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

MICHELLE TORRES, *et al.*, on behalf of themselves and those similarly situated, Plaintiffs, v. W. DOUGLAS COLLINS, in his official capacity as Hamblen County General Sessions Judge, *et al.*, Defendants.	Case No. 2:20-cv-00026

[PROPOSED] MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTIONS FOR A TEMPORARY RESTRAINING ORDER AND CLASS-WIDE PRELIMINARY INJUNCTION

Every day, people in Hamblen County, Tennessee are detained pretrial in the county jail solely because they cannot afford to pay money bail. Defendants, who make and enforce Hamblen County's bail policies, routinely demand that people who have been arrested pay a sum of money to be released. They do so without giving them a meaningful opportunity to be heard on conditions of release, making any inquiry into or findings concerning their ability to pay, or providing them counsel. While those who can afford to pay are immediately released, those who cannot are forced to remain in jail until their case is resolved, which may take months or years. The result of Defendants' unconstitutional money bail practices is an ongoing humanitarian crisis in the Hamblen County Jail, which is so overcrowded that pretrial detainees are unclothed and handcuffed to door handles, forced to sleep shoulder-to-shoulder on mattresses in supply closets,

and shackled to their own wheelchairs. These individuals are forced to endure inhumane jail conditions solely because they cannot pay for their freedom.

Defendants' practices violate the constitutional rights of Plaintiffs[1] in several ways. First, they infringe on two overlapping but distinct substantive constitutional rights: (1) the equal protection and due process right against wealth-based detention, and (2) the fundamental due process right to physical bodily liberty before trial. Neither of these constitutional rights is absolute, but infringement on either requires the government to demonstrate that the wealth-based pretrial detention of a person is necessary to serve the government's interest in court appearance or public safety. Because Defendants make no inquiry into or findings about a person's ability to pay a financial condition of release and fail to consider whether alternative conditions of release would reasonably protect the government's interests, their bail practices are unconstitutional.

Second, Defendants' practices violate Plaintiffs' procedural due process rights by denying them any opportunity at all—let alone a constitutionally adequate hearing—to contest their jailing for weeks, if ever. Bedrock constitutional law requires that, before an individual's right to pretrial liberty or against wealth-based detention is infringed, the government must provide adequate procedural safeguards to ensure the accuracy of any finding that a person must be detained prior to trial. These minimal safeguards include a timely individualized hearing; notice of the issues to be determined; representation by counsel; the opportunity to present and confront evidence and make arguments; findings on the record explaining the basis for any condition of release imposed and the evidence relied on; and, if such conditions will result in pretrial detention, a finding by clear and convincing evidence that pretrial incarceration is necessary because no other alternative

[1] "Plaintiffs" refers to both Named Plaintiffs and proposed Class Members throughout this memorandum.

conditions or combination of conditions would reasonably ensure the individual's future court appearance and the safety of the community.

Absent intervention by this Court, Plaintiffs will remain unlawfully confined in the Hamblen County Jail for weeks with no opportunity to challenge their conditions of release. Because of their poverty, they will languish in a jail notorious for abhorrent conditions. This Court should issue a Temporary Restraining Order for the Named Plaintiffs and a Preliminary Injunction for the putative class, enjoining Defendant Sheriff Jarnagin from continuing to enforce orders that result in pretrial detention unless those orders include a finding, made after the required procedural safeguards have been provided, that pretrial detention is necessary.

FACTS

Every day, hundreds of presumptively innocent individuals in Hamblen County are confined in its jail because they cannot pay the sum of money required by Defendants for their release.[2] This amount of money is determined without an individualized hearing, and people remain incarcerated for weeks without any opportunity to challenge their conditions of release. Courts across the country—including courts in Tennessee—have held that practices materially identical to those followed by Defendants are unconstitutional and have ordered equitable relief to remedy them.[3]

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[2] Ex. 1, TENN. DEP'T OF CORR, DECISION SUPPORT: RESEARCH & PLANNING, TENNESSEE JAIL SUMMARY REPORT 1 (December 2019) (one-day snapshot of Hamblen County Jail population showing 202 individuals detained pretrial).

[3] *See*, *e.g.*, *McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-cv-33, 2019 WL 633012, at *16 (M.D. Tenn. Feb. 14, 2019) (granting preliminary injunction); *Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1376 (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, 320 (E.D. La. 2018) (issuing declaratory judgment), *aff'd on other grounds*, 937 F.3d 525 (5th Cir. 2019); *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, 772 (M.D. Tenn. 2015) (granting

The Named Plaintiffs

Each of the Named Plaintiffs is currently detained in violation of their constitutional rights by Defendant Jarnagin in the Hamblen County Jail. Their detention is a result of money bail orders issued by one of Defendants Collins, West, Robertson, Phillips, or West Moore. None can afford to pay their money bail, nor have they been able to challenge their conditions of release. Absent intervention by this Court, each Named Plaintiff will remain detained indefinitely because of her inability to pay.

Michelle Torres

Plaintiff Michelle Torres, a 50-year-old woman, was arrested on February 14, 2020 on misdemeanor and felony drug charges. Ex. 2, Declaration of Michelle Torres ("Torres Decl.") ¶ 2. She was taken to the Hamblen County Jail where she waited shackled in the entry area for several hours before learning from a guard that her bond was set at $75,000.[4] *Id.* ¶¶ 3-4. She has no idea how or by whom her bond amount was determined. *Id.* ¶ 6. Ms. Torres cannot afford to pay to be released, as her only source of income is federal disability benefits, which were cut off several months ago. *Id.* ¶ 10. She has nobody in her life who can help her pay her bond. *Id.* ¶ 5. Ms. Torres has serious medical issues, including cancer, for which she does not expect to receive treatment or medication in the jail. *Id.* ¶¶ 11-12. She is in extraordinary pain and discomfort in the jail, where she is forced to sleep on the floor without a pillow or proper mattress in a room crowded with other women. *Id.* ¶¶ 12-13. She has yet to have counsel appointed or see any judicial official, and nobody

preliminary injunction); *Cooper v. City of Dothan*, No. 1:15-CV-425-WKW, 2015 U.S. Dist. LEXIS 78813, at *6 (M.D. Ala. June 18, 2015) (granting temporary restraining order).

