UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

THE NASHVILLE COMMUNITY BAIL FUND,	)	
Plaintiff,	)	
	)	**Civil Action No. 3:20-cv-00103**
v.	)	
	)	**Judge Aleta A. Trauger**
HON. HOWARD GENTRY, Criminal Court Clerk, in his official capacity,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

As the Court has noted, the liberty interest in release while awaiting one's criminal trial is a basic component of the American judicial system "entitled to substantial constitutional protection." (Mem. Op. Granting Prelim. Injunction in Part ("PI Order"), Dkt. 22 at 6–7; *see also* Mem. Op. Denying Motion to Dismiss ("MTD Order"), Dkt. 65 at 34.) Pretrial release subject to reasonable conditions—a practice commonly referred to as "bail"—is predicated on the principle "that a person accused of [a] crime shall not, until . . . finally adjudged guilty in the court of last resort, be . . . compelled to undergo imprisonment or punishment." *Hudson v. Parker*, 156 U.S. 277, 285 (1895). This guarantee is crucial because pretrial incarceration has devastating consequences for detainees, their families, and their communities. For instance, persons incarcerated pretrial lose the ability to "work, make money, and take part in family life" as well as "participate . . . directly and comprehensively" in their own defense. PI Order at 7. A well-guarded right to pretrial liberty is essential to a criminal legal system in which the presumption of innocence is realized. *Stack v. Boyle*, 342 U.S. 1, 3 (1951).

Any government policies impeding an arrestee's fundamental right to pretrial liberty must be narrowly tailored to advance a compelling government interest. *United States v. Salerno*, 481 U.S. 739, 750–51 (1987); *see also Hill v. Hall*, 2019 WL 4928915 at *9–10 (M.D. Tenn. Oct. 7, 2019) (Trauger, J.) (discussing heightened scrutiny applied in *Salerno*); MTD Order at 34–36 (same). Additionally, the Eighth Amendment protects arrested persons from bail conditions that are "excessive" in relation to the government's interest in their future court appearance. *Salerno*, 481 U.S. at 754; *Stack*, 342 U.S. at 5. Numerous courts have concluded that schemes automatically

taking cash bail[1] deposits to pay fines, fees, or other debts violate the Eighth Amendment by using bail for an impermissible purpose. *Cohen v. United States*, 82 S. Ct. 526, 528 (1962) (Douglas, J., in chambers); *United States v. Rose*, 791 F.2d 1477, 1480 (11th Cir. 1986); *United States v. Powell*, 639 F.2d 224, 225 (5th Cir. 1981). Finally, government deprivations of property without due process violate the Fourteenth Amendment. U.S. Const. amend. XIV; *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

Davidson County Local Rule Governing Bail Bonds 10(B) ("Rule 10(B)"), and the policies promulgated and applied by Criminal Court Clerk Howard Gentry's office to enforce it, contradict these constitutional principles by automatically garnishing cash bond deposits for the sole purpose of generating revenue. MTD Order at 35 (noting the purpose behind the policies is "fundamentally pecuniary.") This is not a compelling state interest sufficient to justify infringing a fundamental liberty interest and other constitutional rights. *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971) (declaring the government's fiscal interest "irrelevant" in the face of invidious wealth-based discrimination); *Barr v. American Ass'n of Political Consultants*, 140 S.Ct. 2335, 2347 (2020) (scheme intended to collect government debt cannot satisfy strict scrutiny). Accordingly, Rule 10(B) and Gentry's Policies render bail excessive in violation of the Eighth Amendment and violate the doctrine of unconstitutional conditions. Moreover, these policies deprive bail depositors, such as the Nashville Community Bail Fund (the "NCBF")—a community-based nonprofit organization that reduces the harms of unnecessary and overbroad pretrial jailing—of

[1] As Plaintiff previously noted, the terms "bail" and "bond" are used interchangeably in its materials because this case deals with instances in which the form of bail required is a monetary bond. The terms are not otherwise synonymous, however, as courts may set other non-monetary conditions as terms of conditional release or "bail." *See, e.g.*, Harvard Law School Criminal Justice Policy Program, Moving Beyond Money: A Primer on Bail Reform, 5–6 (Oct. 2016), https://cutt.ly/Trvw1lG.

their money without an opportunity to be heard in violation of the Fourteenth Amendment.

