IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

JOSHUA RYAN, BLAZE FRANKLIN, AMISAR NOURANI, and HERBERT SCULLY, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

TARVALD ANTHONY SMITH, BONNIE JACKSON, and RONALD JOHNSON, in their official capacity as Judges of the 19th Judicial District Court of Louisiana; NICOLE ROBINSON, in her official capacity as Commissioner of the 19th Judicial District Court of Louisiana; FRANK HOWZE in his official capacity as Coordinator of the Bail Bond Program for the 19th Judicial District Court of Louisiana; SHERIFF SID J. GAUTREAUX, III, in his official capacity as Sheriff of East Baton Rouge Parish, Louisiana; and LT. COL. DENNIS GRIMES, in his official capacity as Warden of the East Baton Rouge Parish Prison,

Defendants.

Case No. 20-cv-843-SDD-SDJ
(Class Action)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AGAINST DEFENDANTS GAUTREAUX AND GRIMES

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I. INTRODUCTION

Plaintiffs Joshua Ryan,[1] Blaze Franklin, Amisar Nourani, and Herbert Scully are impoverished. They are currently in jail because they cannot pay the Sheriff of East Baton Rouge Parish bail that was ordered by a Judge or Commissioner of the 19th Judicial District Court as a condition of release. The Judge or Commissioner set the bail amount without any inquiry into

[1] Plaintiff "Joshua Ryan" has filed a motion to proceed anonymously in this suit along with a motion to file a supporting declaration—detailing his true identity and reasons for wishing to proceed anonymously—under seal.

whether each of the Plaintiffs could pay it or whether alternative non-financial conditions of release would safeguard the government's interest in public safety or in the Plaintiffs returning to court. If they were able to pay that amount, the Plaintiffs would be released immediately; a wealthier person in the Plaintiffs' shoes would be able to pay for their release and return to their job, home, and family during the pendency of their case. But the Plaintiffs cannot obtain that money and remain in jail solely because of their economic statuses. They will wait in jail, most likely until trial or plea, but at least until their first opportunity to bring a motion before a district judge, which usually will not be until after they are arraigned, several weeks or even several months after their arrests. This system of pretrial detention violates the Plaintiffs' Due Process and Equal Protection rights.

The Plaintiffs' detention—and the detention of the class of people they seek to represent—would be unconstitutional even were the East Baton Rouge Parish Prison ("EBRPP" or the "jail") not a breeding ground for COVID-19. The calculus of whether detaining someone in EBRPP serves public safety has drastically changed in light of the pandemic, particularly given the threat this virus presents to the largely medically vulnerable population in the jail. Apart from the potential serious health risks present for anyone detained in EBRPP, Plaintiffs are harmed by Defendants' wealth-based detention practices in numerous additional ways: loss of housing and jobs, destabilized families and communities, increased poverty, and negative consequences for everyone involved.

Because the named Plaintiffs are—and because many others in their situation will continue to be—jailed solely because of their poverty, they respectfully request that this Court hold a hearing on this Motion in an expedited fashion and, following that hearing, issue: (1) a temporary restraining order requiring the Sheriff and Warden to release them from custody immediately; and

(2) a preliminary order enjoining the Sheriff and Warden from continuing to detain putative class members whose bail conditions were determined in hearings that violate Due Process and Equal Protection rights.

II. STATEMENT OF FACTS

A. Pretrial Detention in the 19th Judicial District.

A core tenet of our legal system is that arrestees are presumed innocent until they have been found guilty. In line with this bedrock presumption, under the U.S. and Louisiana constitutions, arrestees are generally supposed to be released pre-trial, unless a court specifically determines that doing so would present a danger to the community or would fail to ensure that the arrestee return to court to respond to the charges against him or her. As part of that determination, the judicial officer must also evaluate alternative, non-monetary conditions of release that would adequately ensure the accused's presence at trial and the community's security. The presumption under our constitution is that most arrestees do not spend the entire time between their arrest and their trial in state custody. However, this presumption and these constitutional standards do not animate how courts in the 19th Judicial District of Louisiana ("19th JDC") function.

In the 19th JDC, which covers East Baton Rouge Parish, most arrestees are deemed immediately eligible for post-arrest release, so long as they pay an amount of bail money that is set without any inquiry into their ability to pay it.

Louisiana law defines "bail"[2] to include "(1) Bail with a commercial surety[;] (2) Bail with a secured personal surety[3][;] (3) Bail with an unsecured personal surety[;] (4) Bail without surety[;

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[2] "[B]ail," as defined by history, law, and practice, "is a mechanism for pretrial release and not for continued pretrial preventive detention." *ODonnell v. Harris Cnty., Tex.*, 251 F. Supp. 3d 1052, 1070 (S.D. Tex. 2017).

[3] Judicial Defendants and Defendant Howze restrict the use of personal sureties to Louisiana residents of at least 25 years' age, free of any criminal history, and employed full-time by the same company for at least three years. Undersigned counsel know of relatively few members of the bar, or even the state judiciary, who could satisfy these

and] (5) Bail with a cash deposit," La. Code. Crim. Proc. art. 321. In the 19th Judicial District, initial conditions of release are usually financial and almost always secured, meaning that the arrestee must deposit the money upfront in order to be released. And although Louisiana law explicitly permits Defendants to detain individuals that they believe to be especially dangerous or unlikely to reappear in court—regardless of the crimes with which those people are charged—those people may be detained only after "a contradictory hearing [and] . . . upon proof by clear and convincing evidence either that there is a substantial risk that the defendant might flee or that the defendant poses an imminent danger to any other person or the community." La. Code Crim. Proc. art. 313(B). Defendants do not conduct hearings that comply with this standard prior to issuing de facto orders of detention based on unaffordable amounts of money. Instead, as a practice, Defendants declare almost all arrestees eligible for release and impose monetary bail. Many are jailed—solely because of their poverty—for weeks and months without any consideration of their ability to pay or of non-financial alternative conditions of release.[4]

Whenever someone is arrested in East Baton Rouge Parish, she is brought to the East Baton Rouge Parish Prison. Sheriff Sid Gautreaux and Warden Dennis Grimes oversee the jail and have a policy of confining arrestees in the jail if those arrestees cannot make a monetary payment based on the orders of the Judges and Commissioners of the 19th JDC.

After booking an arrestee into the jail, staff of the 19th JDC's Bail Bond Program may interview arrestees about their financial circumstances and other background information. On

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criteria.

[4] *See generally* Ex. 1, Audio Recording of Initial Appearance Hr'g for July 13, 2020, at 19:08–50:00; Ex. 2, Audio Recording of Initial Appearance Hr'g for September 14, 2020, at 17:22–1:18:00; Ex. 3, Audio Recording of Initial Appearance Hr'g for Sept. 16, 2020, at 26:50–1:06:00.

Mondays through Fridays, Sheriff's deputies then bring the arrestee to a room in EBRPP with a closed-circuit video connection to the 19th JDC courthouse.[5] A judicial officer sitting in a room of the courthouse conducts the arrestee's initial appearance by video.[6] State law mandates that this appearance happen within 72 hours of arrest, excluding Saturdays, Sundays, and legal holidays. La. Code Crim. Proc. Ann. art. 230.1(A).

Each "callout hearing" generally lasts a minute or less per person.[7] The judicial officer asks the arrestee if her name, address, and date of birth are correctly listed on her arrest paperwork; tells the arrestee what the charges against her are; tells the arrestee what she must pay in order to be released; and asks the arrestee if she can afford a lawyer.[8] If she cannot afford a lawyer, the judicial officer formally appoints one from the East Baton Rouge Office of the Public Defender.[9] A lawyer from the public defender's office is present in the room at EBRPP with the arrestees to formally accept the appointment. During the callout hearings, however, defense counsel are not given the opportunity to advocate for the arrestees to whom they have just been appointed.[10]

Plaintiffs attach here as Exhibits 1 through 3, audio recordings of callout hearings presided over by Defendant Judge Smith on July 13, 2020, and by Defendant Judge Johnson on September

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[5] *See, e.g.*, Ex. 4, Ryan Decl. ¶ 3; Ex. 5, Franklin Decl. ¶ 4; Ex. 6, Nourani Decl. ¶ 9; Ex. 7, Scully Decl. ¶ 3.

[6] These hearings are also referred to as "first appearances," "callouts," or "tv court."

[7] *See, e.g.*, Ex. 5, Franklin Decl. ¶ **; Ex. 6, Nourani Decl. ¶ 9; Decl. of Elio Erazo ¶¶ 12-13, ECF No. 107-12 (noting that his hearing lasted "only a minute" and he did not have the benefit of an interpreter, despite being a non-native English speaker), filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020); *see generally* Exs. 1–3, Audio Recordings of Initial Appearance Hearings.

[8] *See, e.g.*, Ex. 4, Ryan Decl. ¶¶ 5-8, 11; Ex. 5, Franklin Decl. ¶¶ 6-11; Ex. 6, Nourani Decl. ¶ 9; Ex.7, Scully Decl. ¶¶ 4, 6; Decl. of Kenny Durousseau ¶ 10, ECF No. 107-4, filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020); *see generally* Exs. 1–3, Audio Recordings of Initial Appearance Hearings.

[9] *See, e.g.*, Ex. 4, Ryan, Decl. ¶ 11; Ex. 5, Franklin Decl. ¶ 11; Ex. 6, Nourani Decl. ¶ 11; Ex. 7, Scully Decl. ¶ 6; Exs. 1–3, Audio Recordings of Initial Appearance Hearings.

[10] *See generally* Exs. 1–3, Audio Recordings of Initial Appearance Hearings.

14 and 16, 2020. These hearings exemplify Judicial Defendants' standard practices and procedures in determining conditions of pretrial release.

Immediately preceding the July 13 hearing—during which he ordered that Plaintiff Scully be held on a $30,750 bail—Defendant Howze told Judge Smith that 23 people were on the docket that day. Judge Smith said, "Some of them I set. I recognize the first name here." Howze replied, "Oh yeah, most of them are set. It's just that you've got to tell them." Ex. 1 at 19:10–:27. As this exchange demonstrates, hearings are not conducted with an intent to determine an arrestee's flight risk or danger to the community or to otherwise elicit any information that would influence conditions of release. Rather, they are an assembly-line process in which a defendant states their name and date of birth, the judge informs them of their charges, announces a bond amount, and asks if they can afford an attorney before calling the next arrestee.

Ms. Tabitha Daigle, who appeared before Judge Smith at the July 13 hearing asked, "Can you lift the bond? Because I don't have any—." Judge Smith stopped her, saying, "No, I cannot lift your bond. Your bond is set at $11,500. I'll allow you to make a phone call to attempt to reach that bond. We're talking about two felonies here. No." Ex. 1 at 19:35. Not only was there no inquiry into Ms. Daigle's ability to pay a secured bond, Judge Smith actively prevented her from providing such information. Further, Judge Smith provided no explanation of why $11,500 was a necessary condition for her release. At another point in the same hearing, arrestee Jason Bazille pointed out to Judge Smith that he had another charge for which Judge Smith needed to determine conditions of release. *Id.* at 21:24–24:05. Judge Smith denied this and yelled at Mr. Bazille, "Shut up!" while Mr. Bazille politely tried to make his case. *Id.* at 22:53. Judge Smith ultimately discovered a discrepancy in Mr. Bazille's paperwork from the Sheriff, proving Mr.

Bazille right. Although Judge Smith apologized to Mr. Bazille, the exchange is indicative of arrestees' inability to advocate for conditions of pretrial release during these hearings.

Defendant Judge Ron Johnson's callout hearings follow the same general format and suffer from the same constitutional infirmities. Judge Johnson asks arrestees to provide their names and dates of birth, informs them of their charges, determines whether he will appoint the public defenders to the case, and then announces a bond amount. In the callout hearing Judge Johnson presided over on September 14, 2020, he informed Mr. Ashley Fisher that his bond for two charges of simple burglary and theft would be $20,000. Ex. 2 at 39:00–:55. Mr. Fisher asked, "Can I have a sign-out bond?" *Id.* at 39:30–:45. Judge Johnson replied, "Not on these charges!" *Id.* He provided no further explanation of why a secured bond in that amount had to be a condition of Mr. Fisher's release and made no inquiry into his finances, risk of flight, or potential danger to the community. Mr. Fisher remains incarcerated as of this filing, although Judge Smith recently reduced the bail amount to $5,000. Ex. 8.

Ms. Amy Robinson also appeared before Judge Johnson for a callout hearing on September 14, 2020. Ex. 2 at 23:00–24:35. Judge Johnson informed her that she would need to pay a $5,500 bond as a condition of release for charges of possession of drug paraphernalia and a schedule I substance. Ms. Robinson, whose residence was listed as "homeless" on the affidavit of probable cause for her arrest, Ex. 9 at 1, asked Judge Johnson, "Is there any way I can bond myself out?" Ex. 2 at 23:30–:37. "No, ma'am," Judge Johnson replied, "not on this." *Id.* Ms. Robinson persisted, "So there's no way I can get—." *Id.* at 23:58–24:04. Judge Johnson interrupted her and asked if she could afford to hire an attorney. *Id.* Ms. Robinson responded that she could not, and Judge Johnson appointed the public defender while ordering that Ms. Robinson pay $40 for their representation. *Id.* at 24:05–:15. Ms. Robinson then asked, "I just

wanted to see if I could get like an ROR or something that we can [inaudible].” *Id.* at 24:19–:30. Judge Johnson responded, “You cannot get an ROR on this charge, ma’am.” *Id.* Ms. Robinson ultimately remained in custody until The Bail Project paid her bond six weeks later on October 30th. Ex. 9 at 2. On December 9, 2020, Ms. Robinson pleaded guilty to the paraphernalia charge, receiving a sentence of fifteen days with credit for time served; i.e., one-third of the time that she had actually spent imprisoned on an unaffordable secured bond. *Id.* at 3–4.

