IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LEA ALLISON, *et al.*, on behalf of themselves and those similarly situated, Plaintiffs, v. BRADLEY R. ALLEN, SR., in his official capacity as Chief District Court Judge, *et al.*, Defendants.	Case No. 19-cv-1126 (Class Action)

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Named Plaintiffs and members of the proposed class are presumptively innocent individuals who are jailed in the Alamance County Detention Center pretrial solely because they cannot afford to pay for their release.[1] Defendants, who make and enforce Alamance County's bail policies, have a policy and practice of requiring unattainable money bail without giving individuals a meaningful hearing on conditions of release, making any

[1] The putative class, as defined in Plaintiffs' Motion for Class Certification, is:

> All people who are arrested and charged with non-domestic violence offenses who are or will be detained in the Alamance County Detention Center because they are unable to pay monetary conditions of pretrial release.

Under state statute, individuals charged with domestic violence charges are subject to a process for bail and pretrial release that differs from the process described in the Complaint in this case. *See* N.C. Gen. Stat. § 15A-534.1.

inquiry into or findings concerning a person's ability to pay, or providing individuals with counsel. Decades of United States Supreme Court jurisprudence have established that these practices violate the Fourteenth Amendment rights to equal protection and due process, and the Sixth Amendment right to counsel.

Plaintiffs seek a preliminary injunction on behalf of the proposed class, enjoining Defendant Sheriff from detaining individuals pretrial unless they have been ordered detained pursuant to a process that meets constitutional requirements. Absent immediate intervention by this Court, class members will continue to suffer the irreparable harm of unconstitutional detention.

STATEMENT OF THE FACTS

Defendants have a policy and practice of jailing hundreds of presumptively innocent individuals in Alamance County each year solely because they cannot afford to pay money bail. Defendants set financial conditions of release without making individualized findings about ability to pay, and as a result, people who can afford to pay the money bail amount are set free, while those who cannot remain in jail. Named Plaintiffs Lea Allison, Antonio Harrell, and Katherine Guill are among the many people who are or will be incarcerated because of unattainable bail, set without meaningful consideration of their individual circumstances or their ability to pay.

Plaintiff Lea Allison is a 30-year-old white woman. Ex A ¶1. She has been unemployed or underemployed for the past 6 months, has no savings, and struggles to pay for basic necessities. *Id.* ¶¶12, 13, 16. She was arrested on November 11, 2019 and charged

with felony drug possession and several misdemeanors. *Id.* ¶2. She was taken to the Alamance County Detention Center and booked, but was not taken to see a magistrate. *Id.* ¶¶3-4. In the jail, a sheriff's deputy gave her a "Magistrate's Order" and "Conditions of Release and Release Order." *Id.* ¶5. The release order states that she must pay $3,500 secured money bail to be released from jail. *Id.* ¶7. Ms. Allison cannot pay $3,500, or even a percentage of that to a bail agent. *Id.* ¶11. Ms. Allison is supposed to begin a new job this week, but is terrified that she will lose the job because she cannot pay the money bail required for her release. *Id.* ¶17. She is also afraid that she will lose her housing and will not receive the medication that she needs while in jail. *Id.* ¶¶18-19. Because her housing unit in the jail is overcrowded, she is sleeping on a mat on the floor. *Id.* ¶21.

Plaintiff Antonio Harrell is a 36-year-old Black man. Ex. B ¶1. He lives primarily on a fixed income due to his disability and has a part-time job bussing tables. *Id.* ¶16. He was arrested on November 9, 2019, and charged with misdemeanor offenses. *Id.* ¶2. He was taken to the Alamance County Detention Center for a proceeding before a magistrate at which he was not represented by counsel. *Id.* ¶¶3, 5, 6. The magistrate informed Mr. Harrell of the charges against him and told him that the secured money bail required for his release was $1,500. *Id.* ¶7. The magistrate did not ask Mr. Harrell any questions about his ability to pay. *Id.* ¶11. Mr. Harrell cannot pay $1,500 for his release. *Id.* ¶18. He lives in a supportive housing group home for individuals with mental disabilities where he waited six months to get a room. *Id.* He has not been receiving the medications or that treatment that he uses every day to manage mental health and substance abuse challenges.

Id. ¶¶19-20. Mr. Harrell is afraid that if he cannot make the payment required for his release, he will lose his job, his room at the group home, and his social security check. *Id.* ¶21. His first appearance in district court is not until December 5, 2019, which is more than three weeks after the date of his arrest. *Id.* ¶14.

Plaintiff Katherine Guill is a 42-year-old white woman. Ex. C ¶1. She works at a restaurant where she makes $8 per hour plus tips. *Id.* ¶17. She was arrested on November 11, 2019 and charged with several misdemeanor offenses. *Id.* ¶2. She was taken to the Alamance County Detention Center where she saw a magistrate. *Id.* ¶¶3, 5. At the proceeding before the magistrate, Ms. Guill was not represented by counsel. *Id.* ¶6. The magistrate told Ms. Guill not to speak and that she would get in trouble if she spoke. *Id.* ¶7. The magistrate did not ask Ms. Guill any questions about her ability to pay or her ties to the community. *Id.* ¶13. The magistrate informed Ms. Guill that the money bail amount she would have to pay for her release was $2,500. *Id.* ¶8. Ms. Guill attempted to ask for an attorney but the magistrate would not let her speak. *Id.* ¶9. Ms. Guill cannot afford to pay the secured money bail required for her release. *Id.* ¶12. She lives in a sober living facility where she had to wait a month for a bed. *Id.* ¶16. She takes medication that she has not been receiving in jail. *Id.* ¶18. If she stays in jail, she is afraid that she will lose her job, her bed in the sober living facility, and that her physical and mental health will deteriorate. *Id.* ¶19. Because her housing unit in the jail is overcrowded, she is sleeping on a thin mat on the floor. *Id.* ¶19. Her first appearance in district court is not until December 10, 2019, which is about one month after the date of her arrest.

