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. (Class Action)

PLAINTIFFS' BRIEF IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION

Named Plaintiffs, Lea Allison, Antonio Harrell, and Katherine Guill, file this motion contemporaneously with their Complaint, which challenges Alamance County's practice of locking people in jail before trial, simply because they cannot afford to buy their release. Named Plaintiffs, who seek injunctive and declaratory relief, move for class certification under Federal Rules of Civil Procedure 23(a) and 23(b)(2) to represent all people charged with non-domestic violence offenses who are or will be detained in Alamance County Detention Center because they are unable to pay secured money bail.[1] Named Plaintiffs also move for appointment of the undersigned as class counsel under Rule 23(g).

[1] The proposed class includes only people arrested for felony and misdemeanor offenses that do not include domestic violence offenses. Individuals charged with domestic violence offenses receive a different process for bail and pretrial release under state law, which requires that their bail be set by a judge. *See* N.C. Gen. Stat. § 15A-534.1.

Class certification is warranted here. Defendants maintain an unconstitutional bail and pretrial detention system, which has caused the same injury to named Plaintiffs and all putative class members: confinement in jail solely because they cannot afford to pay for their release. The Named Plaintiffs and the proposed class meet Rule 23(a)'s prerequisites for class certification: joinder of all proposed class members in this numerous, transient, and indigent class is impracticable; the Named Plaintiffs' claims are typical of the class and resolving them requires resolving questions of law and fact common to the entire class; and the named Plaintiffs and their counsel are dedicated to vindicating the constitutional rights of the proposed class. Finally, as Rule 23(b)(2) requires, Defendants' unconstitutional acts apply to every member of the class, such that the requested final declaratory and injunctive relief is appropriate for the class a whole.

Accordingly, Plaintiffs seek to certify and represent a class, defined as:

> 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.

STATEMENT OF THE FACTS

Named Plaintiffs Lea Allison, Antonio Harrell, and Katherine Guill were arrested on non-domestic violence charges on November 9 and November 11, 2019, and are currently detained pretrial at Alamance County Detention Center on secured bonds ranging from $1,500 to $3,500, which they cannot afford to pay. Declaration of Lea Allison, (Allison Decl.), Ex. A ¶¶2-3, 7, 11; Declaration of Antonio Harrell, (Harrell Decl.), Ex. B ¶¶2-3, 25, 18; Declaration of Katherine Guill, (Guill Decl.), Ex. C ¶¶2-3, 8, 12. For each

of these Named Plaintiffs, their secured bond was set by magistrate, who never asked them about their ability to pay, their ties to the community, or made any other individualized inquiry. Allison Decl., Ex. A ¶¶3-5, 8; Harrell Decl., Ex. B ¶¶11; Guill Decl., Ex. C ¶¶7-8, 13. None of the Named Plaintiffs received the assistance of counsel at their bail-setting. Allison Decl., Ex. A ¶¶3-5; Harrell Decl., Ex. B ¶6; Guill Decl., Ex. C ¶9. In fact, in Ms. Allison's case, she did not have a bail-setting appearance before a magistrate at all, and simply received a pre-printed form with her bond written on it. Allison Decl., Ex. A ¶3-5. Thus, each of the Named Plaintiffs are being kept in jail because they are too poor to pay a secured financial condition of release that was imposed upon them without an inquiry into or findings concerning their ability to pay. As a result of being detained on unaffordable money bail, each Named Plaintiff has suffered or will suffer serious harm, including loss of jobs and income, loss of housing, and deterioration of mental and physical health due to lack of access to important medication. Allison Decl., Ex. A ¶¶17-19; Harrell Decl., Ex. B ¶¶18-21; Guill Decl., Ex. C ¶¶16-19.