[4] Throughout this brief, "bond," "bail," "money bail," and "secured financial condition of release" refer to the same thing: an sum of money that an individual detained pretrial must pay before she is released from jail. In Hamblen County, these often contemplate use of a commercial surety, which require a nonrefundable payment of 10% of the bail amount.

has told her when her initial appearance will be or when she will be able to request a lower bond or non-financial conditions of release. *Id.* ¶¶ 7-8.

Robbie Johnson-Loveday

Plaintiff Robbie Johnson-Loveday is a 49-year-old woman. Ex. 3, Declaration of Robbie Johnson-Loveday ("Johnson-Loveday Decl."), ¶ 1. She was arrested on February 11, 2020, on charges of driving under the influence and related charges, all misdemeanors, and taken to the Hamblen County Jail. *Id.* ¶¶ 2-3. She was not booked into the jail until the evening of February 12. *Id.* ¶ 4. At that time, a correctional officer told her that her bond was $6,000. *Id.* ¶ 13. That was the only time she was informed of the amount of her bond. *Id.* On the morning of February 14, she communicated with a court official by video conference in a room in the jail. *Id.* ¶ 5. The video interaction lasted less than two minutes. *Id.* ¶ 12. She did not have an attorney present. *Id.* ¶ 9. During the video conference, the court official did not ask Ms. Johnson-Loveday if she had a job, if she could afford a lesser bond amount, or anything else about her financial resources, nor did the court official consider any non-financial conditions for her release. *Id.* ¶ 10. Ms. Johnson-Loveday cannot pay her bail, and remains incarcerated. *Id.* ¶ 16. She is afraid that if she remains in jail, she will lose her job, which will cause financial ruin. *Id.* ¶ 19. As a result of being unable to afford her bail, she is trapped in an overcrowded cell where she is forced to sleep on the floor—from which it is especially difficult for her to rise because she has only one hand. *Id.* ¶¶ 21-22. She also does not have access to the medication she takes daily. *Id.* ¶ 23.

Amanda Cameron

Amanda Cameron is a 36-year-old woman. Ex. 4, Declaration of Amanda Cameron ("Cameron Decl."), ¶ 1. She was arrested shortly after midnight on February 15, 2020. *Id.* ¶ 2. She was charged with Schedule II, III, and IV drug violations, theft, and unlawful drug paraphernalia.

Id. After her arrest, she was taken to the Hamblen County Jail, where she waited for several hours to be booked. *Id.* ¶ 3. A guard informed her that her bond was set at $30,000. *Id.* ¶ 4. She has no idea how her bond was determined or why that is the amount of money she needs to pay to be released. *Id.* ¶ 6. She cannot afford to pay $30,000 or make a payment to a bondsman, and does not think anyone in her family will be able to help her. *Id.* ¶ 5. Her sole income comes from food stamps and flower arrangements she sells from her home. *Id.* ¶ 10. She is the primary caretaker for her one-year-old daughter, and the money she and her boyfriend earn is just enough to cover basic necessities. *Id.* ¶¶ 9-10. She is desperate to get home to her daughter, and is stressed and scared in jail, where she has to sleep on a thin strip of foam in an overcrowded pod. *Id.* ¶¶ 9, 12. She is concerned she will not be provided with her prescribed medications, without which she is at risk of having seizures. *Id.* ¶ 11.

Bethany Edmond

Plaintiff Bethany Edmond is a 36-year-old homeless woman who was arrested on February 12, 2020, and charged with aggravated criminal littering, a Schedule III drug violation, and a Schedule V drug violation, all misdemeanors. Ex. 5, Declaration of Bethany Edmond ("Edmond Decl."), ¶ 2. She was taken to the Hamblen County Jail, where a guard told her she had a bond of $1,500. *Id.* ¶ 4. She cannot afford her money bail, and her family is unable to give her financial assistance. *Id.* ¶ 5. When she was arrested, she had 36 cents in her pocket, the only cash she possesses. *Id.* ¶ 10. She and her husband currently live in a tent. *Id*. She has been unemployed for over a year. *Id.* On February 14, 2020, she had a video hearing conducted by a woman. *Id.* ¶ 6. The woman read Ms. Edmond the charges, appointed her a public defender, and told her that her next court date is March 3, 2020. *Id.* The entire video hearing took two minutes; no attorney was present. *Id.* ¶ 7. Because she cannot pay money bail, Ms. Edmond is forced to endure jail conditions

including mold, overcrowding that means she must sleep on the floor, and no access to her medication, which causes her pain, insomnia, and loss of appetite. *Id.* ¶¶ 13-14. She is also separated from her children, ages six and twelve, whom prior to her incarceration she saw every day. *Id.* ¶ 12.

The Initial Pretrial Release and Detention Process

Named Plaintiffs' circumstances are typical of pretrial detainees in Hamblen County. All people arrested in Hamblen County have their conditions of release first determined—in their absence—at the warrant stage by Defendant Collins, the Defendant Judicial Commissioners Moore, Phillips, and Robertson, or Defendant West (collectively, the "initial bail-setters"). Ex. 6, Declaration of Elizabeth Bou ("Bou Decl.") ¶ 6; Ex. 7, Declaration of Ethel Rhodes ("Rhodes Decl."), ¶ 6.

When a warrant is sought prior to arrest, a police officer presents an affidavit of complaint to Defendant West or one of her deputies, who signs off on the warrant. Bou Decl. ¶ 6. After the warrant is approved, one of the initial bail-setters affixes a money bail amount to the warrant. *Id.* ¶ 6; Rhodes Decl. ¶ 6. In the case of a warrantless arrest, after an individual is arrested and booked into the Hamblen County Jail, the arresting officer will go to the Clerk's office to follow the same bail-setting procedure as he would in the case of an arrest on a warrant. Bou Decl. ¶ 7.

In either case, the financial condition required for release is based solely on the charges on which an arrested person has been booked; the nature of the allegations in the affidavit of complaint and, when available, any information in the court's computer system, which may include an arrested person's previous criminal cases in Hamblen County, probation status in Hamblen County, missed court dates, and place of residence. *Id.* ¶¶ 8, 12. The initial bail-setters make no inquiry into and have no information about an individual's ability to pay money bail, their ties to

the community, or other relevant factors. *Id.* ¶ 9; *see also id.* ¶ 10 (noting that Defendant West said it is "not [the bondsetters'] business" how much money an arrestee has access to (alteration in original)). Although the initial bail-setters are authorized to release an individual on personal recognizance or with a citation to return to court, they rarely do so, instead requiring money bail in the vast majority of cases. *Id.* ¶ 13; Rhodes Decl. ¶ 5. Because they lack any financial information about the individual, the bail-setters do not know whether that person will be released immediately or remain in jail.

