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

Just City, Plaintiff, v. Floyd Bonner Jr., Shelby County Sheriff, *et al.*, Defendants.	Case No. 24-cv-XXXX

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND EXPEDITED DECLARATORY JUDGMENT

Tennessee's new bail law, HB 1719, provides that "ability to pay shall not be considered" by judges who are setting bail. This law is unprecedented and unconstitutional. The Court should declare the law unconstitutional and enjoin its enforcement.

As a matter of fundamental fairness, judges cannot set bail without considering the arrestee's ability to pay it: to do otherwise risks arbitrary detention of people who would otherwise return to court and live peacefully in their communities. Courts in Tennessee and around the country have uniformly rejected bail setting procedures that do not consider ability to pay because such procedures deny due process and impose discriminatory wealth-based detention. *See, e.g.*, *McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-CV-00033, 2019 WL 633012, at *9–*13 (M.D. Tenn. Feb. 14, 2019) (reviewing caselaw), *aff'd*, 945 F.3d 991 (6th Cir. 2019). Consistent with these constitutional principles, statutes in forty-one states explicitly *require* judges to consider an arrestee's ability to pay.

The purpose of HB 1719 was to target reforms to Shelby County's bail system that were the subject of a negotiated agreement with Plaintiff Just City. Just City is a mission-driven nonprofit organization that operates a charitable bail fund to mitigate wealth-based discrimination in Shelby County criminal proceedings. To address decades of unconstitutional bail practices, and to avoid litigation with Just City, Shelby County officials entered into an agreement to reform its bail practices. Among other reforms, the agreement requires Shelby County Judicial Commissioners to use an ability-to-pay calculator to evaluate arrestees' financial information when setting bail. Judicial Commissioners must use that information to set affordable bail if they intend to release an arrestee, or to set unaffordable bail if they intend to detain an arrestee. Following the enactment of HB 1719, Shelby County officials abandoned their constitutional obligations and the terms of the agreement. The Shelby County Sheriff is now enforcing unconstitutional bail orders issued under HB 1719 against arrestees who cannot afford their bail.

As in *McNeil*, 2019 WL 633012, at *9–*13, Just City seeks a preliminary injunction that prohibits the Shelby County Sheriff from enforcing bail orders unless the judicial commissioners considered ability to pay when setting bail. Just City is likely to succeed on its claims that HB 1719 is unconstitutional because the statute violates settled principles of due process. In addition, an injunction would prevent Just City and the arrestees it serves from suffering irreparable harm through unconstitutional bail orders, the balance of the equities favors Plaintiff, and an injunction would advance the public interest in protecting important constitutional rights.

In addition to seeking a preliminary injunction against the Sheriff, Just City also seeks an expedited declaratory judgment against all parties under Rule 57 of the Federal Rules of Civil Procedure.

Each day HB 1719 is in effect results in unconstitutional detention. The Court should grant the requested preliminary and expedited relief.

STATEMENT OF FACTS

HB 1719 targeted Shelby County's 2022 bail reform agreement (the "Agreement"). Agreement, Ex. 4. Prior to the Agreement, judges[1] in Shelby County had a well-documented history of failing to consider ability to pay when setting bail.[2] A court-appointed monitor overseeing jail conditions found that this practice resulted in widespread detention of people who "simply cannot afford even a minimal bail," even if their detention was "not necessary to ensure future court appearances or to protect public safety." Shelby County Jail Monitor Report at 3, 30, Ex. 2. This practice violated both the Constitution and Tennessee law, which requires judges to "impose the least restrictive conditions of release that will reasonably ensure the appearance of the person as required and the safety of the community." Tenn. Code Ann. § 40-11-115(a)(2). Should the magistrate find other conditions insufficient, the magistrate must order bail in the lowest amount that will suffice. Tenn. Code Ann. § 40-11-118(a)(2). To determine this amount, the magistrate must consider factors including the arrestee's "financial condition." § 40-11-118(b)(2).

To address the systematic failure to consider ability to pay, along with other constitutional deficiencies in Shelby County's pretrial detention practices, Shelby County officials negotiated the Agreement with Plaintiff Just City and other local advocates to protect the rights of Shelby County arrestees. Plaintiff Just City is a nonprofit organization that operates

[1] This motion uses the term "judge" to refer to any judicial officer who sets bail, including the Shelby County Judicial Commissioners.

