named Plaintiffs could have afforded to pay, however, they would have been released. The named Plaintiffs' experiences were typical of Defendants' treatment of class members.

Under the challenged practices (and to this day), Defendants detain class members without making *any* findings that a given arrestee would be a danger to public safety or a flight risk, nor any findings that less restrictive conditions of release could not advance the government's interests. Both determinations are constitutionally required. Indeed, because Defendants do not have information about class members' ability to pay when setting bail, the imposition of money bail is completely disconnected from any rational purpose. Without that knowledge, Defendants cannot know whether an arrestee is likely to be detained or released on the bond. Without knowing whether a person would be detained under the bail amount set, a judge could not consider less restrictive alternatives. Conversely, even if a person could post the amount of bond set, without knowledge of ability to pay, the judge could not know what incentive, if any, the monetary condition of release would provide to return to court.[11]

This Court should grant summary judgment on Plaintiffs' claim that Defendants' practices at the time of filing violated class members' rights to be free from wealth-based detention.

2. <u>This Court Misapplied Applicable Law in Determining Plaintiffs Were Unlikely to Succeed on Their *Bearden* Claim at the Preliminary Injunction Stage</u>.

Plaintiffs urge this Court to reconsider its conclusion that Plaintiffs were unlikely to succeed on their *Bearden* claim in its order issuing a preliminary injunction, PI Op. at 11-15. A decision that money bail set pretrial does not implicate the fundamental fairness principle for

[11] Indeed, there is no evidence that financial conditions of release are more effective than alternative measures for ensuring court appearances and public safety. *See* Pls.' Mem. Supp. Mot. for Prelim. Inj. 38, ECF No. 26 (citing cases).

ability to pay bail at the time bail is set," PI Op. at 13, confirms, rather than negates, the constitutional violation. In both *Williams* and *Tate*, financial burdens of sentencing were imposed without consideration of ability to pay, but nonetheless violated the constitutional rights of those who could not pay. So too here: even though "when setting bail, there is no direct discrimination or treatment of arrestees differently based upon their ability to pay[,]" PI Op. at 13, the bail amount nonetheless "works an invidious discrimination" against those who are unable to pay it and remain jailed as a result. *Williams*, 399 U.S. at 242.

For similar reasons, this Court erred in its conclusion that there is no discrimination against indigent arrestees—and therefore no constitutional violation derived from equal protection—because "those non-indigent arrestees, who cannot make bail, remain in the same jail cell as the indigent" and "both the indigent and the non-indigent are both locked up because of not being able to make their bail." PI Op. at 13. The constitutional principle in *Griffin*, *Williams*, and *Bearden* does not require a distinction between people who are indigent and those who are non-indigent under some objective metric. Instead, these cases apply to *all* people who "because of their impecunity were completely unable to pay for some desired benefit, and as a consequence, . . . sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973); *see also, e.g.*, *Griffin*, 351 U.S. at 19.

Such is the case here. Plaintiffs are unable to pay for the desired benefit—their freedom—and thus suffer an "absolute deprivation" of that benefit.[13] *See ODonnell*, 892 F.3d at 162 (where

[13] Although this Court cited the Eleventh Circuit for the proposition that a claim may be artificially framed to "transform a diminishment into a total deprivation" of a benefit, PI Op. at 15 n.4 (quoting *Walker v. City of Calhoun, Ga.*, 901 F.3d 1245, 1264 (11th Cir. 2018)), the cited case confirms that the facts here involve an absolute deprivation. In *Walker*, no arrestee who could not pay would be detained longer than 48 hours pursuant to the Standing Bail Order, which the *Walker* court referred to as a "diminishment" of the benefit of pretrial release. 901 F.3d at 1252. The *Walker* court erred by not heeding the Supreme Court's admonition that "*[a]ny* amount of jail time is

arrestees "are unable to pay secured bail" they "sustain an absolute deprivation of their most basic liberty interests"). It is immaterial whether class members are determined to be "indigent" according to any established standard.[14] The important thing is that they cannot afford to pay the cash bail required to secure their liberty, and they must stay in jail as a result.[15]

Second, because the fundamental fairness doctrine derives from the imposition of a serious sanction based on inability to pay rather than traditional equal protection principles, it is of no moment that "wealth, alone, without other considerations, is not a suspect class for equal protection analysis purposes." PI Op. at 13 (citing *Rodriguez*, 411 U.S. at 25). The Supreme Court in *Rodriguez* expressly distinguished an "absolute deprivation," which warrants heightened scrutiny, from other applications of equal protection based on financial status, which apply rational basis review for want of a suspect class. *Rodriguez*, 411 U.S. at 20-24; *see also supra* section I.A.

