UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Twanda Marshinda Brown, *et al.*, Plaintiffs, v. Lexington County, South Carolina, *et al.*, Defendants.	Civil Action No. 3:17-cv-01426-MBS-SVH

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

This lawsuit challenges the operation of a modern-day debtors' prison in Lexington County, South Carolina ("the County"). Each year, hundreds of indigent people are routinely arrested and incarcerated in the County jail for a week to months at a time simply because they lack the means to pay fines and fees imposed by the County's magistrate courts. These seizures are unreasonable and the subsequent confinements occur without pre-deprivation ability-to-pay hearings, notice of the right to request counsel, and the assistance of court-appointed attorneys to help defend against incarceration. Such ongoing constitutional violations are the direct result of the policies, practices, and customs of Defendants Lexington County, Rebecca Adams, Albert J. Dooley, III, Bryan Koon, and Robert Madsen. As victims of Defendants' conduct, Plaintiffs Xavier Larry Goodwin and Raymond Wright, Jr. bring claims, on behalf of themselves and a proposed Class of similarly situated people, against the Defendants for declaratory and injunctive relief under the Fourteenth, Sixth, and Fourth Amendments to the U.S. Constitution.

The parties have only just begun discovery in this case. Defendants nevertheless filed a supplemental motion for judgment as a matter of law on Plaintiffs' prospective relief claims on the ground of mootness under the voluntary cessation doctrine. Defendants argue that a September 15, 2017, memorandum issued by Chief Justice Donald W. Beatty of the Supreme Court of South Carolina ("Chief Justice's Memorandum") demonstrates Defendants have ceased the alleged unlawful conduct. Defendants assert that the memorandum, which acknowledges "clear violations" of indigent defendants' Sixth Amendment right to counsel by South Carolina summary courts, cures any defect in Defendants' unlawful policies and practices. Defendants further contend that they are entitled, as government defendants, to a "lighter burden" than

private defendants to demonstrate voluntary cessation sufficient to merit a grant of summary judgment.

Defendants' premature motion for summary judgment fails as a matter of law and fact. As a threshold matter, this Court must apply a stringent standard to determine whether Plaintiffs' prospective relief claims are moot under the voluntary cessation doctrine. Contrary to Defendants' assertions, the U.S. Court of Appeals for the Fourth Circuit has long required government defendants to meet the "heavy" and "formidable" burden of establishing that any changed policies and practices have mooted claims in litigation. Defendants must show that it is absolutely clear that their alleged conduct leading to the unlawful arrest and incarceration of indigent people could not reasonably be expected to recur. Defendants fail to meet this burden for three main reasons.

First, Defendants entirely fail to identify any undisputed facts demonstrating that they have terminated the unlawful policies and practices alleged in the Amended Complaint and that they no longer retain the authority and capacity to revert to those policies and practices. Defendants' sole evidence of any purported change is the Chief Justice's Memorandum—an advisory memorandum generically addressed to South Carolina magistrate and municipal judges, which reiterates longstanding legal principles concerning the right to counsel and encourages judges to assess ability to pay when imposing fines and fees. Defendants provide no evidence that the memorandum binds any of the named Defendants in an unconditional and irrevocable agreement to end the specific policies and practices alleged to cause the unlawful arrest and incarceration of indigent people who cannot pay money to the County's magistrate courts. These include the enforcement of standard operating procedures resulting in warrants to arrest indigent people who owe money to the courts, the execution of those warrants, and the inadequate

funding for and provision of indigent defense in those courts. Nor do Defendants show that the memorandum addresses, much less eliminates, their authority or capacity to engage in those specific, unlawful policies and practices. Defendants offer only bald assertions that the Chief Justice's Memorandum has even the potential to impact Defendants' conduct or their authority or capacity to continue such conduct. These assertions fail to meet Defendants' heavy burden of proving that the challenged conduct cannot reasonably be expected to recur.

Second, Plaintiffs have compiled and analyzed publicly-available records that raise numerous questions of material fact as to whether Defendants' conduct leading to the unlawful arrest and incarceration of indigent people who cannot afford to pay money to Lexington County magistrate courts is ongoing. These records show that the County's magistrate courts continue to issue bench warrants ordering the arrest and incarceration of people for nonpayment of fines and fees and that law enforcement officers continue to enforce these warrants by arresting and incarcerating people unless they pay the full amount of money owed. These facts belie Defendants' claim that the alleged unlawful conduct has ceased and preclude a grant of summary judgment to Defendants.

Third, although there is ample basis for this Court to reject Defendants' assertion of mootness, should the Court conclude otherwise, it should stay a decision on Defendants' premature motion and permit additional time for Plaintiffs to conduct discovery. Plaintiffs submit a declaration under Federal Rule of Civil Procedure 56(d) explaining that discovery remains outstanding on questions of fact material to the resolution of Defendants' supplemental motion for summary judgment. Defendants have not yet responded to Plaintiffs' requests for production of documents, which seek targeted information concerning Defendants alleged policies and practices and whether any changes to these policies and practices have followed the

issuance of the Chief Justice's Memorandum. Because Plaintiffs demonstrate the need for discovery of facts essential to oppose Defendants' motion, this Court should afford Plaintiffs an opportunity to obtain the additional discovery requested.

Defendants' motion amounts to an improper attempt to end this litigation against a modern-day debtors' prison before Plaintiffs secure discovery on their well-pleaded allegations. Accordingly, this Court should deny Defendants' supplemental motion for summary judgment and permit this case to proceed to discovery. In the alternative, this Court should stay a decision on Defendants' motion and permit additional time for Plaintiffs to conduct discovery under Federal Rule of Civil Procedure 56(d).

II. STATEMENT OF FACTS

A. Defendants' policies and practices for collecting magistrate court fines and fees routinely result in the unconstitutional arrest and incarceration of indigent people.

The Plaintiffs in this case are indigent people who were arrested and incarcerated for periods of time ranging from seven to 63 days because they could not afford to pay fines and fees to Lexington County magistrate courts for traffic and misdemeanor offenses. Plaintiffs Xavier Larry Goodwin and Raymond Wright, Jr. bring claims for declaratory and injunctive relief against five named Defendants directly responsible for policies, practices, and customs that result in the routine and widespread arrest and incarceration of indigent people. As a consequence of Defendants' actions, each year, hundreds, if not more than one thousand, of the poorest residents of the County and its surrounding areas are deprived of their liberty in the Lexington County Detention Center ("Detention Center") for no reason other than their poverty and in violation of their most basic constitutional rights.

Plaintiffs' Class Action Amended Complaint ("Amended Complaint") details specific policies, practices, and customs that each of the named Defendants are alleged to enforce, which lead to Lexington County's modern-day debtors' prison.