[2] This motion uses the term "bail" to refer to secured bail, which requires a payment in exchange for release. This is in contrast to unsecured bail or unsecured bond, which does not require a payment before release, but obligates the arrestee to pay the bail amount if they fail to appear as required.

a charitable bail fund to advance its mission of fighting discrimination based on race, ethnicity, and income in Shelby County criminal proceedings. *See generally* Spickler Decl. ¶¶ 3–7, Ex. 1.

Consideration of ability to pay was central to the Agreement between Just City and Shelby County. Specifically, the Agreement requires that pretrial services officers interview arrestees about their finances to complete a written evaluation of the arrestee's ability to pay bail. Agreement ¶ 13(a). Judicial Commissioners must then use that ability-to-pay assessment when setting bail. Agreement ¶¶ 13(a), 13(c). Consistent with Tennessee law, the Judicial Commissioner may set a bail amount only if other conditions will not reasonably ensure the safety of the community and the appearance of the arrestee. *Id.* ¶ 13(c) The bail amount must be affordable, and thus allow for release, if affordable bail would reasonably ensure the safety of the community and the appearance of the arrestee. *Id.* The bail amount may be unaffordable, and thus detain the arrestee, only if no other combination of release conditions would reasonably ensure the safety of the community and the appearance of the arrestee. *Id*.

The General Sessions Judges implemented these changes through an administrative Standing Bail Order. Standing Bail Order, Ex. 5. As contemplated by the Agreement, the advocates and Shelby County stakeholders identified an ability-to-pay calculator. They also drafted bail forms that required judges to input the amount that an arrestee was able to pay, consider that amount before setting bail, and state whether they intended to release the individual on affordable bail or detain them on unaffordable bail. Original Bail Form at 2–4, Ex. 7. The General Sessions Judges officially adopted the bail forms and agreed that Pretrial Services would use the ability-to-pay calculator identified by the parties. Spickler Decl. ¶¶ 14–16. These new procedures were implemented beginning in early 2023 and remained in effect until HB 1719 was passed. *Id.* ¶ 16.

Soon after Shelby County began implementing the Agreement, Tennessee legislators introduced HB 1719 seeking to roll back these reforms. Spickler ¶¶ 17–18. HB 1719 modified Section 40-11-118(b)(2) to maintain the requirement that the judge consider the arrestee's "financial condition," but add: "provided, that the defendant's ability to pay shall not be considered." HB 1719 did not define "financial condition" or "ability to pay," and did not explain how a judge was to consider one but not the other. Despite the lack of coherence, HB 1719 was enacted as 2024 Tenn. Pub. Acts Ch. 869 and went into effect on May 1, 2024.

Days before HB 1719 went into effect, the General Sessions Judges convened an administrative meeting to make decisions about the law's implementation. Spickler Decl. ¶ 22. The General Sessions Judges' administrative directives implementing HB 1719 are binding on the Judicial Commissioners under Tennessee law. *See* Tenn. Code Ann. § 40-1-111(a)(1)(A)(iv) (requiring Judicial Commissioners to follow bail guidelines from the Presiding General Sessions Judge).

Shortly after the meeting, pretrial services stopped administering the ability-to-pay calculator. Spickler Decl. ¶ 24. The Judicial Commissioners started using new bail forms, which the County Attorney's Office had drafted at the General Sessions Judges' direction, that did not reference ability to pay bail. Spickler Decl. ¶¶ 25–26; Email Regarding Bail Form Revisions, Ex. 8. *Compare* Original Bail Form, Ex. 7 (including a section entitled "Release on Affordable Bail" which provides, in part, for the entry of the maximum affordable bail amount as calculated by the Vera Institute Bail Calculator) *with* Revised Bail Form, Ex. 9 (removing that section). The Judicial Commissioners stopped considering ability to pay when setting bail. Spickler Decl. ¶ 23. The Sheriff began enforcing the resulting unconstitutional bail orders to detain arrestees who are unable to pay for their release. *Id.* This process, which persists today, results in widespread unconstitutional wealth-based detention.