Third, Plaintiffs urge this Court that its distinction of *Bearden* rests on a faulty premise. This Court found that "[s]ince all the plaintiffs in *Bearden* had served their sentence, post-conviction detention turned solely on non-payment of the fine. No other factors were considered. That is not the case when setting bail." PI Op. at 14. But this is a distinction without a difference.

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significant and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (emphasis added). But regardless, as the dissenting judge in *Walker* explained, "even 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." *Id.* at 1277 n.6 (Martin, J., concurring in part and dissenting in part) (emphasis in original). Here, it is unquestionable that arrestees who cannot pay are held on money bail for longer than 48 hours. *See* SMF ¶ 15. Accordingly, even if *Walker* controlled, this case entails an absolute deprivation of liberty for those who cannot pay bail.

[14] Where Plaintiffs have used the term "indigent" or "indigency" to characterize their claims, it has been generally intended to broadly refer to anyone who has insufficient money to pay a sum determined by a court, not some objective measure of wealth. *Accord Williams*, 399 U.S. at 244 (using the term "indigent" to refer to anyone who does not have the money to satisfy the financial portion of a sentence); *Tate*, 401 U.S. at 398 (same).

[15] This understanding accords with the class definition, which does not include indigency among its membership criteria. *See* Order Granting Mot. to Certify Class, ECF No. 116.

wealth-based detention and in their pretrial liberty. *See* PI Op. at 24 ("Plaintiffs are deprived of their fundamental right to liberty when they are confined to jail prior to their criminal trial without a hearing that takes into account their individualized circumstances."). At the second step, a court must determine what process is due. *Crosby*, 863 F.3d at 552. "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 "meaningful" procedures satisfy the Due Process Clause varies depending on context. *See Silvernail v. County of Kent*, 385 F.3d 601, 604 (6th Cir. 2004). Three factors guide consideration of what process is due: the "private interest that will be affected by the official action," the "risk of an erroneous deprivation" of that interest "through the procedures used" and the "probable value . . . of additional or substitute procedural safeguards," and the "Government's interest." *Mathews*, 424 U.S. at 335.

1. **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 comply with procedural due process are informed by the substantial private interest at stake. *Mathews*, 424 U.S. at 335; *see also Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). Here, not only have Plaintiffs been incarcerated in violation of their fundamental liberty interest in freedom from detention and their right against wealth-based detention, but these deprivations have persisted for *weeks* before their first opportunity to be heard and often for months thereafter. *See Mackey v. Montrym*, 443 U.S. 1, 12 (1979) ("The duration of any potentially wrongful deprivation . . . is an important factor in assessing the impact of official action on the private interest involved."). Moreover, the collateral consequences of detention cause profound harms. *See* SMF ¶ 122.

The seriousness of the private interests at stake here demands that rigorous procedures be provided. "The government must actually utilize procedures that provide for a meaningful, individualized hearing where the government's interest is weighed against the liberty interest of an arrestee." PI Op. at 26; *see also, 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)). Application of the *Mathews* factors establishes that, at a bare minimum, before imposing a financial condition of release Defendants must provide the following procedural safeguards:

The court must first determine whether any financial condition it is imposing will result in *de facto* detention because the person cannot afford to pay it. 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. PI Op. at 26 ("Central to that inquiry is the necessity of bail and an arrestee's ability to pay bail."); *see also, e.g.*, *Bearden*, 461 U.S. at 672-73; *ODonnell*, 251 F. Supp. 3d at 1161.

Next, 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 procedures required for a deprivation of liberty similar to that at issue here has been established. In *Morrissey v. Brewer*, the Supreme Court explained what due process requires at a parole revocation hearing:

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

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

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

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

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

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

408 U.S. 471, 488-89 (1972). If these procedures are owed to persons on parole—who have a diminished "conditional liberty" interest because of their convictions, *id.* at 480—it necessarily follows that they must also be provided to persons who are constitutionally presumed innocent before trial. And, indeed, because Plaintiffs here retain the presumption of innocence and thus the "absolute liberty" lacking in *Morrisey*, *id.*, additional protections are due.