Named Plaintiffs' experiences are typical of individuals arrested in Alamance County. Defendants have adopted and maintain a policy and practice of denying pretrial release to people detained in the Alamance County jail who cannot afford to pay secured money bail.[2] Senior Resident Lambeth is responsible under state law for promulgating the bond policy for the superior court district in which Alamance County is located. For people

[2] "Secured money bail" is an order to pay the money bail amount in full up front as a condition of release from jail. By contrast, "unsecured bail" or "personal bond" is a promise to pay money bail later, if an individual fails to appear in court.

arrested for non-domestic violence offenses, bail is set by magistrates, who are supervised by Chief District Judge Allen. The magistrates set bail at an initial appearance, a brief proceeding in the jail that does not include *any* of the following: (1) a meaningful opportunity to be heard, including the opportunity to present or rebut evidence relevant to the setting of bail; (2) an inquiry or findings regarding an individual's ability to pay money bail; (3) the assistance of counsel; (4) individualized findings, by clear and convincing evidence, as to whether the individual presents an unmanageable flight risk or an identified and articulable danger to the public that might otherwise establish grounds for pretrial detention; or (5) any finding that non-financial conditions of release would not sufficiently reduce risk of flight or danger to the public.

Rather, at the initial appearance, magistrates require secured money bail in most cases, and do so without making an individualized inquiry into or findings about the person's ability to pay. Nor do the magistrates make a finding that pretrial detention is the least restrictive condition that can reasonably assure the person will appear in court or address concerns that the person poses a danger to the public. As a result, while wealthier individuals can immediately obtain release by paying secured money bail, poor arrestees must remain in jail for several days—and often as long as weeks—before they have a meaningful opportunity for review of their conditions of release.

After this initial appearance before a magistrate, individuals who are unable to pay money bail must wait for a "first appearance" before a district judge, which could occur

between one day and several weeks after being booked into the jail.[3] These first appearances, which last typically only a few minutes, are limited to the district judge informing detained persons of the charges against them, stating the maximum possible sentence for each charge, and determining eligibility for appointed counsel. The district judge does not discuss conditions of release unless a statutory exception requires the district court to set bail, such as for individuals charged with a domestic violence offenses.

The district judges refuse to hear any request from detained individuals to modify conditions of release. These individuals are not represented by counsel and are not allowed to speak to the judge at their first appearance except to inform the judge whether they plan to retain counsel or would like appointed counsel, and possibly to respond to questions about their affidavit of indigence for purposes of appointment of counsel. If a detained person attempts to request that bail be modified, the judge informs them that the first appearance is not the appropriate time to talk about their release conditions and they must file a bail motion. Detained individuals who are indigent are therefore never given an opportunity at the first appearance to provide the judge with information about their inability to meet the release conditions. Even after an attorney enters an appearance in their case and files a motion for bond reduction, they are forced to wait at least one additional

[3] Individuals charged with felony offenses are entitled under state law to a first appearance within 96 hours of arrest. N.C. Gen. Stat. § 15A-601. Individuals charged only with misdemeanor offenses, however, are not. In cases involving only misdemeanor charges, Alamance County magistrates typically schedule first appearances for the next date that the arresting officer is scheduled to be in court, which can be weeks, or sometimes a month or more, after arrest.

day after it is filed to be heard because the district court's policy requires that defendants must give prosecutors notice at least 24 hours before a bond reduction can be heard. The result is that indigent arrestees remain incarcerated in the custody of the Sheriff at a minimum for several days, and as long as several weeks before they are given *any* opportunity to challenge or modify the conditions of release set in their case.

Defendants' bail policies and practices therefore jail people solely because they cannot afford to buy their freedom. This discriminates on the basis of wealth in violation of the equal protection and due process clauses, infringes upon individuals' fundamental interest in pretrial liberty, violates their procedural rights under the due process clause, and deprives them of the constitutional right to counsel. *See* Mem. in Supp. of TRO & Prelim. Inj. Of the nearly 350 human beings who are detained in the Alamance County jail, a significant majority, approximately 78 percent, are awaiting trial and are therefore presumptively innocent.[4] Many of these individuals are detained, as a result of Defendants' unconstitutional policies and practices, solely because they are too poor to pay the monetary release conditions imposed.