ARGUMENT

HB 1719 is unprecedented and unconstitutional. The Court should enter a preliminary injunction precluding the Sheriff from enforcing unconstitutional bail orders issued pursuant to HB 1719 as in *McNeil v. Cmty. Prob. Servs., LLC*, 2019 WL 633012 (M.D. Tenn. Feb. 14, 2019), *aff'd*, 945 F.3d 991 (6th Cir. 2019). The Court should also grant an expedited declaratory judgment against all parties. *See* Fed. R. Civ. P. 57.

Below, Plaintiff describes why HB 1719 violates due process (Section I), and why this action warrants expedited relief (Section II).

I. HB 1719 Mandates a Fundamentally Unfair Pretrial Detention Procedure in Violation of Due Process

Before conditioning physical liberty on a payment, "'fundamental fairness' requires a court to inquire into whether a criminal defendant is able to pay." *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 608 (6th Cir. 2007) (quoting *Bearden v. Georgia*, 461 U.S. 660, 673 (1983)). HB 1719 is fundamentally unfair because it prohibits judges who set bail from considering an arrestee's ability to pay.

Due process governs "the fairness of relations between the criminal defendant and the State," and prohibits criminal proceedings that are "fundamentally unfair or arbitrary." *Bearden*, 461 U.S. at 665–66. Because the ability to pay "bears no rational relationship to a defendant's guilt or innocence," *Griffin v. Illinois*, 351 U.S. 12, 17–18 (1956), due process entails a "right not to lose [one's] liberty due to indigency." *Alkire v. Irving*, 330 F.3d 802, 816 (6th Cir. 2003). To prevent violation of this right, courts must be "sensitive to the treatment of indigents in our criminal justice system" with respect to both "procedural and substantive fairness." *Bearden*, 461 U.S. at 664, 666 n.7.

A. HB 1719 Violates Procedural Due Process

Due process requires a "meaningful" opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). HB 1719 prevents arrestees from receiving a meaningful opportunity to be heard by prohibiting judges from considering their ability to pay.

The Sixth Circuit determines the procedural safeguards required for deprivation of a liberty by balancing the *Mathews* factors: "the private individual's interests," "the value of the suggested procedural requirements," "the risk of erroneous deprivation of the individual's rights that is inherent in current procedures," and "the government's interests, including the fiscal and administrative burdens at stake." *United States v. Brandon*, 158 F.3d 947, 953 (6th Cir. 1998) (citing *Mathews*, 424 U.S. at 335) (imposing stronger procedural protections for forcibly medicating pretrial detainee). Here, all four factors weigh heavily against HB 1719.

First, the private interest at stake is physical liberty, which "always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (quoting *Greenholtz v. Nebraksa Penal Inmates*, 442 U.S. 1, 18 (1979)). Specifically at issue in bail determinations are the right against wealth-based detention and the right to pretrial liberty, both of which are "fundamental" liberty interests. *Fowler v. Benson*, 924 F.3d 247, 260–61 & n.7 (6th Cir. 2019) (wealth-based detention); *Johnson v. City of Cincinnati*, 310 F.3d 484, 503 (6th Cir. 2002) (citing *United States v. Salerno*, 481 U.S. 739, 750 (1987)) (pretrial liberty). In addition, bail hearings implicate the right against excessive bail under the Eighth Amendment, as well as the fundamental right to bail protected by the Tennessee Constitution. TENN. CONST. art. I, § 15. (providing that, other than people charged with capital offenses, that "all prisoners shall be bailable by sufficient sureties").

Second, the value of considering ability to pay, and the risks of not doing so, are enormous. The value of considering ability to pay is plain: judges can ensure that the impact of