First, the hearing must occur "within a reasonable period of time of arrest[.]" PI Op. at 26-27 (noting that probable cause determinations have been found by the Supreme Court to be required within 48 hours of arrest, and that some courts have applied the same standard to bail hearings). Any additional burden imposed on Defendants by providing a prompt hearing cannot outweigh the serious harms posed to Plaintiffs who are at risk of prolonged unconstitutional pretrial incarceration. *See* PI Op. at 27 ("The Court is not persuaded by [Defendants'] 'sky is falling' argument as this case deals with constitutional concerns.").

Second, procedural due process also requires that pretrial detention, whether explicit, or *de facto* based on unaffordable financial conditions, be justified by "clear and convincing" evidence. Under *Mathews*, this is required by 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. *See Santosky v. Kramer*, 455 US 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.'" (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)); *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282–83 (1990) (explaining that the Court has required the clear and convincing evidence standard for deportation, denaturalization, civil commitment, termination of parental rights, allegations of civil fraud, and in a variety of other civil cases implicating important interests); *Foucha*, 504 US at 85–86. And because the government has "no interest" in wrongly confining individuals—the third *Mathews* factor—the state cannot be harmed by the higher standard. *Addington*, 411 U.S. at 426.

Federal courts addressing nearly identical factual circumstances to this case, in which the imposition of unaffordable money bail operated as a *de facto* 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.[17]

[17] *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, 803-04 (N.J. 2017); *Wheeler v. State*, 864 A.2d 1058, 1065 (Md. Ct.

Third, although Plaintiffs have a standalone claim under the Sixth Amendment, due process separately demands that counsel be available to individuals facing pretrial detention. In *Salerno*, the Supreme Court expressly identified the "right to counsel at the detention hearing" as a key procedural safeguard against unlawful detention. 481 U.S. at 751-52. Empirical evidence demonstrates 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 to cogently articulate why an individual should not be detained.[18] The risk of erroneous pretrial detention—the second *Mathews* factor—is high in the absence of counsel. Hearings on conditions of release involve specialized knowledge and skill that only counsel can provide.

Although provision of counsel necessarily presents some financial cost, the third *Mathews* factor nonetheless favors provision of counsel, because Defendants themselves have an interest in ensuring that individuals are adequately represented. *See Caliste*, 329 F.Supp. 3d at 314 ("[The] financial burden on [Defendants] to provide attorneys for the indigent . . . 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."). Indeed, the record here establishes that the cost to Defendants of providing counsel is alleviated by an attendant reduction in the enormous expense of unnecessarily imprisoning people pretrial. *See* SMF ¶¶ 122, 128.

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).

[18] *See* Pls.' Mem. Supp. Mot. for Prelim. Inj. 29 n.15, ECF No. 26 (citing empirical evidence).

2. 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. Until the preliminary injunction order issued, Defendants provided absolutely no mechanism for Plaintiffs to challenge their detention for weeks after incarceration. *See* Process After Initial Appearance, *supra* at 10. Although Plaintiffs appeared before Judge Collins or a Judicial Commissioner at a first appearance during which their conditions of release were announced, Defendants often did not permit individuals to argue for bail modification during this proceeding. *See* SMF ¶¶ 33-34, 40, 56, 64. As this Court found, Defendants did "not engage in any individualized assessment when reviewing the bail that was initially set." PI Op. at 25. The Court determined that when setting bail "the government must actually utilize procedures that provide for a meaningful, individualized hearing where the government's interest is weighed against the liberty interest of an arrestee." PI Op. at 26. A component "[c]entral to that inquiry is the necessity of bail and an arrestee's ability to pay bail." *Id.*[19] Accordingly, "Hamblen County fails the minimum constitutional standards that must be followed in making bail determinations[.]" *Id.* at 24.

As explained below in Section III, many of the deficiencies identified by this Court at the time of its preliminary injunction order have persisted. All that is required for summary judgment, however, is a showing that violations were occurring under Defendants' previous practices. Accordingly, based on the complete absence of procedural protections of Plaintiffs, this Court should grant summary judgment on Plaintiffs' claim that Defendants have violated their right to procedural due process before taking away their pretrial liberty.