Mr. Courtney Davis also appeared before Judge Johnson for a callout hearing on September 14, 2020, having been charged with unauthorized use of a motor vehicle and simple criminal damage to property. Ex. 2. at 36:05–37:18. Before informing Mr. Davis of his charges or his bond, Judge Johnson asked Davis if he had been working prior to his arrest. *Id.* at 36:20–:30. Mr. Davis answered that he had not. *Id.* Judge Johnson asked, “How do you support yourself?” *Id.* Mr. Davis responded, “Family.” *Id.* Judge Johnson proceeded to impose a $7,000 bond and a protective order as conditions of release. He then appointed the public defender’s office to Mr. Davis’s case. There was no explanation of why a protective order alone would not have been sufficient, whether Mr. Davis could afford to pay a $7,000 bond, or whether a secured bond was necessary to ensure his appearance at future hearings. Mr. Davis remained in custody for nine days before a commercial surety posted his bond. Ex. 10.

On September 16th, Mr. Johnny Patterson appeared before Judge Johnson for a callout hearing. Ex. 3 at 52:15–54:30. After Judge Johnson informed Mr. Patterson that he would have to pay a bond of $15,000 to be released while awaiting trial on two counts of simple criminal damage to property, Patterson asked why the bond was “so high over something so petty?” *Id.* at 53:46–54:02. Judge Johnson replied, “Well, because of the nature of the allegations. I will consider a motion to reduce bond; once your attorney is enrolled, they can come to me and ask

me to reduce the bond." *Id.* at 54:03–:18. Judge Johnson made no inquiry into Patterson's finances, whether he could pay that bail, or whether alternative conditions of release—such as the protective order and "criminal tracking service" that he also imposed—would have been sufficient conditions. On that same day, Judge Johnson ordered the release of one arrestee accused of shoplifting. *Id.* at 29:26–31:55. Releases on recognizance are apparently such a rare occurrence, however, that Judge Johnson turned to Mr. Howze to ask, "Mr. Frank, where do I put that on this bond sheet?" *Id.* at 31:30–:40. Howze responded, "I just put it in here in big letters, 'ROR WAIVE FEES.'" *Id.*

After the initial appearance hearing, an arrestee's only opportunity to modify her conditions of release is by filing a motion before a Judge of the 19th JDC. Because it often takes several weeks or even months for a public defender to make an individualized determination and file a motion for a bond reduction, many individuals are forced to proceed pro se in their initial efforts at a bond reduction.[11] If the district attorney has not yet decided whether to prosecute the defendant, a bond reduction motion will be heard by the judge on duty; if the district attorney has accepted the charges and filed a Bill of Information, the arrestee's case will be assigned to a Division of Court and that Division's Judge would preside over the motion if a contested hearing has been docketed in the case.[12] If no contested hearing has been docketed, either the assigned Division Judge or a duty judge may preside over the motion for bond reduction. Arrestees typically wait several weeks or even months before they can even be heard on the issue of their ability to

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[11] *See, e.g.*, Ex. 7, Scully Decl. ¶ 11; Decl. of John Leagard ¶ 3, ECF No. 98-12, filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020); *cf.* Ex. 5, Franklin Decl. ¶ 11 (stating that he had not communicated with a public defender since the callout hearing); Ex. 4, Ryan Decl. ¶ 11; Ex. 6, Nourani Decl. ¶ 11.

[12] *See* Rules for Criminal Proceedings in District Courts, Rule 14.2, *available at* https://www.lasc.org/District_Court_Rules?p=TitleIII; Rules for Louisiana District Courts: Nineteenth Judicial District Court Appendix, Rules 3.2, 14.0, *available at* https://www.lasc.org/rules/dist.ct/19thJDCAppendices.PDF

pay or the consideration of non-financial alternative conditions of release.[13]

B. Conditions in East Baton Rouge Parish Prison.

The East Baton Rouge Parish Prison normally holds over 1500 detainees[14] and is staffed by over 300 sheriff's deputies.[15] Approximately 81% of the people held in the Jail at any given time have not been convicted of a crime and are being held pre-trial, and approximately 85% of people accused of a crime in Louisiana are indigent.[16] Between 12,000 and 15,000 people cycle through EBRPP annually, and they can be brought in by over 30 law enforcement agencies that operate in and around Baton Rouge.[17] Currently, over 1,400 pre-trial detainees are trapped behind the walls of this facility.[18] In recent years, EBRPP has been plagued by a high number of prisoner deaths—approximately 44 since 2012 and nearly 20 of those under the current private medical

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[13] *See, e.g.*, Ex. 7, Scully Decl. ¶ 11.

[14] The Sheriff regularly has custody over more individuals than can fit in the East Baton Rouge Parish Prison—the majority of whom are in the Sheriff's custody following bonds imposed by judges of the 19th JDC—and it is the Sheriff's regular practice to transfer numerous individuals in his custody to facilities across the state. These transfers continue to take place even during the pandemic. Transferred individuals who are detained under bonds imposed by judges of the 19th JDC remain under the Sheriff's custody and part of the putative class in this case.

[15] *See* East Baton Rouge Sheriff's Office, "Parish Prison," https://www.ebrso.org/WHO-WE-ARE/Divisions/Parish-Prison (last visited Apr. 4, 2020); *see also* Promise of Justice Initiative, "Dying In East Baton Rouge Parish Prison" at 11 (July 2018), *available at* https://promiseofjustice.org/wp-content/uploads/2019/07/Dying-in-East-Baton-Rouge-Parish-Prison-Final.pdf (last visited Apr. 4, 2020) (stating that the East Baton Rouge Parish Prison holds "an average population of 1,594 individuals" and that this is the jail's "full design capacity").

[16] Loop Capital Financial Consulting Services, *East Baton Rouge Parish: Justice Center Study – Final Report* 6 (June 30, 2016) ("The majority of the Prison's inmate population is unsentenced (81%)."), *available at* https://static1.squarespace.com/static/5b07033af79392c7df457840/t/5ba945fee2c483603e70055c/1537820159490/loop+report.pdf (last visited Nov. 19, 2020); Sabrina Canfield, *Class Claims Louisiana's Public-Defender System Fails Them*, Courthouse News Service (Feb. 21, 2017), *available at* https://www.courthousenews.com/326697-2/.

[17] Teresa Mathew, *More than 40 people have died in the East Baton Rouge Jail. Will voters oust the Sheriff?*, The Appeal (Oct. 9, 2019), *available at* https://theappeal.org/more-than-40-people-have-died-in-custody-of-the-east-baton-rouge-jail-will-voters-send-the-sheriff-packing/.

[18] Parish Prison Inmate List, East Baton Rouge Sheriff's Office, *available at* https://www.ebrso.org/Parish-Prison-Inmate-List/PrisonInmateListApp (last visited Dec. 10, 2020).

provider's watch between 2017 and 2020.[19] Local government and community members have raised serious concerns over the quality of care provided by the private company the City/Parish contracts with for prisoners' medical care.[20] In addition, three wings of the jail were condemned and closed in 2018, over safety concerns for prisoners and staff. The Sheriff rapidly reopened these wings in April to house individuals who were battling COVID-19,[21] with minimal repairs or cleaning; reports from men who have suffered the conditions on those condemned wings were uniformly troubling.[22] The jail also used those condemned wings to house individuals being quarantined upon intake to the jail for a period. In or around August 2020, the jail also began housing newly arrested individuals in a large general population dorm in open-air contact with

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[19] Three of those deaths have occurred in 2020. *See* Lea Skene, *Latest inmate death at Baton Rouge jail comes as officials weigh new health care contract*, The Advocate (Dec. 10, 2020), *available at* https://www.theadvocate.com/baton_rouge/news/crime_police/article_4e6982b6-3b3c-11eb-9430-b7acedff4908.html; Lea Skene, *Zachary man accused of stabbing girlfriend to death dies from suicide in East Baton Rouge jail*, The Advocate (Aug. 24, 2020), *available at* https://www.theadvocate.com/baton_rouge/news/crime_police/article_d73154e4-e627-11ea-9d7f-2f96632a3e14.html; Lea Skene, *Inmate dies from suicide in East Baton Rouge jail two days after his arrest*, The Advocate (Jan. 22, 2020), *available at* https://www.theadvocate.com/baton_rouge/news/crime_police/article_a8528a80-3d62-11ea-a998-a7999bbfe922.html; Teresa Mathew, *More than 40 people have died in the East Baton Rouge Jail. Will voters oust the Sheriff?*, The Appeal (Oct. 9, 2019), *available at* https://theappeal.org/more-than-40-people-have-died-in-custody-of-the-east-baton-rouge-jail-will-voters-send-the-sheriff-packing/.

[20] *See* Lea Skene, *Three years after East Baton Rouge privatized jail health care, inmate death rate remains high*, The Advocate (Jan. 6, 2020), *available at* https://www.theadvocate.com/baton_rouge/news/crime_police/article_4934bb2c-30c4-11ea-a28a-07e2d1b58a37.html; *see also* Rebekah Allen & Andrea Gallo, *Medical Staff at East Baton Rouge Parish Prison say they are understaffed, overworked and lack critical supplies*, The Advocate (Aug. 27, 2015), *available at* https://www.theadvocate.com/baton_rouge/news/article_1a9f4959-689c-5795-a073-289815d2dce4.html (noting the systemic problems in care delivery that precipitated the Parish's move to privatize health care in the prison).

[21] *See* Lea Skene, *Number of coronavirus cases among Baton Rouge jail inmates climbs to 53, Sheriff's office says*, The Advocate (Apr. 16, 2020), *available at* https://www.theadvocate.com/baton_rouge/news/coronavirus/article_49eca0e4-8028-11ea-8a5a-ab5bc7534c4c.html.

[22] *See, e.g.*, Decl. of Demond Harris ¶¶ 8-29, ECF No. 21-10; Decl. of Christopher Lee Rogers ¶¶ 13-43, ECF No. 21-6; Decl. of Cedric Franklin ¶¶ 24-25, 32-43, ECF No. 21-4; Decl. of Willie Shepherd ¶¶ 7-9, ECF No. 21-5; Decl. of Billy Pettice ¶¶ 8-15, 17-21, ECF No. 98-13; Decl. of Jerry Bradley ¶ 7, 9-21, ECF No. 21-8; Decl. of Joseph Williams ¶¶ 7-25, ECF No. 21-11; Decl. of Devonte Stewart ¶¶ 8, 11-22, 24, 26, 28, ECF No. 21-13; Decl. of Lyndell Alford ¶¶ 11-23, ECF No. 39-11; Decl. of Casey Wade Harris ¶¶ 19-21, ECF No. 98-9; all filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020).

other dorms and without following proper quarantine practices.[23]

EBRPP had its first positive coronavirus test result on Sunday, March 29, 2020. The individual was tested only after he became so sick that he required hospitalization—all while EBRPP officials brushed him off as a drug addict experiencing an overdose.[24] Since then, the number of prisoners who are recognized as being infected in the Jail has grown to approximately 100.[25] Sadly, the first COVID-19 death related to EBRPP was announced on April 5, 2020, when Sheriff Gautreaux released the news of the death of Sgt. Gregory Warren, a supervisor in the inmate transportation division and who also had contact with numerous housing lines in the jail.[26] Since then, numerous additional guards have become sick with the virus—including the Warden's own brother—and have continued to infect individuals detained at the jail.[27] But the jail's medical staff have declined to engage in regular testing or surveillance practices to track the spread of the virus throughout the facility.[28] On some housing lines ("lines"), most of the detainees became

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[23] *See, e.g.*, Suppl. Decl. of Jerry Bradley ¶¶ 4, 9-15, ECF No. 107-8; Decl. of Nicholas Kalivoda ¶¶ 8-13, ECF No. 107-6; Decl. of Kenny Durousseau ¶¶ 12-17, ECF No. 107-4; all filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020).

[24] *See* WBRZ Staff, *East Baton Rouge Prison quarantining 94 inmates after one tests positive for COVID-19* WBRZ-TV (March 30, 2020), *available at* https://www.wbrz.com/news/east-baton-rouge-prison-quarantining-94-inmates-after-one-tests-positive-for-covid-19/.

[25] *See, e.g.*, Lea Skene, *Number of coronavirus cases among Baton Rouge jail inmates climbs to 53, Sheriff's office says*, The Advocate (Apr. 16, 2020), *available at* https://www.theadvocate.com/baton_rouge/news/coronavirus/article_49eca0e4-8028-11ea-8a5a-ab5bc7534c4c.html.

[26] *See* Lea Skene, *East Baton Rouge deputy—'a dedicated public servant'—dies from coronavirus, sheriff says*, The Advocate (Apr. 5, 2020), *available at* https://www.theadvocate.com/baton_rouge/news/coronavirus/article_27ecdcac-7759-11ea-9ab3-e72613b104ed.html; *see also* Decl. of Joseph Denning ¶ 7, ECF No. 39-5; Decl. of Jocquenee Bernard ¶ 3, ECF No. 98-11; all filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020).

[27] *See* Decl. of Ransom Parker ¶¶ 6-7, ECF No. 98-5, filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020).