their bail orders matches their intent by setting affordable amounts for people they intend to release and, where permissible, unaffordable amounts for people they intend to detain. Prohibiting judges from considering ability to pay poses significant risks for most arrestees. The vast majority of people booked into Shelby County Jail cannot afford minimal bail amounts. For these arrestees, setting even a "low"[3] bail amount effectively orders pretrial detention. Such orders are highly likely to be erroneous because they result in wealth-based detention without any inquiry into ability to pay. *Bearden*, 461 U.S. at 672 (holding the judge must "inquire into" ability to pay before imposing wealth-based detention); *Fowler*, 924 F.3d at 261 (holding *Bearden* requires the judge to "inquire[] further into . . . inability to pay"); *Alkire*, 330 F.3d at 817 (holding wealth-based detention unconstitutional where the judge "made no inquiry into whether [the defendant] . . . was unable to pay"). *See also Turner v. Rogers*, 564 U.S. 431, 442, 445, 448 (2011) (applying *Mathews* balancing to require ability to pay inquiry in order "to ensure accurate decision-making in respect to the key 'ability to pay' question" for failure to pay child support, because "an incorrect decision . . . can increase the risk of wrongful incarceration").

In addition to the extremely high risk of impermissible *wealth-based* detention, this process creates an extremely high risk of imposing unnecessary pretrial detention, which is also impermissible. Because pretrial liberty is a fundamental right, courts cannot impose pretrial detention unless it is necessary to "serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). The Supreme Court has approved of pretrial detention only upon a judge's individualized determination that no other conditions of release would satisfy the state's interest in ensuring the defendant's future appearance and protecting the public. In other words, the judge must find that there is no

[3] A bail amount may be low relative to other amounts the court typically sets, yet high or unattainable with respect to what the arrestee is able to pay. HB 1719 prohibits judges from considering the value of bail amounts in this second, critical sense.

adequate alternative to unaffordable bail, and thus pretrial detention is necessary. *Salerno*, 451 U.S. at 742, 750–51. *Accord Nashville Cmty. Bail Fund v. Gentry*, 496 F. Supp. 3d 1112, 1136–37 (M.D. Tenn. 2020) (applying "*Salerno*'s heightened scrutiny" to pretrial detention). As an independent court monitor found, Shelby County Judicial Commissioners' failure to consider ability to pay resulted in widespread detention of people who "simply cannot afford even a minimal bail," even if their detention was "not necessary to ensure future court appearances or to protect public safety." Shelby County Jail Monitor Report at 3, 30, Ex. 2. The failure to consider ability to pay under HB 1719 carries the same extraordinarily high risk of imposing unnecessary, and therefore erroneous, pretrial detention.

Setting bail without considering ability to pay also carries a high risk of imposing excessive bail that violates the Eighth Amendment and Tennessee Constitution. TENN. CONST. art. I, § 16. Bail is excessive if it is set higher than "an amount reasonably calculated to fulfill th[e] purpose" of bail—namely, "assurance of the presence of an accused." *Stack v. Boyle*, 342 U.S. 1, 5 (1951). Bail can serve as an incentive to return to court only if it is set at an amount the arrestee can pay but would not want to forfeit. *See Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1033 (1954) ("One purpose for imposing a higher [bail] amount which would be consistent with the theory of bail would be that the increase in the defendant's financial stake reduces the likelihood of non-appearance at his trial."). If a judge does not consider an arrestee's ability to pay, the judge cannot know whether a particular bail amount will provide a sufficient incentive for the arrestee to return to court. This "compound consideration of the ability of the prisoner to give bail" and the purpose of setting bail has been required under the Eighth Amendment for more than a century. *United States v. Brawner*, 7 F. 86, 89 (W.D. Tenn. 1881). For the same reason, setting bail without considering

ability to pay poses an unacceptable risk of setting bail higher than an amount that is "sufficient." TENN. CONST. art. I, § 15.

Finally, the government has no legitimate interest in prohibiting judges from considering ability to pay. The legitimate interests in bail are preventing flight, protecting the public, and facilitating prompt release. *See* Tenn. Code Ann. § 40-11-118(a) (requiring bail in the lowest amount that will reasonably assure public safety and appearance in court). For decades, Tennessee served these interests by allowing consideration of an arrestee's ability to pay, ensuring that the court's bail amounts could be crafted to serve their intended purpose. Tenn. Code Ann. § 40-11-118(b)(2) (1996) (mandating consideration of the arrestee's "financial condition" without further qualification) (amended 2024). This scheme followed the approach of every other state in the country by allowing for consideration of ability to pay.[4] Forty-one states explicitly *require* consideration of ability to pay.[5] Another six states explicitly allow it.[6] Shelby

[4] Only two states make no mention of the defendant's financial resources or ability to pay as a factor in bail determinations. See DEL. CODE ANN. tit. 11, § 2104(e) (West 2019); OR. REV. STAT. ANN. § 135.265 (West 2011).

