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-DCLC-CRW

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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. Before this Court's preliminary injunction, the amount was determined based on limited information, without the participation of the arrestee or the prosecution, and without providing counsel or any meaningful process until, typically, weeks after arrest. Those who could afford to pay were immediately released, while those who could not were forced to remain in the deplorable conditions of the Hamblen County jail until their case was resolved, months or years later, without a bail hearing or any other meaningful way to challenge their pretrial detention.

This Court previously found that Plaintiffs were likely to succeed on their argument that these bail practices were unconstitutional. It should reach that conclusion on the merits now. The

discovery process has only confirmed the factual basis for the preliminary injunction. As the uncontroverted evidence and the Parties' stipulations demonstrate, consistent with the allegations in the complaint, Defendants' practices before the issuance of the preliminary injunction violated Plaintiffs' constitutional rights to equal protection, substantive due process, procedural due process, and representation by counsel.

Even after the preliminary injunction, Defendants' adjusted bail processes remain constitutionally deficient. For some arrestees, Defendant Judge Collins now appoints a public defender at the initial appearance and allows a hearing on bail. However, money bail is still initially set in an opaque process without consideration of the arrestee's ability to pay. A hearing addressing conditions of release is offered only to those who tell the court that they cannot afford the opaquely pre-set amount and is typically styled as a hearing to potentially "reduce" that amount, placing the burden on the arrestee to convince Judge Collins to alter the pre-set bail. At the conclusion of these hearings, Judge Collins frequently imposes bail beyond what a person can afford without consideration of alternatives and without a determination based on any evidence that pretrial detention is necessary. Defendants still do not "provide for a meaningful, individualized hearing where the government's interest is weighed against the liberty interest of an arrestee," as this Court commanded. ECF No. 90 (Memorandum Opinion and Order Granting Plaintiffs' Motion for a Preliminary Injunction, hereinafter "PI Op.") at 26.

The pertinent facts for the resolution of this lawsuit on the merits are those that existed before the preliminary injunction was entered. Based on those facts and the legal principles informing this Court's prior Order, Plaintiffs are entitled to summary judgment and permanent equitable relief. Specifically, plaintiffs are entitled both to a declaratory judgment, and to an order permanently enjoining Defendant Jarnagin from enforcing financial conditions that result in *de*

facto pretrial detention without a finding, after a hearing including sufficient procedural safeguards, that detention is necessary to meet a compelling government interest. Although Plaintiffs need not make any showing of continuing constitutional deficiencies to obtain this relief, because Defendants' practices since the issuance of the preliminary injunction continue to fall short of constitutional requirements, Plaintiffs seek an order of permanent injunctive relief that is more particular and exacting than the preliminary injunction order.

FACTS

At the time Plaintiffs filed this suit, hundreds of presumptively innocent individuals were confined in the Hamblen County jail because they could not afford to pay the cash bonds Defendants required for their release. Statement of Material Facts ("SMF") ¶¶ 6, 123. These bonds were initially set *ex parte* without anything resembling an individualized hearing. SMF ¶ 3. Those who could not pay were forced to wait in jail, sometimes for more than 48 hours, until their initial appearance in court and first interaction with a judge. SMF ¶ 15-18. But this interaction was woefully inadequate.[1] Initial appearances featured "a complete lack of any meaningful individualized hearing." PI Op. at 19. After the initial appearance, class members remained incarcerated for weeks without any opportunity to challenge their conditions of release. SMF ¶ 25. Courts across the country, including this Court, have held that pretrial systems like Defendants'

[1] The *ex parte* bond-setting, waiting in jail for initial appearances, and constitutionally deficient proceedings at the initial appearance and subsequent hearings remain today. As noted above, however, the only facts necessary for a final adjudication of this case on the merits are those that existed prior to the issuance of the preliminary injunction order. Post-injunction facts are included in this motion as support for Plaintiffs' request that this Court clarify and particularize the constitutional requirements in its permanent order.

that fail to provide for individualized determinations made after hearings with exacting procedural and substantive safeguards cannot meet constitutional scrutiny.[2]