Rule 10(B) and Gentry's Policies also inflict concrete practical harms. These policies threaten the very existence of the NCBF by taking the funds it uses to operate. These policies have reduced the number of arrestees in Davidson County released on bail. If they remain in place, the NCBF's ability to post bail could very well diminish until the NCBF runs out of funds. Ultimately, Rule 10(B) and Gentry's Policies erect a substantial barrier for presumptively innocent arrestees to exercise their right to pretrial liberty, without doing anything to promote the purposes of bail.

Because the undisputed facts and the relevant law clearly show that Rule 10(B) and Gentry's Policies enforcing it violate the Eighth and Fourteenth Amendments, the Court should grant summary judgment in the NCBF's favor on Counts I, II, and III of the Complaint.

FACTUAL BACKGROUND

The NCBF is a not-for-profit, community-based organization established to end wealth-based detention, largely by posting money bail for people who cannot afford to pay. (Statement of Undisputed Material Facts ("SUMF") ¶¶ 6-7.) The NCBF uses a revolving fund to pay bail deposits, and thus the NCBF's continued existence depends on recovering deposited money at the conclusion of an individual's criminal case. *See* SUMF ¶¶ 10. The NCBF posts cash bond deposits for individuals who would otherwise be unable to pay for their release. SUMF ¶ 6. In 2019, the NCBF posted 445 cash bond deposits—an average of 37 per month—and paid an average of $1,800.13 per deposit. SUMF ¶ 8.

Rule 10(B) provides that any individual who deposits a cash bond be notified in writing by the Clerk that the cash deposit shall be returned subject to garnishment of fines, court costs, or restitution. SUMF ¶ 1. Criminal Court Clerk Howard Gentry enforces Rule 10(B) by requiring any individual who desires to post a cash bond to sign a notice form created by Gentry's office (the

"Clerk's Form"). SUMF ¶¶ 2-3. If a depositor refuses to sign the form, Gentry's office refuses to accept the bond payment, and the person whose bond was to be posted remains incarcerated. SUMF ¶¶ 4-5. After the conclusion of a case and when the depositor requests the bond be returned, Gentry automatically deducts any fines, court costs, and restitution imposed by the court against the defendant before refunding the balance of a cash bond deposit. SUMF ¶¶ 19-20.[2]

When the NCBF was established in 2016, it received an exemption from the garnishment requirements of Rule 10(B). SUMF ¶ 11. From 2016 to September 30, 2019, after an individual for whom the NCBF paid money bail appeared for all required court appearances and concluded their case, the entire bail deposit was refunded. SUMF ¶ 13) The NCBF was then able to use this same money to pay for another individual's release. SUMF ¶ 10. While it was exempt from Rule 10(B), representatives of the NCBF were also not required to sign the Clerk's Form when paying a cash bond. SUMF ¶ 12.

Effective September 30, 2019, after multiple petitions by the NCBF to reconsider, the Criminal Court Judges revoked the NCBF's previously granted exemption to Rule 10(B). SUMF ¶ 14. On or around that date, the Clerk's Office began requiring representatives of the NCBF to sign the Clerk's Form prior to posting cash bonds. SUMF ¶¶ 15-16. Whenever the NCBF was required to sign the Clerk's Form to post bond for an incarcerated individual, that representative indicated in writing that they were signing the form under protest. SUMF ¶ 17. In approximately 30 cases, the NCBF also made a written request for a hearing prior to any court debts being garnished against the deposit. SUMF ¶ 18.

The NCBF's requests for hearings have never been granted. SUMF ¶ 21. Neither Rule

[2] Plaintiff refers to Gentry's enforcement of Rule 10(B), Gentry's requirement that a bail depositor sign the Clerk's Form, and Gentry's automatic garnishment, collectively, as "Gentry's Policies."

10(B) nor the Clerk's Form state any process for bail depositors to contest the garnishment of their bail deposit to pay fines, fees, court costs, taxes, or restitution assessed against the defendant by the court. SUMF ¶¶ 22-23. No process exists for the NCBF to challenge Gentry's Policies. SUMF ¶ 24.