Defendants' Process for Setting Initial Conditions of Release

Plaintiffs' experiences are typical of individuals who are arrested and booked in the Alamance County Detention Center. In the vast majority of cases, Defendants impose secured money bail—i.e., cash payment of a specific sum of money to the court—as the primary condition of pretrial release.[2]

In Alamance County, people who are arrested are brought before a magistrate for an initial appearance. *See* N.C. Gen. Stat. § 15A-511. During this brief proceeding, a magistrate informs the person of the charges against them, sets conditions of release, and sets the next court date. These proceedings typically take only minutes. Sometimes, the person does not see a magistrate at all and a jail employee simply hands them the magistrate's release order with a secured money bail amount printed on the form.

Magistrates set conditions of release—usually secured money bail—without making any inquiry into individuals' ability to pay, their ties to the community, or other relevant factors other than the charges for which the individual has been booked and, sometimes, prior convictions, the contents of the police report, or cooperation with law enforcement. They typically ask no questions of the person before them and make no findings on the record. Individuals are not provided with counsel at these bail-setting appearances. As in Named Plaintiffs' cases, for many people, these money bail orders

[2] In 2017, Alamance County judges required a secured bond in 93% of felony release orders and 85% of misdemeanor release orders, representing 88% of all release orders. *See* Josh Shaffer & David Raynor, *Pay $500 on a panhandling charge or sit in jail for five days. Should NC find a better way?*, THE NEWS & OBSERVER (Feb. 21, 2019), https://www.newsobserver.com/news/state/north-carolina/article224673805.html.

operate as *de facto* detention orders because the individuals cannot obtain the amount of money required for their release.

Lack of Prompt Opportunity for Review of Conditions of Release

After this initial appearance before a magistrate, individuals must wait for a "first appearance" before a district judge. *See* N.C. Gen. Stat. § 15A-601. The first appearance is the first opportunity to request court-appointed counsel for people who cannot afford to hire an attorney. For people who are unrepresented at the first appearance, there is no opportunity at to request that the judge review their conditions of pretrial release. District judges do not state the money bail amount required for release, inquire into the person's ability to pay the required money bail, or hold a hearing to determine the least restrictive conditions of release. Instead, district judges refuse to hear requests to change conditions of release at these hearings and discourage unrepresented people from speaking to them at all except to state their plans for attorney representation.

District judges do not review an individual's conditions of release unless a motion for bond reduction is filed and a minimum 24-hour's notice has been given to the district attorney. Thus, people who cannot afford to hire a lawyer must wait for a district judge to appoint counsel at their first appearance, for counsel to make contact with them, and then for counsel to file a bond reduction motion with the required notice period, all before district judges will consider a request to modify bail.

This delay can take, at a minimum, several days for people charged with felonies, and up to weeks or longer for people charged with misdemeanors. While individuals

charged with felonies are entitled under state law to a first appearance within 96 hours of arrest, *see* N.C. Gen. Stat. § 15A-601, there is no time restriction for individuals charged with misdemeanors. In cases that involve only misdemeanor charges, magistrates often schedule first appearances for the next date that the arresting officer is scheduled to be in court, which can mean waiting weeks, or longer, before having the opportunity to be appointed counsel and challenge conditions of release.

Throughout this process, people who are too poor to pay money bail and to hire a private attorney suffer irreparable harm, starting with the deprivation of their fundamental constitutional rights to pretrial liberty and against wealth-based detention, and extending to the well-documented, devastating, and long-term harms of pretrial detention, which destabilize people's lives and their families.

QUESTION PRESENTED

Whether a preliminary injunction should be granted where:

(a) Plaintiffs are likely to succeed on their claims that Defendants' policies and practices of wealth-based pretrial detention violate the Plaintiffs' Fourteenth Amendment Equal Protection and Due Process rights (Counts I-III), as well as their Sixth Amendment right to counsel (Count IV);

(b) Plaintiffs will suffer irreparable harm in the absence of preliminary injunctive relief because they will continue to be unconstitutionally jailed;

(c) The balance of hardships weighs in favor of preliminary relief because the ongoing, irreparable harm to Plaintiffs outweighs any potential hardship to Defendants; and

(d) Granting preliminary relief is in the public interest.