[5] *See* ALASKA STAT. ANN. § 12.30.011(c), (8) (West 2019); ARIZ. REV. STAT. ANN. § 13-3967(B)(7) (2022); Ark. R. Crim. P. 9.2(c)(ii); *In re Humphrey*, 11 Cal. 5th at 143; COLO. REV. STAT. ANN. § 16-4-103(3)(a) (West 2023); CONN. GEN. STAT. § 54-63(b)(6) (West 2022); FLA. STAT. § 903.046(2)(c) (West 2023); GA. CODE ANN. § 17-6-1(d)(2)(A)-(C) (West 2022); HAW. REV. STAT. § 804-9 (West 2023); 725 ILL. COMP. STAT. ANN. 5/110-5(a)(3)(A) (West 2023); IND. CODE ANN. § 35-33-8-4(b)(2) (West 2017); IOWA CODE § 811.2(2) (20232); KAN. STAT. ANN. § 22-2802(8) (West 2018); KY. REV. STAT. ANN. § 431.525(1)(e) (West 2011); LA. CODE CRIM. PROC. ANN. art. 316(4) (West 2017); ME. REV. STAT. ANN. tit. 15, § 1026(4)(C)(4) (2023); Md. R. 4-216.1(b)(2); MASS. GEN. LAWS ANN. ch. 276, § 57 (West 2018); Mich. Ct. R. 6.106(F)(1)(f); Minn. R. Crim. P. 6.02(1)(2)(e) ; Miss. R. Crim. P. 8.2(a); Mo. R. Crim. P. 33.01(e); MONT. CODE ANN. § 46-9-301(6) (West 2023); NEB. REV. STAT. ANN. § 29-901(3) (West 2022); NEV. REV. STAT. ANN. § 178.498(2) (West 2021); N.M. R. Crim. P. Dist. Ct. 5-401(C); N.Y. Crim. P. L. § 510.10(1)(f); N.C. GEN. STAT. ANN. § 15A-534(c) (West 2023); N.D. R. Crim. P. 46(3)(C); OHIO REV. CODE ANN. § 2937.011(E)(4) (West 2023); *Brill v. Gurich*, 965 P.2d 404, 406 (Okla. Crim. App. 1998); 234 PA. CODE § 523(A)(2) (2016); R.I. Super. Ct. R. Crim. P. 46(c); S.D. CODIFIED LAWS § 23A-43-4 (2017); TEX. CODE CRIM. PROC. ANN. art. 17.15(a)(4) (West 2021); UTAH CODE ANN. § 77-20-205(7)(a) (West 2024); VT. STAT. ANN. tit. 13, § 7554(b)(1) (West 2024); VA. CODE ANN. § 19.2-121(A) (West 2022); WASH. REV. CODE ANN. § 10.21.050(3)(a) (West 2023); W. VA. CODE ANN. § 62-1C-1a(a)(3)(A) (West 2021); Wyo. R. Crim. P. 46.1(d)(3)(A).

[6] *See* Ala. R. Crim. P. 7.2(a)(3)(xiii); Idaho Crim. R. 46(c)(1); N.H. REV. STAT. ANN. § 597:2(III)(b)(3), (b)(4) (West 2020); N.J. STAT. ANN. § 2A:162-20(c)(1) (West 2022); S.C. CODE ANN. § 17-15-30(A)(3) (2023); WIS. STAT. ANN. § 969.01(4) (West 2023).

County officials, including the General Sessions Judges, have acknowledged the benefit and critical importance of considering ability to pay. Standing Bail Order, Ex. 5 at 1 ("These procedures distinguish between an unaffordable bail order and an affordable bail order, because an unaffordable bail order serves to detain an individual and affordable bail order does not."), 4 ("Based [] on judicial officers' . . . constitutional obligation to ensure no one is detained due to their poverty or without adequate due process protections, judicial officers . . . must know what amount of bail is affordable to a given individual."); Resolution Approving Agreement, Ex. 6 at 4 (supporting consideration of ability to pay in part because the "Board of Commissioners finds it fiscally prudent to reduce the cost of unnecessary pretrial detention").