People arrested in Hamblen County have their conditions of release first determined (in their absence) by either Judge Collins; Defendant Judicial Commissioners Moore, Phillips, or Robertson; or Defendant West (collectively, the "initial bail-setters"). SMF ¶¶ 2-3. Although these initial bail-setters are authorized to issue recognizance releases or set non-financial conditions of release, secured money bail is the condition set for most arrestees in Hamblen County. SMF ¶¶ 5-6. At the time bail is first set, the initial bail-setter typically does not have information about the arrestee's employment status, financial condition, family ties and relationships, or members of the community who might vouch for the arrestee, except where a particular bail-setter happens to have past knowledge or experience with an arrestee. SMF ¶ 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, and do not apply any particular burden or standards when determining the amount of money bail. SMF ¶¶ 10-14. There are no factual findings on the record about why bail is set at any particular amount. SMF ¶ 13. Because they lack financial information

[2] *See, e.g.*, PI Op.; *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017), *aff'd as modified*, 892 F.3d 147 (5th Cir. 2018); *McNeil v. Cmty. Prob. Servs., LLC*, No. 18-CV-33, 2019 WL 633012 (M.D. Tenn. Feb. 14, 2019), *aff'd*, 945 F.3d 991 (6th Cir. 2019); *Schultz v. Alabama*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018); *Daves v. Dallas Cty.*, 341 F.Supp. 3d 688 (N.D. Tex. 2018), *aff'd in part*, 984 F.3d 381 (5th Cir. 2020), *pet'n for rehearing en banc granted and order vacated*, 988 F.3d 834 (5th Cir. 2021); *Edwards v. Cofield*, No. 17-CV-321, 2017 WL 2255775 (M.D. Ala. May 18, 2017); *Walker v. City of Calhoun*, No. 15-CV-0170, 2017 WL 2794064, at *3 (N.D. Ga. June 16, 2017), *vacated in part*, 901 F.3d 1245 (11th Cir. 2018); *Rodriguez v. Providence Cmty. Corr.*, 155 F. Supp. 3d 758, 768-70 (M.D. Tenn. 2015); *Thompson v. Moss Point*, No. 15-CV-182, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); *Martinez v. City of Dodge City*, No. 15-CV-9344, 2016 WL 9051913, at *1-2 (D. Kan. Apr. 26, 2016); *Jones. v. City of Clanton*, No. 15-CV-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); *Cooper v. City of Dothan*, No. 15-CV-432, 2015 WL 10013003 (M.D. Ala. June 18, 2015); *Snow v. Lambert*, No. 15-CV-567, 2015 WL 5071981 (M.D. La. Aug. 27, 2015); *Pierce v. City of Velda City*, No. 15-CV-570, 2015 WL 10013006 (E.D. Mo. June 3, 2015).

about the individual, the bail-setters do not know whether that person will be able to pay and be released immediately or will remain in jail. SMF ¶ 10. Once money bail is set and the arrestee is processed into the jail, individuals who can pay are released, while those who cannot immediately pay remain in jail and await their "initial appearance,"[3] which is the first time the arrestee will see a judicial official. SMF ¶¶ 15-16. Nothing in discovery has revealed that this initial bail-setting process has changed.

Initial Appearances Prior to the Preliminary Injunction Order

Until December 4, 2020,[4] one week after the issuance of the preliminary injunction order, initial appearances in the Hamblen County General Sessions Court took place on Mondays, Wednesdays, and Fridays around 8:30 AM. If a holiday fell on a Monday, initial appearances were not held on that day. SMF ¶ 17. Accordingly, those arrested on a Friday who could not pay bail typically waited more than 48 hours, and sometimes as many as five days, before seeing a judicial official. SMF ¶ 18. In Hamblen County, one of the Defendant Judicial Commissioners or Judge Collins presided over the initial appearance. SMF ¶ 20. The proceeding was off-the-record and behind closed doors, typically conducted by video between the judicial officer in chambers and arrested persons in the jail.[5] SMF ¶ 19. Information about the timing and location of initial appearances was not publicly posted, and they were closed to the public unless a member of the public requested to observe a particular initial appearance. SMF ¶¶ 21-22.