1. Defendants Rebecca Adams and Albert J. Dooley, III, as the Chief Judge and Associate Chief Judge for Administrative Purposes of the Summary Courts in Lexington County

Defendants Rebecca Adams and Albert J. Dooley, III are the administrative leaders of Lexington County magistrate courts, and are sued for declaratory and injunctive relief under the Fourteenth, Sixth, and Fourth Amendments. Dkt. No. 20 ¶¶ 442–52 (Claim One), 453–68 (Claim Two), ¶¶ 469–76 (Claim Three). Defendant Adams is the Chief Judge and Defendant Dooley is the Associate Chief Judge for Administrative Purposes of the Summary Courts in Lexington County. *Id.* ¶¶ 28, 30. [1] Defendants Adams and Dooley are required to establish uniform policies and procedures for the collection of court fines and fees in Lexington County, to administer the County's Bond Court, to determine the hours of operation and nighttime and weekend schedules of the County's magistrate courts, to assign cases to magistrate court judges, and to coordinate the planning of budgets and request funding for magistrate courts. *Id.* ¶¶ 82–87. Defendants Adams and Dooley are also required to "[r]eport to the Office of South Carolina Court Administration any significant or repetitive non-compliance by any summary court judge in the county concerning the Chief Judge's execution" of administrative duties. S.C. Supreme Court Order, June 28, 2017. Pursuant to these authorities and responsibilities, Defendants Adams and Dooley oversee, enforce, and sanction at least three standard operating procedures across Lexington County that directly cause the arrest and incarceration of indigent people who cannot afford to pay magistrate court fines and fees in violation of their rights. Dkt. No. 20

[1] Prior to June 28, 2017, Defendant Adams served as the Associate Chief Judge for Administrative Purposes of the Summary Courts in Lexington County and Defendant Gary Reinhart served as the Chief Judge for Administrative Purposes for the Summary Courts in Lexington County. *See* Dkt. No. 1 ¶¶ 25–26; Dkt. No. 20 ¶¶ 6, 10.

¶¶ 88–109, 132–34.

First, Defendants Adams and Dooley are responsible for the Default Payment Policy, under which Lexington County magistrate courts routinely order the arrest and incarceration of people who cannot afford to pay fines and fees in traffic and misdemeanor criminal cases. *Id.* ¶¶ 88–101. When an indigent person is unable to pay in full at sentencing, the magistrate court imposes a payment plan requiring steep monthly payments beyond the individual's financial means. *Id.* ¶¶ 7, 90. If the indigent person fails to pay in the amount of time required by the payment plan, the court issues a bench warrant that orders law enforcement to arrest and jail the individual unless the full amount owed is paid before booking. *Id.* ¶¶ 7, 92.

Second, Defendants Adams and Dooley are responsible for the Trial in Absentia Policy, under which the County's magistrate courts routinely order the arrest and incarceration of indigent people who cannot afford to pay fines and fees imposed through trials and sentencing proceedings held in their absence. *Id.* ¶¶ 102–109. Regardless of the reason for a defendant's absence, the magistrate court proceeds without the defendant, imposes a conviction in absentia, and sentences the defendant to a term of incarceration suspended on the payment of fines and fees. *Id.* ¶¶ 8, 103. Without affording the defendant notice of the sentence, the magistrate court then swiftly issues a bench warrant ordering law enforcement to arrest and jail the defendant unless the individual is able to pay in full before being booked. *Id.* ¶¶ 8, 104, 108, 109.

Third, Defendants Adams and Dooley are responsible for the policy of denying individuals arrested on warrants issued under the Default Payment and Trial in Absentia Policies ("payment bench warrants") an ability-to-pay hearing in court and representation by court-appointed counsel to defend against incarceration. *Id.* ¶¶ 10, 12, 13, 28, 30, 95, 114, 116, 134. Defendants Adams and Dooley exercise administrative authority over the schedule, staffing,

policies, procedures, and practices of all Lexington County magistrate courts, including the Lexington County Bond Court, which is located in a building adjacent to the Detention Center. *Id.* ¶¶ 10, 132. Defendants Adams and Dooley make a deliberate decision not to require or even permit the Bond Court or the original magistrate court that issued the payment bench warrant to hold hearings for indigent people arrested and jailed on these warrants. *Id.* ¶¶ 10, 133.

The Amended Complaint alleges that, as the administrative leadership of Lexington County's magistrate courts, Defendants Adams and Dooley are aware, or should be aware, that these policies result in the persistent, widespread, and routine arrest and incarceration of indigent people for nonpayment of court fines and fees without pre-deprivation ability-to-pay hearings or representation by counsel. *Id.* ¶ 10. It also alleges that Defendants Adams and Dooley, in an exercise of their administrative authority, fail to take corrective action through written policy and make a deliberate decision not to increase court dockets or hours of operation, or request additional County funding for court operations to ensure that magistrate courts conduct ability-to-pay hearings before ordering the arrest and incarceration of indigent people who are unable to pay outstanding fines and fees in full. *Id.* ¶¶ 10, 114, 449, 504.

2. Defendant Bryan Koon, as the Lexington County Sheriff

Defendant Bryan "Jay" Koon is the chief law enforcement officer of the Lexington County Sheriff's Department ("LCSD") and the chief administrator of the Detention Center, and is sued for prospective relief under the Fourth and Fourteenth Amendments. Dkt. No. 20 ¶¶ 122, 474–76. When a payment bench warrant is issued under the Default Payment or Trial in Absentia Policies, it is transmitted to the LCSD warrant division for execution. *Id.* ¶ 121. Defendant Koon oversees and directs the law enforcement officers who arrest and incarcerate indigent people pursuant to payment bench warrants, unless these people pay the full amount of

fines and fees owed prior to being booked in the Detention Center. *Id.* ¶¶ 8, 31, 128, 483. Defendant Koon routinely oversees and directs jail staff to incarcerate indigent people arrested on bench warrants without subsequent transport to Bond Court or to the original magistrate court that issued the warrant for a court hearing on ability to pay. *Id.* ¶¶ 9, 450, 483. Defendant Koon's exercise of authority and capacity results in the arrest and incarceration of indigent people for days to months without ever seeing a judge, having a hearing, or receiving the advice of counsel. *Id.* ¶¶ 9, 446, 447, 450–52, 466–68.

3. Defendants Lexington County and Robert Madsen

Robert Madsen is the Circuit Public Defender for the Eleventh Judicial Circuit in South Carolina and, along with Lexington County, is sued for declaratory and injunctive relief for violations of the Sixth Amendment. Dkt. No. 20 ¶¶ 453–68. Defendant Madsen and the Lexington County Council are the final policymakers for the provision of indigent defense in the County's magistrate courts. *Id.* ¶¶ 11, 26, 44, 77, 79. In this capacity, Defendants Madsen and Lexington County routinely and systemically deprive indigent people of the right to assistance of counsel when those people face incarceration under the Default Payment and Trial in Absentia Policies. *Id.* ¶¶ 48, 460. Defendants Lexington County and Madsen make the deliberate decision to provide grossly inadequate funding for indigent defense in the County's magistrate courts. *Id.* ¶¶ 55, 460, 490.[2] Defendants Lexington County and Madsen also make deliberate decisions that result in public defenders not being assigned to represent indigent people facing incarceration for nonpayment or sentences of incarceration suspended on payment of fines and fees; not being assigned to represent indigent people arrested on payment bench warrants; and

[2] Lexington County provides less than half the amount of funding for public defense than the amount allocated by York County and Spartanburg County—two South Carolina counties of comparable population size. *See* Dkt. No. 20 ¶ 11.

not being assigned to meet with indigent people incarcerated in the Detention Center under payment bench warrants. *Id.* ¶¶ 11, 461, 491.