Thus, all *Mathews* factors—the fundamental rights at stake, the value of considering ability to pay, the risk of erroneous deprivation without such consideration, and the absence of any countervailing government interest—weigh heavily in favor of considering ability to pay. HB 1719's prohibition on considering ability to pay is an impermissible, fundamentally unfair procedure.

B. HB 1719 Imposes Impermissible Wealth-Based Detention

"'[F]undamental fairness' requires a court to inquire into whether a criminal defendant is able to pay" before jailing them for failure to pay. *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 608 (6th Cir. 2007) (quoting *Bearden v. Georgia*, 461 U.S. 660, 673 (1983)). Courts in Tennessee, and across the country, have applied this requirement to bail determinations. *See e.g.*, *Walker v. City of* C*alhoun*, 901 F.3d 1245, 1259–60 (11th Cir. 2018) (holding that bail setting "falls within the *Bearden* . . . framework"); *ODonnell v. Harris Cty.*, 892 F.3d 147, 153–59 (5th Cir. 2018) (holding bail procedures "inadequate" because they did not require consideration of "ability to pay"); *Torres v. Collins*, No. 2:20-CV-00026-DCLC-CRW, 2023 WL 6166523, at *6 (E.D. Tenn. Sept. 21, 2023) (basing analysis on whether arrestees

"were able to request a reduction in bail because of their inability to pay"); *McNeil v. Cmty. Probation Servs.*, 2019 WL 633012, *15 (M.D. Tenn. Feb. 14, 2019) (holding "setting secured bail" requires "findings regarding the arrestee's ability to pay"); *Weatherspoon v. Oldham*, No. 17-CV-2535-SHM-CGC, 2018 WL 1053548, at *7 (W.D. Tenn. Feb. 26, 2018) (holding bail process "inadequate" where judge "failed to consider defendant's ability to pay the bail amount" or alternatives); *In re Humphrey*, 11 Cal.5th 135, 143 (2021) ("[T]he court must consider the arrestee's ability to pay the stated amount of bail . . . ."). *Cf. Black v. Decker*, 103 F.4th 133, 158–59 (2d Cir. 2024) (upholding injunction requiring the immigration judge "conducting Black's bond hearing to consider his ability to pay"); *Hernandez v. Sessions*, 872 F.3d 976, 982, 991 (9th Cir. 2017) (upholding injunction requiring immigration judges to "consider [] financial ability to obtain bond").

These cases apply the prohibition on arbitrary wealth-based detention articulated in *Bearden v. Georgia*. *Bearden* held that courts may not condition liberty on a payment without "a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose.'" *Bearden*, 461 U.S. at 666–67 (citing *Williams v. Illinois*, 399 U.S. 235, 260 (1970) (Harlan, J.. concurring)). The Court went on to specify procedures that courts must follow to comply with this standard: the judge "must inquire into" the arrestee's ability to pay, then enter "evidence and findings" to "determine" that the arrestee is able to pay, or that alternatives to jail are inadequate. *Id.* at 665, 672–74.

Detaining an arrestee without these procedures is to detain him "simply because, through no fault of his own, he cannot pay" and is "contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 672–73. *See also Fowler*, 924 F.3d at 261 (observing that

Bearden requires the judge to "inquire[] further" into "inability to pay"); *Powers*, 501 F.3d at 608 (quoting *Bearden*: "'fundamental fairness' requires a court to inquire into whether a criminal defendant is able to pay"); *Alkire*, 330 F.3d at 817 (observing that arrestee "imprisoned for failing to pay . . . without any inquiry into his ability to pay having been made" would suffer a "constitutional deprivation"); *Rodriguez v. Providence Cmty. Corr.*, 155 F. Supp. 3d 758, 770 (M.D. Tenn. 2015) (requiring "an inquiry into . . . inability to pay").

Plainly, to "inquire into" and "determine" ability to pay, as required by *Bearden*, requires judges to "consider" ability to pay, as prohibited by HB 1719.