[28] *See* TRO Hr'g Transc. at 148-51, 154, 187, 191, 196, 198-99, 200, ECF No. 84; Decl. of Jean Paul J. Walston ¶ 10, ECF No. 107-10; Decl. of Jocquenee Bernard ¶ 4-6, ECF No. 98-11; Decl. of Derick Mancuso ¶¶ 7-9, ECF No. 39-8; Suppl. Decl. of Derick Mancuso ¶ 6-7, 12, ECF No. 98-8; all filed in *Belton v. Gautreaux*, No. 3:20-cv-

sick, but few received any medical care for the virus[29]—and those who did were detained on the condemned wings or shipped to Camp J at the Louisiana State Penitentiary, a solitary confinement unit that was closed in 2018 in an effort to make Louisiana's prisons more humane.[30] But, because they declined to test for, track, or treat the full spread of the virus, jail staff have no accurate numbers of those individuals who became sick and have no baseline for an individual's potential to contract the virus during their detention, even to this day.[31]

C. Plaintiffs' Callout Hearings and Their Detention in EBRPP

Joshua Ryan is a 38-year-old Black man who, before his arrest, was homeless and unemployed. Ex. 4, Decl. of Joshua Ryan ¶¶ 1, 12. He has no assets or savings. *Id.* ¶ 12. Earlier this year, Mr. Ryan was diagnosed with a condition that renders him medically vulnerable to COVID-19. *Id.* ¶ 15. He was arrested on Friday, November 6, 2020, and received a preset bond because he would not be brought before the court for an initial appearance until the following Monday. *Id.* ¶ 2. At Mr. Ryan's initial appearance via closed-circuit television, Judge Ronald R. Johnson imposed a $10,000 bond on Mr. Ryan without inquiring into his financial circumstances or ability to pay a bond. *Id.* ¶¶ 3, 6, 9. Judge Johnson also did not evaluate whether Mr. Ryan was a danger to the community or a flight risk, nor did he evaluate alternative conditions of release.

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[29] *See, e.g.*, Decl. of Jocquenee Bernard ¶ 4-6, ECF No. 98-11; Decl. of Steven Thomason ¶¶ 9-10, ECF No. 39-3; Decl. of Joseph Denning ¶¶ 6-8, ECF No. 39-5; Decl. of Lyndell Alford ¶ 9, ECF No. 39-11; Decl. of Joshua Weatherspoon ¶ 4, ECF No. 39-14; Decl. of Calvin Kemp ¶ 20, ECF No. 98-15; all filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020).

[30] *See* Decl. of Billy Pettice ¶ 22, ECF No. 98-13; Decl. of Demond Harris ¶ 13, ECF No. 21-10; Decl. of Joshua Weatherspoon ¶ 4, ECF No. 39-14; Decl. of Eddie Jones ¶ 10, ECF No. 107-5; Decl. of Calvin Kemp ¶ 20, ECF No. 98-15; all filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020).

[31] *See, e.g.*, TRO Hr'g Trans. at 187 (Testimony of Phyllis McNeel, CorrectHealth), ECF No. 84; *see also* Decl. of Dr. Susan Hassig (Aug. 17, 2020) ¶ 10, ECF No. 98-3; Decl. of Dr. Fred Rottnek (Aug. 17, 2020) ¶¶ 9(a)(v), 22-26, ECF No. 98-14; all filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020).

Id. ¶¶ 7-8. Mr. Ryan asked for a sign-out bond, but Judge Johnson refused his request, telling him that his next hearing would be soon. *Id.* ¶ 10. But Mr. Ryan's arraignment has been delayed to January 7, 2021, due to the COVID-19 pandemic. *Id.* ¶ 14.

Mr. Ryan cannot afford his bond and will be stuck in jail for months before he again appears before the court. *Id.* ¶¶ 13-14. He is very worried about facing another wave of the COVID-19 pandemic in the jail, where he cannot practice social distancing. *Id.* ¶ 15. Mr. Ryan was not represented by counsel at the hearing where this detention decision was made or able to speak with one before or during his hearing; although he was appointed a public defender, Mr. Ryan still has not been able to contact his attorney, despite multiple attempts to call the public defender's office. *Id.* ¶ 11. Mr. Ryan remains trapped in the East Baton Rouge Parish Prison and has no resources to help defend against the charges or bond imposed against him.

Blaze Franklin is a 67-year-old Black man and a resident of Baton Rouge. Ex. 5, Decl. of Blaze Franklin ¶ 1. Mr. Franklin suffers from stage four prostate cancer that has metastasized to his bones, a diagnosis he received in June of this year. *Id.* ¶ 2. He is in pain all the time and has trouble sleeping, standing eating, or even talking due to the pain. *Id.* ¶ 2. Mr. Franklin is retired and receives Social Security payments of about $750 per month; he had only about $750 in his bank account when he was arrested. *Id.* ¶ 12. He does not have any other assets or income and had not received other income since his retirement in June 2018. *Id.* ¶ 12. Mr. Franklin lived with his mother, who leased Section 8 housing. *Id.* ¶ 12. His mother died while he has been confined in the jail. *Id.* ¶ 12.

Mr. Franklin was arrested on October 27, 2020, and appeared before Defendant Commissioner Robinson by closed-circuit television for his initial appearance on October 28, 2020. *Id.* ¶¶ 3-4. The Commissioner informed the detainees before her that she would not discuss

any of their bail conditions and that the decision she announced would be final. *Id.* ¶ 5. The Commissioner imposed a $200,000 bond on Mr. Franklin, without inquiring into his income, expenses, or ability to pay the bond and obtain release. *Id.* ¶ 7. She also did not evaluate whether Mr. Franklin was a danger to the community or a flight risk, nor did she consider any non-financial conditions of release. *Id.* ¶¶ 8-9. The Commissioner did not tell him why he could not be released from jail. *Id.* ¶ 8. His hearing—and the hearings for everyone else in the room that day—lasted a matter of seconds each. *Id.* ¶ 6. Mr. Franklin was not represented by counsel during or before his initial appearance; even though the public defender has been appointed to his case, he still has not been able to speak to an attorney about his case. *Id.* ¶ 11. His arraignment has been delayed due to the COVID-19 pandemic and has not yet been scheduled. *Id.* ¶ 14.

Mr. Franklin cannot afford his bond and does not know when he will be able to secure his release from the jail. *Id.* ¶ 13-14. This is particularly concerning because Mr. Franklin is not receiving the medical care he requires for his cancer, and his condition has worsened since he got to the jail. *Id.* ¶ 2. At first, the jail provided him only Tylenol for the pain related to his metastasized, stage-four cancer; although he now receives tramadol, that is insufficient to alleviate his constant pain. *Id.* ¶ 2. The jail has done nothing else for his condition—he has not even seen a doctor—and the growing COVID-19 pandemic presents another threat to his health that the jail has proven unable to manage. *Id.* ¶ 2. To add to the physical agony and humiliation he experiences daily, the jail refused to permit Mr. Franklin to attend his mother's funeral after she passed. *Id.* ¶ 15.

Amisar Cyrus Nourani is a 28-year-old Persian man from Kansas City, who worked in Baton Rouge caring for an autistic boy and training service dogs for autistic children. Ex. 6, Decl. of Amisar Nourani ¶¶ 1, 15. Mr. Nourani suffers from Lupus and chronic obstructive pulmonary

disease (COPD). *Id.* ¶ 12. He was arrested on November 9, 2020, and he had his initial appearance hearing by video on November 12, 2020. *Id.* ¶¶ 2, 9. No one at the 19th JDC's Bail Bond Project—directed by Mr. Howze—interviewed Mr. Nourani about his financial circumstances or any other information about his background. *Id.* ¶ 9. Judge Ronald Johnson imposed a $13,000 bond against Mr. Nourani, without explaining why the bond was so high or identifying any factors justifying that bond amount. *Id.* Judge Johnson did not determine that Mr. Nourani was a danger to the community or a flight risk, nor did he consider any alternative conditions of release for Mr. Nourani. *Id.* Mr. Nourani requested a reduction to his bond or a sign-out bond, but Judge Johnson dismissed his request, noting that such a request was not possible. *Id.* Mr. Nourani's hearing lasted less than 30 seconds, and he did not have the benefit of counsel prior to or during his initial appearance hearing. *Id.* Mr. Nourani was appointed a public defender, but—despite trying multiple times—has not been able to speak to anyone in that office yet. *Id.* ¶ 11.

Mr. Nourani cannot bond out and is forced to remain in the jail, to detrimental effect. Mr. Nourani has been sexually and physically assaulted numerous times since he entered the jail, by both the detainees and the guards, including when he sought protection or assistance from the guards and medical staff in the facility. *Id.* ¶¶ 3-7. The incidents to which Mr. Nourani has been subjected include a detainee biting his penis and inserting fingers into Mr. Nourani's anus through his clothing, another detainee rubbing his penis on Mr. Nourani as a guard observed and laughed, a guard slamming Mr. Nourani into a wall when he sought medical care, a guard causing ongoing damage to Mr. Nourani's hand when Mr. Nourani sought medical treatment, and a nurse refusing to remove Mr. Nourani from punitive housing conditions with his assailant until Mr. Naourani withdrew his internal grievances. *Id.*

Mr. Nourani also routinely faces discrimination for his religion as a Sufi Muslim, and the

guards refuse to provide him Halal meals, point him east for his daily prayers, or allow him to clean himself before those prayers, as his religion requires. *Id.* ¶ 14. One time, a guard beat him while mocking his religion and suggesting that God's light would save him. *Id.* He is also called a terrorist, Osama, or an ISIS sleeper cell inside the facility. *Id.* When he was booked into the jail, staff suggested he receive an STD test, then declined to give him one after interrogating him about his race, religion, and immigration status as a citizen. *Id.* ¶ 13.

This treatment has reignited Mr. Nourani's PTSD and had caused a noticeable deterioration of Mr. Nourani's mental health status. *Id.* ¶ 8. In addition to these assaults, Mr. Nourani fears daily for his health in this congregate facility, due to his Lupus and COPD, because it is difficult to socially distance or access the medical and hygiene resources that he needs during the COVID-19 pandemic. *Id.* ¶ 12.

Herbert Scully is a 67-year-old man from Westwego, Louisiana. Ex. 7, Decl. of Herbert Scully ¶ 1. In 2019, Mr. Scully attempted to run a small lawn service and received about $200 per month, but he was largely unable to work due to his medical conditions—a severe hernia that requires surgery and a fractured pelvis. *Id.* ¶¶ 8. Before his arrest, Mr. Scully was informed by medical professionals that his hips were "bone on bone" and that he needed hip replacement surgery. *Id.* ¶ 12. Mr. Scully has not had a steady income since 2018, has no savings and minimal assets, and still has a fractured pelvis and an outstanding need for a hip replacement. *Id.* ¶ 8. He was arrested on July 12, 2020, almost 5 months ago, and he has still not been arraigned—his arraignment has recently been delayed until January 12, 2021 due to the COVID-19 pandemic. *Id.* ¶¶ 2, 10.

Mr. Scully appeared before Judge Tarvald Smith by closed-circuit television for an initial appearance on July 13, 2020. *Id.* ¶ 3; Ex. 1 at 44:10–45:10. Judge Smith did not inquire into Mr.

Scully's financial circumstances or consider alternative conditions of release before imposing a $30,750 bond on Mr. Scully. Ex. 1 at 44:10–45:10; Ex. 7 at ¶¶ 4, 6. Judge Smith also did not evaluate whether Mr. Scully was flight risk or a danger to the community. Ex. 1 at 44:10–45:10; Ex. 7 at ¶ 6. Of this minute-long hearing, Mr. Scully's bail determination comprised seven seconds. Ex. 1 at 44:43–50. Judge Smith appointed Mr. Scully a public defender and told him that his attorney could contact the Judge about his detention. Ex. 1 at 44:35–45:10; *Id.* ¶¶ 4-5. On November 16th, most of Mr. Scully's charges were dropped, but his bond has not been reduced commensurate with his charges. *Id.* ¶ 7.

Mr. Scully cannot afford his bond and has been trapped in the jail since his arrest. *Id.* ¶¶ 9-10. Mr. Scully has not been able to speak with an attorney about his case and has been forced to file his own motion to dismiss and 701 motion for release of bond obligations on October 27, 2020. *Id.* ¶ 11. The court has not addressed Mr. Scully's motions yet, nor has it even scheduled them for a hearing date. *Id.*

Mr. Scully receives inadequate medical care in the jail—he has not seen a specialist about the issues with his hips and receives nothing more than ibuprofen for his constant pain. *Id.* ¶ 12. He is worried about catching COVID-19 in the jail, where he cannot socially distance, does not have access to cleaning supplies, and where he lives in dangerously cold situations. *Id.* ¶ 13. Mr. Scully has not been tested for COVID-19 and does not know of anyone in the jail who was been tested. *Id.* ¶ 14.

III. ARGUMENT

A preliminary injunction should issue if the movant demonstrates:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Janvey v. Alguire, 647 F.3d 585, 595 (5th Cir. 2011) (quoting *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009)). The named Plaintiffs satisfy each of these requirements. A court must consider these factors on a sliding scale—a greater threat of irreparable injury may justify issuance of preliminary relief in a situation with a less certain likelihood of success, and vice versa. *See Prods. Carnic, S.A. v. Cent. Am. Beef & Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980); *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 635 (M.D. La. 2015), *aff'd*, 862 F.3d 445 (5th Cir. 2017), *cert. denied*, 139 S. Ct. 408 (2018).

A. The Plaintiffs are Likely to Succeed on the Merits Because the Defendants' Practices of Jailing Indigent People on Unattainable Financial Conditions Violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Defendants' practices are unconstitutional on three distinct yet related grounds: equal protection, substantive due process, and procedural due process. First, equal protection and due process forbid jailing a person solely because of her inability to pay. *See Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983); *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc); *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (holding that a requirement to pay a fine or serve time in jail violates equal protection and due process unless it is "necessary to promote a compelling governmental interest" (quotation and citation omitted)); *see also Barnett v. Hopper*, 548 F.2d 550, 554 (5th Cir. 1977) ("To imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws."), *vacated as moot*, 439 U.S. 1041 (1978).