4. Defendant Rebecca Adams, in her capacity as a judge of the Irmo Magistrate Court

In addition to serving as the chief administrative judge for the County's magistrate courts, Defendant Adams serves as a judge on the Irmo Magistrate Court, and is sued by Mr. Goodwin for declaratory relief only for violations of the Fourteenth and Sixth Amendment. Dkt. No. 20 ¶¶ 29, 508–15 (Claim Seven), 516–23 (Claim Eight). In her capacity as a judge, Defendant Adams adjudicates traffic and criminal cases, and routinely orders the arrest and incarceration of indigent people for nonpayment of court fines and fees without affording them any pre-deprivation ability-to-pay hearings. *Id.* ¶¶ 7, 8, 29. Defendant Adams also routinely fails to notify indigent people of the right to request counsel and the risks of proceeding without counsel; fails to notify them of the right to request waiver of the $40 public defender application fee; fails to appoint counsel to represent them at no cost before ordering their arrest and incarceration for nonpayment, despite prima facie evidence of their indigence; and fails to engage in any colloquy to ensure that the signing of a Trial Information and Plea Sheet confirms a knowing, voluntary, and intelligent waiver of the right to counsel. *Id.* ¶ 29.

Defendant Adams recently sentenced Mr. Goodwin to pay traffic fines and fees to the Irmo Magistrate Court that he cannot afford. Mr. Goodwin faces a substantial and imminent risk of being unlawfully arrested and incarcerated for nonpayment of those fines and fees. *Id.* 35–1 ¶¶ 22–24, 342, 356–59, 511, 513, 514. He seeks a declaration that Defendant Adams routinely violates the Fourteenth Amendment by ordering the arrest and incarceration of indigent people for nonpayment of court fines and fees without providing them any pre-deprivation ability-to-pay hearings. Dkt. No. 20 ¶¶ 508–515 (Claim Seven for Declaratory Relief). Mr. Goodwin further

seeks a declaration that Defendant Adams routinely violates the Sixth Amendment right to counsel by failing to afford and adequately notify defendants of their right to assistance of counsel. *Id.* ¶¶ 516–523 (Claim Eight for Declaratory Relief).

B. Chief Justice Beatty's September 15, 2017 Memorandum

On September 15, 2017, Chief Justice Donald W. Beatty of the Supreme Court of South Carolina issued a memorandum to all municipal and magistrate court judges in South Carolina concerning the "Sentencing [of] Unrepresented Defendants to Imprisonment." Dkt. No. 40–1. The Chief Justice's Memorandum acknowledges that it has "continually" come to the Chief Justice's attention that "defendants, who are neither represented by counsel nor have waived counsel," are being sentenced to jail time. *Id.* at 1. In Chief Justice Beatty's words, "[t]his is a *clear* violation of the Sixth Amendment right to counsel and numerous opinions of the Supreme Court of the United States." *Id.* (emphasis supplied). The memorandum restates the minimum standard required by the Constitution:

> Absent a waiver of counsel, or the appointment of counsel for an indigent defendant, summary court judges shall not impose a sentence of jail time, and are limited to imposing a sentence of a fine only for those defendants, if convicted.

Id. at 1–2 (original emphasis omitted). The Chief Justice also instructs that, "[w]hen imposing a fine, consideration *should* be given to a defendant's ability to pay." *Id.* at 2 (emphasis supplied). The Chief Justice concludes the two paragraph-long memorandum by noting that he is "mindful of the constraints that [summary judges] face in [their] courts," but that "these principles of due process . . . cannot be abridged." *Id.*

Notably, the Chief Justice's Memorandum does not announce any specific policy changes or create mechanisms to ensure compliance with the basic constitutional principles it acknowledges. Nor does the memorandum reference bench warrants, much less correct the

misuse of bench warrants to arrest and incarcerate indigent people for inability to pay magistrate court fines and fees, as detailed in the Amended Complaint.

Whatever its intended effect, the Chief Justice's Memorandum is not a Supreme Court writ or order, any of which the Supreme Court has the power to issue. *See* S.C. Const. art. V, § 5. Nor is it a Supreme Court rule, which the Supreme Court may promulgate and present to the legislature. *Id*. § 4.A. The memorandum also does not appear on the website of the South Carolina Office of Court Administration, which compiles policy material, memoranda from the Chief Justice, a bench book, and other guidance for magistrate court judges across South Carolina. *See* S. C. Jud. Dept., Court Orders, http://judicial.state.sc.us/courtOrders/ (last visited Oct. 13, 2017). Nor does the memorandum appear to be publicly-available in any format. Additionally, although the Chief Justice's Memorandum is addressed to "Magistrate and Municipal Judges," it is not directed to any counties, county sheriffs, or public defenders.

C. Defendants persist in their challenged policies and practices after issuance of the Chief Justice's Memorandum.

Publicly-available records show that since the issuance of the Chief Justice's Memorandum, people continue to be arrested and incarcerated in the Detention Center pursuant to payment bench warrants issued under the Default Payment and Trial in Absentia Policies without first being afforded hearings on their ability to pay. Plaintiffs submit the Declaration of Eric R. Nusser ("Nusser Declaration"), which identifies publicly-available jail and court records documenting the continued issuance of payment bench warrants and incarceration of people who owe money to the County's magistrate courts during the 24-day period following issuance of the Chief Justice's Memorandum on September 15, 2017.

Each time a payment bench warrant is issued, the magistrate court enters a notation of "Failure to Comply" or "Archived Bench Warrant" in the applicable case record available on the

online South Carolina Judicial Department Public Index. Dkt. No. 21–8 ¶¶ 4–12. From September 15 to October 9, 2017, the County's magistrate courts recorded such a notation in cases concerning 50 unique individuals. Nusser Decl. ¶¶ 2–4. Information in these online court records suggests that the bench warrants were issued for nonpayment of fines and fees. *Id.* ¶¶ 5–6. Thus, even after the issuance of the Chief Justice's Memorandum, 50 people were targeted by the County's magistrate courts with payment bench warrants.

A review of online Detention Center records during the 24-day period following the issuance of the Chief Justice's Memorandum also confirms that payment bench warrants continue to result in the widespread arrest and incarceration of indigent people. From September 15 to October 9, 2017, 57 people were incarcerated in the Detention Center following an arrest on a payment bench warrant issued by a Lexington County magistrate court. *Id.* ¶ 13.[3] Online case records for 40 of these people offer no indication that the person was afforded a "Show Cause Hearing" or any other pre- or post-arrest hearing at which the court could have addressed ability to pay. *Id.* ¶¶ 20, 22. Even after the issuance of the Chief Justice's Memorandum, therefore, at least 40 people were targeted by the County's magistrate courts with payment bench warrants without being afforded an ability-to-pay hearing.