II. This Action Warrants Expedited Relief

Every day, the enforcement of HB 1719 jails more arrestees under unconstitutional bail orders. The Court should enter a preliminary injunction precluding the Sheriff from enforcing these unconstitutional bail orders. The Court should also order expedited declaratory relief against all parties.

A. A Preliminary Injunction Against the Sheriff is Warranted

For the reasons described in Section 1 above, Plaintiff Just City is likely to succeed on its claims that HB 1719 violates due process. Binding precedent on unconstitutional bail orders supports a preliminary injunction against the Sheriff. Because the "constitutional violation is an improperly determined bail amount" and the Sheriff "detains the [arrestee] until she pays the bail amount," this violation warrants injunctive relief against the Shelby County Sheriff. *McNeil v. Cmty. Prob. Servs., LLC*, 945 F.3d 991, 996 (6th Cir. 2019).

Other preliminary injunction factors weigh heavily in Just City's favor: an injunction would prevent arrestees from suffering irreparable harm through detention under unconstitutional bail orders, an injunction would cause no countervailing harm to the government, and an injunction would advance the public interest in protecting constitutional rights. *See, e.g.*, *Catholic Healthcare Int'l v. Genoa Charter Twp.*, 82 F.4th 442, 447 (6th Cir. 2023) (preliminary

injunction standard). As the district court determined in *McNeil*, 2019 WL 633012, this Court should issue a preliminary injunction prohibiting enforcement of secured bail orders issued without consideration of ability to pay.

Absent relief, presumptively innocent arrestees will be jailed under unconstitutional bail orders. No further showing of injury is required—the deprivation of constitutional rights alone is sufficient to establish irreparable harm. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *ACLU of Ky. v. McCreary Cty*., 354 F.3d 438, 445 (6th Cir. 2003) ("if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated."); *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016). Every additional night in jail causes harm to a person that cannot be later undone. *See, e.g.*, *United States v. Bogle*, 855 F.2d 707, 710 –11 (11th Cir. 1988) ("unnecessary deprivation of liberty clearly constitutes irreparable harm"); *Matacua v. Frank*, 308 F. Supp. 3d 1019, 1025 (D. Minn. 2018) ("[L]oss of liberty . . . is perhaps the best example of irreparable harm"). Moreover, pretrial detention "solely due to the inability to pay the secured bail amount . . . can result in loss of work, separation from family, undue pressure to plead guilty, and other negative consequences," *McNeil*, 2019 WL 633012, at *16, such as the risk of contracting serious illness in the Shelby County Jail, *see, e.g.*, *Busby v. Bonner*, No. 2:20-CV-2359-SHL-ATC, 2021 WL 4127775, at *1 (W.D. Tenn. Jan. 28, 2021) (preliminarily approving settlement requiring monitoring of jail's management of COVID-19 crisis).

Given these irreparable harms, the balance of equities in this case is straightforward. The government will suffer no harm from temporarily losing the ability to enforce a law that does not advance any legitimate interest. *See Planned Parenthood Ass'n of Cincinnati v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (finding it "questionable" whether state "has any 'valid' interest in enforcing" an unconstitutional law). Courts ruling on similar constitutional

violations have reached the same conclusion. *E.g.*, *McNeil*, 2019 WL 633012 at *16 (holding unconstitutional wealth-based pretrial detention "outweighs any harm to Defendants or to the public interest."); *Rodriguez*, 155 F. Supp. 3d at 771–72 ("[T[he Court declines to categorize the need to erect the proper constitutional safeguards as an injury."). A preliminary injunction would also serve the public interest: "[I]t is always in the public interest to prevent violation of a party's constitutional rights." *ACLU Fund of Mich. v. Livingston Cty.*, 796 F.3d 636, 649 (6th Cir. 2015). *Accord McNeil*, 2019 WL 633012 at *16; *Rodriguez*, 155 F. Supp. 3d at 771–72.

Finally, the Court should waive the requirement to require posting of security, given that this case constitutes "public-interest litigation," *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981), and Defendants are unlikely to suffer any monetary loss from the requested injunction, *see, e.g., Council on American-Islamic Relations v. Graubatz*, 667 F.Supp. 2d 67, 81 (D.D.C. 2009) (waiving bond where injunction posed little financial risk). *Accord* 11A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2954 n.13 (3d ed.) (collecting cases waiving security requirement where there is no risk of monetary loss).