Second, substantive due process protects a right to pretrial liberty that is "fundamental." *United States v. Salerno*, 481 U.S. 739, 750 (1987); *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

Third, the Constitution requires the government to provide procedural safeguards to protect against the erroneous deprivation of substantive rights. *See Washington v. Harper*, 494 U.S. 210, 228 (1990). To determine whether those procedural safeguards are adequate, a court must first determine whether an individual has been deprived of a liberty interest and then ask whether the procedures accompanying the deprivation were sufficient. *See, e.g.*, *ODonnell*, 882 F.3d at 540; *Caliste*, 329 F. Supp. 3d at 312–13.

The two substantive constitutional rights at issue—the right against wealth-based detention and the fundamental right to pretrial liberty—cannot be infringed unless the government satisfies strict scrutiny: the government must demonstrate that wealth-based pretrial detention is the least restrictive way for it to serve a compelling interest. Thus, before requiring a person to make a monetary payment in exchange for release from detention, the government must inquire into and make findings concerning the person's ability to pay. If the person cannot pay the amount required, such that the condition of release will function as a de facto detention order, then the government must justify the order in the same way that it justifies an order of pre-trial detention without bail.

1. The Constitution prohibits wealth-based detention and secures a right to pretrial liberty.

The Equal Protection and Due Process Clauses protect a substantive right against wealth-based detention. *Pugh*, 572 F.2d at 1057 ("The incarceration of those who cannot [pay money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."). It has long been recognized that jailing someone after conviction solely because of poverty violates the Fourteenth Amendment. *Tate v. Short*, 401 U.S. 395, 397–98 (1971) ("[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."); *see also Williams v. Illinois*, 399 U.S. 235,

241–42 (1970); *Frazier*, 457 F.2d at 728. The Supreme Court later ruled that a court sentencing a person to prison for inability to pay a fine violated the Fourteenth Amendment if the court did not consider "the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders." *Bearden*, 461 U.S. at 674. These principles apply with greater force in the pretrial context, where the detainee is presumed innocent. *See Pugh*, 572 F.2d at 1056 (holding that the Constitution's prohibition on post-conviction wealth-based detention has "broader . . . implications" for those "accused but not convicted of crimes"). Several appellate courts have recently held that the detention of a pretrial arrestee without meaningful consideration of that person's indigence or other possible alternative conditions of release is unconstitutional.[32] Other district courts in Louisiana[33] and throughout the country[34] have reached the same conclusion.

Applying *Pugh*, the Fifth Circuit in *ODonnell* recently reaffirmed the right against wealth-based detention, holding that Harris County, Texas's post-arrest system—in which "poor arrestees . . . are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond"—violates the Constitution. 882 F.3d at 544.

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[32] *ODonnell v. Harris Cty.*, 892 F.3d 147, 160 (5th Cir. 2018) (citing *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (holding that pretrial imprisonment solely because of indigency violates due process and equal protection); *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017); *see also United States v. Leisure*, 710 F.2d 422, 425 (8th Cir. 1983) ("[S]etting of bond unreachable because of its amount would be tantamount to setting no conditions at all.").

[33] *Caliste v. Cantrell,* 329 F. Supp. 3d 296 (E.D. La. 2018), *aff'd*, 937 F.3d 525 (5th Cir. 2019).

[34] *See McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-CV-00033, 2019 WL 633012 (M.D. Tenn. Feb. 14, 2019); *Schultz v. Alabama*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018); *Edwards v. Cofield,* No. 3:17-CV-321-WKW, 2017 WL 2255775 (M.D. Ala. May 18, 2017); *Pierce v. City of Velda City*, No. 4:15-CV-570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015); *Jones v. City of Clanton*, No. 215CV34-MHT, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758 (M.D. Tenn. 2015); *Thompson v. Moss Point*, No. 1:15CV182LG-RHW, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015); *Cooper v. City of Dothan*, No. 1:15-CV-425-WKW, 2015 WL 10013003 (M.D. Ala. June 18, 2015); *Snow v. Lambert*, No. CV 15-567-SDD-RLB, 2015 WL 5071981 (M.D. La. Aug. 27, 2015).

Pretrial detention of a presumptively innocent person due to her inability to make a monetary payment implicates a second substantive constitutional right: the "fundamental" right to pretrial liberty. *Salerno*, 481 U.S. at 750; *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); *Foucha*, 504 U.S. at 80; *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014) (en banc) (applying strict scrutiny to Arizona's pretrial detention law because it infringed on the "fundamental" right to pretrial liberty); *Caliste*, 329 F. Supp. 3d at 310 (holding that criminal defendants detained solely because of their indigence were "deprived of their fundamental right to pretrial liberty"); *Buffin v. San Francisco*, No. 15-CV-04959, 2018 WL 424362, at *6 (N.D. Cal. Jan. 16, 2018) (holding that pretrial detention due to inability to pay "implicates plaintiffs' fundamental right to liberty"). Recent opinions in state supreme courts have also held that the U.S. Constitution protects a fundamental liberty interest in pretrial freedom. *In re Humphrey*, 472 P.3d 435 (Cal. 2020) (upholding precedential effect of appellate court's ruling recognizing the "fundamental constitutional right to pretrial liberty"); *Brangan v. Commonwealth*, 80 N.E.3d 949, 961–63 (Mass. 2017) (recognizing that the right to pretrial liberty is "fundamental").

In an amicus brief before the Fifth Circuit in *ODonnell*, the Conference of Chief Justices—whose membership consists of the highest judicial officer of each state, the District of Columbia, and each United States territory and commonwealth—affirmed this principle, stating that an arrestee "has a protected interest in pretrial liberty." Brief of Conference of Chief Justices as Amicus Curiae, *ODonnell v. Harris Cnty., Tex.*, No. 17-20333, 2017 WL 3536467, at *27 (5th Cir. Aug. 9, 2017).

a. Requiring unattainable money bond is a de facto order of detention

Every court to consider the question has recognized that an order requiring a person to pay an unattainable amount of money to secure release is a de facto order of pretrial detention. *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1161 (S.D. Tex. 2017) (holding that secured money bail set in an amount that an arrestee cannot afford is constitutionally equivalent to an order of detention), *aff'd in relevant part, rev'd on other grounds*, 882 F.3d at 544 (holding that defendants' practices result in the "absolute deprivation of [indigent arrestees'] most basic liberty interest—freedom from incarceration"). The First Circuit and D.C. Circuit Courts of Appeal have also recognized that unattainable conditions of release operate as detention orders. *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) ("[O]nce a court finds itself in this situation—insisting on terms in a 'release' order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid detention order . . . ."); *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) ("[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all."); *see also Brangan*, 80 N.E.3d at 963 (holding, by Massachusetts's highest court, that unattainable money bail "is the functional equivalent of an order for pretrial detention, and the judge's decision must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty.").

b. Requiring unattainable money bond without making a finding that detention is necessary to serve a compelling government interest is a violation of equal protection and due process

An unattainable money bail order triggers both the strict scrutiny required for the deprivation of pretrial liberty under *Salerno* and the strict scrutiny required by the *Bearden-Frazier-Pugh* wealth-based detention cases. According to both lines of precedent, because a person may not be jailed unless there are no less-restrictive alternatives that are adequate to meet

a compelling government interest, the government may not detain an arrestee prior to trial unless it determines that the detention is necessary.

Because the "interest in liberty" is "fundamental," it is 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." *Salerno*, 481 U.S. at 750 (internal citation omitted). Like other constitutional rights, however, the right to pretrial liberty is not absolute: the government may deprive a person of her right to pretrial liberty if the government's interest is sufficiently compelling and the deprivation is narrowly tailored to serve that interest. *Id.* at 749, 751; *see also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (holding that the government may not infringe "'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest" (internal quotations omitted)); *Lopez-Valenzuela*, 770 F.3d at 780 (holding that infringement of the fundamental right to pretrial liberty requires strict scrutiny review). A government infringement on pretrial liberty must be the least restrictive means necessary to reasonably serve the government's interests in court appearance and community safety. *See ODonnell*, 251 F. Supp. 3d at 1156–57.

In the equal protection framework, government action that infringes the right against wealth-based detention must likewise satisfy strict scrutiny. In *Frazier*, the Fifth Circuit held that strict scrutiny was the appropriate constitutional standard when it invalidated a practice requiring an indigent person to either pay a fine or be jailed after conviction because the alternative jail term was not "necessary to promote a compelling government interest." 457 F.2d at 728 (quotations omitted). *Frazier* explained that there were "far less onerous alternatives" that would satisfy the "state's interest in collecting its fine revenue." *Id.* at 728. In light of *Frazier*'s binding precedent, the Fifth Circuit's later panel decision in *ODonnell* should also be read to have applied strict

scrutiny. There, the Fifth Circuit held that "heightened scrutiny"[35] applies and that "the district court's application of intermediate scrutiny was not in error." *ODonnell*, 882 F.3d at 544. The District Court had ruled that the plaintiffs were likely to succeed on their claim challenging wealth-based detention even under a more deferential, intermediate-scrutiny standard. *ODonnell*, 251 F. Supp. 3d 1052, 1138 (S.D. Tex. 2017). The ultimate question of whether strict or intermediate scrutiny is the correct standard in a final adjudication of these claims was not addressed by either the district court or the Fifth Circuit in *ODonnell*. The Fifth Circuit's statement that the use of intermediate scrutiny "was not in error"—when read in the context of *Frazier*—approves of heightened scrutiny in this context. *ODonnell*, 882 F.3d at 543–44; *see also Caliste*, 329 F. Supp. 3d at 313 (applying a heightened level of scrutiny and requiring consideration of ability to pay and consideration of nonfinancial alternatives before ordering pretrial detention of criminal defendants); *Buffin*, 2018 WL 424362, at *8 ("[A]n examination of the *Bearden-Tate-Williams* line of cases persuades the Court that strict scrutiny applies to plaintiffs' Due Process and Equal Protection claims.").

Ultimately, it is unnecessary for this Court to resolve whether strict or intermediate scrutiny applies to Plaintiffs' Equal Protection claims, because the challenged practices do not withstand even intermediate scrutiny and because strict scrutiny unquestionably applies to the substantive due process claim. If the government's interest in "appearance at trial could reasonably be assured by . . . alternate [conditions] of release, pretrial confinement for inability to post money bail" is

[35] "Heightened" scrutiny may be either strict or intermediate. *See, e.g.*, *Lauder, Inc. v. City of Houston, Tex.*, 751 F. Supp. 2d 920, 933 (S.D. Tex. 2010). Both require the government to show that infringing a private right is narrowly tailored to a compelling interest. *Id.* If strict scrutiny applies, the policy must be necessary to achieve a compelling interest. *Id.* If intermediate scrutiny applies, then the action is constitutional if it serves "a substantial government interest that would be achieved less effectively absent the regulation." *Id.*; *see also ODonnell*, 251 F. Supp. 3d at 1138–39.

unconstitutional. *Pugh*, 572 F.2d at 1058.[36]

2. Defendants violate these substantive rights by entering de facto orders of pretrial detention for impoverished arrestees without regard to whether incarceration until trial is necessary or appropriate.

Defendants' failure to inquire into and consider the Plaintiff class's ability to pay the secured money bonds that they set violates equal protection and due process. All else being equal, a wealthy person and a poor person arrested for the same crime and brought before Judicial Defendants for an initial appearance have drastically different fates. The poor person would remain incarcerated prior to trial for no other reason than her poverty, while the wealthy person could pay for her freedom. This disregard for an arrestee's ability to afford a secured bond is indicative of Defendants' customary practice and is exactly the conduct that the Fifth Circuit first decried in *Pugh* and condemned most recently in *ODonnell*.

Defendants' de facto orders of pretrial detention for those who cannot pay for their release—like Plaintiffs, who have already spent weeks or months behind bars because they could not afford bond—are not narrowly tailored to a compelling interest. The resulting mandatory incarceration until trial for low-income arrestees would be proper only if the judge had determined after a contradictory hearing that a particular individual should be denied release due to safety or flight-risk concerns. However, judges do not hold contradictory hearings where arrestees are represented by counsel before setting unaffordable bonds that amount to mandatory incarceration, nor do they enter any findings as to safety or flight risk that would justify a complete denial of

[36] *Pugh* does not address whether strict or intermediate scrutiny applies in the context of wealth-based detention. 572 F.2d 1053. But *Frazier*, which remains binding, explicitly applied strict scrutiny, 457 F.2d at 728, consistent with *Bearden*'s later rejection of a challenged practice because the government's interest could "often be served by alternative means," 461 U.S. at 671–72.

release.[37] Instead, the amounts of these secured bonds are imposed without any consideration of whether a less restrictive alternative would achieve the government's interests.[38] The effect is to discriminate against people on the basis of their poverty and to deprive them of a fundamental liberty interest.

3. The Constitution requires adequate procedural safeguards when a judicial officer imposes de facto pretrial detention.

Analysis of procedural due process issues "proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). Plaintiffs satisfy the first step because, as explained above, Plaintiffs have been deprived of two substantive liberty interests: the right against wealth-based detention and the fundamental interest in pretrial liberty. *See Salerno*, 481 U.S. at 750; *Caliste*, 329 F. Supp. 3d at 313 ("Plaintiffs successfully assert that they have been deprived of a liberty interest based on 'the well-established principle that an indigent criminal defendant may not be imprisoned solely because of her indigence.'. . . Additionally, Plaintiffs have been deprived of their fundamental right to pretrial liberty." (citation omitted)).

The second step of the procedural due process analysis—determining the procedures required for a valid pretrial detention order—proceeds under the *Mathews v. Eldridge* three-part balancing test, in which a court must consider, for each procedure, (1) "the private interest" at issue, (2) "the risk of an erroneous deprivation" absent the sought-after procedural protection, and

[37] *See supra* §§ II.A & II.C and materials cited therein.

[38] *Id.*

(3) the state's interest in not providing the additional procedure. 424 U.S. 319, 334–35 (1976); *Caliste*, 329 F. Supp. 3d at 310–11.