On July 24, 2019, the NCBF decreased its original maximum bail deposit of $5,000 per person to $2,000 per person because its officials were concerned that they could not continue operating in the face of the financial threat posed by Rule 10(B) and Gentry's Policies. SUMF ¶ 25. Effective January 2020, the NCBF instituted a $20,000 cap on the total amount of bail it could post each month for the same reason. SUMF ¶ 26. In January 2019, the NCBF posted bail deposits totaling $70,700; in January 2020, the NCBF posted bail deposits totaling only $21,050. SUMF ¶¶ 27-28. Because of the NCBF's 2020 limits, prior to the entry of a preliminary injunction ordered by this Court, it had to turn away eligible people for whom the NCBF would have posted bail were it not for Rule 10(B) and Gentry's Policies. SUMF ¶ 29.

The NCBF filed this lawsuit and moved for a preliminary injunction on February 5, 2020. (Dkt. 1, 3.) As of that date, the NCBF had $132,250 in bails on deposit with the Criminal Court Clerk's Office that were paid on or after September 30, 2019. SUMF ¶ 30. By March 17, 2020, $22,850 of that amount became subject to garnishment under Rule 10(B) because the arrestee was assessed court costs, fees, fines, or restitution at the conclusion of the underlying case. SUMF ¶ 31. The NCBF did not request refunds of these bail deposits before the preliminary injunction was issued in this case because Gentry would have automatically garnished the deposits. SUMF ¶ 33. After the preliminary injunction issued, the NCBF requested and received a refund of the bail deposits previously subject to substantial garnishment. SUMF ¶ 32. Until then, the NCBF did not have access to an increasing amount of its money, which it left on deposit to avoid its permanent

loss. SUMF ¶ 34. If Rule 10(B) is applied to the NCBF, it will sustain significant financial losses. SUMF ¶ 35. On October 26, 2020, the Court denied a second Motion to Dismiss filed by Defendant Gentry. (Dkt. 65.)

STANDARD OF REVIEW

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the initial burden of informing the court of the basis for its motion and identifying portions of the record that demonstrate the absence of a genuine dispute over material facts. *Rodgers v. Banks*, 344 F.3d 587, 595 (6th Cir. 2003). Once the movant meets its initial burden, the non-movant has the burden to provide evidence "set[ting] forth specific facts showing that there is a genuine issue for trial." *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). In evaluating a motion for summary judgment, "the judge's function is not . . . to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The non-movant may not rely on a mere "scintilla of evidence" to defeat a motion for summary judgment. *Id.* at 252. Instead, the non-movant must point to a genuine issue of fact, meaning that the evidence would allow a reasonable jury to find in its favor. *Id.*

ARGUMENT

It is undisputed that (1) Rule 10(B) contemplates the garnishment of cash bond deposits,[3] SUMF ¶ 1, (2) Gentry enforces Rule 10(B) by requiring people to sign the Clerk's Form before

[3] As the Court previously noted, the text of Rule 10(B) only requires *notice* that garnishment will occur, but the Clerk's Office has interpreted Rule 10(B) as requiring garnishment and uses actual garnishment practices to enforce the rule. (Dkt. 22 at 9 n.3.)

they are allowed to post cash bond for an incarcerated individual, SUMF ¶ 3, and (3) Gentry enforces Rule 10(B) by automatically deducting fines, costs, taxes, and restitution from cash bond deposits before issuing a refund. SUMF ¶ 20. Whether Rule 10(B) violates the Constitution is a question of law, and there are no material issues of fact in dispute.

There is no disputed material issue of fact that the NCBF has standing to bring these claims. *See United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). Rule 10(B) and Gentry's Policies injure the NCBF financially. MTD Order at 18 ("standing in this case is apparent . . . [t]he Clerk's Office wants to keep some of NCBF's money, and NCBF wants that money back."). Financial losses reduce the fund from which the NCBF can pay bail for indigent arrestees. SUMF ¶¶ 34-35. The NCBF has third-party standing based on its close alignment with its participants and the hindrance they face to litigating their own claims. SUMF ¶ 9; MTD Order at 22–25. Further, the NCBF has had to divert resources to fight the unconstitutional loss of funds due to Rule 10(B) and Gentry's Policies, through this lawsuit and other legal action. SUMF ¶ 36. Between the imposition of the Rule and the preliminary injunction, the NCBF did not have access to thousands of dollars on deposit at the Clerk's Office. SUMF ¶¶ 31, 34. Had the NCBF requested this money back, Gentry would have garnished a significant portion of the deposits by automatic operation of Rule 10(B). SUMF ¶ 33. If allowed to stand, Rule 10(B) and Gentry's Policies enforcing it will threaten the NCBF's continued existence by garnishing money until the revolving fund is gone. SUMF ¶ 35. Gentry's enforcement of Rule 10(B) will also continue to injure arrestees for whom the NCBF would have paid bail but is no longer able. SUMF ¶ 29.