ARGUMENT

A party seeking a temporary restraining order or preliminary injunction must show that: "(1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm, (3) the balance of hardships tips in their favor, and (4) the injunction is in the public interest." *Pashby v. Delia,* 709 F.3d 307, 320 (4th Cir. 2013) (citing *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Each of these factors weigh heavily in support of Plaintiffs' request for preliminary relief.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR CLAIMS

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

The U.S. Supreme Court has long recognized that a person may not be "subjected to imprisonment solely because of his indigency." *Tate v. Short*, 401 U.S. 395, 398 (1971); *see also Bearden v. Georgia*, 461 U.S. 660, 672 (1983); *Williams v. Illinois*, 399 U.S 235, 242 (1970). The Fourth Circuit has applied this bedrock principle of equal justice, holding that an "indigent defendant ordered to repay his attorney's fees as a condition of work-release, parole, or probation cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his contumacy." *Alexander v. Johnson*, 742 F.2d 117, 124 (4th Cir. 1984). This well-established right against imprisonment based solely on poverty is based on a convergence of equal protection and due process principles. *Bearden*, 461 U.S. at 665, 674.

The right against imprisonment based solely on wealth applies with greater force to individuals being detained pretrial. As the *en banc* Fifth Circuit explained in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978), *Williams*, *Tate*, and *Bearden*'s core holding—that post-conviction imprisonment "solely because of indigent status is invidious discrimination and not constitutionally permissible"—has even "broader . . . implications" for pretrial individuals who are "accused but not convicted of crime" and are presumptively innocent. *Id*. at 1056. The Fifth Circuit recently reaffirmed its holding in *Rainwater* when it found unconstitutional the bail practices in Harris County, Texas, where, as in the present case, judicial actors engaged in a practice of imposing secured money bail as a condition of pretrial release without regard to ability to pay. *ODonnell v. Harris Cty.* ("*ODonnell II*"), 892 F.3d 147, 163 (5th Cir. 2018). Federal court decisions across the country have likewise determined that the practice of requiring secured money bail regardless of an individual's ability to pay—precisely the practice Defendants engage in here—is unconstitutional.[3]

[3] *See, e.g.*, *McNeil v. Cmty. Prob. Servs., LLC*, 1:18-CV-0033, 2019 WL 633012, at *13-15 (M.D. Tenn. Feb. 14, 2019), *appeal docketed*, No. 19-5262 (6th Cir. Mar. 20, 2019); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314 (E.D. La. 2018); *Dixon v. City of St. Louis*, No. 4:19-CV-0112-AGF, 2019 WL 2437026 at *14 (E.D. Mo. June 11, 2019) *appeal docketed*, No. 19-2254 (8th Cir. June 19, 2019); *Schultz v. Alabama*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018), *appeal docketed sub. nom. Hester v. Gentry*, No. 18-13894 (11th Cir. Sept. 13, 2018); *Daves v. Dallas Cty., Texas*, 341 F. Supp. 3d 688, 698 (N.D. Tex. 2018), *appeal docketed*, No. 18-11368 (5th Cir. Oct 23, 2018); *ODonnell v. Harris Cty.* ("*ODonnell I*"), 251 F. Supp 3d 1052 (S.D. Tex. 2017), *aff'd as modified*, 892 F.3d 147 (5th Cir. 2018).

Any government action that infringes upon the right against wealth-based detention must satisfy heightened scrutiny. *See Bearden*, 461 U.S. at 666-7 (requiring "careful inquiry" into the state's asserted interests and "the existence of alternative means for effectuating" those interests); *ODonnell II*, 892 F.3d at 161 (explaining that "heightened scrutiny is required when criminal laws detain poor defendants *because of* their indigence" (citing *Tate*, 401 U.S. at 397-99, and *Williams*, 399 U.S. at 241-42)); *see also Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (observing that requiring an indigent person to either pay a fine or be jailed is not "necessary to promote a compelling governmental interest"); *Rainwater*, 572 F.2d at 1057; *Buffin v. City & Cty. of S.F.*, No 15-CV-04959-YGR, 2018 WL 424362, at *8 (N.D. Cal. Jan. 16, 2018) (applying "strict scrutiny").[4]

Under the heightened scrutiny standard, if the government's interests "could reasonably be assured by . . . alternate [conditions] of release, pretrial confinement for inability to post money bail" is unconstitutional. *Rainwater*, 572 F.2d at 1058; *see also In*

[4] In *Walker v. City of Calhoun*, a divided Eleventh Circuit panel held that heightened scrutiny did not apply where defendants imposed secured bail using a bond schedule without regard to an individual's ability to pay in the 48-hour period prior to a hearing on conditions of release, reasoning that the 48-hour waiting period posed a "marginal increase in the length of a detention" for indigent defendants. 901 F.3d 1245, 1263 (11th Cir. 2018). The Eleventh Circuit's reasoning, if correct, would not apply to the case at hand because Plaintiffs and proposed class members have been or will be jailed for longer than 48 hours, and potentially face weeks of wealth-based detention before they may be heard on their conditions of release. *See id.* at 1277 n.6 (Martin, J., dissenting) ("[E]ven under the Majority's view, challenges to indigency-based jail stays warrant heightened scrutiny so long as they show that the challenged system, in practice, results in indigents being detained longer than 48 hours.").

re Humphrey, 228 Cal. Rptr. 3d 513, 535 (Ct. App. 2018); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014); *cf. Bearden*, 461 U.S. at 672.

Defendants' practices do not satisfy heightened scrutiny because they are not narrowly tailored to achieve the state's interests in court appearance and public safety. Defendants require secured money bail without any inquiry into an individual's financial circumstances and thus do not know whether the financial condition of release will result in *de facto* detention. And because Defendants do not inquire into or make findings regarding an individual's ability to pay, they do not engage in the constitutionally-mandated analysis of whether less-restrictive alternatives to wealth-based detention are sufficient to serve the government's interest. Instead, the Defendants routinely set a financial condition of release that the individual cannot afford without making the finding required under the Constitution. *See Bearden*, 461 U.S. at 669-70.