QUESTIONS PRESENTED

1. Whether named Plaintiffs Lea Allison, Antonio Harrell, and Katherine Guill may maintain this action as representative parties on behalf of all people charged with non-domestic violence offenses who are or will be detained in the Alamance County

[4] Data obtained from Alamance County Sheriff's Office Inmate Inquiry, *accessed on* Nov. 8, 2019 at 2:30 p.m.

Detention Center post-arrest because they are unable to pay the monetary release conditions, where the named Plaintiffs have demonstrated that the prerequisites of Rule 23(a) and 23(b)(2) are satisfied.

2. Whether Plaintiffs' counsel may be appointed to represent the class under Federal Rules of Civil Procedure 23(g), where counsel have committed substantial resources to investigating Defendants' alleged misconduct and prosecuting the claims, have the resources to continue representing the class, and have substantial litigation experience litigating similar actions.

ARGUMENT

I. CERTIFICATION OF THE PROPOSED CLASS IS PROPER UNDER RULES 23(A) AND (B)(2).

Under Federal Rule of Civil Procedure 23(a), the party seeking class certification must show that:

> (1) The class is so numerous that joinder of all members is impracticable;
> (2) There are questions of law or fact common to the class;
> (3) The claims or defenses of the named parties are typical of the claims or defenses of the class; and
> (4) The named parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. 23(a); *Berry v. Schulman*, 807 F.3d 600, 608 (4th Cir. 2015).

Additionally, the class must fit one of the three types of classes listed in Rule 23(b). *Berry*, 807 F.3d at 608-09. Here, Named Plaintiffs seek certification of the class under Rule 23(b)(2), which is commonly used in certifying civil rights class actions. Class certification under Rule 23(b)(2) is appropriate when a "single injunction or declaratory judgment

would provide relief to each member of the class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011).

While the court must perform a "rigorous analysis" to determine whether to certify a class, *id.* at 351, it may not require the plaintiffs to prove their claims at the class certification stage. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). Courts consider merits questions only to the extent that they are "relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Brown v. Nucor Corp.*, 785 F.3d 895, 903 (4th Cir. 2015) (citing *Amgen*, 568 U.S. at 466). Thus, "[a]n evaluation of the probable outcome on the merits is not properly part of the certification decision," *Amgen*, 568 U.S. at 466.

Class certification is particularly favored when, as here, the named plaintiffs assert civil rights claims that are transitory in nature, such that mootness concerns would make it difficult or impossible for individuals to litigate the issues outside of the class context. *See Gratz v. Bollinger*, 539 U.S. 244, 268 (2003) (noting that class-action treatment was "particularly important" in a case where the claims of the individual plaintiffs ran "the risk of becoming moot" because the "[t]he class action vehicle . . . provides a mechanism for ensuring that a justiciable claim is before the Court") (quotation marks and citation omitted)). Indeed, class-action treatment is favorable here given the relatively brief nature of incarceration in county jail. *See, e.g.*, *Hiatt v. Cty. of Adams*, 155 F.R.D. 605, 608–09 (S.D. Ohio 1994) (explaining that given the "short term nature of incarceration in a county

jail," a class should be certified when it is the "only vehicle whereby the legality of [a jail's] operation can be reviewed").

As such, district courts around the country have consistently certified classes that, similar to the proposed class here, are composed of individuals who are arrested and subjected to bail policies that detain them solely because of their inability to pay secured money bail, in violation of due process and equal protection. *See, e.g.*, *Booth v. Galveston Cty.*, No. 3:18-CV-00104, 2019 WL 1129492 (S.D. Tex. Mar. 12, 2019); *Caliste v. Cantrell*, No. CV 17-6197, 2018 WL 1365809, at *2 (E.D. La. Mar. 16, 2018); *Edwards v. Cofield*, No. 3:17-CV-321-WKW, 2018 WL 4323920 (M.D. Ala. Sept. 10, 2018); *Buffin v. City & Cty. of San Francisco*, No. 15-CV-04959-YGR, 2018 WL 1070892 (N.D. Cal. Feb. 26, 2018); *ODonnell v. Harris Cty.*, No. CV H-16-1414, 2017 WL 1542457 (S.D. Tex. Apr. 28, 2017); *Walker v. City of Calhoun*, No. 4:15-CV-170-HLM, 2016 WL 361580, at *10 (N.D. Ga. Jan. 28, 2016). As discussed below, each of the requirements under Rule 23(a) and (b)(2) is met in this case, and the Court should grant Plaintiffs' motion for class certification.