Confronted with a similarly deficient pretrial detention system in Orleans Parish, Judge Fallon held that the balancing of the *Mathews* factors required that the government must provide an arrestee:

> 1) an inquiry into the arrestee's ability to pay, including notice of the importance of this issue and the ability to be heard on this issue;
>
> 2) consideration of alternative conditions of release, including findings on the record applying the clear and convincing [evidence] standard and explaining why an arrestee does not qualify for alternative conditions of release; and
>
> 3) representat[ion by] counsel.

Id. at 315.

a. The judicial officer must conduct an inquiry into ability to pay and make on-the-record findings concerning ability to pay.

The first step in determining what further protections are required is determining whether a financial condition of release will result in de facto detention. As the Supreme Court has held, if the government seeks to condition physical liberty on a payment, due process requires notice of the nature and significance of the financial information to be provided; an inquiry into the person's ability to pay; and findings on the record as to whether the person has the ability to pay. *See Turner v. Rogers*, 564 U.S. 431, 447–48 (2011) (applying the *Mathews* test and holding that, before the state may jail a person for not paying child support, the government must provide notice that ability to pay is a critical issue, an opportunity to be heard on the issue, and "an express finding by the court that the defendant has the ability to pay"); *Bearden*, 461 U.S. at 673 (holding that the state must inquire into whether nonpayment is willful before revoking probation); *see also Caliste*, 329

F. Supp. 3d at 315*; ODonnell*, 251 F. Supp. 3d at 1143–61 (requiring an inquiry into ability to pay and notice to arrestees about the significance of the financial information they are asked to provide).

If, after the required notice and inquiry into ability to pay, the government determines that the person cannot pay the amount required, then further procedures are required to ensure the accuracy of any finding that pretrial wealth-based detention is necessary to serve a compelling interest in any particular case.

b. The judicial officer must adhere to additional procedural safeguards to ensure the accuracy of the pretrial detention decision.

The substantive rights to pretrial liberty and against wealth-based detention require safeguards to ensure that the preventive pretrial detention decision is accurate and that detention of presumptively innocent people remains the "carefully limited exception." *Salerno*, 481 U.S. at 746 (citing *Mathews*, 424 U.S. at 335).

In *Salerno*, the Court upheld the procedural protections provided by the Bail Reform Act and emphasized that an order of detention may be issued under the Act only after the provision of robust procedural safeguards, including: a "full-blown adversary hearing," *id.* at 750, "findings of fact" by "clear and convincing evidence," and a "statement of reasons for a decision to detain," *id.* at 752. Balancing the individual and government interests at stake, the *Mathews* test makes clear that due process requires similar safeguards to those features of the Bail Reform Act emphasized by the Supreme Court in *Salerno*.

> [T]he Court noted that the Bail Reform Act is "narrowly focuse[d] on individuals who have been arrested for a specific category of extremely serious offenses." [*Salerno*,] 481 U.S. at 750. Even with this heightened government interest, "[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.* The Court then praised other procedural safeguards found to be sufficient under Due Process

> including: "findings of fact, statements of reasons for decisions, and the right to counsel." *Id.* at 750-51; *see also Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (listing the minimum requirements of due process when revoking probation). These procedures are required for defendants charged with committing serious offenses. How much more important are these safeguards when considering pretrial detention for criminal defendants who may not be accused of committing extremely serious offenses?

Caliste, 329 F. Supp. 3d at 313.

The basic procedures that due process requires prior to the deprivation of *any* liberty interest are well established. Most of them apply even in the post-conviction context, where a person's liberty interest is less than that of the Plaintiffs, who are pretrial detainees and presumptively innocent. In *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973), the Supreme Court explained what due process requires at a probation revocation hearing for a person whose liberty interest has been diminished by a criminal conviction:

> (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."

See also Morrissey v. Brewer, 408 U.S. 471, 488–89 (1972) (holding that "the minimum requirements of due process" require the same six procedural protections in the context of parole revocation of a convicted and sentenced person).[39] Because a bail hearing implicates the

[39] These principles have also been applied to incarceration for nonpayment of child support, *Turner*, 564 U.S. at 447, and the revocation of prisoners' good time credits, *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974).

fundamental right to pretrial liberty, each of these safeguards is required. *See Caliste*, 329 F. Supp. 3d at 315. As described below, pretrial detention also calls for a heightened evidentiary burden and a right to assistance of counsel.

c. The judicial officer must make findings supported by clear and convincing evidence that pretrial detention is necessary to mitigate either a risk of flight or a danger to the community.

When the government seeks to infringe the fundamental right to bodily liberty prior to or absent a criminal conviction, the government bears a heightened evidentiary burden. As the Supreme Court explained in *Addington v. Texas*, 441 U.S. 418, 432–33 (1979), the deprivation of the fundamental right to bodily liberty requires a heightened standard of proof beyond a mere preponderance in order to ensure the accuracy of the decision. Since *Addington*, the Supreme Court has never required a lower standard than "clear and convincing" evidence in any context in which bodily liberty is at stake.

In *Addington*, the Supreme Court held that the standard of proof required before a person can be confined in state custody for mental illness based on the possibility of future dangerousness must, under the Due Process Clause, be "equal to or greater than" the "clear and convincing" evidentiary standard. *Id.* at 432. The Court applied the *Mathews* balancing test. First, the Court articulated the government's interest: "to protect the community from the dangerous tendencies of some who are mentally ill." *Id.* at 426. However, the Court explained: "Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings." *Id.* The Court then balanced the important private interests and concluded that "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Id.* at 427. The Court

explained that it had consistently required the "clear and convincing" standard of proof to protect against erroneous deprivations of particularly important individual interests in other contexts, such as deportation and denaturalization. *Id*. at 424. The "clear and convincing" standard[40] enables the government to achieve its interest when it has a convincing basis but rigorously protects the fundamental individual rights at stake. *See id.*

In *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992), the Court again explained the importance of the "clear and convincing" standard and struck down, on due process grounds, Louisiana's statutes perpetuating the confinement of those acquitted on the basis of insanity in criminal trials. The Court held that "[t]he State may . . . confine a mentally ill person if it shows by clear and convincing evidence that the individual is mentally ill and dangerous." *Id*. at 80 (quotation and citation omitted). The Court relied on its earlier ruling in *Salerno*, which had upheld the Bail Reform Act's preventive detention mechanism in part because the statute required findings of dangerousness by the longstanding "clear and convincing" standard:

> Unlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited. Under the state statute, Foucha is not now entitled to an adversary hearing at which *the State must prove by clear and convincing evidence* that he is demonstrably dangerous to the community.

Foucha, 504 U.S. at 81 (emphasis added).

The Supreme Court has reached the same conclusion in every other context in which a person's physical liberty is at stake. *See Santosky v. Kramer*, 455 U.S. 745, 756 (1982) ("This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more

[40] The Court rejected a beyond-a-reasonable-doubt standard in *Addington* because of the noncriminal nature of the commitment and because, "given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment." *Addington*, 441 U.S. at 432.

substantial than mere loss of money."). Thus, the Court has required the "clear and convincing" evidence standard in deportation proceedings, denaturalization proceedings, civil commitment proceedings, proceedings for the termination of parental rights, cases involving allegations of civil fraud, and a variety of other kinds of civil cases. *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282–83 (1990).

Lower courts, interpreting *Salerno*, have consistently emphasized the necessity of (at a minimum) the "clear and convincing" standard in the context of pretrial detention. *Lopez-Valenzuela* stuck down the Arizona pretrial detention statute in part because the Arizona law, unlike the federal Bail Reform Act, did not require the government to prove by "clear and convincing evidence" that an individual arrestee's detention was necessary. 770 F.3d at 784–85. As the Ninth Circuit explained, one of the features that *Salerno* explicitly relied on was that the Act required the government "to prove by 'clear and convincing evidence' that the individual presented 'a demonstrable danger to the community' and that 'no conditions of release c[ould] reasonably assure the safety of the community.'" *Id.* Louisiana's Fourth Circuit Court of Appeals has also recognized that a denial of bail without a contradictory hearing conducted under a "clear and convincing" evidentiary standard would violate the Due Process Clause of the Constitution. *State v. Butler*, No. 2011-K-0879 (La. App. 4 Cir. 7/28/11), 2011 WL 12678268.[41] Various state

[41] The court considered the denial of a defendant's bail in light of the Louisiana Constitution's guarantee of bail "by sufficient surety" to all, with the exception of capital crimes, certain violent crimes, and certain drug crimes. *Butler*, 2011-K-0879 (La. App. 4 Cir. 7/28/11), 2011 WL 12678268 at *1. Louisiana's constitution explicitly allows a denial of bail for crimes of violence and drug crimes only when "after a contradictory hearing, the judge or magistrate finds by *clear and convincing* evidence that there is a substantial risk that the person may flee or poses an imminent danger to any other person or the community." La. Const. art. I, § 18 (emphasis added). The court in *Butler* held that the defendant's detention without bail was unconstitutional, violating both the Louisiana Constitution and the Due Process Clause of the U.S. Constitution, because the defendant was not afforded a hearing under this standard. *Butler*, 2011 WL 12678268 at *1 ("The defendant's argument that the constitution requires a contradictory hearing where the State bears the burden is persuasive. Without such a hearing the defendant would be deprived of those procedural safeguards which the Due Process Clause requires before the State may deprive a presumptively innocent person of liberty." (citing *Salerno*, 481 U.S. 739 (1987))). The Louisiana Supreme Court denied the state's writ seeking review of this decision and its application for reconsideration. 78 So. 3d 442; 75 So.

courts have also held this standard to apply.[42]

While courts have amply addressed the evidentiary standard to detain someone on the basis of dangerousness, the Fifth Circuit has not squarely ruled on the evidentiary standard due process requires for detention based on a risk of flight.[43] Nonetheless, the intermediate standard of "clear and convincing" evidence should apply regardless of whether the government seeks to detain a person pretrial based on a purported risk of danger to the community or a purported risk of flight, because the vital private right at stake in pretrial liberty is the same. The Eastern District recently recognized this when Judge Fallon concluded that the clear-and-convincing standard must apply to pretrial detention because, "[w]hile this Court has not found a case requiring the clear and convincing standard in the particular circumstances of this case, determining pretrial detention

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3d 132.

[42] *See State v. Ingram*, 165 A.3d 797, 803, 805 (N.J. 2017) (interpreting the state statute to require "clear and convincing evidence" when a person is preventively detained on the basis of his potential future dangerousness); *Wheeler v. State*, 864 A.2d 1058, 1065 (Md. App. 2005) ("We are persuaded, however, that 'preventive detention' may not be ordered unless the judicial officer is persuaded by clear and convincing evidence that no condition or combination of conditions of pretrial release can reasonably protect against the danger that the defendant poses to the safety of an identifiable person or to the community at large."); *Brill v. Gurich*, 965 P.2d 404, 409 (Okla. 1998); *Lynch v. United States*, 557 A.2d 580, 581 (D.C. 1989). Most recently, in *In re Humphrey*, the California Court of Appeal held under the federal Constitution that, "[i]f [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." 19 Cal. App. 5th 1006, 1037 (Cal. Ct. App. Jan. 25, 2018). Although the *Humphrey* decision is on appeal, the California Supreme Court recently ruled that the relevant portions of the appellate opinion—setting out the appropriate legal standard for bail determinations—have precedential effect. *In re Humphrey*, 472 P.3d 435 (Cal. 2020).

[43] Thirty years ago (and prior to *Foucha*), the Fifth Circuit held that a federal court could detain a defendant as a flight risk so long as the court found by a preponderance of the evidence that no conditions existed to reasonably mitigate the person's risk of flight. *United States v. McConnell*, 842 F.2d 105, 110 (5th Cir. 1988). But the *McConnell* opinion was limited to the question of what standard was required under the Bail Reform Act. The *McConnell* panel was not presented with the question of what burden of proof would be required by the Constitution. *Id.* at 107 ("McConnell maintains that the imposition of a financial condition of bail which a defendant cannot meet violates the eighth amendment and the Bail Reform Act of 1984."). Similarly, the authorities relied upon by *McConnell* in applying a statutory preponderance-of-the-evidence standard to questions of flight risk did not consider the burden of proof required by the Constitution. *Id.* (citing *United States v. Trosper*, 809 F.2d 1107 (5th Cir. 1987) (challenging statutory presumption of flight risk in 18 U.S.C. § 3142); *United States v. Fortna*, 769 F.2d 243 (5th Cir. 1985) (noting silence of Bail Reform Act on the proper standard and applying preponderance standard without any discussion of constitutional requirements); *United States v. Medina*, 775 F.2d 1398 (11th Cir. 1985) (same)). Thus, *McConnell* was based on statutory interpretation of the Bail Reform Act and made no holding concerning procedural due process, because the issue was not before the court.

based specifically on risk of flight, the Court is convinced of the vital importance of the individual's interest in pretrial liberty recognized by the Supreme Court." *Caliste*, 329 F. Supp. 3d at 313. The *Caliste* opinion further explained:

> [T]he consequences to the defendant from an erroneous pretrial detention are certain and grave. The potential harm to society, although also significant, is speculative, because pretrial detention is based on the possibility, rather than the certainty, that a particular defendant will fail to appear. Moreover, society's interest in increasing the probability of detention is undercut by the fact that it has no interest in erroneously detaining a defendant who can give reasonable assurances that he will appear. I conclude therefore that the injury to the individual from an erroneous decision is greater than the potential harm to society, and that under *Addington* due process requires that society bear a greater portion of the risk of error: the government must prove the facts supporting a finding of flight risk by clear and convincing evidence.

Id. at 313–14 (quoting *United States v. Motamedi*, 767 F.2d 1403, 1415 (9th Cir. 1985)).