Finally, during the 24-day period following the issuance of the Chief Justice's Memorandum, an average of 50 people were incarcerated in the Detention Center on a payment bench warrant issued by a Lexington County magistrate court on any given day, which corresponds to 7.48% of all inmates. *Id.* ¶¶ 14, 16. This figure is higher than the corresponding figure for the time period preceding the filing of this lawsuit on June 1, 2017. In comparison,

[3] From September 15 to October 9, 2017, 114 unique individuals were incarcerated in the Detention Center under a primary charge listed as either "Magistrate Court Bench Warrant" or "Municipal/Magistrate Court Bench Warrant." Nusser Decl. ¶ 11, Ex. B. A review of publicly-available, online case records for these individuals indicates that 57 of them were targeted with bench warrants in Lexington County magistrate court cases. *Id.* ¶ 13.

during the 28-day period from May 1, 2017 to May 28, 2017, an average of 43 people were incarcerated in the Detention Center on a payment bench warrant issued by a Lexington County magistrate court on any given day, which corresponds to 7.22% of all inmates. Dkt. No. 21–5 at ¶ 11.

III. AUTHORITY AND ARGUMENT

Defendants seek judgment as a matter of law as to Plaintiffs' claims for declaratory and injunctive relief on the ground of mootness under the doctrine of voluntary cessation.[4] The only evidence Defendants provide in support of their motion is the Chief Justice's Memorandum concerning the sentencing of unrepresented defendants to imprisonment. Defendants also assert that, as government actors, they are entitled to a lighter standard to prove mootness than a private defendant. These arguments fail on all counts.

Contrary to Defendants' assertions, it is well established that this Court must apply a stringent standard to determine whether Plaintiffs' prospective relief claims against Defendants are moot under the voluntary cessation doctrine. The U.S. Court of Appeals for the Fourth

[4] In a separate, pending motion, Defendants seek summary judgment on Mr. Goodwin's prospective relief claims under the *Younger* abstention doctrine. *See* Dkt. No. 29. In reply on that motion, Defendants raised a new argument: that *Younger* applies because "outstanding unpaid fines . . . are undoubtedly a matter of the State enforcing the orders and judgments of its courts." Dkt. No. 39 at 8 (internal quotation marks omitted). Defendants' initiation of a new argument in reply is improper. *See* Local Civ. Rule 7.07 (D.S.C.) (replies are "discouraged" and limited in scope "to matters raised initially in a response to a motion or in accompanying supporting documents[.]").

Defendants' untimely argument nevertheless fails. Defendants appear to shoehorn this case into the third "exceptional" category to which *Younger* narrowly applies, which concerns "pending 'civil proceedings involving certain orders [that are] uniquely in furtherance of the state court's ability to perform their judicial functions.'" *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)(citation omitted) (emphasis added); *see* Dkt. No. 35 at 25–27. But there is simply is no "pending proceeding" against Mr. Goodwin—civil or otherwise. *See* Dkt. No. 35 at 29–30, 32. Although a bench warrant may imminently issue, the only result would be Mr. Goodwin's arrest and incarceration. *Id*. at 32. Defendants' contention that Mr. Goodwin could move to vacate a warrant is belied by their admission that "no South Carolina case" recognizes such a procedure. Dkt. No. 39 at 9. And contrary to Defendants' assertions, Mr. Goodwin was afforded no opportunity to challenge the terms of the payment plan imposed on him prior to agreeing to it. *See* Dkt. 35-1 at 10, 14–16. Because there is no pending proceeding and Mr. Goodwin never had, and never will have, an opportunity to raise his federal claims in state court, the application of *Younger* to this action is wholly unwarranted. *See* Dkt. No. 35 at 32–33.

Circuit has long required government defendants to meet the "heavy" and "formidable" burden of establishing that any changed policies and practices have mooted claims in litigation. Defendants must show that the alleged conduct leading to the unlawful arrest and incarceration of indigent people has not only ceased, but that it is absolutely clear that such conduct could not reasonably be expected to recur. Defendants fail to meet this stringent standard for three main reasons.

First, Defendants entirely fail to identify any undisputed facts demonstrating that they have terminated the unlawful policies and practices alleged in the Amended Complaint and that they no longer retain the authority and capacity to revert to those policies and practices. For example, Defendants provide no evidence to show that the Chief Justice's Memorandum binds any of the named Defendants or that it constitutes an unconditional and irrevocable agreement that ends any of the policies and practices alleged in the Amended Complaint to cause the unlawful arrest and incarceration of indigent people who cannot afford to pay money to the County's magistrate courts. Nor does the Chief Justice's Memorandum even address, much less eliminate, the authority or capacity of any named Defendant to engage in those specific unlawful policies and practices. On this record, Defendants offer nothing more than bald assertions that the Chief Justice's Memorandum conclusively demonstrates that the challenged unlawful conduct cannot reasonably be expected to recur. Under well-established precedent of the U.S. Court of Appeals for the Fourth Circuit, such assertions fail to meet Defendants' heavy and formidable burden under the voluntary cessation doctrine to demonstrate mootness.

Second, Plaintiffs have compiled and analyzed publicly-available records, which raise numerous questions of fact that preclude a grant of summary judgment to Defendants. These records show that Lexington County magistrate courts continue to issue bench warrants ordering

the arrest and incarceration of people who cannot pay money owed to the court without providing them ability-to-pay hearings prior to incarceration. The records also demonstrate that officers of the Lexington County Sheriff's Department continue to enforce these bench warrants by arresting and incarcerating people in the Detention Center unless they pay the full amount of money owed, which is listed on the face of warrants. This evidence in the record raises questions of material fact as to whether Defendants' conduct leading to the unlawful arrest and incarceration of indigent people who cannot afford to pay money to the County's magistrate courts cannot reasonably be expected to recur. Summary judgment is therefore inappropriate.

Third, to the extent this Court concludes that Plaintiffs' submissions do not preclude a grant of summary judgment to Defendants, Plaintiffs seek relief under Federal Rule of Civil Procedure 56(d). Summary judgment granted prior to discovery is exceptionally rare, and only minimal discovery has taken place in this case. Concurrent with this response to Defendants' premature summary judgment motion, Plaintiffs submit a declaration pursuant to Rule 56(d), which explains that discovery remains outstanding on material questions of fact. Defendants have not yet responded to Plaintiffs' requests for production of documents, which seek targeted information concerning Defendants alleged policies and practices and whether Defendants have changed these policies and practices following issuance of the Chief Justice's Memorandum. Because Plaintiffs demonstrate the need for discovery of facts essential to oppose Defendants' motion, this Court should permit additional time for Plaintiffs to conduct discovery.

Accordingly, this Court should deny Defendants' supplemental motion for summary judgment and permit this case to proceed to discovery. In the alternative, this Court should stay a decision on Defendants' motion and permit Plaintiffs additional discovery under Rule 56(d).