Moreover, automatically imposing secured money bail is incapable of serving the state's interests. There is *no evidence* to support the assertion that requiring money increases rates of appearance at court dates or public safety. *See, e.g.*, *ODonnell II*, 892 F.3d at 154 (finding "reams of empirical data" showing that "release on secured financial conditions does not assure better rates of appearance or of law-abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision"); *McNeil*, 2019 WL 633012 at *14-15; *Schultz v. Alabama*, 330 F.Supp.3d 1344, 1363 (N.D. Ala. 2018). Defendants' practices therefore fail heightened scrutiny; thus, Plaintiffs are likely to succeed on their first claim.

B. Count II: Defendants Violate Plaintiffs' Substantive Due Process Right to Pretrial Liberty.

The Supreme Court has explained that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). This norm reflects the longstanding foundational principle that the "interest in [pretrial] liberty" is "fundamental." *Id.* at 750; *see also United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990) (procedures resulting in pretrial detention implicate a "vital liberty interest"); *Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("[U]nless this right to bail before trial is preserved, the presumption of innocence . . . would lose its meaning"). Because of the fundamental liberty interest at stake, the Supreme Court and lower courts have repeatedly confirmed that *Salerno* required heightened scrutiny where a state action infringes on an individual's pretrial liberty. *See Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (citing *Salerno* as part of its "line of cases which interprets . . . 'due process of law' . . . to forbid[] the government to infringe certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest"); *Lopez-Valenzuela*, 770 F.3d at 780-81; ("*Salerno* applied heightened scrutiny."); *Simpson v. Miller*, 387 P.3d 1270, 1276-77 (Ariz. 2017) (finding "heightened scrutiny" applies where, as in *Salerno*, the "fundamental" "right to be free from bodily restraint" is implicated), *cert denied sub nom. Arizona v. Martinez*, 138 S. Ct. 146 (2017).

Defendants' practice of jailing individuals pretrial on secured money bail orders without making the required inquiry or findings does not satisfy heightened scrutiny.

Setting a financial condition of release that a person cannot afford is the equivalent of an order for pretrial detention. *See 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. Leisure*, 710 F.2d 422, 425 (8th Cir. 1983); *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) (per curiam).

Thus, under *Salerno*, Defendants must establish that their use of secured money bail as a *de facto* order of detention is "narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. at 302. To justify pretrial detention, the government must demonstrate that there are no other alternatives sufficient to mitigate a specifically identified risk posed by the individual.

Defendants practices fail to meet this standard. Defendants do not make any findings regarding whether an individual is unlikely to appear in court or poses a danger to the community, nor do they make any findings concerning whether alternative conditions of release could mitigate those risks. In fact, magistrates typically ask *no* questions of the individuals who appear before them before setting unattainable money bail. Because Defendants routinely deny people their fundamental right to pretrial liberty without any determination that detention is necessary to serve a government interest, Plaintiffs are likely to succeed on their substantive due process claim.

C. Count III: Defendants Violate Plaintiffs' Procedural Due Process Rights

Defendants infringe on class members' rights not only by failing to make the substantive findings described above, but also by failing to provide the necessary procedural safeguards to ensure that any such findings are accurate. *See Washington v. Harper*, 494 U.S. 210, 220 (1990) (explaining that procedural rights "concern[] the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance"). At a minimum, procedural due process requires an individual be given the opportunity to be heard "at a meaningful time and in a meaningful manner" before being deprived of liberty. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

When evaluating constitutionally required due process procedures, courts apply the *Mathews* test, which calls for the balancing of three factors: (1) the nature of the private interest that will be affected by the governmental action; (2) the risk of erroneous deprivation through the procedures used and the probable value of requiring additional procedural safeguards; and (3) the government's interest, including any fiscal and administrative burdens that additional procedural safeguards would impose. *Id.* at 335.

Under *Matthews*, before imposing secured bail as a condition of pretrial release, Defendants are required to have an adversarial hearing where the individual is represented by counsel, provided the opportunity to present and rebut evidence, and where Defendants inquire into and make factual findings on the record regarding the person's ability to pay

and enumerating the factors that necessitate pretrial detention in furtherance of a specific government interest.

1. The Private Interest at Stake is Fundamental.

As discussed above, class members have a fundamental liberty interest in their freedom from pretrial incarceration. *Supra* section I.B. In addition, the collateral consequences of detention are significant: loss of employment; loss of physical or legal custody of children; loss of housing or property due to inability to work; increased physical and mental illness; restricted access to counsel; decreased opportunity to prepare a defense, a resulting increased risk of a finding of guilt, and resulting longer sentences, among many others. *Infra* section II. Thus, the private interests at issue here are both fundamental and substantial.

2. Defendants' Practices Create a Grave Risk of Erroneous Deprivation, and the Probable Value of Requiring Additional Safeguards is High.