The Initial Appearance

Individuals who cannot immediately pay the amount of money bail required for their release remain in jail and await their "initial appearance."[5] In Hamblen County, one of the Defendant Judicial Commissioners or Defendant Collins presides over the initial appearance. This proceeding is off-the-record and behind closed doors, typically conducted by video conference between the judicial officer in chambers and arrested persons in the jail.[6] Rhodes Decl. ¶ 7. Initial appearances take place only on Mondays, Wednesdays, and Fridays. Initial appearances are very brief proceedings at which arrested persons are informed of the charges against them, their conditions of release, and their next court date. *See* Johnson-Loveday Decl. ¶¶ 6-8, 12; Edmond Decl. ¶¶ 6-7; Ex. 8, Declaration of Sonny Clendenin ("Clendenin Decl."), ¶¶ 4, 7; Ex. 9, Declaration of Richard Price, ("Price Decl.") ¶¶ 6-7. Defense counsel is not typically present at

[5] This proceeding is sometimes referred to as an "arraignment" or "video arraignment" even though no plea is entered and it does not take place in criminal court. *See* DAVID LOUIS RAYBIN 9 TENN. PRAC. CRIM. PRAC. & PROCEDURE § 3:2, Westlaw (differentiating between an "initial appearance" before a General Sessions judge or judicial commissioner and an "arraignment" before the criminal court following an indictment).

[6] Because the initial appearances are conducted by video link between the judicial officer's chambers and the jail, they are not accessible to the public, in violation of Tennessee law. *See* Tenn. R. Crim. P. 43(e)(2) (providing that if initial appearance occurs by audio-visual device, it must "be heard in the courtroom by members of the public" or "be contemporaneously accessible by the public").

the initial appearance. Rhodes Decl. ¶ 7; Johnson-Loveday Decl. ¶ 9; Edmond Decl. ¶ 7. Arrested persons have no opportunity to raise any challenge to their ongoing pretrial detention or modify the bail amount written on their warrant. Rhodes Decl. ¶ 7; Clendenin Decl. ¶ 6; Price Decl. ¶ 8.

At the initial appearance, the Defendant Judicial Commissioners and Defendant Collins make no alterations to the amounts affixed on the warrant by the initial bail-setters and make no inquiries for the purpose of determining conditions of release. Johnson-Loveday Decl. ¶¶ 10-11; Clendenin Decl. ¶¶ 4-5, 10; Price Decl. ¶¶ 6, 9-10. By setting conditions of release that are unattainable, the initial bail-setters thereby issue *de facto* detention orders without any individualized assessment and without considering non-monetary conditions that might serve the government's interests. Furthermore, they issue these *de facto* detention orders without any meaningful process, let alone the detailed procedures required by the due process clause, including a timely individualized hearing; notice of the issues to be determined; representation by counsel; the opportunity to present and confront evidence and make arguments; findings on the record explaining the basis for any condition of release imposed and the evidence relied on; and, if such conditions will result in pretrial detention, a finding by clear and convincing evidence that pretrial incarceration is necessary because no alternative conditions would reasonably ensure future court appearance and the safety of the community.

The Preliminary Hearing

After the initial appearance, individuals have a preliminary hearing before Defendant Collins in General Sessions court. This preliminary hearing occurs as many as 14 business days after the initial appearance (and therefore as many as 21 days from arrest) for individuals who have been unable to pay bail. Rhodes Decl. ¶ 8; *see also* Tenn. R. Crim. P. 5, 2018 Advisory Commission Cmt. This hearing is typically the first opportunity for indigent defendants to meet

their court-appointed counsel. Rhodes Decl. ¶ 8; Edmond Decl. ¶ 9. Because Defendants provide no mechanism to request review of conditions of release until an individual meets with counsel, the preliminary hearing is also typically the first conceivable opportunity for individuals to file a motion contesting their ongoing pretrial detention. Rhodes Decl. ¶ 8.

Prolonged Wealth-Based Pretrial Detention

Bail orders issued by Defendants Collins, West, Robertson, Phillips, and West Moore are enforced by Defendant Sheriff Jarnagin, who is in charge of the Hamblen County Jail.[7] As a result of Defendants' policies and practices, indigent individuals are subject to extended periods of wealth-based pretrial detention before being provided a hearing on conditions of release. *Id.* ¶ 9. Such hearings, if and when conducted by Defendant Collins, are routinely constitutionally inadequate.

Individuals who are detained because of Defendants' practices suffer immense irreparable harm beyond a deprivation of their constitutional rights, including loss of employment and housing, leading to long-term economic instability and poverty; harm to children and family members reliant on the support of individuals who are jailed; physical and mental health problems due to inhumane conditions at the jail; and a greater likelihood of being found guilty and receiving a harsher sentence. *See infra* Section II.

LAW AND ARGUMENT

"District courts consider four factors in deciding whether to issue a preliminary injunction: '(1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be

[7] Sheriff's Department and Jail, Hamblen County Tennessee, http://www.hamblencountytn.gov/sheriffs-department-and-jail/ (last visited Feb. 16, 2020).

served by granting injunctive relief.'" *Cooper v. Honeywell Int'l, Inc.*, 884 F.3d 612, 615 (6th Cir. 2018) (quoting *Entm't Prods., Inc. v. Shelby Cty.*, 588 F.3d 372, 377 (6th Cir. 2009)); *see also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The same standard applies for a temporary restraining order. *See Defoe ex rel. Defoe v. Spiva*, No. 3:06-CV-450, 2008 WL 2697342, at *2 (E.D. Tenn. July 1, 2008) (describing the same standard for both temporary restraining and preliminary injunction orders).

I. Plaintiffs Are Likely to Succeed on Their Claims That Defendants' Practices Violate Their Fourteenth and Sixth Amendment Rights

Defendants have violated both Plaintiffs' substantive and procedural due-process 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) (alteration in original) (quoting *Mills v. Rogers*, 457 U.S. 291, 299 (1982)). 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' practices violate individuals' substantive rights against wealth-based detention and to pretrial liberty. Separately, Defendants' practice of setting conditions of release that result in detention without providing any meaningful opportunity to be heard violates Plaintiffs' procedural rights. Constitutionally adequate process must be provided to ensure that Plaintiffs are not detained in violation of their substantive rights. Finally, Defendants violate individuals' Sixth Amendment rights by failing to provide counsel at initial appearances.