[3] 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* 9 Tenn. Prac. Crim. Prac. & Procedure § 3:2 (differentiating between an "initial appearance" before a General Sessions judge or judicial commissioner and an "arraignment" before the criminal court following an indictment).
[4] ECF No. 94, Defendants' Response to Plaintiffs' Motion for Status Hearing (describing plan to comply with preliminary injunction order).
[5] 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) (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").

Arrestees were given no advance notice of what would happen at the initial appearance. SMF ¶ 24. During the initial appearance, the presiding official would advise the pretrial detainee of the charges, bail amount, and preliminary hearing date. SMF ¶ 25. If the arrestee requested court-appointed counsel, they were required to fill out an affidavit of indigency. If indigent, they were appointed counsel at the initial appearance. *Id.* Appointed counsel, however, did not appear to represent the individual; most arrestees would not even know who their appointed counsel was until their preliminary hearing. SMF ¶ 31. At the initial appearance, the only documents possessed by the presiding official were the arrest warrant, affidavit of indigency, criminal history information from Hamblen County (if any), and, if applicable, specialized forms for specific charges. SMF ¶ 26. The presiding official typically had no information about the arrestee's employment history, family ties or relationships, or other factors relevant to bail. SMF ¶¶ 27-28.

The presiding official typically did not make factual findings on the record about ability to pay, the necessity of detention, the adequacy of alternative conditions of release, or the necessity of money bail. SMF ¶ 30. Judicial Commissioners presiding over initial appearances were in fact not authorized to modify the bail amount set on the warrant but were obligated to forward a request to Judge Collins to review. SMF ¶¶ 69-70. Judge Collins often informed arrestees (including Plaintiff Amanda Cameron) that he would not consider bail modification requests at initial appearances. SMF ¶¶ 34, 56. Indeed, for certain charges, Judge Collins had a general practice of refusing to consider requests for bond modification at the initial appearance. SMF ¶ 33.

The initial appearances of Plaintiffs Michelle Torres and Amanda Cameron, quoted from in this Court's prior opinion, were typical of how Judge Collins conducted initial appearances. SMF ¶ 66. They showed "no indication" that "anyone was pursuing a particular interest in protecting the public or ensuring a criminal defendant's appearance at trial when they set bail

initially or at the initial appearance hearing." PI Op. at 21. Neither the district attorney nor a defense attorney was present at either appearance. "[T]he initial appearance [was] simply a very short rapid-fire question and answer event." *Id.* Even when "the general sessions judge [knew] the arrestee [was] indigent and ha[d] appointed an attorney," he "conduct[ed] no individualized hearing on the arrestee's bail conditions and instead [left] them detained under the same bail conditions that were set *ex parte* until he recall[ed] the case for a preliminary hearing." *Id.* at 22.

Each of the named Plaintiffs experienced these practices when they were arrested in February 2020. Each had bail set *ex parte* for thousands of dollars, without any findings that the amount was necessary or affordable. SMF ¶¶ 37, 45, 52, 61. No named Plaintiff could in fact afford to pay. SMF ¶¶ 38, 46, 53, 62. Each was found indigent for appointment of counsel, but none was provided counsel or represented at their initial appearance, and none had their pre-set bail adjusted. SMF ¶¶ 39-40, 48, 55-56, 64. Each remained in jail until a third-party charitable organization eventually paid their bail. SMF ¶¶ 43, 50, 59, 63.

Initial Appearances After the Preliminary Injunction Order

Since the entry of the preliminary injunction, Defendants have modified their initial appearances. The modifications are informal; Defendants have not had *any* communications in writing amongst themselves or with third parties (like public defenders or prosecutors) about implementing the preliminary injunction. SMF ¶ 75. The Hamblen County General Sessions Court has adopted no written policy, guidance, memorandum, training, or court rules related to pretrial detention, release, or appointment of and access to defense counsel. SMF ¶¶ 74, 76. The modifications have been applied only to class members arrested after issuance of the November 30, 2020, order. Defendants have not held remedial individualized bail hearings for any person who was detained in the jail on unaffordable bail prior to that date. SMF ¶ 77.