A. Standard of Review

A court shall grant summary judgment pursuant to Federal Rule of Civil Procedure 56(a), if the moving party "show[s] that there is no genuine dispute as to any material fact" and that it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this showing, the nonmoving party must demonstrate specific, material facts that give rise to a genuine issue. *Id.* at 324. A "mere scintilla" of evidence is insufficient to overcome summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

The evidence presents a genuine issue of material fact if "a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Any inference drawn from the facts should be viewed in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). A motion for summary judgment should be denied when "the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002) (quoting *Anderson*, 477 U.S. at 250 n. 5).

B. Defendants' summary judgment motion must be denied because critical facts are in dispute.

1. Defendants must meet a heavy and formidable burden under the voluntary cessation doctrine to prove that the Chief Justice's Memorandum moots Plaintiffs' prospective relief claims.

"When a case or controversy ceases to exist—either due to a change in the facts or the law—the litigation is moot and the court's subject matter jurisdiction ceases to exist also." *Porter v. Clarke*, 852 F.3d 358, 363 (4th Cir. 2017) (internal quotation marks omitted). "There is, however, a well-recognized exception to the mootness doctrine holding that a defendant's

voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id*. (internal quotation marks omitted) (emphasis supplied). "If it did, the courts would be compelled to leave the defendant free to return to his old ways." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks and alterations omitted). For this reason, the U.S. Supreme Court has required courts to apply a "stringent" standard to assess claims of mootness on the ground of voluntary cessation. *Id*. It is well settled that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 190 (emphasis supplied). The U.S. Court of Appeals for the Fourth Circuit has repeatedly applied this standard, recognizing that defendants' burden to prove mootness is "formidable" and "heavy." *See Porter*, 852 F.3d at 364 (emphasizing defendants' "formidable burden") (citing *Laidlaw*, 528 U.S. at 190); *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) ("The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.") (alterations and internal quotation marks omitted).

Defendants incorrectly rely on a decision of the U.S. Court of Appeals for the Fifth Circuit to contend that this Court must apply a "relatively light burden" to them as government defendants seeking to demonstrate mootness under the voluntary cessation doctrine. Dkt. No. 40 at 3 (citing *Stauffer v. Gearhart*, 741 F.3d 574 (5th Cir. 2014)). The U.S. Court of Appeals for the Fourth Circuit continues to apply the "heavy burden" standard to voluntary cessation claims by government actors and has explicitly declined to address the question of whether a lesser burden, such as that adopted by the Fifth Circuit, should apply. *See Heyer v. United States Bureau of Prisons*, 849 F.3d 202, 219 (4th Cir. 2017) (requiring prison officials to meet "the

heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again") (internal quotation marks omitted); *Porter*, 852 F.3d at 364 (same); *Wall*, 741 F.3d at 497–98 ("The defendants invite us to adopt an approach employed by several of our sister circuits, in which governmental defendants are held to a less demanding burden of proof than private defendants . . . . [This is] a question which we expressly do not decide . . . .").

Defendants inexplicably rely on *Wilkinson v. Forst*, 717 F. Supp. 49 (D. Conn. 1989), and *Attwell v. Nichols*, 608 F.2d 228 (5th Cir. 1979), *cert. denied*, 446 U.S. 955 (1980), for the proposition that comity concerns weigh in favor of this Court's application of a relaxed standard to assess their assertion of mootness. Dkt. No. 40 at 4. These cases are inapposite. *Wilkinson* considered whether a fact-intensive record established a state court's competence to comply with the Fourth Amendment of the U.S. Constitution. 717 F. Supp. at 52 (finding the state court order "based on specific findings of an articulable suspicion of violence at the rally . . . sufficient to permit magnetometer searches of persons and packages at the rally in question"). Even less apt, *Atwell* dismissed as "present[ing] no federal question" a claim that a state supreme court rule violated separation of powers. 608 F.2d at 230 ("The principle of separation of powers is not enforceable against the states as a matter of federal constitutional law."). Nothing in either court's opinion addresses an assertion of mootness on the basis of voluntary cessation.

Established Fourth Circuit precedent thus requires this Court to reject Defendants' request for application of a relaxed standard for determining whether voluntary cessation moots Plaintiffs' prospective relief claims. In order to prevail, Defendants must meet the heavy and formidable burden of proving that it is "absolutely clear" that the unlawful conduct challenged in the Amended Complaint is not reasonably expected to recur.

2. Defendants fail to prove that their alleged conduct causing the arrest and incarceration of indigent people who cannot afford to pay money to the County's magistrate courts has terminated and cannot reasonably be expected to recur.

A defendant can satisfy the heavy and formidable burden to demonstrate that it is "absolutely clear" the alleged unlawful conduct is not reasonably expected to recur by establishing entry "into an unconditional and irrevocable agreement that prohibits it from returning to the challenged conduct" or by showing that it "has not asserted its right to enforce the challenged policy at any future time." *Porter*, 852 F.3d at 364 (internal quotation marks omitted). A defendant may also put forward evidence establishing that "interim events have completely and irrevocably eradicated the effects of the alleged violation." *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1231 (4th Cir. 1989) (internal quotation marks omitted). The U.S. Court of Appeals for the Fourth Circuit has made clear, however, that "when a defendant retains the authority and capacity to repeat an alleged harm, a plaintiff's claims should not be dismissed as moot." *Wall*, 741 F.3d at 497 (collecting cases) (emphasis supplied); *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013) (denying mootness argument despite reinstatement of Medicaid benefits to plaintiffs because state officials retained authority to cancel the benefits and could do so again). Finally, the Fourth Circuit has repeatedly held that "bald assertions of a defendant—whether government or private—that it will not resume a challenged policy fail to satisfy any burden of showing that a claim is moot." *Wall*, 741 F.3d at 498; *Heyer*, 849 F.3d at 220 (4th Cir. 2017).

Defendants rely solely on the Chief Justice's Memorandum to make the bald assertion that Plaintiffs' prospective relief claims are moot due to voluntary cessation. In doing so, they fail to meet their heavy and formidable burden of demonstrating that, based on undisputed facts, it is absolutely clear that their conduct leading to the unlawful arrest and incarceration of

indigent people who owe court fines and fees could not reasonably be expected to recur for two main reasons.

First, the Chief Justice's Memorandum is far from the sort of "unconditional and irrevocable agreement" found to prove voluntary cessation by prohibiting a named defendant from returning to the conduct challenged in the litigation. *Porter*, 852 F.3d at 364 (internal quotation marks omitted). The memorandum recites long established precedents of the U.S. Supreme Court concerning the Sixth Amendment right to counsel and broadly recognizes that in South Carolina, defendants are improperly sentenced to imprisonment without first being "informed of their right to counsel and, if indigent, their right to court-appointed counsel prior to proceeding with trial." Dkt. No. 40–1 at 1. It also generally instructs magistrate and municipal court judges not to impose jail "[a]bsent waiver of counsel, or appointment of counsel for an indigent defendant," and to only sentence such defendants to the payment of a fine upon a conviction. *Id.* at 1–2. Finally, the Chief Justice's Memorandum suggests that "[w]hen imposing a fine, consideration *should* be given to a defendant's ability to pay." *Id.* at 2 (emphasis supplied).