Because Rule 10(B) and Gentry's Policies violate the Eighth and Fourteenth Amendments, the NCBF is entitled to summary judgment on Claims I, II, and III.

I. Rule 10(B) and Gentry's Garnishment Policies Violate the Eighth Amendment to the U.S. Constitution.

A. *Bail May Not be Conditioned on the Future Payment of Court Debts*

The Constitution provides that "[e]xcessive bail shall not be required . . . [.]" U.S. Const. amend. VIII. Bail is excessive if it exceeds the "amount reasonably calculated" to ensure an individual's future presence in court. *Stack*, 341 U.S. at 5; *see also Salerno*, 739 U.S. at 754 ("[C]onditions of release or detention [may] not be excessive in light of the perceived evil."); *Fields v. Henry County*, 701 F.3d 180, 184 (6th Cir. 2012) ("[W]hen bail is granted, it may not be unreasonably high in light of the government's purpose for imposing bail."). The primary purpose of bail is to reasonably ensure "that the accused will reappear at a given time by requiring another to assume personal responsibility for him, on penalty of forfeiture of property." *Cohen*, 82 S. Ct. at 528; *see also Hill*, No. 3:19-cv-00452, 2019 WL 4928915 at *11 (noting the purpose of bail is "to assure the defendant's appearance at trial or hearing"). Assuring the appearance of an arrestee in court is also the primary goal of bail articulated under Tennessee law. *See* Tenn. Code Ann. § 40-11-115 (listing the factors a magistrate shall consider in determining a release on recognizance or unsecured bond "will reasonably assure the appearance of the person as required"); Tenn. Code Ann. § 40-11-116 (If an arrestee is not eligible for release on recognizance or unsecured bond, "the magistrate shall impose the least onerous conditions reasonably likely to assure the defendant's appearance in court."); Tenn. Code Ann. § 40-11-118(a) ("Bail shall be set as low as the court determines is necessary to reasonably assure the appearance of the defendant as required."); *see also Wallace v. State*, 193 Tenn. 182, 187 (Tenn. 1952) (the primary purpose of bail is "to relieve the accused of imprisonment . . . and to secure the appearance of the accused"). Any bail condition in excess of that which is necessary to secure the arrestee's presence, or the use of deposited money to further an interest unrelated to the purposes of bail, renders bail

unconstitutionally excessive. *See United States v. Beaman*, 631 F.2d 85, 86 (6th Cir. 1980) ("The test for excessiveness is . . .whether the amount of bail is reasonably calculated to assure the defendant's appearance at trial").

In *Cohen v. United States*, the Supreme Court held that requiring a bail bond to "also operate as a supersedeas to a judgment for the payment of a fine" renders the bail amount "'excessive' in the sense of the Eighth Amendment because it would be used to serve a purpose for which bail was not intended." 82 S. Ct. at 528.[4] In addition to *Cohen*, multiple federal circuit courts have ruled that the use of bail deposits for purposes other than securing court appearance is excessive and therefore unconstitutional. In *United States v. Rose*, for example, the arrestee's bond contained a condition requiring payment of a fine. The Eleventh Circuit, noting that the arrestee had satisfied the appearance conditions of the bond, held:

> [w]e have no doubt that the addition of any condition to an appearance bond to the effect that it shall be retained by the clerk to pay any fine that may subsequently be levied against the defendant after the criminal trial is over is for a purpose other than that for which bail is required to be given under the Eighth Amendment. Such provision is therefore "excessive" and is in violation of the Constitution.