The D.C. Court of Appeals has also held that clear-and-convincing evidence is the proper standard for an order of pretrial detention intended to mitigate flight risk. *Kleinbart v. United States*, 604 A.2d 861, 868 (D.C. 1992). There, the court reviewed *Salerno* and concluded that if the Bail Reform Act's clear-and-convincing evidence standard preserved the statute from unconstitutionality when authorizing detention for dangerousness, then it must equally apply to detention for flight risk. *Id.* Analogous case law from the immigration context, where the liberty interests are more constrained than in the pretrial context, supports this conclusion. *See Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011) (requiring "clear and convincing evidence" regardless of whether the government seeks detention based on flight or dangerousness because "due process places a heightened burden of proof [where] the individual interests at stake . . . are both particularly important and more substantial than mere loss of money").[44]

[44] This analysis has been adopted by the American Bar Association's Criminal Justice Standards. ABA Standard 10-5.8 explains that the "clear and convincing" standard applies to decisions relating to dangerousness and risk of flight. Courts have long looked to the Standards for guidance when answering constitutional questions about

There is no compelling reason that "the degree of confidence our society thinks [it] should have in the correctness of factual conclusions," *Santosky*, 455 U.S. at 755, should be lower when the question is whether a person poses a risk of flight versus whether the person poses a danger to other people in the community. Nor is there reason that the appropriate evidentiary standard to detain a person without bail should be applied differently when a court issues a de facto order of pretrial detention using money bond. The holdings and reasoning in *Addington*, *Foucha*, *Santosky*, *Salerno*, *Lopez-Valenzuela*, *Kleinbart*, *Humphrey*, and *Caliste* demonstrate that the deprivation of the fundamental right to physical liberty requires a heightened standard of proof whether the government is considering alternatives to mitigate a risk of flight or alternatives to mitigate a risk of danger to the community.[45]

d. Arrestees must be represented by counsel.

Both the Due Process Clause and the Sixth Amendment require representation by counsel at a pretrial detention hearing. The *Mathews* balancing test dictates the need for counsel to protect against the erroneous deprivation of liberty in the pretrial context. The "risk of an erroneous deprivation" of that right is high absent counsel because detention hearings can be complex. These hearings involve specialized knowledge and skill well outside the scope of a lay defendant, especially in the days immediately following an arrest, when a person is in crisis, removed from

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the appropriate balance between individual rights and public safety in the field of criminal justice. *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010); *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984); *United States v. Teague*, 953 F.2d 1525, 1533 n.10 (11th Cir. 1992).

[45] And although the formal rules of evidence need not apply at detention hearings, the findings of "clear and convincing evidence" on which the government relies for the complete incapacitation of a presumptively innocent person must meet minimal standards of reliability. *See, e.g.*, *United States v. LaFontaine*, 210 F.3d 125, 131 (2d Cir. 2000) ("[W]hile the informality of bail hearings serves the demands of speed, the magistrate or district judge must also ensure the reliability of the evidence, by selectively insisting upon the production of the underlying evidence or evidentiary sources where their accuracy is in question."); *United States v. Accetturo*, 783 F.2d 382, 389 (3d Cir. 1986); *United States v. Acevedo-Ramos*, 755 F.2d 203, 207–08 (1st Cir. 1985); *Reem v. Hennessy*, No. 17-cv-06628-CRB, 2018 WL 1258137, at *3 (N.D. Cal. March 12, 2018).

her family and community, and confined to a jail cell. Even the State has an interest in providing a lawyer because the State has an interest in the accuracy of the determination, avoiding needless and costly pretrial incarceration, and allowing continuity of representation throughout the case.

The State's only interest in not providing a lawyer is financial, which is not enough on its own to outweigh the vital individual right and the enormous risk of erroneous deprivation. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 92 n.22 (1972) ("A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right.").

For these reasons, Judge Fallon determined that procedural due process required the provision of counsel in pretrial detention hearings in Orleans Parish:

> The interests of the government are mixed regarding provision of counsel at this stage. It is certainly a financial burden on the state to provide attorneys for the indigent. However, this burden is outweighed not only by the individual's great interest in the accuracy of the outcome of the hearing, but also by the government's interest in that accuracy and the financial burden that may be lifted by releasing those arrestees who do not require pretrial detention. Accordingly, the *Mathews* test demonstrates that due process requires representative counsel at pretrial detention hearings.

Caliste, 329 F. Supp. 3d at 314.

Independently of the requirements of due process, the Sixth Amendment also requires the government to provide counsel at pretrial detention hearings. The Sixth Amendment requires that counsel be appointed in time to ensure adequate representation at all "critical stages," *United States v. Wade*, 388 U.S. 218, 237 (1967), that occur after "criminal prosecution[]" against the defendant has begun, U.S. Const. amend VI. Courts describe the beginning of criminal prosecutions as causing the right to counsel to "attach." *Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 214 (2008) (Alito, J., concurring). In *Rothgery*, the Supreme Court held that the right to counsel "attaches" at the first formal appearance before a judicial officer, regardless of whether a prosecutor consents to—

or even knows about—the charges against the defendant. 554 U.S. at 198. After the right to counsel has attached, the Sixth Amendment requires that counsel be present to assist the defendant at all "critical stages" that follow. *Wade*, 388 U.S. at 237. To determine whether a proceeding is a critical stage, courts ask two questions. First, does the proceeding risk prejudicing the outcome of the defendant's case? *See id.* at 235–37. Second, is the proceeding sufficiently complex and adversarial to require a lawyer to protect the defendant's rights? *See United States v. Ash*, 413 U.S. 300, 310 (1973).

The hearing required by the Due Process Clause before imposing an order of detention is a critical stage. Although "[c]ourts are divided over whether an initial bail-setting is a 'critical stage' in the criminal process requiring counsel," *ODonnell*, 251 F. Supp. 3d at 1141, the question whether a hearing *that results in detention* is a critical stage is distinct. *See also Higazy v. Templeton*, 505 F.3d 161, 172 (2d Cir. 2007) (explaining that a bail hearing is a "critical stage"); *Smith v. Lockhart*, 923 F.2d 1314, 1319 (8th Cir. 1991) (same). As explained above, an unattainable condition of release is equivalent to an order of detention. Because Defendants routinely set unattainable money-bail amounts, this Court need not answer the question whether *any* proceeding at which money bail is set is a critical stage; this Court need only decide that the hearing required by the Due Process Clause, as described above, is a critical stage.[46]

As a matter of law and a matter of fact, the result of a detention hearing is sufficiently likely to prejudice the defendant's criminal case to qualify as a critical stage under *Wade*, 388 U.S. at 237. Pretrial detention works prejudice to a criminal case via two independently sufficient routes. First, pretrial detention hampers the accused's ability to participate in his or her defense and therefore increases the chances of conviction and the likely length of sentence. *See, e.g.*, *Stack v.*

[46] This Court needs to decide this question only if it disagrees with Judge Fallon's conclusion on materially identical facts that counsel is required under the due process clause.

Boyle, 342 U.S. 1, 4 (1951) ("This traditional right to freedom before conviction permits the unhampered preparation of a defense."); *see also Bandy v. United States*, 81 S. Ct. 197, 198 (1960) (Douglas, J., in chambers) ("The wrong done by denying release is not limited to the denial of freedom alone. That denial may have other consequences."). And Chief Judge Rosenthal of the Southern District of Texas found, as a matter of fact, that pretrial detention increases the likelihood that a defendant will be convicted. *ODonnell*, 251 F. Supp. 3d at 1105 (describing "uncontroverted and reliable testimony, based on the County's own data, that the likelihood of a conviction differs dramatically depending on whether a defendant is detained before trial"). That factual finding was affirmed by the Fifth Circuit. *ODonnell*, 892 F.3d at 166.

And pretrial detention, as a matter of law and a matter of fact, works prejudice on a defendant's criminal case by all but forcing him to plead guilty. If an arrestee will spend more time in jail awaiting trial than he is offered as part of a plea bargain, he will almost certainly accept the plea bargain even if he is not guilty. *See, e.g.*, *ODonnell*, 251 F. Supp. 3d at 1107 ("The credible, reliable, and well-supported testimony of the witnesses and the statistical studies in the record overwhelmingly prove that thousands of misdemeanor defendants each year are voluntarily pleading guilty knowing that they are choosing a conviction with fast release over exercising their right to trial at the cost of prolonged detention. This Hobson's choice is, the evidence shows, the predictable effect of imposing secured money bail on indigent misdemeanor defendants."), *aff'd*, 892 F.3d at 166. Because pretrial detention can force even an innocent defendant to plead guilty, the hearing at which that detention may be imposed must be a critical stage. *Cf. Lafler v. Cooper*, 566 U.S. 156, 168 (2012) (holding that, in light of the centrality of plea bargaining to the modern criminal system, defendant is prejudiced for Sixth Amendment purposes when deficient advice of counsel causes him to lose the opportunity to plea bargain).

Similarly, as a matter of fact and a matter of law, a pretrial detention hearing is sufficiently trial-like and adversarial to qualify as a critical stage under *Ash*, 413 U.S. at 310. The procedures required by the Due Process Clause before the government may deprive presumptively innocent arrestees of their liberty is akin to a "full-blown adversary hearing." *Salerno*, 481 U.S. at 750. As described above, an average defendant stands little chance of successfully navigating this hearing without counsel. And counsel, as a matter of law, protects an accused's rights at a pretrial detention hearing. *E.g.*, *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) ("[C]ounsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as . . . bail."). Because Defendants do not currently provide constitutionally compliant pretrial detention hearings, Plaintiffs cannot present evidence on the question of whether counsel is effective, as a matter of fact, at protecting an arrestee's rights at such a hearing. But the characteristics of a pretrial detention hearing are sufficient to establish as a matter of law that the hearing qualifies as a critical stage under *Ash*.[47]

4. The Judicial Defendants issue detention orders without providing the required procedural safeguards.

Defendants provide no notice that ability to pay will be a critical issue at the initial appearance hearing and then make no inquiry into a person's ability to pay before they issue a bond that exceeds that individual's financial means. Furthermore, Defendants provide no notice that consideration of alternative conditions of release is a critical issue at the hearing, and they do

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[47] Empirical studies have also demonstrated the importance of representation in bail hearings. *See, e.g.*, Douglas L. Colbert et al., *Do Attorneys Really Matter?*, 23 Cardozo L. Rev. 1719, 1720, 1773 (2002) (discussing a study comparing case outcomes for represented versus unrepresented arrestees and noting that "legal representation at bail often makes the difference between an accused regaining freedom and remaining in jail prior to trial"); Ernest J. Fazio, Jr. et al., Nat'l Inst. of Justice, U.S. Dep't of Justice, NCJ 97595, *Early Representation by Defense Counsel Field Test: Final Evaluation Report* 208, 211 (1985), http://www.ncjrs.gov/pdffiles1/Digitization/97595NCJRS.pdf (concluding that representation by counsel "had a significant impact on test clients' pretrial release status" in a study of the effect of public defender representation at bail hearings in three counties across the U.S.).

not consider whether alternative conditions of release would achieve the same goal before they issue a de facto detention order for an individual who may have received alternative release conditions had those been considered.

Because they do not inquire into ability to pay,[48] Defendants do not know whether the requirement to pay money bail as a condition of release in fact operates as an order of detention. As a result, Defendants do not make the findings on the record required to explain why a person must be ordered detained prior to trial (i.e. that no condition or combination of alternative conditions could protect against a particular risk of flight or danger to the community).[49] And because they make no findings at all and routinely do not permit evidence or argument on the question, Defendants do not employ any legal standard at all, let alone the heightened evidentiary standard required by federal law, before a person may be detained.[50] Therefore, pretrial detention of the putative Plaintiff class violates procedural due process.

The public defenders present at the initial appearance hearings do not represent arrestees in those hearings.[51] Instead, they are present only for the purpose of accepting appointment for future representation—appointments that Defendants make concurrently with bond setting, instead of allowing arrestees to briefly confer with counsel and be heard via counsel as to conditions of release and ability to pay prior to the Defendants setting bond.[52] The first time an arrestee is able

[48] *See supra* §§ II.A & II.C and materials cited therein.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

to meet with and confer with a public defender may be days or weeks after this initial appearance.[53] As a result, public defenders are not given an opportunity to obtain, let alone present to the judge, evidence related to the arrested individual's ability to afford bail, evidence mitigating any claims of danger to the public or the weight of the evidence presented by the prosecution, evidence addressing whether the individual will likely appear at the next court date, or any other evidence particular to that individual client prior to Defendants' setting of bond or other conditions of release.

5. Courts confronting similar deprivations of rights have issued Temporary Restraining Orders and Permanent Injunctive Relief.

The United States District Court for the Southern District of Texas issued a preliminary injunction forbidding Harris County from detaining people because they could not meet secured financial conditions of release set without any inquiry into their ability to meet them. The court concluded that binding Fifth Circuit precedent required that "once the County has chosen to impose a financial condition of pretrial release, the County may not use that condition to imprison defendants before trial because they lack the means to pay it." *ODonnell*, 251 F. Supp. 3d at 1140 (citing *Rainwater*, 572 F.2d at 1056). The court explained, and answered, the key legal questions applicable in this case:

> Can a jurisdiction impose secured money bail on misdemeanor arrestees who cannot pay it, who would otherwise be released, effectively ordering their pretrial detention? . . . [T]he answers are that, under federal and state law, secured money bail may serve to detain indigent misdemeanor arrestees only in the narrowest of cases, and only when, in those cases, due process safeguards the rights of the indigent accused. Because Harris County does not currently supply those

[53] For some, the wait can be months—with tragic consequences. On February 17, 2016, Tyrin Colbert died in the Baton Rouge jail at the hands of his cellmate. His parents could not afford his bail. As a result, he spent 105 days in jail, was never indicted, and did not see an attorney except during his initial appearance. *Colbert v. City of Baton Rouge/Parish of East Baton Rouge*, No. 17-CV-28-BAJ-EWD, 2018 WL 2224062 (M.D. La. 2018). More recently, detainees brought into the jail have been denied medications critical for certain immunocompromised conditions and for asthma, both outcomes that become far more detrimental during the COVID-19 pandemic. *See, e.g.*, Decl. of Cedric Mario Cage ¶ 3, ECF No. 39-7; Decl. of Lyndell Alford ¶ 5, ECF No. 39-11.