The modifications appear to be as follows:[6] Starting December 4, 2020, initial appearances have been conducted primarily by Judge Collins. ECF No. 94. Since January 29, 2021, initial appearances have occurred every business day, rather than every other weekday. SMF ¶ 78. Before their initial appearance hearing, arrestees are asked to fill out an affidavit of indigency for the purpose of appointing a public defender. Many individuals misunderstand the form and struggle to fill it out accurately. SMF ¶ 90. At the initial appearance, Judge Collins asks arrestees if they are able to pay the money bond amount that was pre-set *ex parte*. SMF ¶ 79. If the person cannot, Judge Collins postpones the matter for a "bond hearing" or "bail hearing" that typically takes place a few minutes later. *Id*. Since the preliminary injunction order was entered, and in response to Plaintiffs' counsel's request, these initial appearances and "bond hearings" have been conducted in open court and are audio recorded. SMF ¶ 89. Though the audio recordings are of low quality, and it is difficult to hear what is said by anyone other than Judge Collins, SMF ¶ 80, they reveal basic inadequacies about these hearings, which purport to comply with this Court's order.

First, although defense counsel has been appointed and appears to be present at most initial appearances, it is unclear how much time they are given to consult with their new clients. Like the initial appearances of Michelle Torres and Amanda Cameron cited in this Court's Order, PI Op. at 5-8, the post-preliminary-injunction hearings typically consist of a brief colloquy between Judge Collins and the arrestee. SMF ¶ 81 (citing to transcripts of exemplar hearings). No burden is placed on the State to justify conditions of release, including financial conditions the arrestee cannot pay that result in pretrial detention. SMF ¶ 83. The State generally does not put on any witnesses or evidence, and often has no role in the initial appearance bond hearings. SMF ¶ 85. Indeed, Judge Collins often refers to these bail hearings—the first time an arrested person typically has had any

[6] Plaintiffs' motion to re-depose Judge Collins after the Order was entered was denied. ECF No. 150.

interaction with the Court or counsel—as hearings on a "motion to reduce bond." *See, e.g.*, SMF ¶ 97 (citing to transcript of hearing for Steven Smith). The bond amount that was previously set *ex parte* on the warrant is given presumptive weight, and the burden generally rests on the arrestee to justify a departure. SMF ¶ 84.

Although Judge Collins typically asks the arrestee whether they *will* pay, he regularly fails to make findings on the record concerning an arrestee's *ability* to pay the bail he sets or refuses to modify. SMF ¶ 87. Thus, Judge Collins regularly sets money bail, or refuses to modify a pre-set money bail, in amounts that arrestees cannot afford. SMF ¶ 89. When he does so, he regularly fails to make any record about the necessity of this unaffordable bail, nor does he impose an evidentiary burden on any party to establish its necessity. SMF ¶¶ 83, 88. Judge Collins reviews the affidavit of indigency that arrestees filled out unassisted in jail, and penalizes arrestees who appear to have erred in filling out the form by accusing them of untrustworthiness. SMF ¶ 91. The record reveals that Judge Collins rarely considers alternatives to money bail as a condition of release. SMF ¶ 82. If a person states that he or she does not have money, Judge Collins uses this information as a justification for refusing to modify the pre-set bail. SMF ¶ 89 (citing to transcript of hearing for Angela Wilson, where Judge Collins leaves in place previously set $5,000 bond because "[i]t doesn't really make sense to reduce the bond if she can't make any bond at all"). After a money bond is set, the court typically issues a Bond Order. SMF ¶ 92. The Bond Order form template contains fields for the Court to write down information about the arrestee, including whether they are homeless. SMF ¶ 93. If the arrestee is homeless, Judge Collins appears to use the fact of homelessness as justification for setting higher money bail amounts, including unaffordable money bail. SMF ¶¶ 94, 98. Similarly, if the arrestee lives in another county, Judge Collins appears to use that fact as a reason to detain the arrestee by setting unaffordable money bail. SMF ¶¶ 95, 104.