B. Expedited Declaratory Relief Against All Parties is Warranted

In addition to granting a preliminary injunction against the Sheriff, the Court should order an expedited declaratory judgment against the General Sessions Judges, the Judicial Commissioners, and the Sheriff under Rule 57 of the Federal Rules of Civil Procedure. Relief against the Sheriff is warranted for the same reasons warranting a preliminary injunction. Relief against the judicial Defendants is warranted because they issue bail orders under HB 1719 without considering ability to pay. Spickler Decl. Ex. 1, ¶ 23. Relief is further warranted by General Sessions Judges' administrative decisions enforcing HB 1719 and rescinding procedures that facilitated consideration of ability to pay. *Id.* ¶¶ 22–27. Undoubtedly, the judicial Defendants

are "actively involved with administering" HB 1719, and when a "judge determines a bail amount without considering ability to pay or adequacy of alternatives," they play a "part in carrying out the alleged harm." *McNeil*, 945 F.3d at 995–96.

The Court should expedite consideration of declaratory relief against these parties. Expedited relief is appropriate because (1) this action concerns imminent and ongoing violations of important rights; (2) the determination is largely one of law, and factual issues are not predominant; and (3) the determination of the requested declaratory judgment would resolve the underlying controversy or narrow the issues. *See, e.g.*, *Rogers v. Gray Media Grp.*, No. 1:22-CV-00035-GNS, 2022 WL 10662399, at *3 (W.D. Ky. Oct. 18, 2022)*; Cnty. of Butler v. Wolf*, No. 2:20-CV-677, 2020 WL 2769105, at *2 (W.D. Pa. May 28, 2020). Each of these grounds justifies expedited relief here.

First, for the reasons described above, this action concerns an ongoing violation of important rights: deprivation of the right to pretrial liberty, the right against wealth-based detention, the right against excessive bail, and the right to be bailable by sufficient sureties. Expedited relief in a declaratory judgment action is appropriate when plaintiffs have alleged such interference with fundamental rights. *See. Cnty. of Butler*, 2020 WL 2769105 at *5 (holding expedited declaratory relief warranted for "violations of substantive due process and equal protection that interfere with important or fundamental rights"). As detailed in the discussion of irreparable harm, *supra* Section II.A, there can be no question that there is a "need for urgency" in this case. *Rogers*, 2022 WL 10662399 at *3.

Expedited relief is also appropriate because this challenge to HB 1719 primarily concerns questions of law, not fact. Plaintiff does not anticipate any factual disputes in this case. Courts in the Sixth Circuit and around the county have granted speedy hearings where, as here, the determination sought is primarily based on legal issues rather than factual matters. *See*

Cincinnati Ins. Co. v. Grand Pointe, LLC., No. 1:05CV161, , 2006 WL 752579, at *3 (E.D. Tenn. Mar. 22, 2006) (granting expedited treatment of their declaratory judgment motion upon finding no remaining disputes of fact and the unjust accrual of costs if the lawsuit were to continue.); *Great Am. Ins. Co. v. Geostar Corp.*, No. 09-12488-BC, 2010 WL 845953, at *14–19 (E.D. Mich. Mar. 5, 2010) (granting expedited declaratory relief concerning interpretation of an insurance policy under Michigan law).

Finally, expedited relief is appropriate because a declaratory judgment would end the case. An expedited declaration would resolve all claims against the judicial Defendants and, as a practical matter, resolve the substantive dispute between the parties. *See e.g. Tri-State Generation & Transmission Ass'n, Inc. v. BNSF Ry. Co*., No. CV08-272-PHX-MHM, 2008 WL 2465407, at *7 (D. Ariz. June 17, 2008) (granting motion for expedited relief where court found that ". . .resolution of Plaintiffs' declaratory judgment claim would likely be dispositive in th[e] matter."). Plaintiffs anticipate that Shelby County officials would resume compliance with the Agreement should the Court declare HB 1719 unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should issue a preliminary injunction against the Shelby County Sheriff and grant expedited declaratory relief against all parties holding that HB 1719 violates due process. A proposed order follows the attached exhibits.

Respectfully Submitted,

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