Defendants' practices pose an enormous risk of erroneous deprivation of the fundamental right to liberty. Defendants set bail at cursory appearances where individuals are unrepresented by counsel, and where Defendants make no findings regarding individuals' ability to pay or the necessity of detention. In fact, empirical evidence shows that the overwhelming majority of felony defendants released pretrial make their court

appearances[5] and refrain from dangerous conduct.[6] Thus, by mechanically imposing secured money bail as a condition of pretrial release, Defendants necessarily detain far more individuals than is warranted by any concern for ensuring future court appearances or protecting public safety.

By contrast, the probable value of additional procedural safeguards is high. Such procedures require that, before requiring a financial condition of release, Defendants employ procedures to determine whether the financial condition will result in detention. As the Supreme Court has held, if the government seeks to condition physical liberty on a monetary payment, procedural due process requires notice of the nature and significance of the financial information to be provided; an inquiry into the person's ability to pay; and findings on the record as to whether the person has the ability to pay. *See Turner v. Rogers*, 564 U.S. 431, 447–48 (2001) (applying the *Mathews* test to determine procedures sufficient for the state to jail a person for not paying child support). Without an inquiry into a person's

[5] *See, e.g.*, Pretrial Services Agency for the District of Columbia, *Washington, DC Pretrial Facts and Figures*, https://www.psa.gov/sites/default/files/Pretrial%20Facts%20and%20Figures%20-%20Updated%203.2018.pdf (noting high rates of court appearance in Washington, D.C. where 94 percent of arrestees are released prior to trial, almost entirely on non-financial conditions).

[6] *See* Marie VanNostrand and Gena Keebler, Pretrial Risk Assessment in the Federal Court, 73 FED. PROB. 1, 22-23 (2009), https://www.uscourts.gov/sites/default/files/73_2_1_0.pdf (data from the federal system showing that only 3.6% of released persons across risk level had a "pretrial outcome" constituting "danger to [the] community"); Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 21 (2016), http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf.

ability to pay, Defendants will continue to routinely and erroneously deprive individuals of their fundamental right to pretrial liberty and to be free from wealth-based detention.

Defendants must also provide the additional procedural safeguards that are constitutionally required before any deprivation of liberty. In *Morrissey v. Brewer*, a parole revocation case, the Supreme Court established the constitutional floor for the minimum process required before such a deprivation:

> (a) "notice" of the critical issues to be decided at the hearing;
> (b) "disclosure" of the evidence presented by the government at the hearing;
> (c) an "opportunity to be heard in person and to present witnesses and documentary evidence";
> (d) "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)";
> (e) a "neutral and detached" factfinder; and
> (f) findings and reasons on the record of "the evidence relied on."

408 U.S. 471, 488-89 (1972); *see also Alexander*, 742 F.2d at 124 (holding state cannot require repayments for costs of court-appointed counsel as a condition of parole without providing "notice of the contemplated action and a meaningful opportunity to be heard"). Because requiring money bail that an individual cannot pay results in detention, these procedures are required here.

In the context of bail setting, this means that Defendants must provide the following: notice to arrestees about the significance of the financial information to be provided; an inquiry into and findings on the record regarding the person's ability to pay; a meaningful opportunity for the individual to present evidence and confront the government's evidence regarding ability to pay, likelihood to appear at trial, countervailing government interests,

and whether less restrictive alternatives to unattainable bond are available, and findings on the record about why continued incarceration is warranted. *See ODonnell I*, 251 F. Supp. 3d at 1145-46. Without these procedural safeguards, Defendants will continue to routinely and erroneously deprive individuals of their fundamental right to pretrial liberty and to be free from wealth-based detention.

The gravity of the pretrial detention decision additionally calls for a prompt hearing, a heightened evidentiary burden, the provision of counsel, and a hearing on the record.

Prompt Hearing. Procedural due process requires a consideration not just of *whether* to have a hearing, which is indisputable in light of *Morrissey*, but also *when*: Because a "more expeditious hearing would significantly reduce the harm suffered," too lengthy of a delay gives rise to a due process violation. *Coleman v. Watt*, 40 F.3d 255, 261 (8th Cir. 1994). Consistent with this principle, the Fifth Circuit held that procedural due process requires hearings on conditions of release no later than 48 hours after arrest. *See ODonnell II*, 892 F.3d at 160. The same prompt hearing should be afforded here.

Clear and Convincing Evidence. Furthermore, the government must support an order of pretrial detention with clear and convincing evidence. As the Supreme Court made clear in *Addington v. Texas*, the deprivation of the fundamental right to bodily liberty requires that the heightened, clear and convincing standard of proof be applied so as to "impress the factfinder with the importance of the decision" and reduce the risk of erroneous detention. 441 U.S. 418, 427 (1979).

Addington concerned the level of proof required to detain someone alleged to be mentally ill. The Court reasoned that the heightened evidentiary standard of clear and convincing evidence is necessary given the seriousness of detention as compared to the more minor disputes—such as the "loss of money"—to which the preponderance of the evidence standard applies. *Id.* at 424. At the same time, the Court explained, because the government has "no interest" in wrongly confining individuals—the third *Mathews* factor—it was "unclear" how the state's interest would be furthered by the lower standard. *Id.* at 426.