Process After Initial Appearance[7]

As this Court has found, if an arrested person cannot afford to pay bail after an initial appearance, the person stays in jail until a defense attorney makes a motion for a bond reduction that, if granted, would modify the bail to an amount the arrestee can pay. SMF ¶ 107. A motion for a bond reduction is not set for a hearing unless the attorney makes a specific request to the Clerk; even then, Judge Collins typically does not consider the motion without agreement from the prosecutor. SMF ¶¶ 108, 110, 116.[8] When adjudicating such a motion, Judge Collins typically makes no findings on the record about public safety or future court appearances. SMF ¶ 109. Indeed, prior to this lawsuit, attorneys from the public defender's office rarely filed such motions because they considered such motions to be futile in light of Judge Collins's refusal to consider them. SMF ¶ 111. After the initial appearance, individuals have a preliminary hearing before Judge Collins in General Sessions court. Because preliminary hearings are set up to 14 business days after an initial appearance, they might occur as many as 18 or 19 days after arrest. SMF ¶ 25. If Judge Collins refuses to modify an unaffordable money bail amount, his bond order remains in place even if the arrested individual is "bound over" to the jurisdiction of the criminal court after indictment. SMF ¶ 119.

The Hamblen County Jail

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. The Hamblen County Jail has failed an inspection for minimum standards set by the Tennessee

[7] The evidence revealed in discovery does not show any materially changed practices after the initial appearance since the issuance of the preliminary injunction.

[8] After the issuance of the preliminary injunction, prosecuting attorneys in the Third Judicial District Attorney General's Office, which includes Hamblen County, were instructed not to agree to motions for bond reductions. SMF ¶ 86.

Corrections Institute as recently as September 2020. SMF ¶ 130. Detainees are made to sleep on the floor in overcrowded rooms where there are not enough beds. SMF ¶¶ 124-25. Meetings with attorneys occur in a storage closet. SMF ¶ 127. The administrators of the jail acknowledge that they are unable to stop violence that occurs there. SMF ¶ 126. The jail has been the site of at least one COVID-19 outbreak in the time since this lawsuit was filed. SMF ¶ 129.

STANDARD OF REVIEW

"Summary judgment is proper 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Maben v. Thelen*, 887 F.3d 252, 261 (6th Cir. 2018) (quoting Fed. R. Civ. P. 56(a)). "The moving party bears the burden of showing that no genuine issues of material fact exist." *Rafferty v. Trumbull Cty.*, 915 F.3d 1087, 1093 (6th Cir. 2019) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324–25 (1986)). "The reviewing court must then determine 'whether the evidence presents a sufficient disagreement to require [a trial] or whether it is so one-sided that one party must prevail as a matter of law." *Maben*, 887 F.3d at 263 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)).

ARGUMENT

This case features no genuine dispute about any material fact. All the facts alleged by Plaintiffs, including those facts to which the Parties stipulated pursuant to Plaintiffs' preliminary injunction motion, remain the facts of the case for summary judgment purposes. The facts necessary to support Plaintiffs' claims have been stipulated by the parties, come from official transcripts or recordings of the Hamblen County General Sessions Court, or come from the Defendants' own deposition testimony. No disputed material fact would affect consideration of

the constitutional matters at issue, and summary judgment in favor of the Plaintiffs should be granted according to the facts prior to the issuance of the preliminary injunction.

I. Defendants' Practices Violate Plaintiffs' Fourteenth and Sixth Amendment Rights.

As this Court previously found, pretrial detention without individualized process, findings based on consideration of evidence, representation by counsel, and a hearing within 48 hours of arrest violates Plaintiffs' constitutional rights. PI Op. at 22, 25-26, 29. Defendants' practices at the time of filing were (and current practices remain) unconstitutional on four distinct grounds.