Although the Chief Justice's Memorandum acknowledges violations of the Sixth Amendment right to counsel and the importance of assessing defendants' ability to pay fines, it does not prohibit any of the five named Defendants from engaging in the specific, unlawful policies, practices, and customs alleged to cause the unlawful arrest and incarceration of indigent people for unpaid magistrate court fines and fees in Lexington County. Defendants point to no undisputed evidence showing that any of the Defendants authored or even received the Chief Justice's Memorandum, much less that the document itself binds them in an agreement to terminate the specific conduct alleged in the Amended Complaint.

For example, the Chief Justice's Memorandum is not directed at Lexington County, Defendant Madsen, or Defendant Koon. Nor does it purport to bind these actors in any way. Although the Chief Justice's Memorandum is generally addressed to "Magistrates and Municipal Judges," which presumably includes Defendants Adams and Dooley, it does not address, much less prohibit, them from overseeing and enforcing the Default Payment and Trial in Absentia Policies—both of which lead to the issuance of warrants that order the arrest and incarceration of indigent people who cannot pay magistrate court fines and fees without requiring courts to provide pre-deprivation ability-to-pay hearings and appointment of counsel. The memorandum does not come close to the type of "unconditional and irrevocable" agreement that "encompasses all of [the defendants'] allegedly unlawful conduct" that has been found to demonstrate mootness under the voluntary cessation doctrine. *Already LLC v. Nike, Inc.*, 568 U.S. 85, 94 (2013).

Second, even if the record did offer undisputed evidence that Defendants have terminated the challenged conduct—and there is no such evidence—Defendants fail to prove that the Chief Justice's Memorandum terminates their authority and capacity to revert to the specific policies, practices, and customs alleged to cause the unlawful arrest and incarceration of indigent people who cannot pay money owed to magistrate courts. For example, the memorandum does not alter the authority and capacity of Defendant Koon, as the Lexington County Sheriff, to direct law enforcement officers to arrest indigent people based on outstanding payment bench warrants and to direct Detention Center staff to incarcerate these people if they cannot pay their debts to magistrate courts in full. Dkt. No. 20 ¶¶ 9, 31, 123–28. Nor does the Chief Justice's Memorandum quash existing payment bench warrants currently in the possession of Defendant Koon and his staff, which continue to be executed as discussed below. *See infra* Section III.B.3 at 27–28. Similarly, the memorandum does not remove or alter Defendant Lexington County's

responsibility to fund indigent defense in magistrate courts or Defendant Madsen's authority to determine the courts in which public defenders will represent indigent defendants. *Id.* ¶¶ 11, 26, 32, 47–65, 76–79, 460–62, 490–91. As such, it fails to change the authority and capacity of the County and Defendant Madsen to inadequately fund and provide for defense to indigent people in Lexington County magistrate court cases.

Additionally, the Chief Justice's Memorandum does not alter Defendants Adams and Dooley's administrative authority to develop and enforce county-wide standard operating procedures for the collection of court fines and fees, to determine the operating hours and schedules of magistrate courts, to assign cases to magistrate court judges, and to coordinate the planning of budgets and funding requests for Lexington County magistrate courts. *Id.* ¶¶ 82–87. Defendants fail to point to any undisputed evidence showing that Defendants Adams and Dooley no longer retain the ability to use these administrative powers to enforce the Default Payment and Trial in Absentia Policies, or the policy of not requiring indigent people arrested on payment bench warrants to be taken to Bond Court or to the sentencing magistrate court for an ability-to-pay hearing and the appointment of counsel. *Id.* ¶¶ 88–109.

Finally, the Chief Justice's Memorandum does not demonstrate that Defendant Adams, in her capacity as a judge on the Irmo Magistrate Court, no longer has the authority or capacity to engage in the specific conduct alleged by Mr. Goodwin in his claims for declaratory relief. Mr. Goodwin's Fourteenth Amendment claim challenges Defendant Adams' practice of routinely ordering the arrest and incarceration of indigent people when they fail to pay fines and fees according to the terms of a Scheduled Time Payment Agreement ("payment agreement") without first affording an ability-to-pay hearing as required under *Bearden v. Georgia*, 461 U.S. 660

(1983).[5] Dkt. No. 20 ¶¶ 508–515 (Claim Seven for Declaratory Relief). Defendant Adams has already sentenced Mr. Goodwin to pay fines and fees according to a payment agreement, and Mr. Goodwin is unable to afford the required monthly payments. Dkt. No. 35–1 ¶¶ 14–23. Mr. Goodwin faces an imminent and substantial risk that Defendant Adams will issue a bench warrant ordering his arrest and incarceration unless he can pay his debt in full, just as she did when Plaintiffs Twanda Marshinda Brown and Sasha Monique Darby fell behind on similar payment agreements. Dkt. No. 35–1 ¶¶ 24; Dkt. No. 20 ¶¶ 145–63 (Ms. Brown); *id*. 20 ¶¶ 196–208 (Ms. Darby).

Although the Chief Justice's Memorandum provides a general encouragement that magistrate judges "should" assess a defendant's ability to pay at the time a fine is imposed, it does *not* limit or prohibit Defendant Adams' authority and capacity to continue misusing bench warrants by issuing them against defendants who fall behind on payment agreements—even though South Carolina law has long permitted bench warrants only to secure a defendant's appearance in court. *See* S.C. Code § 22-5-115 (permitting bench warrant "[i]f the defendant fails to appear before the court"); *id*. § 38-53-70 (requiring bench warrant "[i]f a defendant fails to appear at a court proceeding to which he has been summoned").[6] Similarly, although the Chief Justice's Memorandum provides general guidance on the need to respect the Sixth Amendment right to counsel, it does not alter Defendant Adams' authority or capacity to continue failing to notify defendants of their right to counsel, failing to appoint counsel for indigent defendants, and failing to engage in an adequate colloquy to ensure that defendants have

[5] The U.S. Supreme Court's decision in *Bearden v. Georgia*, 461 U.S. 660 (1983), prohibits courts from imprisoning people for nonpayment of fines or restitution without a pre-deprivation inquiry by a judge into the person's ability to pay, efforts to secure resources to pay and, if the person lacks the ability to pay despite having made reasonable efforts to acquire resources, the adequacy of any alternatives to incarceration.