Since *Addington*, "[i]n cases where physical liberty is at stake in all kinds of situations, the Court consistently applies the clear and convincing standard." *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 313 (E.D. La. 2018) (collecting cases). In *Foucha v. Louisiana*, for example, the Court struck down a scheme for detaining persons who had been acquitted by reason of insanity because the statute placed "the burden on the detainee to prove that he is not dangerous" rather than providing, as is required, "an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community." 504 U.S. 71, 81-82 (1992); *see also Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 286 (1966); *Cruzan by Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 282-83 (1990) (noting clear and convincing evidence required in deportation, civil commitment, denaturalization, civil fraud, and parental termination proceedings). Lower courts have likewise consistently emphasized the

necessity of, at a minimum, a clear and convincing standard in the context of pretrial detention. *See, e.g., Lopez-Valenzuela*, 770 F.3d at 784-85.

In recent cases presenting nearly identical factual circumstances to the case at bar, federal district courts have concluded that the government must prove detention is necessary by clear and convincing evidence before a court may set unaffordable monetary bail that operates as a *de facto* detention order. *See, e.g., Schultz*, 330 F. Supp. 3d at 1372 ("[B]efore ordering an unaffordable secured bond, a judge must find by clear and convincing evidence that pretrial detention is necessary to secure the defendant's appearance at trial or to protect the public."). Doing so is necessary to account for the "vital importance of the individual's interest in pretrial liberty recognized by the Supreme Court." *Caliste*, 329 F. Supp. 3d at 313. Various state courts have reached the same result. *See Humphrey*, 228 Cal. Rptr. 3d at 535 ("If [a] court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose."); *see also Kleinbart v. United States*, 604 A.2d 861, 870 (D.C. 1992).

Counsel. Finally, Defendants must ensure that individuals are provided counsel at the bail-setting hearing.[7] Empirical evidence demonstrates that counsel is the single most

[7] Defendants' practice of failing to provide individuals with counsel at the bail-setting appearances violates not only individuals' Fourteenth Amendment procedural due process rights, but also their Sixth Amendment right to counsel, as explained below. *Infra*. section I.D.

important factor in determining the length of pretrial detention, protecting against self-incrimination, and ensuring that evidence against continued detention is articulated and properly presented.[8] The significant risk of erroneous pretrial detention in the absence of counsel is a consequence of the complexity of bail decisions. Multiple factors must be considered to evaluate a person's likelihood of returning to court or potential risk to public safety, including, among other considerations, unmet needs such as transportation, housing, and healthcare, and whether alternatives to incarceration exist in the particular jurisdiction, such as court appearance reminders, or drug and mental health treatment. Bail hearings require specialized knowledge and skill that only counsel can reliably provide,

[8] *See* Douglas L. Colbert et. al., *Do Attorneys Really Matter? The Empirical and Legal Case For The Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1720, 1773 (2002), https://digitalcommons.law.umaryland.edu/fac_pubs/291/ (explaining that delaying appointment of counsel is the most powerful cause of lengthy pretrial detention); Ernest J. Fazio, Jr. et al., Nat'l Inst. of Justice, U.S. Dep't of Justice, NCJ 97595, *Early Representation by Defense Counsel Field Test: Final Evaluation Report* 208, 211 (1985), https://perma.cc/4882-7CFX (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); *see also* Wayne R. LaFave, et al., 4 CRIM. PROC. § 12.1(c) (4th ed. 2016) (finding that 75 percent of represented defendants at bail hearings are released on their own recognizance, compared to 25 percent of non-represented defendants); Worden, A. P. et al., W*hat Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, 29 CRIM. JUSTICE POLICY REV. 710, 710-735 (2018), https://doi.org/10.1177/0887403417726133 (finding that having counsel at First Appearance in three New York counties led to significant decreases in pretrial detention and bail amounts as well as an increase in the number of people who spent no time in jail pretrial because of cash bail); *see also Caliste*, 329 F. Supp. 3d at 314 ("Considering the . . . vital importance of pretrial liberty, assistance of counsel is of the utmost value at a bail hearing.").

especially immediately following arrest, when a person is in crisis, removed from her family and community, and confined to a jail cell.

3. The State's Interests Are Served by Additional Procedural Safeguards.

With respect to the third *Mathews* factor, Defendants' interests are, in fact, furthered by instituting these procedural safeguards. As discussed in the previous sections, the State's interests in bail are reasonably assuring an individual's appearance in court and protecting public safety. *See supra* section I.A. Providing individuals with counsel and a meaningful, adversarial hearing would ensure that the bail system in Alamance County works in furtherance of those dual governmental interests.

To the extent that Defendants would contend that the procedures outlined above pose an administrative or financial burden, any such burden cannot justify the high risk—in fact, near certainty—of erroneous deprivation of a fundamental right posed by Defendants' practices. *See Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971) (in rationalizing the wealth-based discrimination against low-income criminal defendants, "[t]he State's fiscal interest is . . . irrelevant"). Moreover, providing individuals with the procedural safeguard described above will likely result in a significant number of individuals being released, saving Defendants money that otherwise would be spent on unnecessarily and unconstitutionally incarcerating them.

Thus, any interest Defendants may have in continuing to operate their bail system without these procedures is outweighed by the high risk of erroneous deprivation of individuals' fundamental rights, as well as Defendants' own compelling interests in fair

and accurate adjudication of criminal cases. Plaintiffs therefore establish a likelihood of success on their procedural due process claim.