First, the combination of equal protection and due process known as "fundamental fairness" has long forbidden the government from depriving someone of liberty for inability to make a payment. *See infra* section I.A. Second, substantive due process grants those who are accused but not convicted of crimes a "fundamental" interest in pretrial liberty. PI Op. at 16-23; *see also infra* section I.B. Third, the Constitution requires the government to provide adequate procedural safeguards to protect against the erroneous deprivation of these substantive rights. PI Op. at 23-27; *see also infra* section I.C. Finally, the Constitution requires counsel to be provided at initial bail hearings. PI Op. at 27-29; *see also infra* section I.D. Defendants have fallen short of each constitutional requirement.

A. Defendants' Practices Violate Plaintiffs' Right to be Free from Wealth-Based Detention.

The Supreme Court has long recognized that a person may not be "subjected to imprisonment solely because of his indigency." *Tate v. Short*, 401 U.S. 395, 398 (1971); *see also, e.g.*, *Williams v. Illinois*, 399 U.S. 235, 242 (1970); *Bearden v. Georgia*, 461 U.S. 660, 672 (1983);

Griffin v. Illinois, 351 U.S. 12, 19 (1956).[9] The right not to be imprisoned based solely on inability to pay a sum of money—often deemed the right to "fundamental fairness"—arises from a combination of equal protection and due process principles. *Bearden*, 461 U.S. at 665; *id.* at 661 (emphasizing the "impermissibility of imprisoning a defendant solely because of his lack of financial resources"); *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 courts costs." (quoting *Bearden*, 461 U.S. at 672)). The Sixth Circuit has consistently 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 Cty. Pub. Def. Comm'n*, 501 F.3d 592, 608 (6th Cir. 2007) (citing *Alkire*, 330 F.3d at 816); *United States v. Bichon*, 876 F.2d 895 (6th Cir. 1989).

"[A]bsolute deprivation" of a person's liberty—such as pretrial incarceration—based on inability to pay invokes heightened scrutiny, *ODonnell*, 892 F.3d at 161-62 (Supreme Court precedent calls for heightened scrutiny when the fundamental fairness principle is applied to arrestees who cannot afford to pay),[10] even though other claims of wealth-based discrimination are

[9] *See also Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972); *In re Humphrey*, 11 Cal. 5th 135, 151 (2021) ("[I]f a court does not consider an arrestee's ability to pay, it cannot know whether requiring money bail in a particular amount is likely to operate as the functional equivalent of a pretrial detention order," and "[d]etaining an arrestee in such circumstances accords insufficient respect to the arrestee's crucial . . . rights against wealth-based detention."). 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?").

[10] *See also Bearden*, 461 U.S. at 666 (wealth-based detention requires "careful inquiry"); *Johnson v. Bredesen*, 624 F.3d 742, 749 (6th Cir. 2010) (*Griffin*, *Williams*, and *Bearden* "concerned fundamental interests subject to heightened scrutiny"); *Buffin v. City & Cty. of San Francisco*, No 15-CV-04959, 2018 WL 424362, at *8 (N.D. Cal. Jan. 16, 2018) ("[A]n examination of the

reviewed for a rational basis. Claims arising under *Bearden*, *Williams*, and *Tate* do not require a showing of discriminatory intent: A law that is "nondiscriminatory on its face" because it "extends to all defendants an apparently equal opportunity for limiting confinement . . . simply by satisfying a money judgment" may nonetheless violate their tenets because it "works an invidious discrimination solely because [a plaintiff] is unable to pay . . . ." *Williams*, 399 U.S. at 242; *see also Tate*, 401 U.S. at 397. Applying heightened scrutiny, this Court must perform a careful inquiry into whether Defendants' practices are necessary to achieve the State's two compelling interests related to pretrial detention: protecting public safety and ensuring arrestees appear for their court dates. Defendants must also demonstrate that they have sufficiently "consider[ed] whether adequate alternative methods" would achieve the state's interests before imposing detention in any individual case. *Bearden*, 461 U.S. at 669.

1. <u>Defendants' Practices Violate the Constitutional Right to Fundamental Fairness Established by the Supreme Court</u>.