A. Defendants' Practices Violate the Fourteenth Amendment Right Against Wealth-Based Detention Because They Make No Findings About Plaintiffs' Ability to Pay or the Necessity of Detention Prior to Requiring Secured Money Bail

The constitutional principle at issue is straightforward: A person may not be "subjected to imprisonment solely because of his indigency." *Tate v. Short*, 401 U.S. 395, 398 (1971); *accord 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); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding right to equal protection violated by imprisonment beyond statutory maximum based solely on inability to pay a fine); *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) ("The incarceration of those who cannot [pay money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."); *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (holding that an order 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)).[8] This principle has led the Supreme Court to strike down state and local practices jailing individuals solely due to their inability to pay a fine on three occasions—in *Tate*, *Williams*, and *Bearden*. In the last of these cases, the Court reiterated the core principle on which this substantive right rests: the "impermissibility of imprisoning a defendant solely because of his lack of financial resources." *Bearden*, 461 U.S. at 661.

The Sixth Circuit has applied this bedrock principle of equal justice, finding that the constitutional right against imprisonment for nonpayment of a sum of money is "well established" in the constitution. *Powers v. Hamilton County Pub. Defender Comm'n.*, 501 F.3d 592, 608 (6th

[8] *See also* Brief of Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 24, *ODonnell*, 892 F.3d 147 (2018) (No. 17-20333), 2017 WL 3536467 ("[A]ll the concerns that attend post-conviction deprivations based on indigence apply with even greater force where a defendant has not been convicted of a crime. . . . If a state may not imprison convicted indigent defendants solely 'on account of their poverty,' how can a state constitutionally detain presumably innocent persons for the same reason?" (citation omitted)).

Cir. 2007) (holding constitutional violation established by plaintiff who was imprisoned for nonpayment of a fine without inquiry into ability to pay); *Alkire v. Irving*, 330 F.3d 802, 816 (6th Cir. 2003) ("'[F]undamental fairness' requires that a court inquire into an individual's reasons for failing to pay a fine or court costs." (quoting *Bearden*, 461 U.S. at 672)); *United States v. Bichon*, No. 88–6288, 1989 WL 63268, at *2 (6th Cir. June 14, 1989) ("A probationer should not be placed in custody merely because he lacks the financial resources to pay a fine.").

Although this precedent primarily addresses post-conviction wealth-based jailing, the right not to be imprisoned solely for being poor applies with even 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. 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. *Pugh*, 572 F.2d at 1056–57 (5th Cir. 1978) (en banc). The application of the prohibition on wealth-based detention to the bail context has been repeatedly affirmed. *See Pugh*, 572 F.2d at 1057; *see also ODonnell v. Harris Cty.* (*ODonnell II*), 892 F.3d 147, 159 (5th Cir. 2018); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 311 n.5, 320 (E.D. La. 2018); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 528 (Ct. App. 2018).

In violation of the longstanding constitutional principle that one cannot be jailed solely because she cannot pay for her release, Defendants here routinely impose money bail without any consideration of or findings about an individual's financial circumstances, or whether there are alternative conditions that would reasonably assure the individual's return to court and the safety of the public. Johnson-Loveday Decl. ¶¶ 10-11; Edmond Decl. ¶ 6; Clendenin Decl. ¶¶ 5-6, 10; Price Decl. ¶¶ 6, 8-10. This practice was applied against each of the Named Plaintiffs, who had no

opportunity to be heard before unaffordable financial conditions of release were required, and who were not provided any explanation of the reasons for their detention. Torres Decl. ¶¶ 4, 6; Johnson-Loveday Decl. ¶¶ 6, 13; Edmond Decl. ¶¶ 4, 8; Cameron Decl. ¶¶ 4, 6.

The Named Plaintiffs' experiences are representative: because financial conditions of release in their cases were beyond what they could pay, they have remained in jail for days, resulting in lost employment, financial ruin, separation from family members, confinement in terrible conditions, and declining mental and physical health. Torres Decl. ¶¶ 11-13; Johnson-Loveday Decl. ¶¶ 18-23; Edmond Decl. ¶¶ 11-14; Cameron Decl. ¶¶ 9, 11-12. If these same individuals could afford to pay, however, they would be released. The Fifth Circuit has 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—including two in the Middle District of Tennessee[9]—have agreed that these practices, which are materially indistinguishable from the Defendants' in this case, are unconstitutional.[10]

[9] *McNeil*, 2019 WL 633012, at *16; *Rodriguez*, 155 F. Supp. 3d at 771–72.

[10] *See, e.g.*, *Daves v. Dallas Cty.*, 341 F. Supp. 3d 688, 694 (N.D. Tex. 2018), *appeal filed*, No. 18-11368 (5th Cir. Oct 23, 2018); *Schultz*, 330 F. Supp. 3d at 1374–75; *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *3 (N.D. Ga. June 16, 2017), *vacated in part by* 901 F.3d 1245 (11th Cir. 2018); *Edwards v. Cofield*, No. 3:17-CV-321-WKW, 2017 WL 2255775, at *1 (M.D. Ala. May 18, 2017); *ODonnell I*, 251 F. Supp. 3d at 1156–58; *Martinez v. City of Dodge City*, No. 15-CV-9344-DC-TJJ, 2016 U.S. Dist. LEXIS 190884, at *1–2 (D. Kan. Apr. 26, 2016); *Rodriguez*, 155 F. Supp. 3d at 768-69; *Thompson v. Moss Point*, No. 1:15cv182-LG-RHW,

Courts evaluating these practices have held that where 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 v. Short*, 401 U.S. 395, 397-99 (1971), and *Williams v. Illinois*, 399 US. 235, 241-42 (1970)); *Johnson v. Bredesen*, 624 F.3d 742, 748-9 (6th Cir. 2010) (noting that *Griffin*, *Williams*, and *Bearden* applied a heightened standard of review, and "the fact that the case involved the denial of an indigent defendant's physical liberty appeared dispositive."); *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (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)).[11] Application of heightened scrutiny demands that this court look to whether Defendants' practices are narrowly tailored to achieve the State's two compelling interests related to pretrial detention: protecting public safety

2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); *Jones. v. City of Clanton*, No. 2:15cv34-MHT, 2015 WL 5387219, at *3 (M.D. Ala. Sept. 14, 2015); *Snow v. Lambert*, No. 15-567-SDD-RLB, 2015 WL 5071981, at *2 (M.D. La. Aug. 27, 2015); *Cooper v. City of Dothan*, No. 1:15-CV-432-WKW [WO], 2015 WL 10013003, at *1 (M.D. Ala. June 18, 2015); *Pierce v. City of Velda City*, No. 4:15-cv-570-HEA, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015).