[6] *See also* S.C. Supreme Court Order, Nov. 14 1980 ("[B]ench warrants . . . are to be used only for the purpose of bringing a defendant before a court which has already gained jurisdiction over that defendant by means of a valid charging paper.")

provided a knowing, voluntary, and intelligent waiver of the right to counsel. Dkt. No. 20 ¶¶ 516–523.[7]

Defendants do not point to *any* undisputed evidence showing that they no longer have the authority and capacity to revert to the specific policies, practices, and customs that Plaintiffs allege cause the unlawful arrest and incarceration of indigent people who cannot afford to pay fines and fees to the County's magistrate courts. The record here is therefore even weaker than what government defendants presented in *Porter v. Clarke* and *Wall v. Wade*, cases in which the U.S. Court of Appeals for the Fourth Circuit squarely rejected assertions of mootness—notwithstanding evidence of changed policies following the onset of litigation—because the defendants retained the authority and capacity to revert to the challenged policies. *See Porter*, 852 F.3d at 365 (finding that nothing barred the defendants "from reverting to the challenged policies in the future"); *Wall*, 741 F.3d at 497 ("Nothing in the memo suggests that [the defendant] is actually barred—or even considers itself barred—from reinstating the [challenged] policy should it so choose."). On this basis alone, Defendants' assertion of mootness should be denied. *See, e.g.*, *Pashby*, 709 F.3d at 316 (rejecting mootness argument because state officials retained authority and capacity to cancel Medicaid benefits that were the subject of the litigation despite policy changes following initiation of litigation).

Defendants thus entirely fail to meet their burden to prove, based on undisputed facts, that it is "absolutely clear" that their alleged policies and practices leading to the unlawful arrest and incarceration of indigent people for debts owed to Lexington County magistrate courts cannot reasonably be expected to recur. Defendants provide nothing beyond a generically-

[7] The Chief Justice's Memorandum refers to the holding of *Faretta v. California*, 422 U.S. 806, 835 (1975), that courts must obtain a knowing and voluntary waiver of the right to counsel, but does not instruct courts on how to ensure that this standard is met. Dkt. No. 40–1 at 1, n. 3. Nor does it direct or otherwise bind Defendant Adams to change any particular practice in order to comply with Sixth Amendment requirements. *Id.* at 1–2.

addressed advisory memorandum that was not created by any of the named Defendants, does not bind any of the named Defendants, gives no indication of how the challenged policies have been or *might be* affected, and does not alter the authority or capacity of any of the Defendants to engage in the challenged conduct. Defendants' reliance on the Chief Justice's Memorandum amounts to nothing more than the type of "bald assertion" that they will not resume the challenged policies that the U.S. Court of Appeals for the Fourth Circuit has rejected time and again. *See Wall*, 741 F.3d at 498. Such bare assertions fail to support a grant of summary judgment.

3. Evidence in the record raises questions of material fact concerning whether Defendants' conduct continues to lead to the unlawful arrest and incarceration of indigent people who cannot pay money owed to the County's magistrate courts.

Plaintiffs have compiled and analyzed publicly-available jail and court records, which raise numerous questions of material fact as to whether it is "absolutely clear" that Defendants' conduct leading to the unlawful arrest and incarceration of indigent people who cannot afford to pay money to Lexington County magistrate courts cannot reasonably be expected to recur.

Online court records show that the Lexington County magistrate courts continue to issue payment bench warrants ordering the arrest and incarceration of people who owe money to magistrate courts without providing them ability-to-pay hearings prior to incarceration. From September 15 to October 9, 2017—the 24-day period following the issuance of the Chief Justice's Memorandum—Lexington County magistrate courts issued new bench warrants against 50 people for nonpayment of court fines and fees. Nusser Decl. ¶ 6. During this same period, at least 57 inmates were incarcerated in the Detention Center pursuant to a bench warrant issued by Lexington County magistrate courts. *Id.* ¶ 13.

There is no indication in the relevant Public Index case records that any of the 57 people incarcerated in the Detention Center from September 15 to October 9, 2017 pursuant to a bench warrant issued by a Lexington magistrate court were afforded an ability-to-pay hearing in magistrate court or Bond Court before or after their arrest on a payment bench warrant. *Id.* ¶ 23. There is no indication in the online case records for 40 of the 57 people that they were afforded any pre-deprivation or post-arrest Show Cause Hearing or other hearing in Bond Court or magistrate court at which the court might have considered their ability to pay. *Id.* ¶ 22. Even after the issuance of the Chief Justice's Memorandum, therefore, at least 40 people were targeted by the County's magistrate courts with payment bench warrants without being afforded an ability-to-pay hearing. This evidence thus demonstrates that officers of the Lexington County Sheriff's Department, who all ultimately report to Defendant Koon, continue to enforce payment bench warrants by arresting and incarcerating people unless they pay the full amount of the money owed to magistrate courts, which is listed on the face of warrants.

Finally, during the 24-day period following the issuance of the Chief Justice's Memorandum, the average daily number of individuals incarcerated in the Detention Center on a payment bench warrant issued by a Lexington County magistrate court was 50. *Id.* ¶ 15. This figure is higher than what it was before September 15, 2017. For example, during the 28-day period from May 1, 2017 to May 28, 2017, the average daily number of individuals incarcerated in the Detention Center on a payment bench warrant issued by a Lexington County magistrate court was 43. Dkt. No. 21–5 at ¶ 11.

Evidence in the record therefore raises genuine questions of material fact as to whether it is absolutely clear that Defendants' alleged conduct leading to the unlawful arrest and incarceration of indigent people in Lexington County cannot reasonably be expected to recur.

Because Defendants fail to meet their heavy and formidable burden to prove through undisputed facts that Plaintiffs' prospective relief claims are moot, this Court should deny Defendants' supplemental motion for summary judgment.

C. Discovery will reveal specific facts necessary to Plaintiffs' opposition.

The record in this case provides more than sufficient grounds for this Court to deny Defendants' motion. But should this Court conclude otherwise, Plaintiffs respectfully request that the Court reserve decision on the motion and grant Plaintiffs additional time to conduct discovery under Rule 56(d) in order to adduce additional, relevant evidence to defend against Defendants' premature motion.

"Summary judgment before discovery forces the non-moving party into a fencing match without a sword or mask." *McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 483 (4th Cir. 2014). A nonmovant faced with contesting a motion for summary judgment may seek relief under Rule 56(d) when certain facts are unavailable. Rule 56(d) provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

The declaration or affidavit provided in support of a request for relief under Rule 56(d) must specify the reasons necessitating additional discovery or otherwise notify the district court as to which specific facts are yet to be discovered. *See McCray*, 741 F.3d at 484.

Allowing sufficient time for discovery is "considered especially important when the relevant facts are exclusively in the control of the opposing party." *Harrods Ltd.*, 302 F.3d at 246–47 (quoting 10B Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2741 (3d ed.1998)). Under this principle, a nonmovant's request to conduct

discovery under Rule 56(d) is "broadly favored and should be liberally granted." *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 721 F.3d 264, 281 (4th Cir. 2013) (quoting *Raby v. Livingston*, 600 F.3d 552, 561 (5th Cir.2010)).