A. Joinder of All Proposed Class Members is Impracticable

First, the proposed class is sufficiently numerous to make joinder impracticable. Fed. R. Civ. P. 23(a)(1). In determining whether the numerosity requirement is met, "[n]o specified number is needed to maintain a class action." *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984) (citation and quotation omitted). In fact, even eighteen people can be sufficient. *See Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n.*,

375 F.2d 648, 653 (4th Cir. 1967); *see also Rodger v. Elec. Data Sys. Corp.*, 160 F.R.D. 532, 535 (E.D.N.C. 1995) ("[A] class of as few as twenty-five to thirty members raises a presumption that joinder would be impracticable.").

Moreover, plaintiffs are not required at the certification stage to determine the precise number of class members. "[T]here is no mechanical test for numerosity." *Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir. 1984). The plaintiffs "need only make a reasonable estimate of the number of class members." *Wiseman v. First Citizens Bank & Tr. Co.*, 212 F.R.D. 482, 486 (W.D.N.C. 2003) (citation omitted), *adhered to on reconsideration*, 215 F.R.D. 507 (W.D.N.C. 2003). In fact, when it is difficult to immediately identify all class members, joinder is more impractical. *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 645 (4th Cir. 1975).

Here, the proposed class easily meets the Rule 23(a)(1) numerosity requirement. While the precise number of individuals in the class is unknown, of the nearly 350 people in the Alamance County Detention Center on November 8, 2019, approximately 78 percent were being detained pre-trial.[5] In 2017, Alamance County issued a secured money bond in 85 percent of misdemeanor cases and 93 percent of felony cases. *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. Given that Alamance County's poverty rate is 17.6 percent, it is certain that a significant

[5] *Supra* note 4.

proportion of detainees are in jail simply because they cannot afford to pay money bail. *See* U.S. CENSUS BUREAU, AMERICAN FACTFINDER, POVERTY STATUS IN THE PAST 12 MONTHS: 2013-2017 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, Table at 1 (Alamance County, NC), https://factfinder.census.gov/bkmk/table/1.0/en/ACS/17_5YR/S1701/0500000US37001.

In determining whether Rule 23(a)(1) is satisfied, courts also consider whether the existence of future class members makes joinder inherently impracticable. *See Walker v. Styrex Indus*., 21 Fed. R. Serv. 2d 206, 1 (M.D.N.C 1976); *see Phillips v. Joint Legislative Comm. on Performance & Expenditure Review of State of Miss.*, 637 F.2d 1014, 1022 (5th Cir. 1981). Here, the class is made up of individuals whose pretrial detention will necessarily end with the adjudication of their criminal cases. It would be impracticable to join future class members, even though it is certain that future members of the class will be unconstitutionally held as the result of Defendants' ongoing wealth-based detention practices. Thus, this action, which seeks prospective relief regarding transitory jail time for current and future class members, is especially well-suited for class action status. *See Scott v. Clarke*, 61 F. Supp. 3d 569, 584 (W.D. Va. 2014) (finding joinder impracticable in the context of a proposed class containing members of a fluid prison population); *Hiatt*, 155 F.R.D. at 608.

In addition, where class members lack financial resources or are otherwise disadvantaged, joinder is even more impracticable. *See Rodger*, 160 F.R.D. at 536–37 ("'Relevant considerations include . . . financial resources of class members . . . .'" (quoting

Robidoux v. Celani, 987 F.2d 931 (2d Cir. 1993))); *see also Steward v. Janek*, 315 F.R.D. 472, 480 (W.D. Tex. 2016); *Cortigiano v. Oceanview Manor Home for Adults*, 227 F.R.D. 194, 204–05 (E.D.N.Y. 2005). In this case, the putative class members are people who are detained pretrial because of their poverty. It would be impracticable for such individuals to engage in the resource-intensive exercise of individually litigating their claims.