[11] *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 Plaintiffs, 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 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).

and ensuring defendants appear for their court dates. Here, 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").

Defendants do not make any findings that would allow them to determine whether Plaintiffs will be able to pay the amount required for their pretrial release. Bou Decl. ¶ 10. Defendants have had no contact with the arrested individuals at the time they determine money bail and have no information about their financial circumstances. *Id.* ¶¶ 6-9. Thus, Defendants do not know, when setting financial conditions of release, whether those conditions will result in the arrestee being detained because she cannot pay her money bail. *Id.* ¶ 10. Even if a person states that they cannot pay at their initial appearance, which occurs one to three days after their detention, Defendants refuse to consider that information to modify the bail amount written on the warrant. Rhodes Decl. ¶ 7; Clendenin Decl. ¶ 6; Price Decl. ¶ 8; Johnson-Loveday Decl. ¶ 10; Edmond Decl. ¶ 6. 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 require a financial condition of release that results in detention without making the finding 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 monetary release conditions that cannot be met. *See 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 distinct from what "minimum procedures" must be afforded to accurately determine that an "individual's liberty interest is actually outweighed in a particular instance" (alteration in original) (quoting *Mills*, 457 U.S. at 299)); *Caliste*, 329 F. Supp. 3d at 312-15 (*Bearden* line of cases requires substantive finding); *Schultz*, 330 F. Supp. at 1373 (same); Brief for the United States as Amicus Curiae in Support of Neither Party at 19, *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018) (No. 17-13139-GG), 2017 WL 4117379 (arguing 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").

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

B. Defendants Violate Plaintiffs' Fundamental Right To Pretrial Liberty Because They Detain Plaintiffs Without Findings That Pretrial 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." *United States v. Salerno*, 481 U.S. 481 U.S. 739, 755 (1987). This norm reflects longstanding foundational principles: "[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 "individual's strong interest in [pretrial] liberty is "fundamental." *Id.* at 750.

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 the government demonstrates that pretrial detention is necessary to protect public safety. *See* 481 U.S. at 742; *see also* 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 pretrial detention was necessary to serve a compelling interest, *see id.* at 750-51. 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").

Applying *Salerno*, every appellate court to consider the question has held that an order requiring an unattainable financial condition of release is a *de facto* order for pretrial detention, and, as such, requires a finding that it is necessary because there is no other alternative. As the D.C. 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. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) (per curiam); *see also United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir.

[12] The federal Bail Reform Act also allows for pretrial detention where a 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).

1991) (per curiam); *United States v. Leisure*, 710 F.2d 422, 425 (8th Cir. 1983) ("[T]he amount of bail should not be used as an indirect, but effective, method of ensuring continued custody."); *Humphrey*, 228 Cal. Rptr. 3d at 517; *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017). 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 *aff'd as modified*, 892 F.3d 147 (emphasis added). Under these cases, Defendants (like the government in *Salerno*) must establish that *de facto* pretrial detention through unattainable conditions of release is "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993).

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.*, N.M. Const. art. II, § 13; D.C. Code § 23-1321; N.J. Stat. Ann. § 2A:162-15 to -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 Hamblen County come nowhere close to meeting this requirement. They fail to make any finding whatsoever before detaining Plaintiffs on unattainable financial conditions of release. Bou Decl. ¶¶ 6-10, 12. In particular, they do not make findings about whether Plaintiffs 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. *Id.* The result is

that Plaintiffs are routinely detained without any determination that pretrial 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 their fundamental right to liberty.

C. Defendants Violate Plaintiffs' Procedural Due Process Rights

In addition to violating Plaintiffs' substantive rights, Defendants violate their procedural rights: Defendants fail to provide the necessary procedural safeguards that would ensure that any substantive findings are reliable. *See Harper*, 494 U.S. at 220 (distinguishing between substantive rights and the procedural safeguards 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 Crosby v. Univ. of Ky.*, 863 F.3d 545, 552 (6th Cir. 2017). Here, as explained above, Plaintiffs have a fundamental liberty interest against wealth-based detention and in their 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 Silvernail v. Cty. of Kent*, 385 F.3d 601, 604 (6th Cir. 2004). 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 Plaintiffs' Procedural Due Process Rights By Providing No Process At All

No elaborate analysis is necessary to determine that Defendants have violated Plaintiffs' procedural due-process rights. Defendants provide absolutely no mechanism for Plaintiffs to challenge their detention for weeks after incarceration begins. Rhodes Decl. ¶¶ 7-8. Although Plaintiffs appear in front of Defendant Collins or a Defendant Judicial Commissioner at a first appearance during which their conditions of release are announced, Defendants do not permit individuals to argue for bail modification during this proceeding. *Id.* ¶ 7. That appearance, which lasts no more than three minutes (and at times less than one), Clendenin Decl. ¶ 7; Price Decl. ¶ 7; Johnson-Loveday Decl. ¶ 12; Edmond Decl. ¶ 7, cannot be a "meaningful" "opportunity to be heard," *Mathews*, 424 U.S. at 333, on the critical issue of the arrestee's ability to afford her bond. *See, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 447 (2011) (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, and "an express finding by the court that the defendant has the ability to pay"); *Bearden*, 461 U.S. at 673 (holding that, before the state can revoke probation for nonpayment, it must determine whether the person could afford to pay such that the nonpayment was willful); *ODonnell I*, 251 F. Supp. 3d at 1144–45 (concluding that Harris County's automatic use of secured money bail, without an inquiry into ability to pay, presents an intolerably high risk of erroneous deprivation of a fundamental right, and that Defendants failed to demonstrate an interest in not providing these procedural safeguards); *id.* at 1161 (requiring an inquiry into ability to pay and notice to arrestees about the significance of the

financial information they are asked to provide); *Caliste*, 329 F. Supp. 3d at 311-15 (finding that due process requires an inquiry into ability to pay, consideration of alternative conditions of release and findings on the record applying the clear and convincing standard, and representative counsel at bail hearings).[13]