The presumption in favor of granting relief under Rule 56(d) is strong in a case like this where Defendants filed their supplemental motion for summary judgment when only minimal discovery had taken place—namely, the exchange of initial disclosures. Plaintiffs timely invoke the protection of Rule 56(d) because, without discovery, they "cannot present facts essential to justify [their] opposition." Fed. R. Civ. P. 56(d). In support of this motion, Plaintiffs submit the Declaration of Toby J. Marshall ("Marshall Declaration"), which explains that there are specific facts concerning Defendants' challenged policies and practices, as well as any changes to those policies and practices following issuance of the Chief Justice's Memorandum, that are yet to be discovered, but are material to the Court's resolution of Defendants' supplemental motion for summary judgment. *See McCray*, 741 F.3d at 484.

As detailed in the Marshall Declaration, Defendants have yet to respond to Plaintiffs' Requests for Production, which are designed to uncover information directly relevant to whether Defendants continue to engage in actions that violate the rights of indigent defendants in Lexington County's magistrate courts. Marshall Decl. ¶¶ 12–25. These requests are likely to assist Plaintiffs in raising genuine, triable issues of material fact that would preclude a grant of summary judgment to Defendants on the ground that the Chief Justice's Memorandum signals that Defendants have ceased the unlawful conduct alleged in the Amended Complaint. *Id.* ¶ 25.

For example, Plaintiffs have asked for the production of documents to determine whether Defendant Lexington County is continuing to inadequately fund the Lexington County Public Defender's Office. *See* Marshall Decl. Ex. A at Requests for Production ("RFPs") Nos. 9, 25,

28. Likewise, Plaintiffs have asked for the production of documents to determine whether Defendant Madsen is still failing to allocate the funding and resources necessary to ensure proper representation of indigent people facing incarceration for nonpayment of money owed to the County's magistrate courts. *See* Marshall Decl. Ex. A. at RFPs Nos. 5–9, 24–25, 28. Plaintiffs have also asked for the production of documents to determine the number and kind of active bench warrants that have been issued by Lexington County magistrate courts, which can be served at any time and result in the immediate arrest and incarceration of indigent people in the Detention Center. *See* Marshall Decl. Ex. B at RFPs Nos. 22–27, 29, 32–34, Ex. C at RFPs Nos. 1, 3, 20, 22, 38–41, 43, 45. Plaintiffs' discovery requests also seek production of documents to determine whether the Lexington County Sheriff's Department is continuing to arrest and incarcerate indigent people in the Detention Center pursuant to those bench warrants without providing ability-to-pay hearings or access to legal representation. *See* Marshall Decl. Ex. B at RFPs Nos. 4, 32–33.

Additionally, Plaintiffs have asked for production of any documents relating to changes in Defendants' policies, practices, procedures, instructions, guidance or training in response to the Chief Justice Memorandum. *See* Marshall Decl. Ex. A at RFPs Nos. 29–31, Ex. B at RFPs Nos. 39–40, Ex. C at RFPs Nos. 48–49. These requests are designed to determine whether Defendants have actually taken any steps to voluntarily cease their unconstitutional actions in response to the memorandum and if so, the extent of those steps.

For example, Plaintiffs are seeking to determine whether Defendants Lexington County and Madsen are now providing adequate funding and allocation of resources for legal representation to indigent criminal defendants during court proceedings. *See* Marshall Decl. Ex. A at RFPs Nos. 29–31. Plaintiffs also seek to determine whether Defendants Reinhart, Adams,

and Dooley are now providing adequate notice to accused persons of their right to counsel and to provide pre-deprivation ability-to-pay hearings prior to incarceration. *See* Marshall Decl. Ex. C at RFPs Nos. 6–8, 19, 20, 24. Plaintiffs further seek to determine whether Defendant Koon has stopped enforcing bench warrants that are based solely on a report of failure to pay fines and fees to Lexington County magistrate courts. *See* Marshall Decl. Ex. B at RFPs Nos. 39–40.

Finally, the Marshall Declaration explains that once Plaintiffs receive complete answers to their discovery requests along with responsive documents, they will request an opportunity to depose the Defendants concerning whether they have terminated their challenged policies and practices following issuance of the Chief Justice's Memorandum. Plaintiffs request to depose Defendant Lexington County regarding its current and future funding of the Lexington County Public Defender's Office. Marshall Decl. ¶ 27. Plaintiffs also request an opportunity to depose Defendant Madsen regarding the allocation of resources necessary for providing representation to indigent people facing incarceration for nonpayment of money owed to Lexington County magistrate courts; his receipt and/or knowledge of the Chief Justice's Memorandum; and whether he has taken steps to ensure that indigent people receive adequate representation by court-appointed counsel before incarceration for nonpayment of money owed to Lexington County magistrate courts. *Id.* ¶ 28.

Plaintiffs will similarly request an opportunity to depose Defendants Adams and Dooley regarding the policies, practices, and procedures of the Lexington County magistrate courts to provide accused persons notice of their right to counsel and to provide pre-deprivation ability-to-pay hearings prior to incarceration; their receipt and/or knowledge of the Chief Justice's Memorandum; whether any steps have been taken in response to that memorandum to ensure that the policies, practices, and procedures of the magistrate courts sufficiently provide accused

persons notice of their right to counsel and ability-to-pay hearings prior to incarceration; and whether the magistrate courts are continuing to issue bench warrants that order the arrest and incarceration of accused persons for nonpayment of money owed to the magistrate courts. *Id.* ¶ 29.

Plaintiffs will also request an opportunity to depose Defendant Koon regarding his current and future enforcement of bench warrants issued by the Lexington County magistrate courts; whether any steps have been taken in response to the Chief Justice's Memorandum to ensure that the enforcement of these bench warrants does not result in the unconstitutional incarceration of indigent people in the Lexington County Detention Center; and whether the Sheriff's Department is continuing to enforce bench warrants issued by the Lexington County magistrate courts for nonpayment of money owed. *Id.* ¶ 30.

In sum, Plaintiffs' pending Requests for Production and intended depositions seek targeted and material information that is likely to assist Plaintiffs in raising genuine, triable issues of material fact on the question of whether Defendants have in fact ceased the unlawful policies, practices, and conduct alleged to result in the unlawful arrest and incarceration of indigent people who owe money to Lexington County magistrate courts. Because Defendants filed their supplemental motion for summary judgment before such discovery could be obtained, this Court should reserve decision on Defendants' supplemental motion for summary judgment and grant Plaintiffs additional time to conduct discovery in order to adduce additional, relevant evidence to defend against Defendants' premature motion.

IV. CONCLUSION

For the foregoing reasons, Defendants fail to meet their heavy and formidable burden to prove, based on undisputed facts, that Defendants have ceased the policies, practices, and conduct alleged to lead to the unlawful arrest and incarceration of indigent people who cannot afford to pay money to Lexington County magistrate courts. Plaintiffs therefore respectfully ask the Court to deny Defendants' supplemental motion for summary judgment. In the alternative, Plaintiffs ask the Court to stay its decision on Defendants' motion and to grant Plaintiffs relief under Rule 56(d) to conduct discovery in order to adduce additional, relevant evidence to defend against Defendants' premature motion.

DATED this 13th day of October 2017.

Respectfully submitted by,

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