D. Count IV: Defendants Violate Plaintiffs' Sixth Amendment Right to Counsel.

Defendants violate Plaintiffs' Sixth Amendment right to counsel by failing to provide counsel at the initial bail-setting appearance. The Sixth Amendment requires that a person facing criminal prosecution be provided counsel at all "critical stages" of their case. *See Bell v. Cone*, 535 U.S. 685, 695-96 (2002); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). A "critical stage" is one that holds "significant consequences for the accused," *Bell*, 535 U.S. at 695-96, and includes preliminary proceedings "where certain rights may be sacrificed or lost," *Coleman v. Alabama*, 399 U.S. 1, 7 (1970). *See also Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961) (right to counsel at arraignment).

As one district court in Texas recently opined, "there can really be no question that an initial bail hearing should be considered a critical stage[.]" *Booth v. Galveston Cty.*, 352 F. Supp. 3d. 718, 738 (S.D. Tex. 2019); *see also Higazy v. Templeton*, 505 F.3d 161, 172-73 (2d Cir. 2007); *Caliste*, 329 F.Supp.3d at 314. When conducted in accordance with the Constitution, a bail hearing is substantively and procedurally complex and holds significant consequences for the accused, as they may lose their fundamental right to pretrial liberty at these hearings. In Alamance County, the bail-setting proceedings routinely result in *de facto* orders of detention, which, under federal law, must be accompanied by stringent procedural protections and substantive findings, *see supra* sections I.B and I.C. The importance of counsel at the bail-setting stage is furthermore underscored by the empirical

evidence, *see supra* at section I.C.2, that establishes the substantive, negative impacts that pretrial detention has on an individual's case outcomes.

Indeed, because the question of an individual's pretrial freedom or incarceration is determined at the bail-setting appearance, this is precisely the type of hearing where, according to the Fourth Circuit, an individual "must make decisions which may make the difference between freedom and incarceration," and is a critical stage of the criminal case at which counsel must be provided. *Nelson v. Peyton*, 415 F.2d 1154, 1157 (4th Cir. 1969). Plaintiffs are therefore likely to succeed on their Sixth Amendment right to counsel claim.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY INJUNCTIVE RELIEF

Without a preliminary injunction, putative class members will continue to be unconstitutionally jailed. The deprivation of any constitutional right is alone sufficient to establish irreparable harm. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987); *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016). Nowhere is this more clearly the case than where an individual is imprisoned in violation of one's constitutional rights. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see also Foucha*, 504 U.S. at 80.

Indeed, even one unjustified night in jail causes irreparable harm. *See, e.g.*, *United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988) ("[U]nnecessary deprivation of liberty clearly constitutes irreparable harm."); *Jarpa v. Mumford*, 211 F.Supp.3d 706, 711 (D. Md. 2016) ("[I]f [Plaintiff's] continued detention is indeed unconstitutional, every

subsequent day of detention without remedy visits harm anew," which "cannot be undone or totally remedied through monetary relief.").

In the pretrial context specifically, depriving people of their fundamental liberty interest may cause psychological and economic harm, undermine their ability to prepare a defense, and increase risk of future arrest. As the Supreme Court explained, pretrial incarceration "often means loss of a job," "disrupts family life," and "if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972). Therefore, [i]mposing those consequences on anyone who has not yet been convicted is serious." *Id.* at 533; *see also Pugh*, 572 F.2d at 1056-57; *ODonnell II*, 892 F.3d at 154-55, 162-63; *Schultz*, 330 F. Supp. 3d at 1374-75; *Jones v. City of Clanton*, No. 2:15-CV-34-MHT, 2015 WL 5387219, at *3 (M.D. Ala. Setp. 14, 2015) (explaining that pretrial detention can "impede the preparation of one's defense; . . . it can induce even the innocent to plead guilty so that they may secure a quicker release").

Here, class members are suffering the irreparable harm of unconstitutional detention and are in imminent danger of additional harms including loss of jobs, Ex. A ¶17; Ex. B ¶21; Ex. C ¶19, loss of housing, Ex. A ¶18; Ex. B ¶21; Ex. C ¶19, deterioration of physical and mental health, Ex. A ¶19; Ex. B ¶19-20; Ex. C ¶18, and loss of government benefits, Ex. B ¶21.

Accordingly, the Court should find that Plaintiffs will suffer irreparable injury without a preliminary injunction.

III. THE BALANCE OF HARDSHIPS WEIGHS IN FAVOR OF GRANTING PRELIMINARY INJUNCTIVE RELIEF

The ongoing serious and irreparable harms to Plaintiffs and proposed class members considerably outweigh any potential harm to Defendants. Without immediate injunctive relief, Plaintiffs and proposed class members will be unconstitutionally jailed because they cannot pay secured money bail. This unconstitutional, wealth-based detention results in additional harms, including loss of jobs, loss of homes, and disruption to family life. In addition, pretrial detention hinders individuals' ability to prepare their defense, and strong empirical evidence has linked pretrial detention to negative outcomes in individuals' criminal cases—including increased likelihood of conviction, sentences for longer terms of incarceration, and increased likelihood of failure on eventual pretrial release.[9]

The provision of constitutionally required process to pretrial detainees and substantive determinations regarding the necessity of their detention—the sole relief requested by Plaintiffs in this motion—causes no harm to Defendants. To the contrary, Defendants will save the significant costs of unnecessarily detaining class members in their