Federal district judges in Tennessee have affirmed this basic principle. In *McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-CV-00033, 2019 WL 633012 (M.D. Tenn. Feb. 14, 2019), the court granted a preliminary injunction, holding that the policies of the Giles County General Sessions and Criminal Court judges of setting secured financial conditions on misdemeanor violation-of-probation (VOP) warrants were likely unconstitutional under the Equal Protection and Due Process precedents discussed *infra*. The district court preliminarily enjoined the "County, the Sheriff, and their officers, agents, employees, servants, attorneys and all persons in active concert or participation with them from detaining any person on misdemeanor probation" based on a secured bail amount on a VOP warrant without notice and an opportunity to be heard, and findings by a judicial officer concerning the arrestee's "ability to pay, alternatives to secured bail, and whether

[13] In failing to provide any process to class members, Defendants are also in violation of Tennessee law. The Supreme Court of Tennessee has held that the explicit provision of the right to pre-trial bail in the Tennessee Constitution embodies similar procedural protections and guarantees provided by the Due Process Clause of the Fourteenth Amendment. *State v. Burgins,* 464 S.W.3d 298, 307 (Tenn. 2015). Thus, in *Burgins*, the Court mandated that bail cannot be revoked without notice and an opportunity to be heard, and an evidentiary hearing at which the state is required to prove the grounds to support revocation. *Id*. at 310-11. Under Tennessee's bail statutes, if a General Sessions judge or judicial commissioner finds that there are no conditions other than money bail that will ensure the defendant's return to court, he is *required* to consider a number of factors in determining the bail amount, such as the defendant's financial condition, employment status, family and community ties, and record of court appearances. Tenn. Code. Ann. 40-11-118(b). At a minimum, Tennessee law requires the court to apply a presumption in favor of release, and if that presumption is overcome, to conduct an evidentiary hearing at which it must undertake a thorough and searching inquiry—considering several statutorily enumerated factors, including the defendant's financial circumstances—into the least restrictive conditions that would ensure the defendant's return to court consistent with public safety.

pre-revocation detention is necessary to meet a compelling government interest." *Id.* at *16; *see also Rodriguez*, 155 F. Supp. 3d at 772.

2. 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 procedures Defendants must provide to remedy the procedural due-process violation in this case are informed by the substantial private interest at stake—the first *Mathews* factor. Here, not only are Plaintiffs 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* before their first opportunity to be heard, and oftentimes for months thereafter. *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; 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. Pretrial detention causes some of the most profound harms possible for a human life to endure.

The seriousness of the private interests at stake here 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 preventive 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 contest evidence offered by the government; and the court must make findings on the record, based on clear and convincing evidence, that pretrial detention is necessary to serve a specific compelling government interest.

a. There Must First be an Inquiry into Ability to Pay and Findings on the Record Concerning Ability to Pay

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 Plaintiffs' rights to pretrial 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 on the record of "the evidence relied on" and reasons for revocation.

408 U.S. 471, 488–89 (1972). These procedures are due to persons on parole who have 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 who are constitutionally presumed innocent before trial. And, indeed, because individuals being detained pretrial—and

Plaintiffs here—retain the presumption of innocence and thus the "absolute liberty" lacking in *Morrisey*, *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. Although Defendants usually conduct initial appearances by video within 48 hours after the bond is set on the warrant, those proceedings are utterly nominal, and exhibit none of the necessary due-process safeguards. They last no more than a few minutes, the arrestee is not permitted to make any statements or arguments regarding their ability to pay their money bail, and the presiding officers make no effort to the justify the bond amount. Rhodes Decl. ¶ 7; Johnson-Loveday Decl. ¶¶ 6-8, 10-12; Edmond Decl. ¶¶ 6-8; Clendenin Decl. ¶¶ 4-7, 10; Price Decl. ¶¶ 6, 10. They are, in short, nothing approaching the meaningful hearing required by *Mathews*.

Actual prompt, meaningful hearings likely will result in a significant number of individuals being released, meaning that Defendants will save the resources that otherwise would be spent on unnecessarily incarcerating these individuals, and that some of the inhumane overcrowding at the Hamblen County Jail will be alleviated. *See* Richard A. Oppel, Jr., *'A Cesspool of a Dungeon': The Surging Population in Rural Jails*, N.Y. TIMES (Dec. 13, 2019), https://www.nytimes.com/2019/12/13/us/rural-jails.html (describing overcrowding at the Hamblen County Jail leading to rising operating expenses). Any additional burden imposed on Defendants by providing the procedures required to convert initial appearances into actual hearings is insignificant and cannot outweigh the serious harms posed to the Plaintiffs who are at risk of prolonged unconstitutional pretrial incarceration. Further, because Defendant Collins and the

Defendant Judicial Commissioners all have the authority to set conditions of release, there are several judicial actors equipped to share any burden of providing timely and meaningful hearings. Rhodes Decl. ¶ 6; Bou Decl. ¶ 4. 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 Plaintiffs.

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 for preventive pretrial detention, 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 *Addington v. Texas*, 441 U.S. 418 (1979), 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 focus of the second *Mathews* factor. *See id.* at 432-33. The Court reasoned that the heightened evidentiary standard of clear and convincing evidence is necessary given the seriousness of detention. *See id.* at 423-24. 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. *See id.* at 427. At the same time, 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. *See 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). *See Foucha*, 504 U.S. at 81-82 (striking down scheme for detaining persons who had been acquitted by reason of insanity because it did not provide an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community); *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) ("This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'"); *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 285-86 (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 courts around the country have held in applying the clear and convincing standard to 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's detention was necessary. 770 F.3d at 784-85; *see also* 18 U.S.C. § 3142(f) ("The facts the judicial officer uses to support a finding . . . that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence."). And federal courts addressing nearly identical factual circumstances to the case at bar, in which the *de facto* detention order resulting from the imposition of unaffordable

money bail operated as an order of preventive detention, have similarly applied the clear and convincing standard. *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 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.[14]

Counsel. Although Plaintiffs have a standalone claim under the Sixth Amendment, due process also creates a separate demand that counsel be made available to individuals facing pretrial detention. In evaluating the federal Bail Reform Act, the Supreme Court expressly identified the "right to counsel at the detention hearing" as a key procedural safeguard against unlawful detention. *See 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.[15]

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[14] *See, e.g.*, *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); *State v. Ingram*, 165 A.3d 797, 803, 805 (NJ 2017); *Wheeler v. State*, 864 A.2d 1058, 1065 (Md. Ct. Spec. App. 2005); *Brill v. Gurich*, 965 P.2d 404, 409 (Okla. Crim App 1998). *But see Weatherspoon v. Oldham*, No. 17-CV-2535-SHM-CGC, 2018 WL 1053548 at *8 (W.D. Tenn. Feb. 26, 2018) (affirming use of preponderance of the evidence standard in pretrial release proceedings); *Hill v. Hall*, No. 3:19-CV-00452, 2019 WL 4928915 at *17 (M.D. Tenn. Oct. 7, 2019) (same).