> safeguards or protect those rights, the court will grant the plaintiffs' motion for preliminary injunctive relief.

ODonnell, 251 F. Supp. 3d at 1059. The court concluded that Harris County's ongoing violations of the federal constitution irreparably harmed a class of misdemeanor "arrestees who are detained by Harris County . . . for whom a secured financial condition of release has been set and who cannot pay the amount necessary for release on the secured money bail because of indigence." *ODonnell v. Harris Cty., Texas*, No. CV H-16-1414, 2017 WL 1542457, at *1 (S.D. Tex. Apr. 28, 2017). Balancing the equities, the court issued a preliminary injunction on facts that largely mirror the facts of this case. *ODonnell*, 251 F. Supp. 3d at 1158–59, *aff'd in part* 892 F.3d 147 (5th Cir. 2018) (vacating and remanding for a more narrowly crafted injunction).

Defendants' wealth-based post-arrest detention scheme provides no more procedural protections than Harris County's did. And a parallel class of similarly situated arrestees suffer irreparable harm every day that Defendants' illegal post-arrest detention practices continue. A preliminary injunction should issue.

B. The Named Plaintiffs and other Class Members Will Suffer Irreparable Constitutional Harm If This Court Does Not Issue an Injunction.

Without intervention from the Court, the named Plaintiffs and the class of similarly situated people that they represent will continue to suffer the serious and irreparable harm of being jailed.

Keeping someone in a jail cell in violation of her constitutional rights is an irreparable harm. *See ODonnell*, 251 F. Supp. 3d at 1168 (finding irreparable harm in circumstances materially identical to those in this case); *ODonnell v. Harris Cty.*, No. CV H-16-1414, 2017 WL 1956736, at *1 (S.D. Tex. May 11, 2017) (denying a stay of the injunction pending appeal because "the harm to the plaintiffs if the preliminary injunction is stayed is far greater than any harm to the defendants appealing the order if a stay is denied"); *see also United States v. Bogle*, 855 F.2d 707, 710–11 (11th Cir. 1988) (holding that the "unnecessary deprivation of liberty clearly constitutes

irreparable harm"); *Wanatee v. Ault*, 120 F. Supp. 2d 784, 789 (N.D. Iowa 2000) ("[U]nconstitutional incarceration generally constitutes irreparable harm to the person in such custody."); *SEC v. Bankers Alliance Corp.*, No. 95-0428, 1995 WL 317586, *3 (D.D.C. 1995) ("As for the question of irreparable harm in the absence of a stay, clearly Mr. Lee will be harmed by being incarcerated."); *Lake v. Speziale*, 580 F. Supp. 1318, 1335 (D. Conn. 1984) (granting preliminary injunction requiring court to inform child support debtors of their right to counsel because unlawful incarceration would be irreparable harm); *Cobb v. Green*, 574 F. Supp. 256, 262 (W.D. Mich. 1983) ("There is no adequate remedy at law for a deprivation of one's physical liberty. Thus the Court finds the harm asserted by plaintiff is substantial and irreparable."). Even a few days in jail can have devastating consequences in a person's life, such as losing a job and being unable to care for children. As discussed in the following section, Plaintiffs' unlawful detention also exposes them and staff at the jail to dire, increased risk of COVID-19 infection.

The Plaintiffs and other Class members are languishing in jail because they do not have enough money to buy their release, as required by the Defendants' policies. They ask this Court to enjoin the Defendants, pending a final resolution of this case on the merits, from keeping them and others similarly situated in jail solely because they cannot afford to pay cash up front to secure their release.

C. An Injunction Will Serve the Public Interest, Prevent Unnecessary Detention and the Spread of COVID-19, and Will Not Harm Defendants.

The vindication of constitutional rights is always in the public interest. *See, e.g.*, *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (summarily holding that injunction preventing implementation of unconstitutional statute would serve public interest); *see also Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012); *ODonnell*, 251 F. Supp. 3d at 1159 (finding a preliminary injunction to be in the public interest in materially

identical circumstances); *Giovani Carandola v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("Again, we agree with the district court that upholding constitutional rights surely serves the public interest."); *G & V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

An injunction would not harm the Defendants. Defendants already offer release to almost every arrestee if she can post a secured financial condition of release—a condition imposed without any inquiry into her ability to pay or into non-financial alternative conditions of release. Where necessary, Defendants have the opportunity to seek pretrial detention after following proper procedures, including conducting a constitutionally valid hearing upon which a pretrial detention order might be based.

Continuing to keep impoverished arrestees in jail cells because of their poverty has significant negative consequences for the public interest. It devastates peoples' lives, stability, incomes, and families to be removed from their homes and communities and confined in jail cells. It is also harmful to public safety. Since *Rainwater*, studies have shown that keeping indigent people in jail—even for a few days after an arrest—has severe consequences. The National Institute of Corrections at the Department of Justice (DOJ) has led the way in highlighting both the unequal nature of generic money bail schedules and their negative impacts on community safety.[54] First, jailing the poor disrupts employment and child custody arrangements. Second,

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[54] *See* Timothy R. Schnacke, U.S. Dep't of Justice, Nat'l Institute of Corrs., *Fundamentals of Bail* 28–29 (2014), *available at* https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf; *see also, e.g.*, Arnold Foundation, *The Hidden Costs of Pretrial Detention* (2013) at 3, *available at* http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_hidden-costs_FNL.pdf (studying 153,407 defendants and finding that "when held 2-3 days, low risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours"); Arnold Foundation, *Pretrial Criminal Justice Research Summary* (2013) at 5, *available at*: http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf (finding that "low-risk defendants held 2–3 days were 17 percent more likely to commit another crime within two years" and that those detained "4–7 days yielded a 35 percent increase in re-offense

even just 72 hours in jail after an arrest leads to worse outcomes for all involved by increasing poverty, hurting an arrestee's family, and making it more likely that an arrestee will commit crimes in the future.[55] Finally, it is very expensive to taxpayers and the government to house people in jail.[56] A 2015 report estimated that the average daily cost to detain a single prisoner in Baton Rouge's approximately 1,500 bed facility was $19.18—a daily cost of over $28,000.[57]

1. COVID-19 presents a persistent threat to East Baton Rouge Parish.

We are living in the midst of a pandemic—an extreme, unprecedented, world-wide health emergency caused by the rapid spread of the deadly coronavirus, COVID-19. COVID-19 is highly

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rates.").

[55] Schnacke, at 15–16. Summarizing the current state of research, the DOJ report, *id.* at 15, concluded:

> [R]esearchers found that low- and moderate-risk defendants held only 2 to 3 days were more likely to commit crimes and fail to appear for court before trial than similar defendants held 24 hours or less. As the time in jail increased, the researchers found, the likelihood of defendant misbehavior also increased. The study also found similar correlations between pretrial detention and long-term recidivism, especially for lower risk defendants. In a field of paradoxes, the idea that a judge setting a condition of bail intending to protect public safety might be unwittingly increasing the danger to the public—both short and long-term—is cause for radically rethinking the way we administer bail.

see also Int'l Ass'n of Chiefs of Police, Resolution (October 2014), 121st Annual Congress at 15–16, *available at* http://www.theiacp.org/Portals/0/documents/pdfs/2014Resolutions.pdf ("[D]efendants rated low risk and detained pretrial for longer than one day before their pretrial release are more likely to commit a new crime once they are released, demonstrating that length of time until pretrial release has a direct impact on public safety."). For these reasons, as well as the issues of fundamental fairness that render pretrial poverty-based custody unconstitutional, opposition to the routine use of secured money bail has been incorporated into the policy positions of the major American law enforcement stakeholders. *See, e.g.*, National Sheriff's Association, Resolution 2012-6 ("[A] justice system relying heavily on financial conditions of release at the pretrial stage is inconsistent with a fair and efficient justice system.").

[56] *See* Vera Institute of Justice, *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration* (May 2015), *available at* http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/05/The-Price-of-Jails-report.pdf (explaining that even the reported costs of approximately $50 to $570 per inmate per day in custody at local jails around the country was a significant underestimate of the cost to local jurisdictions of incarceration in local jails).

[57] Loop Capital Financial Consulting Services, *East Baton Rouge Parish: Justice Center Study – Final Report* at 24 (June 30, 2016).

contagious, particularly in confined congregate living spaces.[58] As of December 14, 2020, 6,845 Louisianans have died from COVID-19 complications; of that number, 544 were East Baton Rouge Parish residents.[59] There have been 20,894 confirmed cases in East Baton Rouge Parish.[60] Over the last seven days, there has been an average of 181 new cases, daily, in East Baton Rouge Parish.[61] Nationally, cases have risen to over 200,000 new cases a day during most days in December—some of the highest numbers at any point in the pandemic—and infectious disease experts predict even more cases this winter.[62] Some experts project an additional 280,000 deaths by March 31, 2021.[63]

2. Jails Are Not Equipped to Address COVID-19, Presenting a Serious Risk to the Jail and General Populations.

During pandemics, jail facilities become "ticking time bombs" as "[m]any people crowded together, often suffering from diseases that weaken their immune systems, form a potential breeding ground and reservoir for diseases."[64] As Dr. Jaimie Meyer, an expert in public health in

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[58] *See, e.g.,* Decl. of Dr. Susan Hassig (May 25, 2020) ¶ 9, ECF No. 4-28; Decl. of Dr. Susan Hassig (Aug. 17, 2020) ¶ 5, ECF No. 98-3; Decl. of Dr. Fred Rottnek (May 26, 2020) ¶¶ 13, 31-32, ECF No. 4-10; all filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020).

[59] Louisiana Dep't of Health Coronavirus Dashboard, *available at* https://ldh.la.gov/Coronavirus/ (last visited Dec. 14, 2020). These numbers reflect the total of confirmed and probable COVID-19 deaths, as determined by the LDH.

[60] *Id.*

[61] *Louisiana Coronavirus Map and Case Count*, The New York Times, *available at* https://www.nytimes.com/interactive/2020/us/louisiana-coronavirus-cases.html (last visited Dec. 14, 2020).

[62] The COVID Tracking Project at The Atlantic, US Daily Cases, https://covidtracking.com/data/charts/us-daily-positive (last visited Dec. 10, 2020).

[63] Univ. of Wash. Inst. for Health Metrics & Eval., COVID-19 Projections, *available at* https://covid19.healthdata.org/united-states-of-america?view=total-deaths&tab=trend (last visited Dec. 8, 2020).

[64] *See* St. Louis Univ., "Ticking Time Bomb": Prisons Unprepared For Flu Pandemic, ScienceDaily (2006), *available at* https://www.sciencedaily.com/releases/2006/09/060915012301.htm.

jails and prisons, has explained, "[T]he risk posed by COVID-19 in jails and prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected."[65] This is due to a number of factors: the close proximity of people detained; the impossibility of social distancing; the lack of medical and hygiene supplies ranging from hand sanitizer to protective equipment; ventilation systems that encourage the spread of airborne diseases; difficulties quarantining individuals who become ill; increased susceptibility of the population in jails and prisons; the fact that jails and prisons normally have to rely heavily on outside hospitals that will be unavailable during a pandemic; and loss of both medical and correctional staff to illness.[66]

Medical experts specializing in correctional health continue to urgently recommend a dramatic reduction in the population of detention centers, jails, and prisons and have done so at least since the beginning of the pandemic.[67] Only such an immediate and drastic reduction will

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[65] *See* Decl. of Dr. Jaimie Meyer (Mar. 15, 2020) at ¶ 7, ECF No. 4-8, filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020); *see also* Thomas A. LeVeist, et al., *An open letter regarding COVID-19 and jails in Orleans Parish, Louisiana* (March 25, 2020), *available at* https://sph.tulane.edu/open-letter-covid19-jail.

[66] "The pathway for transmission of pandemic influenza between jails and the community is a two-way street. Jails process millions of bookings per year. Infected individuals coming from the community may be housed with healthy inmates and will come into contact with correctional officers, which can spread infection throughout a facility. On release from jail, infected inmates can also spread infection into the community where they reside." Laura M. Maruschak et al., *Pandemic Influenza & Jail Facilities & Populations*, Am. J. of Pub. Health (Oct. 2009); *see also* Dr. Anne Spaulding, Coronavirus & the Correctional Facility: for Correctional Staff Leadership, Mar. 9, 2020, https://www.ncchc.org/filebin/news/COVID_for_CF_Administrators_3.9.2020.pdf.