The number of potential and future class members, the difficulty in immediately identifying these potential class members, and the putative class members' indigence makes their joinder impracticable, and Rule 23(a)(1) is thus satisfied.

B. The Claims of the Proposed Class Raise Common Questions that will Generate Common Answers

Second, there are questions of law or fact common to the class. *See* Fed. R. Civ. P. 23(a)(2). Commonality requires that class members' claims "depend on a common contention" of facts *or* law such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350.

In other words, the commonality requirement of Rule 23(a)(2) "does not require that all, or even most issues be common, nor that common issues predominate, but only that common issues exist." *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 636 (D.S.C. 1992), *aff'd,* 6 F.3d 177 (4th Cir. 1993); *see also Wal-Mart*, 564 U.S. at 369 ("'[E]ven a single [common] question' will do." (citation omitted)). For this reason, factual differences among the claims of putative class members do not defeat certification. Indeed, "Rule 23 does not require precise, mirror-image identity respecting the injuries caused by

a single practice or policy." *Int'l Woodworkers of Am. AFL-CIO, CLC v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1269–70 (4th Cir. 1981).

Rather, commonality requires that a common question or questions "generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 349-50 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)) (emphasis in original). These "common answers" must "relate[] to the actual theory of liability in the case." *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 505 (6th Cir. 2015). Civil rights cases often easily demonstrate commonality because the defendants' actions are "central to the claims of all class members[,] irrespective of their individual circumstances and the disparate effects of the conduct." *Baby Neal ex. rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994) (citing 7A Charles A. Wright, et al., Fed. Prac. & Proc. § 1763 at 219 (1986)).

Accordingly, courts in the Fourth Circuit have certified class actions in such cases as where a class of people in pretrial detention sought to challenge the state's practice of transferring pretrial detainees from local jails to state institutions, *see Epps v. Levine*, 457 F. Supp. 561, 563 (D. Md. 1978), and where a class of people unable to afford the traffic offense-related fines and court costs sought to challenge the state's practice of revoking their driver's licenses as a consequence of their inability to pay, *see Johnson v. Jessup*, 381 F. Supp. 3d 619, 637 (M.D.N.C. 2019). Courts around the country have also repeatedly and consistently certified classes challenging, as Plaintiffs do here, the constitutionality of jurisdiction-wide bail policies that are alleged to violate the Due Process and Equal

Protection Clauses. *See, e.g.*, *Edwards*, 2018 WL 4323920, at *1; *Buffin*, 2018 WL 1070892, at *3-4; *ODonnell*, 2017 WL 1542457, at *5-6.

In this case, the members of the proposed class share a common injury that is the result of Defendants' unconstitutional bail practices. For each member of the purported class, the injury is the same: they were or will be subjected to uncounseled bail hearings at which judicial officials fail to consider or make findings about their ability to pay, fail to make individualized findings on the record supported by clear and convincing evidence regarding the least restrictive conditions of release necessary in a particular case, and fail to consider more narrowly-tailored, non-financial release conditions to address any flight risk or danger concerns.

This injury is "*capable* of classwide resolution," *Rikos*, 799 F.3d at 505 (quoting *Wal-Mart*, 564 U.S. at 350) (emphasis in original), because the Court can issue a single declaration finding that Defendants' bail and pretrial detention policy and practice unconstitutionally discriminate on the basis of wealth and deprive those arrested of their right to counsel. In fact, here, most of the questions of fact and law at the core of this suit are common across the class, and thus this case more than meets the mere "single common question" that Rule 23(a)(2) requires, *Wal-Mart*, 564 U.S. at 359 (internal quotations and citation omitted).