[9] *See* Cristopher T. Lowenkamp, et al., Laura and John Arnold Foundation, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* 4 (Nov. 2013) https://nicic.gov/investigating-impact-pretrial-detention-sentencing-outcomes, (finding that those detained for the entire pretrial period are more likely to be sentenced to jail and prison—and receive longer sentences—than those who are released at some point before trial or case disposition); Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 18 (Nov. 8, 2016), https://www.econ.pitt.edu/sites/default/files/Stevenson.jmp2016.pdf, (finding that a person who is detained pretrial is 13 percent more likely to be convicted and 18 percent more likely to plead guilty); Arpit Gupta et al., *The Heavy Cost of High Bail*, *supra* n.5 at 15, (finding a 12 percent increase in the likelihood of conviction using the same data).

unconstitutional, wealth-based detention scheme, which is to their benefit. *See Jones*, 2015 WL 5387219 at *3 ("[U]nnecessary pretrial detention burdens States, localities, and taxpayers . . . ."); *see also* Peter Wagner & Bernadette Rabuy, Prison Policy Initiative, *Following the Money of Mass Incarceration* (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html, ("[M]ore than half ($13.6 billion) of the cost of running local jails is spent detaining people who have not been convicted.").

Defendants' potential arguments related to flight risk or public safety are also meritless because, under Defendants' current scheme, individuals who may pose a risk of flight or danger will be released if they can pay the required amount of money. Empirical evidence also shows that Defendants could safely release individuals on unsecured bond or other non-financial conditions without any impact on the administration of justice.[10]

The balance of harms therefore substantially weighs in favor of class members who suffer serious, long-term, and irreparable injuries from being unconstitutionally detained pretrial. Defendants, on the other hand, receive no tangible benefit from this detention system. *See, e.g.*, *Daves v. Dallas Cty.*, 341 F. Supp. 3d 688, 696-97 (N.D. Tex. 2018) (finding balance of harms weighed in favor of enjoining use of secured money bail without the requisite substantive findings and procedural safeguards); *Schultz*, 330 F. Supp. 3d at

[10] *See, e.g.*, Michael R. Jones, Pretrial Justice Institute, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* 10 (Oct. 2013) https://pdfs.semanticscholar.org/5444/7711f036e000af0f177e176584b7aa7532f7.pdf ("Whether released defendants are higher or lower risk or in between unsecured bonds offer the same public safety benefits as do secured bonds."); *see id.* at 11 (same conclusion but with regard to court appearance); Gupta, *The Heavy Cost of High Bail*, supra n.5 at 21 ("Our results suggest that money bail has a negligible effect [on failure to appear] or, if anything, increases failure to appear.")

1375-76 (finding balance of harms weighed in favor of an injunction, in part, because "alternative pretrial detention policies are cost effective").

IV. GRANTING PRELIMINARY RELIEF IS IN THE PUBLIC INTEREST

"[U]pholding constitutional rights surely serves the public interest." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). Here, as discussed above, Defendants' practices have resulted, and will continue to result, in violation of Plaintiffs' and proposed class members' fundamental rights. It is in the public interest to prevent such a violation.

Moreover, the unnecessary detention of indigent individuals has significant, negative consequences for the public: as previously discussed, even a brief period incarceration can lead to loss of employment, disrupted family life, increased poverty, and increased recidivism, upsetting the fabric of a community. *See supra* at section II; *Schultz*, 330 F.Supp.3d at 1364 ("[P]retrial detention may increase the risk of harm to the community"). At the same time, unconstitutionally detaining people solely because they cannot afford to pay financial conditions of release is expensive and drains public coffers of money that could be spent on other needs. *See Jones*, 2015 WL 5387219 at *3.

Meanwhile, there is no evidence that imposing financial conditions of pretrial release (even for those who *can* afford to pay) is more effective than alternative measures for ensuring court appearance and public safety. *See supra* note 10 and accompanying text. Thus, the public interest is served by granting Plaintiffs' and proposed class members'

requested relief. Because each of the preliminary injunction factors weigh in favor of a preliminary injunction, this Court should grant the request for a preliminary injunction.

VI. THE COURT SHOULD NOT REQUIRE PLAINTIFFS TO POST SECURITY

Federal Rule of Evidence 65(c) permits the Court to order the posting of security to protect the other party from any financial harm caused by a preliminary injunction. Under the Fourth Circuit's interpretation of Rule 65(c) the district court "retains the discretion to set the bond amount as it sees fit or waive the security requirement." *Pashby*, 709 F.3d at 332.

Plaintiffs are indigent, and their inability to post bail should not prevent them from obtaining a court order to protect their constitutional rights. *See Wayne Chem., Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977) (affirming district court's order of no bond for indigent person). Moreover, Plaintiffs are "engaged in public-interest litigation, an area in which the courts have recognized an exception to the Rule 65 security requirement" because requiring security would deter others from exercising their constitutional rights. *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981).

Finally, as explained above, Plaintiffs are likely to succeed on the merits of their claims. *See Moltan Co. v. Engle-Pitcher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) ("[N]o security was needed because of the strength of [Defendant's] case and the strong public interest involved.").

CONCLUSION

For the reasons stated, Plaintiffs' motion for preliminary injunction should be granted. Plaintiffs respectfully request that the Court enter injunctive relief against Defendant Sheriff as set forth in the accompanying proposed order.

Date: November 15, 2019

Respectfully submitted,

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**Appearing by special appearance in accordance with Local Rule 83.1(d).*

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on November 15, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record who have appeared in this case.

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