Defendants' practice has long been to reflexively impose financial conditions of release without any consideration of or findings about an individual's ability to pay or whether less restrictive conditions could reasonably assure the individual's return to court and the safety of the public. Each named Plaintiff was subject to these practices: They had no opportunity to be heard on their ability to pay before unaffordable financial conditions of release were set, and they received no explanation of the reasons for those conditions. SMF ¶¶ 40, 48, 56, 64, 66. Because the bail amounts in the named Plaintiffs' cases were beyond what they could pay, they remained in jail, resulting in, among other harms, confinement in terrible conditions. SMF ¶¶ 122-27. If the

Bearden-Tate-Williams line of cases persuades the Court that strict scrutiny applies to plaintiffs' Due Process and Equal Protection claims."); *Frazier*, 457 F.2d at 728 (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" (internal quotation marks and citation omitted)).

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).

someone who cannot afford it departs from the great majority of case law in several meaningful ways. [12]

First, it is of no consequence to Plaintiffs' claim that Judge Collins is "not intentionally discriminating against the indigent." PI Op. at 13. Discriminatory intent is not a prerequisite of a *Williams/Tate/Bearden* claim. In *Williams*, for example, the Supreme Court invalidated a law that required a person to stay in jail if they had not satisfied the monetary provisions of a sentence. 399 U.S. at 237. The Court found the law to be "nondiscriminatory on its face" because it "extends to all defendants an apparently equal opportunity for limiting confinement . . . simply by satisfying a money judgment." *Id.* at 242. Nonetheless, the Court determined that this circumstance "works an invidious discrimination solely because [Williams] is unable to pay the fine." *Id.* The same was true in *Tate*, where fines under a state statute were automatically converted into imprisonment for people who did not pay. 401 U.S. at 398. Neither case involved intentional discrimination, but the Supreme Court held that both provisions entailed wealth-based discrimination and violated the constitutional principle of fundamental fairness by inflicting punishment on people who were unable to pay. That "the person setting bail does not have any information regarding an arrestee's

[12] *See, e.g.*, *Humphrey*, 11 Cal. 5th at 150; *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 777 (9th Cir. 2014); *Schultz v. Alabama*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018), *appeal filed sub. nom. Hester v. Gentry*, No. 18-13894 (11th Cir. Sept. 13, 2018); *Daves v. Dallas Cty.*, No. 3:18-CV-0154-N, 2018 U.S. Dist. LEXIS 160741, at *12-13 (N.D. Tex. Sep. 20, 2018), *appeal filed,* No. 18-11368 (5th Cir. Oct 23, 2018); *ODonnell*, 251 F. Supp 3d 1052; *Edwards v. Cofield*, No. 3:17-cv-321, 2017 WL 2255775 (M.D. Ala. May 18, 2017); *Walker v. City of Calhoun*, No. 4:15-CV-0170, 2017 WL 2794064, at *3 (N.D. Ga. June 16, 2017), *vacated in part by* 901 F.3d 1245 (11th Cir. 2018); *Rodriguez v. Providence Cmty. Corr.*, 155 F. Supp. 3d 758, 768-69 (M.D. Tenn. 2015); *Thompson v. Moss Point*, No. 1:15-cv-182, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); *Martinez v. City of Dodge City*, No. 15-cv-9344, 2016 U.S. Dist. LEXIS 190884, at *1-2 (D. Kan. Apr. 26, 2016); *Jones. v. City of Clanton*, No. 2:15-cv-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); *Cooper v. City of Dothan*, No. 1:15-cv-432, 2015 WL 10013003 (M.D. Ala. June 18, 2015); *Snow v. Lambert*, No. 15-cv-567, 2015 WL 5071981 (M.D. La. Aug. 27, 2015); *Pierce v. City of Velda City*, No. 4:15-cv-570, 2015 WL 10013006 (E.D. Mo. June 3, 2015).

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.

As in *Bearden*, here only one factor determines whether a person remains free: whether they have enough money to pay. *That* is the crux of the constitutional violation. For the same reason, this Court's distinction of *ODonnell* misses the mark. Though the bail amounts there were set by a schedule, and those here are set arbitrarily, *see* SMF ¶ 13, in both cases "those who could pay were released while those who could not pay were not released." PI Op. at 15. This, according to a long line of precedent, violates the Constitution. *See, e.g.*, *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) ("The incarceration of those who cannot [afford to pay monetary bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."); *accord ODonnell*, 892 F.3d at 159; *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 311 n.5 (E.D. La. 2018).