791 F.2d at 1480; *accord Cain v. United States*, 148 F.2d 182, 183 (9th Cir. 1945) ("[A]

[4] While the Court has previously noted that the *Cohen* opinion itself stemmed from a different procedural posture as this § 1983 action, "[t]he mere fact *Cohen* has not given rise to much litigation at the Supreme Court level . . . does not mean that its principles can or should be disregarded. . . ." PI Order at 30. Of note, other courts have treated its principles as good law. *See infra* 9-10. Examination of the history of in-chambers decisions, and the rarity with which they were accompanied by written opinions, also suggests that the publication of the *Cohen* decision in the Supreme Court Reporter reveals an intention for the decision to carry precedential weight. *See* Ira B. Matetsky, *The History of Publication of U.S. Supreme Justices' In-Chambers Opinions*, 6 J. L. A Periodic Laboratory of Legal Scholarship, 19, 30–31 (2016) (noting that in-chambers orders which were written out and reasoned—as compared to those involving only "short notations" or handwriting—were generally considered to have precedential value prior to 1969); *see also* Frank Felleman and John C. Wright, *The Powers of the Supreme Court Justice Acting in an Individual Capacity*, 112 U. Penn. L. R. 981, 988–999 (1964) (discussing broad powers of individual justices to decide matters of bail in individual federal criminal cases, and recognizing that in some such cases "the Court has in effect delegated its decision-making authority to individual Justices").

requirement by the Court that the bail bond should contain a condition that the bond should also operate as a supersedeas to a judgment for the payment of a fine, made the bail required excessive.") (internal citation omitted). In *United States v. Powell*, the government sought to use money from an individual's appearance bond to satisfy the fine imposed at his sentencing. 639 F.2d at 225. The Fifth Circuit denied that request and held that "[t]he purpose of bail is to secure the presence of the defendant; its object is not to enrich the government or punish the defendant." *Id.* (internal citations omitted).

Rule 10(B) is nearly identical to the rules in *Cohen*, *Rose*, *Powell*, and *Cain*. Just like the rules at issue in those cases, Rule 10(B) conditions liberty on the future use of the money deposited to post bail to pay any ultimate judgment, costs, and restitution. MTD Order at 32–33 (noting that Rule 10(B) and Gentry's policies have "no relationship to the traditional purposes of bail" and thus "exceed the boundaries of permissible bail under the Eighth Amendment."). This financial condition does nothing to secure the arrestee's presence in court. *See infra* 11-12.

B. *Rule 10(B) and Gentry's Garnishment Policies are Not Narrowly Tailored to Meet a Compelling Government Interest*

Nor are Rule 10(B) or Gentry's Policies narrowly tailored as required by *Salerno*, 481 U.S. at 754, and *Stack*, 342 U.S. at 5. Revenue generation is the only government aim Rule 10(B) and Gentry's Policies rationally further, but revenue generation is not a compelling government interest sufficient to infringe an arrestee's constitutional rights. *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 263 (1974) (rejecting fiscal savings as a sufficient basis for justifying constitutionally suspect policy); *see also Rose*, 791 F.2d at 1480 ("The purpose of bail is to secure the presence of the defendant . . . not to enrich the government or punish the defendant."); *Wallace*, 193 Tenn. at 187 (the "primary purpose of bail in a criminal case *is not to increase the revenue of the state* . . .") (emphasis added); MTD Order at 33, 35.

Even if revenue generation were a compelling state interest that could justify burdening an arrestee's right to pretrial liberty, Rule 10(B) and Gentry's Policies are not narrowly tailored to further that interest. Whether a policy is narrowly tailored to further its intended interest "will turn on whether it is the least restrictive and least harmful means of satisfying the government's goal." *United States v. Brandon*, 158 F.3d 947, 960 (6th Cir. 1998). Gentry cannot in good faith assert that garnishing funds from persons accused of crimes, their families, and nonprofit organizations is the least restrictive and least harmful way to raise money for the court's operation.[5]

Nor can Gentry or any other policymaker show that Rule 10(B) furthers any legitimate interest related to bail. While promoting future court appearance of arrested individuals *is* a compelling state interest, there is no evidence that court appearance rates have improved since Rule 10(B)'s implementation. And empirical evidence suggests that unsecured bonds are just as effective in securing court appearance as secured cash bond when controlling for an individual's actuarial risk level. *See, e.g.*, Michael Jones, Ph.D., *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, Pretrial Justice Institute (Oct. 2013), https://cutt.ly/Se3WGqK (Dkt. 4–17); *see also McNeil v. Cmty. Prob. Servs., LLC*, 2019 WL 633012, at *15 (M.D. Tenn. Feb. 14, 2019) ("Given the complete absence of evidence supporting the [secured cash] bail system