For example, among the most important common questions of fact for the class are:

a. Whether Defendants have a policy and practice where Defendants set pretrial release conditions without process or a hearing;

b. Whether, when, and how any judicial official determines what conditions of pretrial release should be and whether, for example, any judicial official considers ability to pay, makes findings concerning ability to pay, and offers non-monetary release conditions for those unable to pay;

c. What standard post-arrest procedures created, implemented, and enforced by the Defendants apply to people booked in the Alamance County jail;

d. How long individuals booked in the Alamance County jail must wait in detention before they have an opportunity to challenge pretrial release conditions, raise their inability to pay for their release, or request alternative, non-monetary conditions;

e. How long individuals arrested must wait to be appointed an attorney who may challenge their pretrial detention;

f. The role of the magistrates in the setting of bail and conditions of release, whether any individualized analysis occurs, and whether and how inability to pay is considered;

g. Any supervision or training given to magistrates and used to help determine release conditions.

Among the most important common questions of law are:

a. Whether requiring an individual to pay money to secure release from pretrial detention without an inquiry into or findings concerning the individual's present ability to pay the amount required, the need for detention, and less restrictive alternative release conditions, violates the Fourteenth Amendment's Due Process and Equal Protection clauses;

b. Whether imposing a monetary release condition that operates as a *de facto* order of pretrial detention because of a person's inability to pay without complying with the substantive findings, legal standards, and procedures required for issuing and enforcing a *de facto* order of preventive detention violates the class members' substantive and procedural due process rights; and

c. Whether the setting of pretrial release conditions without an individual's ability to consult and be represented by counsel violates the Fourteenth Amendment's Due Process clause.

d. Whether the bail hearing before the magistrate is a critical stage of the criminal case, such that class members are entitled to a state-provided attorney under the Sixth Amendment.

Resolution of these common issues will provide "a common answer to the crucial question," *Wal-Mart*, 564 U.S. at 352, in this case of whether Defendants' pretrial policies are unconstitutional, and the class-wide declaratory and injunctive relief sought is common to the members of each proposed class. Rule 23(a)(2) is thus satisfied.

C. The Named Plaintiffs' Claims are Typical of the Proposed Class

Plaintiffs also meet the third Rule 23(a) requirement, in that their claims are "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The threshold requirements of . . . typicality are not high" *Brown v. Nucor Corp*., 576 F.3d 149, 153 (4th Cir.2009) (quotation omitted)). Class representatives must "be part of the class and possess the same interest and suffer the same injury as the class members." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982)). Under the typicality requirement, the Court does not require "members of the class [to] have identical factual and legal claims in all respects." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998). "[F]actual differences will not render a claim atypical," so long as the class representative's claim "arises from the same event or practice or course of conduct that gives rise to the claims of the class members" and is "based on the same legal theory," *Casey*, 43 F.3d at 58. In other words, "[t]he essence of the typicality requirement is captured by the notion that 'as goes the claim of the named plaintiff, so go the claims of the class.'" *Deiter v.*

Microsoft Corp., 436 F.3d 461, 466 (4th Cir. 2006) (quotation omitted). Therefore, in pursuing their own case, the representative parties "must simultaneously tend to advance the interests of the absent class members." *Id.*

Here, the claims advanced by the Named Plaintiffs' are identical to that of each class member's claims. Specifically, every Named Plaintiff and every class member's conditions of release were, or will be, summarily set at a brief hearing, lasting only a matter of minutes, without the presence or assistance of counsel and without an inquiry into, or findings concerning their ability to pay. Moreover, Named Plaintiffs and class members will not have *any* opportunity to challenge the required condition of release or even provide a district judge with information about their inability to pay secured money bail until 24 hours *after* their first appearance. Accordingly, they will languish in jail because of their inability to pay secured money bail. The Named Plaintiffs' experiences are exemplary of the experiences of the class members, and none of the Named Plaintiffs has received any unusual treatment that would make their claim atypical. Moreover, the relief that the named Plaintiffs seek would benefit all class members in an identical manner, and thus advance the interests of those absent class members. Rule 23(a)(3)'s typicality requirements is therefore satisfied.