B. Defendants' Practices Violate Class Members' Substantive Due Process Rights to Liberty.

Defendants' practices also violate class members' substantive due process rights. "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. 739, 755 (1987). This norm reflects longstanding foundational principles: "Freedom 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). *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 the Supreme Court's words, the "individual's strong interest in [pretrial] liberty is "fundamental." *Id.* at 750. As this Court found, that substantive due process guarantee "requires ... government action that infringes upon a fundamental right to be narrowly tailored to serve a compelling governmental interest." PI Op. at 16. When money bail is set at

"unpayable amounts," it operates "as [a] de facto detention order," *ODonnell*, 251 F. Supp. 3d at 1150, and heightened scrutiny applies.

In light of these principles, *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. 481 U.S. at 742 (quoting 18 U.S.C. § 3142(e)). Absent such a "sharply focused scheme," 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 was not a "carefully limited exception[] permitted by the Due Process Clause").

Thus, compliance with substantive due process "necessarily requires an individualized hearing, which is not occurring under the facts of this case." PI Op. at 23. Defendants' practices, both before and after the issuance of the preliminary injunction,[16] come nowhere close to this requirement. For each of the class representatives, and typical of class members' experiences, Defendants failed to make any findings whatsoever before ordering them detained on unattainable financial conditions of release. *See* SMF ¶¶ 40, 48, 56, 64, 66. Plaintiffs are thus routinely detained without any determination that pretrial detention is necessary to serve *any* government interest.

This Court's description of the insufficiency of the process at the time of the preliminary injunction has not been disturbed by any evidence produced or revealed in discovery about the practices before this Court's Order. At the time bail is set, "[n]o one makes factual findings as to the reason for the amount of bail. It is just set." PI Op. at 17; *see also* SMF ¶ 13. At the subsequent initial appearance, which takes places approximately 48 hours after arrest (but sometimes longer), PI Op. at 17-18; SMF ¶¶ 17-18, arrestees have not typically been represented by counsel, SMF ¶ 31, bail modification requests have not "generally [been] considered," PI Op. at 18; SMF ¶ 34, and

[16] As stated throughout this brief, Plaintiffs need only show that Defendants' practices at the time this lawsuit was filed were constitutionally insufficient to prevail on summary judgment.

even when constitutional concerns have been raised by the arrestee, there is a "complete lack of any meaningful individualized hearing." PI Op. at 19; SMF ¶¶ 28-30. This Court reviewed transcripts of the initial appearances of two of the named Plaintiffs and found "no evidence" that the Hamblen County court made any attempt to conduct an "actual inquiry and weighing of interests and factors in addressing bail issues" or "restrict its abridgment of [the] individual's liberty interest in as narrow a way as possible." PI Op. at 21. These transcripts were typical of how Defendants conducted initial appearances before the preliminary injunction took effect. SMF ¶ 66. This Court concluded that "[t]here simply is nothing to indicate that Defendants have narrowly tailored the option of pretrial detention in any appreciable way." PI Op. at 22. "The effect of this is to leave an arrestee in jail with bail remaining as it was initially set, having no consideration given to their ability to pay or any alternative conditions of release." *Id.* Accordingly, Plaintiffs have demonstrated success on the merits of 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 have violated and continue to violate Plaintiffs' procedural rights. "Procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest." *Warren v. City of Athens, Ohio*, 411 F.3d 697, 708 (6th Cir. 2005) (citing *Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001)).

A procedural due process claim involves two steps. The first asks whether the person claiming a constitutional violation has asserted a protected liberty or property interest. *Crosby v. Univ. of Ky.*, 863 F.3d 545, 552 (6th Cir. 2017) (citing *Johnston-Taylor v. Gannon,* 907 F.2d 1577, 1581 (6th Cir. 1990). As explained above, Plaintiffs here have a fundamental interest against

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.

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