[5] To its credit, Davidson County acknowledged as much in March 2019 when it sought technical assistance to study court-imposed fines and fees, with the goal of "cultivating economic prosperity by reducing or eliminating" court fines and fees in the county. *See* PFM's Center for Justice and Safety Finance, *Reducing Reliance on Criminal Fines and Fees*, 4 (October 2020), https://www.nashville.gov/Portals/0/SiteContent/MayorsOffice/docs/news/Cooper/FinesFeesReport.pdf. The recently-released report describes throughout the "high pain" court debts impose upon indigent defendants compared to the "low gain" governments typically achieve from them—due to relatively low collection rates. *Id.* at 8, 10-13. The report also evidences that the revenue generated by Rule 10(B) is not substantial enough that the government depends on it to operate. *Id.* at 13-15 (highlighting the most significant sources of fines and fees revenue, which does not include Rule 10(B), and describing several actions the government can take to reduce and eliminate use of court fines and fees).

. . . , Defendants have failed to show the current bail system rationally furthers a legitimate governmental interest."); *Schultz v. State*, 330 F. Supp. 3d 1344, 1361 (N.D. Ala. 2018) ("[T]he challenged distinction" of using a secured cash bond schedule to promote court appearance and public safety "does not rationally further a legitimate state purpose.") and 1362–63 (discussing "considerable evidence" that unsecured bail promotes court appearance as well as secured).

In fact, it is likely that Rule 10(B) *interferes* with court appearance rates by delaying release. Even very short periods of incarceration—a natural result of Rule 10(B) and Gentry's barriers to posting bond—yield worse court appearance rates upon release. *See, e.g.*, Christopher T. Lowenkamp et al., Laura and John Arnold Foundation, *The Hidden Costs of Pretrial Detention*, 4 (2013), https://cutt.ly/4e3YVvR (concluding that even forty-eight hours of pretrial detention is associated with increased likelihood of failure to appear pending trial) (Dkt. 4–20). And Rule 10(B) and Gentry's Policies undermine the entire philosophy of cash bail by reducing whatever limited incentives for court appearance exist: even perfect court attendance will not ward off garnishment of the secured bail deposit.[6] Given the at-best-tenuous connection between secured cash bond requirements and court appearance, the further step of garnishing money from a cash deposit to fund court systems bears no relationship whatsoever to promoting court appearance.

The undisputed facts establish that Rule 10(B) and Gentry's Policies—like the rules in *Cohen, Rose, Powell,* and *Cain*—convert bail into a revenue-generation device, and do not advance an accepted legal purpose of money bail. The Rule and Policies are thus excessive in violation of the Eighth Amendment, and the NCBF is entitled to summary judgment in its favor on Count I.

[6] As noted elsewhere in the record, the harms of wealth-based detention and availability of equally effective alternatives impugn the very premise of using money bail to promote court appearance, though Plaintiff concedes that question is not at issue in this case. (*See* Dkt. 4 at 13 n.10.)

II. Rule 10(B) and Gentry's Policies Violate the Fourteenth Amendment Doctrine of Unconstitutional Conditions.

The unconstitutional conditions doctrine stems from the principle that "[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). It is equally impermissible for the government to interfere indirectly with a constitutional right as it is for the government to directly infringe upon the right. *See Speiser v. Randall*, 357 U.S. 513 (1958). Under the doctrine, the government "may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether," Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989), and "even though the burden may be characterized as being only indirect," *Sherbert v. Vermer*, 374 U.S. 398, 404 (1963) (citation omitted). Any condition the government places on access to a fundamental right is subject to strict scrutiny. *Koontz v. St. Johns River Water Mgt. Dist.*, 570 U.S. 595, 606 (2013) ("[W]e have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."); *Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1189 (6th Cir. 1997), *rev'd on other grounds*, 523 U.S. 272, 118 (1998) ("Once applied, the doctrine requires a court to employ strict scrutiny in analyzing the challenged condition.").