[19] Federal district judges in Tennessee have affirmed this basic principle. *See* Pls.' Mem. Supp. Mot. for Prelim. Inj. 22, ECF No. 26.

D. Defendants Violate Plaintiffs' Sixth Amendment Right to Counsel.

Prior to the issuance of the preliminary injunction order, Defendants violated Plaintiffs' Sixth Amendment right to counsel by failing to provide counsel at an individualized bail hearing within a reasonable amount of time after arrest. 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). A "critical stage" is one that holds "significant consequences for the accused," *id.* at 695-96, including preliminary proceedings where "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, 144 (2012) (right to counsel at plea negotiations). 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). And as the Supreme Court stated, "the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008). Accordingly, this Court correctly held that "an arrestee has a right to representation at a bail hearing or at an initial appearance hearing that also constitutes a bail hearing." PI Op. at 29. Because Plaintiff Johnson-Loveday "was not represented by counsel during the [initial appearance] proceeding[,]" the Court determined that there was a "violation of the Sixth Amendment."[20] *Id.* That is all Plaintiffs need to show to succeed on the merits.[21] For the reasons this Court granted the

[20] Plaintiffs note that although the Court appointed counsel for the other named Plaintiffs, no counsel was present, and none were represented at their initial appearances. SMF ¶¶ 39, 48, 55, 64.

[21] Although Defendants have provided counsel to some arrestees at their initial appearances since issuance of the preliminary injunction, for the reasons discussed in section III, *infra*, this new

preliminary injunction motion on this ground, this Court should grant summary judgment on Plaintiffs' Sixth Amendment right to counsel claim.

II. Suitability of Injunctive and Declaratory Relief.

With respect to Judge Collins and each of the Defendant Judicial Commissioners, Plaintiffs seek only a declaratory judgment. "[T]he traditional equitable prerequisites to the issuance of an injunction" need not "be satisfied before the issuance of a declaratory judgment." *Steffel v. Thompson*, 415 U.S. 452, 471 (1974). This Court should accordingly issue a declaratory judgment upon a finding that Plaintiffs prevail on the merits.

With regard to Plaintiffs' claims for injunctive relief against Defendant Sheriff Jarnagin, "[a] plaintiff seeking a permanent injunction must demonstrate that it has suffered an irreparable injury, there is no adequate remedy at law, and 'that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted,' and that it is in the public's interest to issue the injunction." *Audi AG v. D'Amato*, 469 F.3d 534, 550 (6th Cir. 2006) (quoting *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006)). These factors—which mirror the factors for a preliminary injunction—are easily met.

First, 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). This element is satisfied, as Plaintiffs face an ongoing violation of their constitutional rights. Even absent this rule, class members face irreparable harm as a result of their imprisonment. Every additional night in jail causes harm to a person that cannot be remedied. *See,*

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practice does not moot the Sixth Amendment claim, which warrants a permanent injunction. Moreover, also as discussed in Initial Appearances After the Preliminary Injunction Order *supra* at 7, the Defendants' other practices inhibit the effectiveness of the counsel provided.

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. *See supra* section I.D.2 (on the need for counsel). Plaintiffs have established that class members will suffer irreparable injury unless this Court enjoins Sheriff Jarnagin.

Second, there is no adequate remedy at law because the fundamental right at stake—bodily liberty—requires equitable relief. *See Cole v. City of Memphis*, 108 F. Supp. 3d 593, 607 (W.D. Tenn. 2015) ("[B]ecause there is an ongoing risk of the deprivation of class members' fundamental rights, Plaintiffs have shown that legal remedies by themselves are inadequate to resolve the City's constitutional violations."). There is a risk of repeated, ongoing deprivation absent an injunction. Should Defendants continue their unconstitutional practices, class members "will suffer continuing irreparable injury for which there is no adequate remedy at law." *Saieg v. City of Dearborn*, 641 F.3d 727, 733 (6th Cir. 2011).