[67] *See, e.g.*, Ray Levy-Uyeda, *Prisons are a public health crisis, American Public Health Association says*, Mic.com (Oct. 26, 2020), *available at* https://www.mic.com/p/prisons-are-a-public-health-crisis-the-american-public-health-association-says-40336505 (American Public Health Association releases policy proposals recognizing that "prisons and public health are mutually exclusive" and calling for the abolition of incarceration to protect public health during pandemics and beyond); Kelly Davis, *Coronavirus in Jails and Prisons*, The Appeal (Oct. 17, 2020), *available at* https://theappeal.org/coronavirus-in-jails-and-prisons-67/; *see also* Josiah Rich, Scott Allen, & Mavis Nimoh, *We must release prisoners to lessen the spread of coronavirus*, Wash. Post (Mar. 17, 2020), *available at* https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/ ("Authorities should release those who do not pose an immediate danger to public safety . . . . *Those being held in jails simply due to their inability to afford bail, or for minor infractions or violations, can generally be released promptly by the judiciary or even the local sheriff.*" (emphasis added)); *JHU Faculty Express Urgent Concern about COVID-19 Spread in Prison*, Johns Hopkins Univ. (Mar. 25, 2020), *available at*

maximize the opportunity for appropriate distancing, for proper sanitization, and personal hygiene and for appropriate care for those who are or may be infected with COVID-19. The East Baton Rouge Parish Prison is currently facing a lawsuit for its handling of the COVID-19 pandemic, and two medical experts have opined in that case that this particular jail cannot adequately protect individuals—especially medically vulnerable individuals—from infection and possibly complications from COVID-19.[68] Both experts further opined that it was imperative for the Jail to release people and reduce the population to save lives, both within the jail and in the surrounding community.[69] The consensus among public health experts since the beginning of this pandemic and based on past pandemics is that jails are uniquely situated to facilitate the rapid spread of COVID-19 and that immediate action, in the form of reducing detainee populations, is needed to combat that threat and protect the public as a whole. Failure to do so in other communities has verified these experts' predictions and resulted in serious viral spread within the community, in some locations amounting to over 50% of viral cases.[70]

3. Detention in EBRPP Presents a Serious Risk of COVID-19 Infection to Putative Class Members and the Public.

These concerns and recommendations apply with full force to the East Baton Rouge Parish Prison. People detained in EBRPP—and those who must interact with them—are subject to all of

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https://bioethics.jhu.edu/news-events/news/jhu-faculty-express-urgent-concern-about-covid-19-spread-in-prison/.

[68] *See* Decl. of Dr. Fred Rottnek (Aug. 17, 2020) ¶¶ 14, 34, 40, ECF No. 98-14; Decl. of Dr. Susan Hassig (Aug. 17, 2020) ¶ 9, ECF No. 98-3; all filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020).

[69] *See* Decl. of Dr. Fred Rottnek (Aug. 17, 2020) ¶ 10, ECF No. 98-14; Decl. of Dr. Susan Hassig (May 25, 2020) ¶¶ 10, 12, ECF No. 4-28; all filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020).

[70] Dale Chappell, *More than Half of Chicago's COVID-19 Cases Linked to Cook County Jail*, Prison Legal News (Oct. 1, 2020), *available at* https://www.prisonlegalnews.org/news/2020/oct/1/more-half-chicagos-covid-19-cases-linked-cook-county-jail/.

the potentially problematic conditions outlined in Section III.C(2) above and cannot fully employ the CDC-recommended measures for mitigating the spread of COVID-19.[71] The combination of lack of adequate sanitation, close quarters, and limited medical capacity[72] creates an intolerably dangerous situation and puts detainees, jail staff, and the communities to which they belong at greater risk of illness and death. The constant cycling of people in and out of the jail makes containment—both within the jail and in the broader community—impossible.[73] This is particularly critical right now, as COVID-19 infection rates continue to rise quicker than any other time during the pandemic.[74] Furthermore, if more detainees incarcerated in EBRPP become infected with COVID-19 and the virus were to spread rapidly within the jail, many prisoners and detainees would require urgent care, overwhelming the capacity of the Sheriff's healthcare provider, CorrectHealth, or Baton Rouge-area hospitals to provide such care, exacerbating the death toll and the risks to all involved.

The relief Plaintiffs request in their preliminary injunction is eminently in the public

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[71] *Cf.* Ctrs. for Disease Control & Prevention, How to Protect Yourself & Others, *available at* https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited Dec. 10, 2020). Experts in a case challenging the jail's response to COVID-19 have concluded that it is impossible for detainees to follow the CDC's guidance in the jail. *See* Decl. of Dr. Fred Rottnek (June 8, 2020) ¶ 12, ECF No. 49-1 to 49-18; Decl. of Dr. Susan Hassig (Aug 17, 2020) ¶ 9, ECF No. 98-3; all filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020).

[72] *See, e.g.*, Decl. of Jocquenee Bernard ¶¶ 11-17, ECF No. 98-11; Decl. of Calvin Kemp ¶¶ 16-18, 22-28, 32-38, ECF No. 98-15; Suppl. Decl. of Derick Mancuso ¶¶ 4-6, 12-18, 21, ECF No. 98-8; Decl. of Clifton Belton ¶¶ 3, 6-8, 10-12, ECF No. 21-12; Decl. of Nicholas Kalivoda ¶¶ 5-6, 8-14, 16-20, 23-25, ECF No. 107-6; Decl. of Jimmie Knoten ¶ 6-7, 10, 16, 19, 21, ECF No. 98-16; Decl. of Billy Pettice ¶¶ 12, 17-19, 24-37, 40-41, ECF No. 98-13; Decl. of Lyndell Alford ¶¶ 5, 7, 9, 11, 14-15, 19-21, 23, 28-29, ECF No. 39-11; Decl. of Moses Evans, Jr. ¶¶ 5-8, 10-12, 15, 21-29, ECF No. 39-9; Decl. of Elio Erazo ¶¶ 8-9, 14-17, 26, 29-32, 37, 39-40, 44, 47-49, 51-55, ECF No. 107-12; Decl. of Kenny Durousseau ¶¶ 5-9, 12-16, 19-21, 23, 25-26, 28-33, ECF No. 107-4; Decl. of Eddie Jones ¶¶ 7-8, 11-15, 17-24, ECF No. 107-5; all filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020).

[73] *See* Decl. of Dr. Fred Rottnek (May 26, 2020) ¶¶ 11-12, 15, ECF No. 98-14; Decl. of Dr. Susan Hassig (Aug 17, 2020) ¶ 6, ECF No. 98-3; both filed in *Belton v. Gautreaux*, No. 3:20-cv-00278-BAJ-SDJ (M.D. La. filed May 4, 2020).

[74] *See supra* § III.C(1)–(2).

interest. An order ensuring that any detention is truly necessary to advance the State's compelling interests benefits not only the health and well-being of all those confined in the Jail but also the larger community. The likely result of this preliminary injunction, moreover, will be that some currently detained will be released and others arrested in the future will never be detained at all—reducing crowding at the jail and the potential for further spread of the virus in a congregate setting.

D. The Court Should Use Its Discretion Not to Require the Posting of Security.

Federal Rule of Civil Procedure 65(c) requires a party moving for a preliminary injunction to post security to protect the other party from any financial harm likely to be caused by a temporary injunction if the injunction is later overturned. Rule 65(c), however, "vest[s] broad discretion in the district court to determine the appropriate amount of an injunction bond," *DSE v. United States*, 169 F.3d 21, 33 (D.C. Cir. 1999), including the discretion to require no bond at all. *See City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981); *Steward v. West*, 449 F.2d 324, 325 (5th Cir. 1971) (finding that no injunction bond need be posted when "it is very unlikely that the defendant will suffer any harm"). The Fifth Circuit has also recognized an exception to the security requirement for movants engaged in public-interest litigation. *City of Atlanta*, 636 F.2d at 1094 (affirming waiver of bond requirement where preliminary injunction sought to prevent transit fare increase on behalf of "local government entities, a union for domestic workers, a welfare rights organization, and a pauper representing herself and others similarly situated. These parties were seeking to protect citizens . . . from perceived adverse economic and social consequences."). The Court should use its considerable discretion not to require security, or to require only nominal security.

First, the likelihood of Defendants suffering any harm from an improperly issued injunction requiring Defendants to comply with federal law is minimal. *See, e.g.*, *Council on American-Islamic Relations v. Gaubatz*, 667 F. Supp. 2d 67, 81 (D.D.C. 2009) (requiring no bond where the

defendant would not be substantially injured by the issuance of an injunction); 11A Charles A. Wright, Arthur R. Miller, et al., *Federal Practice and Procedure* § 2954 (2d ed. 2017) ("[T]he court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant."). The limited injunction sought in this Motion would not eliminate Defendants' ability to release the named Plaintiffs or other future arrestees on a signature bond. The Defendants may issue the same bond to the named Plaintiffs and other arrestees and charge them the same amount of money should they fail to appear in court. Thus, very little financial harm would result from this preliminary injunction, and that potential harm would be more than offset by the benefit to the public.

Second, the named Plaintiffs and other Class members are all living in poverty, and the very reason for bringing this case is their lack of financial resources. *See, e.g.*, *Snow v. Lambert*, No. 15-567-SDD-RLB, 2015 WL 5071981 (M.D. La. Aug. 27, 2015) (waiving bond requirement "in light of Ms. Snow's indigency, the ability of Sheriff Wiley to secure Snow's future appearance through alternative measures, and the Court's determination that no costs or damages will be incurred by Sheriff Wiley"); Preliminary Injunction Order at 3, *Mitchell v. City of Montgomery*, No. 14-cv-186-MEF, ECF No. 18 (M.D. Ala. May 1, 2014) (issuing preliminary injunction without requiring a bond for indigent plaintiffs because they were likely to succeed on the merits and because the City was unlikely to suffer significant financial harm); *Johnson v. Bd. of Police Comm'rs*, 351 F. Supp. 2d 929, 952 (E.D. Mo. 2004) (requiring no bond for homeless plaintiffs); *Swanson v. Univ. of Haw. Prof. Assembly*, 269 F. Supp. 2d 1252, 1261 (D. Haw. 2003) (waiving the security requirement for public employees based on ability to pay and also because the injunction sought enforcement of constitutional rights); *Wayne Chem. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977) (requiring no bond for indigent person); *Bass v.*

Richardson, 338 F. Supp. 478, 490 (S.D.N.Y. 1971) ("It is clear to us that indigents, suing individually or as class plaintiffs, ordinarily should not be required to post a bond under Rule 65(c)."); *see also* 11A Wright & Miller *supra* § 2954 (courts can waive the bond requirement in cases involving poor plaintiffs).

Finally, the Plaintiffs are likely to succeed on the merits. The outcome of any future trial, if necessary, is likely to reaffirm the basic principles that have been repeatedly reaffirmed by the Supreme Court and federal and state courts across the country.[75]

CONCLUSION

This case is about the Defendants' policy and practice of unconstitutionally jailing the poor because of their inability to pay an amount of money that may seem small to some but is impossibly large for them. For the reasons stated above, the Court should grant the Plaintiffs' motion for emergency relief and enjoin the Defendants from keeping the named Plaintiffs and those similarly situated in jail without offering release on unsecured bond or recognizance. Plaintiffs request a temporary restraining order directing Defendants Gautreaux and Grimes to immediately release

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[75] This Court need not rule on the Plaintiffs' class certification motion or formally certify a class in order to issue preliminary injunctive relief. *See Newberg on Class Actions* § 24:83 (4th ed. 2002) ("The absence of formal certification is no barrier to classwide preliminary injunctive relief."); *Moore's Federal Practice* § 23.50, at 23-396, 23-397 (2d ed. 1990) ("Prior to the Court's determination whether plaintiffs can maintain a class action, the Court should treat the action as a class suit."); *see also Lee v. Orr*, No. 13-cv-8719, 2013 WL 6490577 at *2 (N.D. Ill. Dec. 10, 2013) ("The court may conditionally certify the class or otherwise order a broad preliminary injunction, without a formal class ruling, under its general equity powers. The lack of formal class certification does not create an obstacle to classwide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons."); *Ill. League of Advocates for the Developmentally Disabled v. Ill. Dep't of Human Servs*., No. 13 C 1300, 2013 WL 3287145 at *4 (N.D. Ill. June 28, 2013) ("At this early stage in the proceedings, the class allegations in the Second Amended Complaint are sufficient to establish Plaintiffs' standing to seek immediate injunctive relief on behalf of the proposed class. At a later stage, we may revisit whether that classwide representation is inappropriate, but until that time, we will preserve the status quo (within the limits set forth in the TRO) with respect to all potential class members."); *N.Y. State Nat. Org. For Women v. Terry*, 697 F. Supp. 1324, 1336 (S.D.N.Y.1988) (holding that "the Court acted in the only reasonable manner it could under the circumstances, ruling on the continuation of [the] temporary restraining order and leaving the question of class certification for another day."); *Leisner v. New York Tel. Co*., 358 F. Supp. 359, 371 (S.D.N.Y.1973) ("[R]elief as to the class is appropriate at this time even though when the preliminary injunction motion was heard, the class action had not yet been certified.").

them from jail and a preliminary injunction requiring Gautreaux and Grimes within two weeks to release putative class members whose conditions of release were determined at hearings that did not comply with the requirements of the Constitution.

Respectfully submitted,

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LOCAL RULE 65 CERTIFICATE

I certify that, prior to filing, copies of this motion and accompanying memorandum along with a copy of the complaint, motion for class certification, and supporting memorandum were e-mailed and faxed to counsel for Defendants Gautreaux and Grimes, Ms. Catherine St. Pierre of Erlingson Banks PLLC, by undersigned counsel. Undersigned counsel faxed and emailed said documents to email addresses and fax numbers publicly listed on the 19th JDC's website for Defendant Howze and Chambers of Defendants Jackson, Johnson, Smith, and Robinson as follows:

Judge Bonnie Jackson: wsimms@brla.gov (judicial assistant), 225-389-5341
Judge Ronald Johnson: vrobillard@brla.gov (judicial assistant), 225-389-8546
Judge Tarvald Anthony Smith: mrwilliams@brla.gov (judicial assistant), 225-389-7617
Commissioner Nicole Robinson: bsaik@brla.gov (judicial assistant); 225-389-8780
Frank Howze: bailbonds1@brla.gov; 225-389-4763

I have also emailed and faxed a copy of this motion and the above-referenced pleadings to James "Gary" Evans, Assistant Special Litigation Counsel, Office of Attorney General Jeff Landry, who I know to have represented Louisiana judges in cases brining similar claims. Physical copies will also be postmarked to the Defendants on this date via U.S.P.S.

/s/ *Eric A. Foley*
Eric A. Foley