An unconstitutional-conditions claim first requires identification of a constitutional right. *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 913 (6th Cir. 2019) (quoting *Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't Health*, 699 F.3d 962, 986 (7th Cir. 2012)). Here, Rule 10(B) and Gentry's Policies impose a condition on an arrestee's federal constitutional right to pretrial release. *See supra* 3–5; *Hill*, No. 3:19-CV-00452, 2019 WL

4928915, at *9 ("The liberty interest at stake is actual liberty—the right of a person who has not been convicted of a crime to be free from detention prior to trial. There is no dispute that this is a fundamental liberty interest protected by the Due Process clause, for purposes of both procedural and substantive due process."); MTD Order at 34. The Tennessee Constitution also provides that "*all prisoners* shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great." Tenn. Const. art. I § 15 (emphasis added). "This constitutional provision grants a defendant the right to pretrial release on bail pending adjudication of criminal charges." *State v. Burgins*, 464 S.W.3d 298, 304 (Tenn. 2015) (citing *Swain v. State*, 527 S.W.2d 119, 120 (Tenn. 1975)); *Atkins v. Michigan*, 644 F.2d 543, 550 (6th Cir. 1981) (interpreting the Michigan Constitution's nearly identical language to guarantee a "fundamental interest in liberty pending trial"). Once a court determines that a cash bond is appropriate—i.e., that the case does not meet one of the few exceptions articulated in the Tennessee Constitution—it must set the bail amount "as low as the court determines is necessary to reasonably assure the appearance of the defendant as required." Tenn. Code Ann. § 40-11-118(a).

Even if federal constitutional principles did not protect the right to pretrial liberty, or the Tennessee Constitution did not guarantee bail to most arrestees, an arrestee has a constitutionally protected liberty interest in satisfying money bail once it is set as a condition of pretrial release. *See* PI Order at 6–7; *see also Steele v. Cicchi*, 855 F.3d 494, 502 (3rd Cir. 2017) (recognizing that substantive due process protection is triggered by a "liberty interest in exercising [one's] bail option, once bail had been set," as "[s]uch a right emanates from the liberties 'at the heart' of the Due Process Clause") (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)); Tenn. Op. Att'y Gen. 95-057, 1995 WL 325606 (May 24, 1995) ("the right to bail . . . is violated . . . if a criminal defendant is denied the opportunity to make bail."). In *Dodds v. Richardson*, for example, plaintiff

was arrested on a Friday and money bail was set. 614 F.3d 1185 (10th Cir. 2010). When two individuals tried to pay the money required for the plaintiff's release, they were told they could not do so until he was arraigned, which did not occur until Monday. The district court concluded, and the Tenth Circuit affirmed, that when the sheriff's office refused to allow plaintiff to post money for his release, he was unnecessarily detained "without a legitimate goal" in violation of his due process rights. 614 F.3d at 1192-93. "To avoid depriving an arrestee of due process, the government may only interfere with this protected liberty interest . . . if its actions reasonably relate to a legitimate goal. Otherwise, the detention of such an arrestee would constitute punishment prior to trial, in violation of due process." *Id.* (quoting *Gaylor v. Does*, 105 F.3d 572, 576 (10th Cir. 1997)) (internal citations and quotation marks omitted). And as the Ninth Circuit has explained:

> The right to keep someone in jail does not in any way imply the right to release that person subject to unconstitutional conditions—such as chopping off a finger or giving up one's first-born. Once a state decides to release a criminal defendant pending trial, the state may impose only such conditions as are constitutional, including compliance with the prohibition against excessive bail.

United States v. Scott, 450 F.3d 863, 867 n.5 (9th Cir. 2006).

Rule 10(B) and Gentry's Policies interfere with an arrestee's fundamental pretrial liberty interest and the right to post bail once set. Thus, they trigger the doctrine of unconstitutional conditions, are subject to strict scrutiny review, and may be upheld only if narrowly tailored to serve a compelling government interest. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Woodard*, 107 F.3d at 1189; *Salerno*, 481 U.S. at 752–55. "Implicit in the strict-scrutiny approach is the requirement that the government's interest be sufficiently weighty to override a fundamental right in general, without attention to the specific fundamental right implicated." *Brandon*, 158 F.3d at 959.

Collection of court costs through the garnishment of cash bond deposits is not a compelling

government interest. *See supra* 10; *Mayer*, 404 U.S. at 197; *Mem'l Hosp.*, 415 U.S. at 263; *Wallace*, 193 Tenn. at 187; *Barr*, 140 S.Ct. at 2347. Further, even if revenue generation were a compelling state interest, Rule 10(B) and Gentry's Policies are not narrowly tailored to that end. *See supra* 10–11. Pretrial liberty and the posting of bail cannot be conditioned on ensuring the payment of fees or debts consistent with the Fourteenth Amendment.