Third, the previously discussed ongoing serious harms to Plaintiffs because of unconstitutional pretrial detention considerably outweigh any potential harm to Defendants. In fact, providing 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: "[U]nnecessary 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. 15-CV-34, 2015 WL 5387219, at *3 (M.D. Ala. Sept. 14, 2015). Defendants' nearly automatic detention of the class members imposes an unnecessary burden on Hamblen County; ending their wealth-based detention is more likely to benefit Defendants than cause them harm. *See, e.g.*, *supra* n.12 (citing courts around that country finding that balance of harms weighed in favor of enjoining the use of secured money bail without requisite substantive findings and procedural safeguards). Although Defendants complained in their preliminary injunction briefing that relief would be tantamount to "overhauling the criminal justice system" in Tennessee, this Court was correct not to be persuaded by the "sky is falling" argument. PI Op. at 27. The balance of harms weighs substantially in favor of the Plaintiffs.

Finally, a permanent injunction "'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."). The public interest here would be served by injunctive relief prohibiting the detention of Plaintiffs unless they are accorded adequate procedures and substantive findings to protect their constitutional rights.

All of the factors that inform the consideration of injunctive relief weigh in favor of a permanent injunction. This Court should grant Plaintiffs' motions and order Defendant Jarnagin to release Plaintiffs unless they are provided constitutionally adequate procedures.

III. Defendants' Current Practices Demonstrate that Permanent Equitable Relief Should Describe Constitutional Requirements with Particularity.

As a final matter, Plaintiffs urge this Court to issue final equitable relief that describes Defendants' obligations with greater particularity than in the preliminary injunction order.

Defendants' modified practices in response to the preliminary injunction demonstrate a fundamental misunderstanding of the basic constitutional requirements. Accordingly, Plaintiffs have submitted a proposed order that contains a more detailed description of the constitutional requirements to ensure Defendants do not continue to systemically violate Plaintiffs' rights. *See* [Proposed] Decl. Judgment & Perm. Inj., ECF No. 162-1.

As a threshold matter, as stated throughout this brief, Plaintiffs have no obligation to prove deficiencies in Defendants' current practices to succeed on the merits. Even if Defendants' practices following the preliminary injunction were constitutionally sufficient, final judgment and the entry of a permanent injunction would be necessary to ensure that Defendants' previous practices did not resume. Post-lawsuit changes to practices are evaluated by applying a mootness analysis. *See, e.g.*, *Gonzalez v. United States Immigr. & Customs Enf't*, 975 F.3d 788, 806 (9th Cir. 2020) (argument that changes after lawsuit was filed showed there was no valid claim "mistakes for a merits issue what is plainly a mootness inquiry."). As stands to reason, actions taken in response to a preliminary injunction order cannot moot the underlying claims. *See, e.g.*, *N.C. State Conference of the NAACP v. NC. State Bd. of Elections*, 283 F. Supp. 3d 393, 408 (M.D.N.C. 2017) (compliance with a preliminary injunction does not moot the underlying claims); *Mister Softee, Inc. v. Amanollahi*, No. 2:14-CV-01687, 2016 U.S. Dist. LEXIS 136158, at *26 (D.N.J. Sep. 30, 2016) ("[C]ompliance with [a] preliminary injunction is no defense to entry of a permanent one."); *Lapeer Cty. Med. Care Facility v. Michigan*, No. 1:91-CV-333, 1992 U.S. Dist. LEXIS 23162, at *19 (W.D. Mich. Feb. 4, 1992) ("Compliance with the provisions of a preliminary injunction order ... does not render moot the underlying claims.").

Regardless, Defendants here have not complied with the Court's order. Defendants have issued no new policies, memoranda, guidance, or rules to ensure compliance. SMF ¶¶ 74, 76. Nor

have they communicated with each other, or with anybody else, in any written medium about the Order. SMF ¶ 75. It is unsurprising, then, that Defendants' informal attempts to comply have fallen well short. Among other things, Defendants' process for determining an arrestee's ability to pay, and thus whether that arrestee will be released or detained upon imposition of money bail, remains constitutionally insufficient. As expert Diana Pearce attests, "the Hamblen County General Sessions Court's bail-setting practices do not adequately assess criminal defendants' ability to afford cash bail." Ex. 1, Pearce Dec. ¶ 21. Moreover, "[t]he process of determining whether a given criminal defendant has the ability to pay cash bail without impairing their ability to meet their basic needs is straightforward and simple." *Id*. at ¶ 19, *see also id.* at 19-21 (explaining that the indigency affidavit currently used in Hamblen County General Sessions Court to determine eligibility for a court-appointed lawyer could, with modifications, provide the information necessary for the bail-setter to assess the arrestee's ability to afford money bail). Defendants' practices violate this Court's mandate that the pretrial detention inquiry address "the necessity of bail and an arrestee's ability to pay bail." PI Op. at 26.