[15] *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

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[16]; *see also* Worden, *supra*, at 710–35. 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, which involve the application of a multitude of state laws and federal constitutional rules. Hearings on conditions of release involve specialized knowledge and skill that only counsel can provide, especially in the days immediately following

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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), http://www.ncjrs.gov/pdffiles1/Digitization/97595NCJRS.pdf (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.").

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

arrest, when a person is in crisis, removed from her family and community, and confined to a jail cell. Bail determinations often involve detailed discussions of the merits of the state's case and technical discussions about possible penalties that are not feasible for a recently arrested individual required to proceed *pro se*. Moreover, multiple factors must be 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. Defense counsel, as repeat players in a jurisdiction, are often familiar with programs and alternative options that may help meet the state's goals without resorting to incarceration. Hence, counsel is necessary to make individualized hearings "meaningful."

Although provision of counsel necessarily presents some financial cost, the third *Mathews* factor nonetheless favors provision of counsel, because, like Plaintiffs, 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 conclude 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* Oppel, *supra*; ALENA YARMOSKY, THE IMPACT OF EARLY REPRESENTATION: AN ANALYSIS OF THE SAN FRANCISCO PUBLIC DEFENDER'S PRE-TRIAL RELEASE UNIT 32 n.87 (2018),

http://public.sfpdr.com/wp-content/uploads/sites/2/2018/05/The-Impact-of-Early-Representation-PRU-Evaluation-Final-Report-5.11.18.pdf (describing a program that provided early representation to arrested individuals saved San Francisco over $800,000 in incarceration costs during first five months of operation).

D. Defendants Violate Plaintiffs' Sixth Amendment Right to Counsel

Defendants violate Plaintiffs' Sixth Amendment right to counsel by failing to provide counsel at the initial appearance. The Sixth Amendment requires that a person facing criminal prosecution be provided counsel at all "critical stages" of their case. *See Bell v. Cone*, 535 U.S. 685, 695-96 (2002); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). A "critical stage" is one that holds "significant consequences for the accused," *Bell*, 535 U.S. at 695-96, and includes preliminary proceedings "where certain rights may be sacrificed or lost," *Coleman v. Alabama*, 399 U.S. 1, 7 (1970); *see also Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961) (right to counsel at arraignment); *Missouri v. Frye*, 566 U.S. 134, 139 (2012) (right to counsel at plea negotiations). The Supreme Court has defined a critical stage as any proceeding at which counsel would help the accused in "coping with legal problems or . . . meeting his adversary." *United States v. Ash*, 413 U.S. 300, 312–13 (1973). The Sixth Circuit, reviewing Supreme Court precedent, has concluded that the entire "pre-trial period" is critical for purposes of the Sixth Amendment. *Mitchell v. Mason*, 325 F.3d 732, 748 (6th Cir. 2003).

As one district court in Texas recently held, in light of Supreme Court precedent "there can really be no question that an initial bail hearing should be considered a critical stage." *Booth v. Galveston Cty.*, 352 F. Supp. 3d. 718, 738 (S.D. Tex. 2019); *see also Higazy v. Templeton*, 505 F.3d 161, 172-73 (2d Cir. 2007); *Caliste*, 329 F.Supp.3d at 314. When conducted in accordance with the Constitution, a bail hearing is substantively and procedurally complex, and holds

significant consequences for the accused, as they may lose their fundamental right to pretrial liberty. In Hamblen County, the bail-setting proceedings routinely result in *de facto* orders of detention, which, under federal law, must be accompanied by stringent procedural protections and substantive findings. *See supra* sections I.B and I.C.

In *Van v. Jones*, 475 F.3d 292, 311-13 (6th Cir. 2007), the Sixth Circuit performed an exhaustive analysis of the various standards that have been applied to determine what is a critical stage. It determined that for a proceeding to be a critical stage, "[t]here must be a reasonable likelihood that . . . prejudice will arise from the complete absence of counsel." *Id.* at 313. If there is a "reasonable probability" of consequences, the stage is critical. *Id.* That standard is more than met here. Each of the Named Plaintiffs has suffered significant consequences—indefinite pretrial detention—that reasonably could have been avoided with representation at the initial appearance. Moreover, as established *supra*, section I.C.2.b, multiple studies have shown that unaffordable bail that results in pretrial detention has significant downstream consequences for the outcome of an individual's criminal case. Accordingly, "bail hearings fit comfortably within the sphere of adversarial proceedings closely related to trial." *Higazy*, 505 F.3d at 173 (quoting *United States v. Abuhamra*, 389 F.3d 309, 323 (2d Cir. 2004)); *see also Ditch v. Grace*, 479 F.3d 249, 253 (3d Cir. 2007); *Rojas v. City of New Brunswick*, No. 04-CV-3195, 2008 WL 2355535, at *17 (D.N.J. June 4, 2008). Because the critical question of an individual's freedom before trial is determined at the initial appearance and significant personal and legal consequences result from this determination, the initial appearance is precisely the type of hearing "where rights are preserved or lost," *id.* at 312 (quoting *White v. Maryland*, 373 U.S. 59, 60 (1963)), and holds "significant consequences for the accused," *id.* (quoting *Bell*, 535 U.S. at 696).

Plaintiffs are therefore likely to succeed on their Sixth Amendment right to counsel claim.

II. Plaintiffs Will Suffer Irreparable Harm Without Injunctive Relief

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). On that basis, this element is satisfied, as Plaintiffs face an ongoing violation of their constitutional rights.