D. The Named Plaintiffs are Competent and Dedicated Class Representatives

Finally, the Named Plaintiffs also meet the final requirement under Rule 23(a): they "will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). The adequate representation requirement is met where: "'1) plaintiff's interests are [not]

antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified experienced and able to conduct the litigation.'" *Longo v. Trojan Horse Ltd*., 208 F. Supp.3d 700, 711 (E.D.N.C. 2016) (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000)); *see also Olvera-Morales v. Int'l Labor Mgmt. Corp. Inc*, 246 F.R.D. 250, 258 (M.D.N.C. 2007) ("To establish adequacy, 'the representative must have common interests with unnamed members of the class' and 'it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.'") (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996)).

In this case, the Named Plaintiffs do not have interests that conflict with those of the rest of the class. To the contrary, as laid out above in the commonality and typicality discussions, the Named Plaintiffs here pursue claims common to the class as a whole in an effort to advance a common interest in reforming Defendants' unconstitutional bail practices. As also discussed above, the declaratory and injunctive relief they seek would benefit the entire class equally. The Named Plaintiffs and their fellow class members thus share a common interest and are not conflict with each other.

The Named Plaintiffs also meet the requirement that they will "vigorously prosecute the interests of the class through qualified counsel." *Olvera-Morales*, 246 F.R.D at 258. They are represented here by highly qualified and experienced civil rights attorneys who are able and willing to conduct this litigation on behalf of the class. Plaintiffs' counsel from the American Civil Liberties Union Foundation, American Civil Liberties Union of North Carolina Legal Foundation, and Civil Rights Corps collectively have extensive experience

litigating complex class action cases and civil rights cases, including cases concerning unconstitutional pre-trial systems. Hubbard Decl., Ex. A ¶¶6-8; Como Decl., Ex. B¶¶ 2, 5, 6; Buskey Decl., Ex. C¶¶ 3, 4, 8. As discussed in further detail below, *infra* Part II, Plaintiffs' counsel are qualified and experienced counsel with a history of zealous advocacy on behalf of their clients, and Rule 23(a)(4)'s adequacy requirement is thus met.

E. Certification of the Class for Prospective Relief is Appropriate Under Rule 23(b)(2).

In addition to satisfying Rule 23(a), the proposed class in this case satisfies Rule 23(b)(2). A court may certify a class under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2); *see also Zimmerman v. Bell*, 800 F.2d 386, 389–90 (4th Cir. 1986) ("[S]ubsection (b)(2) [is] limited to claims where the relief sought [is] primarily injunctive or declaratory."); *Bumgarner v. NCDOC*, 276 F.R.D. 452, 457–58 (E.D.N.C. 2011) ("The essential consideration is whether the complaint alleges that the plaintiffs have been injured by defendants' conduct which is based on policies and practices applicable to the entire class." (citation omitted)).

As the Supreme Court has recognized, "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of cases in which class certification is proper under Rule 23(b)(2). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *see also* William B. Rubenstein, Newberg on Class Actions § 1:3 (5th ed. 2019) ("Rule 23(b)(2) . . . . is typically employed in civil rights cases and other actions not

primarily seeking money damages. The (b)(2) class action is often referred to as a 'civil rights' or 'injunctive' class suit."). This is because "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart,* 564 U.S. at 360 (citation omitted). Certification is thus appropriate where final injunctive relief is sought and will "settl[e] the legality of the behavior with respect to the class as a whole." *Thorn v. Jefferson-Pilot Life Ins. Co.,* 445 F.3d 311, 329 (4th Cir. 2006) (quoting Fed. R. Civ. P. 23(b)(2) Adv. Cmt. Notes (1996)).

Plaintiffs satisfy these requirements. As discussed above, members of the proposed classes face the same harm: current or future detention on the basis of their inability to pay secured money bail as a result of Defendants' unconstitutional policy and practices. Defendants have therefore acted on grounds that apply generally to the entire class. *See Thorn,* 445 F.3d at 330 ("The twin requirements of Rule 23(b)(2) [are] that the defendant acted on grounds applicable to the class and that the plaintiff seeks predominantly injunctive or declaratory relief . . ."). As a result, injunctive and declaratory relief is appropriate to the class because the only relief that can adequately address the ongoing harm is to enjoin Defendants' unconstitutional practices. Furthermore, it is far more efficient for this Court to grant injunctive and declaratory relief protecting all of the class members than to extend that relief piecemeal through individual lawsuits. Indeed, class certification is necessary because the transitory nature of the constitutional harms at issue