Even where Defendants are aware that a class member cannot afford to pay the pre-set bail, they continue to fail to comply with other basic constitutional requirements, including placing the burden of proof on the government and considering alternative conditions of release to unaffordable money bail. Instead, initial bail hearings are considered "bond reduction" hearings where the burden of proof is placed on the arrestee to justify departure from the money bond amount previously set *ex parte*, and Judge Collins often maintains or sets unaffordable money bail amounts based on scant evidence of indeterminate origin, without explaining why alternative or lesser conditions would not suffice. For example, in a case involving an arrestee named Kevin Ray, the public defender informed Judge Collins that Mr. Ray could not make the previously set

$1,000 bond and asked for release. The prosecutor had no comment when asked if the state had a position. Judge Collins considered Mr. Ray's initial bail hearing a request for "reduction in bond" and denied it. The only justification placed on the record was "the court's concern [that] apparently this has happened twice this year already with the same person." SMF ¶ 101. Besides indicating an apparent presumption of guilt, this comment sheds no light on what evidence Judge Collins considered about prior events, or why Judge Collins believed a payment of $1,000 would prevent any harm or ensure Mr. Ray returned to court. There was no consideration of alternative conditions of release, such as a protective order, or explanation of why they could not achieve the state's interests. Indeed, Judge Collins ordered Mr. Ray to have no contact with the complainant, but only if he first made the bond. *Id.* Absolutely nothing was placed on the record as to why a *de facto* detention order in the form of an unaffordable bail was necessary. *See also, e.g.*, ¶ SMF 105 (citing hearing transcript setting unaffordable bail amount of $2,000 before inquiring about ability to pay, based solely on "the danger to the community alleged in the warrant" and without consideration of alternatives); SMF ¶ 99 (citing hearing transcript where judge left unaffordable bail in place because arrestee could not provide "proof" that prior missed court date was due to being in jail); SMF ¶ 98 (citing hearing transcript where judge failed to consider conditions other than money bail and left unaffordable bond in place because arrestee appeared to be "fairly transient").

Another deeply concerning practice is Judge Collins' use of errors on the indigency forms filled out by arrestees for public defender appointment—generally without assistance or explanation—as justification for setting unaffordable money bail. For example, in the case of an arrestee named Daniels, Judge Collins was informed that Mr. Daniels could not afford a pre-set money bail of $1,000 on two nonviolent misdemeanor charges. Although initially suggesting recognizance release would be appropriate, Judge Collins refused to do so because he found that

the indigency form contained a different address for Mr. Daniels than he stated in court or what was on the arrest register. Instead of inquiring of Mr. Daniels' counsel about the reason for the differences, Judge Collins simply maintained the unaffordable bail because, as he explained to Mr. Daniels, "it's either you don't have a secure residence or you're being dishonest with the court about where you live and you're out of county." SMF ¶ 106. Judge Collins did not explain why a detention order was necessary, explore any of the statutory bail factors, or consider alternatives to unaffordable money bail. Facing lengthy pretrial detention because of his inability to pay, Mr. Daniels pleaded guilty on the spot. Despite having just imposed a condition of release that would require pretrial detention, upon the guilty plea Judge Collins sentenced Mr. Daniels to be released on probation. *Id*.

These hearings, and others like them, demonstrate that Defendants have failed to comply with this Court's mandate to "narrowly tailor[] the option of pretrial detention in any appreciable way[,]" and for the "government [to] demonstrate[] how its interest is compelling vis-à-vis each individual Plaintiff." PI Op. at 22. Accordingly, Plaintiffs request that the declaratory relief and permanent injunction in this case explain with particularity the constitutional requirements. *See* [Proposed] Decl. Judgment & Perm. Inj., ECF No. 162-1.

CONCLUSION

For all of the foregoing reasons, this Court should grant Plaintiffs' Motion.

Dated: April 29, 2022 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2022, 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 filing will be served in accordance with the Federal Rules of Civil Procedure.

/s/ Tara Mikkilineni