Even were this rule not to apply, Plaintiffs 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) ("[L]oss 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 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, Plaintiffs are suffering such irreparable harms including:

Long-term economic instability and poverty due to Plaintiffs' inability to work while incarcerated and risk of losing jobs. For example, Plaintiff Robbie Johnson-Loveday is likely to lose her job at a bookbinding factory because of her pretrial detention. Johnson-Loveday Decl. ¶¶ 15, 19. Loss of employment would not only deprive Robbie and her husband of their acutely needed income but also force the couple into debt, unwinding years of work improving their credit. *Id.* ¶¶ 17-20. Plaintiff Bethany Edmond has missed orientation for a new job as a result of her pretrial detention, potentially depriving her and her husband of a pathway out of homelessness. Edmond Decl. ¶¶ 10-11.

Harm to families that are reliant on jailed Plaintiffs for support. For example, Plaintiff Robbie Johnson-Loveday's husband is struggling to afford household expenses while Robbie is detained. Johnson-Loveday Decl. ¶ 18. Plaintiffs Bethany Edmond and Amanda Cameron have been separated from their children since being arrested, causing them great emotional distress. Edmond Decl. ¶ 12; Cameron Decl. ¶ 9.

Risk of serious physical and mental health problems due to inhumane conditions inside the Hamblen County Jail. Plaintiffs describe horrendous conditions inside the Hamblen County Jail. Large numbers of inmates are forced to sleep on thin mats on the ground because of severe overcrowding—a direct result of Defendants' unconstitutional bail practices. Torres Decl. ¶ 13; Johnson-Loveday Decl. ¶ 21; Edmond Decl. ¶ 14; Cameron Decl. ¶ 12. Sleeping on the floor is especially difficult for Plaintiff Johnson-Loveday because she is disabled and has only one hand. Johnson-Loveday Decl. ¶ 22. Mold and mildew are rampant throughout the facility. Edmond

Decl. ¶ 14; Rhodes Decl. ¶ 13. Even Defendant Sheriff Jarnigan admits inmates are forced to endure "horrible conditions" at his jail, which he describes as a "cesspool of a dungeon." Oppel, *supra*. Furthermore, Plaintiffs have not been given prescribed medications during their detention at the Jail, causing them pain and discomfort. Torres Decl. ¶ 12; Johnson-Loveday Decl. ¶ 23; Cameron Decl. ¶ 11; Edmond Decl. ¶ 13. Plaintiff Michelle Torres's medical situation is particularly dire. She suffers from cancer, among other serious medical conditions. Torres Decl. ¶ 11. Because Michelle is not receiving her prescribed medication or liquid diet while she is being detained, she is in extraordinary pain and discomfort. *Id.* ¶ 12. Without her daily medication, Plaintiff Amanda Cameron is at risk of seizures. Cameron Decl. ¶ 11.

Worse case outcomes and pressure to plead guilty because of the potential for prolonged unconstitutional pretrial detention. Individuals who cannot afford to pay for their release on bail can wait several months and up to a year in pretrial detention before they are even indicted. Rhodes Decl. ¶ 10. Because defense counsel is not entitled to discovery prior to indictment, they usually cannot meaningful investigate the claims against their clients, evaluate possible legal defenses, or assess the strength of the State's case. *Id.* ¶ 11. People held on money bail therefore face enormous pressure to reach plea deals just to escape the nightmarish conditions at the Jail. *Id.* ¶ 12.

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

III. Plaintiffs' Injuries Outweigh Any Potential Harm to Defendants Caused by Injunctive Relief

The previously discussed ongoing serious harms to Plaintiffs as a result of unconstitutional pretrial detention considerably outweigh any potential harm to Defendants. The provision of constitutionally required process to recently arrested individuals and substantive determinations regarding the necessity of their *de facto* detention—the sole relief sought by Plaintiffs in this

motion—causes no cognizable harm to Defendants. Further, Defendants will save the cost of unnecessarily detaining Plaintiffs if this Court grants the requested injunctive relief. 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 v. City of Clanton*, No. 2:15cv34-MHT, 2015 WL 5387219, at *3 (M.D. Ala. Sept. 14, 2015). Defendants' nearly automatic detention of Plaintiffs imposes an unnecessary burden on Hamblen County, and ending Plaintiffs' wealth-based detention is more likely to benefit Defendants than cause them harm. Thus, the balance of harms weighs substantially in favor of the Plaintiffs 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. Injunctive Relief 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); *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004) ("[T]he public interest is served by preventing the violation of constitutional rights."). Accordingly, the public interest would be served by issuance of injunctive relief prohibiting the detention of Plaintiffs unless they are accorded adequate procedures and substantive findings to protect their constitutional rights.

Moreover, as explained throughout this memorandum, the unnecessary detention of indigent individuals has significant negative consequences for the public. Even brief periods of detention 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* Section II.

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. Community Probation Services*, 1:18-cv-33, at *27 (M.D. Tenn. Feb. 14, 2019) (finding no evidence "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").[17]

[17] *See, e.g.*, Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization* 21 (2016), http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf ("[M]oney bail has a negligible effect or, if anything, increases failures to appear.").

These factors amply demonstrate that the public interest is undermined by Defendants' current unconstitutional procedures and would benefit from a system that grants Plaintiffs 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 both a temporary restraining order as to the Named Plaintiffs and a preliminary injunction as to the entire Plaintiff class, this Court should grant Plaintiffs' motions for relief and order Defendant Jarnagin to release Plaintiffs 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 temporary 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. *See Moltan Co. v. Eagle-Picher Indus.*, 55 F.3d 1171, 1176 (6th Cir. 1995) ("[T]he rule in our circuit has long been that the district court possesses discretion over whether to require the posting of security.").

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 Plaintiffs 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, Plaintiffs 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., Fowler v. Johnson*, 2017 No. 17-11441, 2017 U.S. Dist. LEXIS 209949, at *5 (E.D. Mich. Dec. 21, 2017) (waiving bond requirement because "Plaintiffs claim to be indigent and to have suffered injuries because of their lack of financial resources").

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*, 55 F.3d at 1176 ("no security was needed because of the strength of [Plaintiff's] case and the strong public interest involved").

CONCLUSION

For all of the foregoing reasons, this Court should grant Plaintiffs' Motions for a Temporary Restraining Order and Preliminary Injunction.

Dated: February 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 2020 I electronically filed the foregoing with the clerk of the court for the U.S. District Court, Eastern District of Tennessee, using the electronic case filing system of the Court. This Memorandum in Support of Plaintiffs' Motions For a Temporary Restraining Order and Class-Wide Preliminary Injunction will be served in accordance with the Federal Rules of Civil Procedure.

/s/ George T. Lewis