here make it likely that many individual class members' claims would become moot before they could be addressed on the merits. *See, e.g.*, *Gayle v. Warden Monmouth Cty. Corr. Inst.*, 838 F.3d 297, 312 n.17 (3d. Cir. 2016) ("[I]mpending mootness of individual claims counsels in favor of certification . . . [f]or in that situation, class certification may be the *only* way to provide relief.") (emphasis in original); *Adams v. Califano*, 474 F.Supp. 974, 979 (D. Md. 1979) ("The class action is especially appropriate where, as here, the claims of the members of the class may become moot as the case progresses."); *see also ODonnell,* 2017 WL 1542457, at *1 (certifying a Rule 23(b)(2) class of individuals arrested and detained by Harris County who are unable to pay their secured bail because of indigence).

Defendants' unconstitutional practices apply generally to the proposed class, making the requested final injunctive and declaratory relief appropriate for the class as a whole. The Court should therefore certify the proposed class under Rule 23(b)(2).

II. PLAINTIFFS' COUNSEL SHOULD BE APPOINTED CLASS COUNSEL UNDER RULE 23(G).

Federal Rule of Civil Procedure 23(g) requires that the court appoint class counsel for any class that is certified. Fed. R. Civ. P. 23(g)(1). Class counsel must "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In determining whether this requirement is met, courts must consider: (1) "the work counsel has done in identifying or investigating potential claims in the action;" (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the

action;" (3) "counsel's knowledge of the applicable law;" and (4) "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

Undersigned counsel satisfy these four requirements. First, Plaintiffs' counsel have interviewed Plaintiffs and other class members, performed relevant legal research and drafting, and investigated the facts and legal claims raised in this case for many months. Hubbard Decl., Ex. D ¶¶4, 5; Como Decl., Ex. E ¶8; Buskey Decl., Ex. F ¶10. Second, Plaintiffs' counsel have significant experience litigating class action and civil rights actions, including claims concerning due process, equal protection, and the right to counsel, and have litigated challenges to unconstitutional bail systems in other jurisdictions across the country. Hubbard Decl., Ex. D ¶¶6-8; Como Decl., Ex. E ¶¶2, 3; Buskey Decl., Ex. F ¶¶3, 8, 9. Third, Plaintiffs' counsel are particularly familiar with the application of constitutional rights in criminal cases. Hubbard Decl., Ex. D ¶¶4, 7; Como Decl., Ex. E ¶4; Buskey Decl., Ex. F ¶¶4, 10. Counsel have advocated for policy reform on the issues raised in this case with state and local officials and educated the public and other attorneys about preventing and remedying the type of constitutional violations exemplified by this case. Buskey Decl., Ex. F ¶4. Finally, Plaintiffs' counsel are prepared to contribute significant resources to the representation of this class. Hubbard Decl., Ex. D ¶9; Como Decl., Ex. E ¶9; Buskey Decl., Ex. F ¶11.

Plaintiffs' counsel therefore satisfy Rule 23(g), and they respectfully request this Court's appoint them class counsel for the proposed class.

CONCLUSION

For the above reasons, Plaintiffs respectfully request the Court grant Plaintiffs' Motion for Class Certification. In the alternative, if Defendants contest material issues of fact necessary for class certification, Plaintiffs request the opportunity to conduct discovery related to class certification and hold a subsequent hearing.

Date: November 12, 2019

Respectfully submitted,

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

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CERTIFICATE OF WORD COUNT

In accordance with Local Rule 7.3(d)(1), I certify that the foregoing Memorandum in Support of Motion for Certification of Class, including the body of the brief, headings, and footnotes, does not exceed 6,250 words.

/s/ Irena Como
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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on November 12, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. I further certify that arrangements have been made to deliver a true and correct courtesy copy of the foregoing to the following via Certified U.S. Mail, Return Receipt Requested.

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