued that the claim should have been raised in a habeas proceeding because no "purpose could be served by a determination of probable cause" other than to release improperly held detainees. Brief of *Amicus Curiae* State of Texas at 9, *Gerstein v. Pugh*, 420 U.S. 103 (1975) (No. 73-477), 1974 WL 186448, at *9. The Court rejected this reasoning, and looking at whether the injunction would *necessarily* require release, concluded that by asking that the state be ordered "to give them a probable cause determination," "the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy." *Gerstein*, 420 U.S. at 107 n. 6.

As in *Gerstein*, the relief sought in this case does not request release of all putative class members, but requests that putative class members be provided with individualized hearings before they may be detained pretrial on unaffordable money bail. Also, as in *Gerstein*, although release is a possibility based on the relief sought, the Plaintiffs understand that their legal claims do not

entitle them to release from custody as a matter of constitutional law. As many other courts have held under similar circumstances, *Preiser* does not apply. *See, e.g.*, *Holland v. Rosen*, 277 F. Supp.3d 707, 738 (D.N.J. 2017) (*Preiser* inapplicable because plaintiff "does not seek an injunction ordering his immediate or speedier release into the community, but rather an injunction ordering a hearing that conforms to his conception of his constitutional rights. . . ."), *aff'd*, 895 F.3d 272 (3d Cir. 2018); *ODonnell v. Harris Cnty.*, 260 F. Supp. 3d 810, 816 (S.D. Tex. 2017) (rejecting *Preiser* argument because "[t]he plaintiffs mount a broad-based challenge to Harris County's administration of its bail procedures, but they do not seek or assert 'entitlement' to pretrial release"); *Booth v. Galveston Cty.*, No. 3:18-CV-104, 2018 U.S. Dist. LEXIS 218967, at *27-29 (S.D. Tex. Dec. 10, 2018) (*Preiser* inapplicable for plaintiff who "seeks an injunction requiring constitutionally adequate processes to determine post-arrest release or detention."); *Walker v. City of Calhoun*, No. 15-CV-170, 2016 WL 361612, at *13 (N.D. Ga. Jan. 28, 2016) (finding *Preiser* inapplicable in a challenge to money bail schedule), *vacated on other grounds*, No. 16-10521, 2017 WL 929750 (11th Cir. Mar. 3, 2017).

## CONCLUSION

For the foregoing reasons, the City Defendants' Motion to Dismiss should be denied.

Dated: March 22, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of March, 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