The undisputed facts demonstrate that Rule 10(B) and Gentry's Policies interfere with the constitutional right to pretrial liberty, as well as the right to post bond once set, by forcing would-be payors to accept that the bond will be garnished to satisfy fines, court fees, and restitution assessed against the arrestee. This scheme is not narrowly tailored to promote a compelling government interest. Rule 10(B) and Gentry's Policies thus violate the doctrine forbidding unconstitutional conditions, and the NCBF is entitled to summary judgment on Count II.

III. Rule 10(B) and Gentry's Policies Violate the Fourteenth Amendment Right to Due Process.

Rule 10(B) and Gentry's Policies unconstitutionally deprive the NCBF of money it deposits without providing the NCBF with an opportunity to be heard. The Due Process Clause of the Fourteenth Amendment requires the government to provide notice and opportunity to be heard before it deprives individuals of their property. U.S. Const. amend. XIV. Procedural due process is violated when there is a deprivation of a life, liberty, or property interest requiring protection under the Due Process Clause without adequate process. *Fields*, 701 F.3d at 185 (citing *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006)).

Courts engage in a two-step inquiry to determine whether an individual has been denied procedural due process. First, the court determines "whether there exists a liberty interest or property interest which has been interfered with" by the defendants. *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). Second, "once it is determined that the Due Process Clause

applies, 'the question remains what process is due.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

To have a property interest protected by the Fourteenth Amendment, one must have "a legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The property interest at issue here is the NCBF's interest in the bail deposits it pays on behalf of the arrestees it serves. A right to one's own money is a quintessential property interest. *See id.* at 571. Under Tennessee law, a bail deposit does not convert into the arrestee's property. *State v. Clements*, 925 S.W.2d 224, 227 (Tenn. 1996); *see also* MTD Order at 37–38 (noting the Clerk's form and *Clements* make clear that third-party depositors retain a property interest in cash bail). Thus, the NCBF retains a property interest in the bail it posts on behalf of arrestees.

When examining a deprivation of a constitutionally protected interest, a court must determine if the accompanying process is constitutionally sufficient. *Puckett v. Lexington-Fayette Urban County Gov't*, 833 F.3d 590, 606 (6th Cir. 2016). To assess whether a particular procedure complies with due process, courts apply a three-part balancing test that looks to "the private interest that will be affected by the official action"; "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and "the Government's interest, including the function involved and the fiscal and administrative burdens" that new procedures would impose. *Mathews*, 424 U.S. at 335.

The *Mathews* test is unnecessary, however, where there is *no* process through which the deprivation can be challenged. *Henry v. City of Middletown, Ohio*, 655 F. App'x 451, 463 (6th Cir. 2016) ("[H]owever weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero—that is, the government is never relieved of its duty to provide some notice and some opportunity to be heard prior to final deprivation of a property

interest.") (quoting *Propert v. District of Columbia*, 948 F.2d 1327, 1332 (D.C. Cir. 1991)). Instead, "*some* form of hearing is required before an individual is finally deprived of a property interest, no matter how small the interest or how great the governmental burden." *Hicks v. Comm'r of Soc. Sec.*, 909 F.3d 786, 800 (6th Cir. 2018) (quoting *Mathews*, 424 U.S. at 333) (internal citation and quotation marks omitted). When no process is provided, due process is not satisfied.

In this case, Rule 10(B) and Gentry's Policies do not provide for any opportunity to be heard by a neutral decision-maker prior to Gentry's garnishment of the NCBF's bail deposit. Neither Rule 10(B) nor the Clerk's Form state any process for cash bail depositors to contest the garnishment of their bail deposit to pay fines, fees, court costs, taxes or restitution assessed against the defendant by the court. SUMF ¶¶ 22-23. There is no opportunity to challenge the enforcement of Rule 10(B) when paying the bail: Gentry simply requires individuals paying cash bonds to sign the Clerk's Form, thereby "agreeing" in writing to future garnishment. SUMF ¶ 3. Gentry's policy is that without a signed Clerk's Form, the Clerk's Office will not accept a bail deposit, and the arrestee on whose behalf bail was to be posted will remain incarcerated. SUMF ¶¶ 4-5. As the Court noted, this is a "take-it-or-leave-it proposition." MTD Order at 38.

Finally, the bail depositor is never provided an opportunity to challenge garnishment when it happens. Gentry enforces Rule 10(B) when the depositor requests a refund by automatically garnishing from the bail deposit any court costs, fines, and restitution assessed against the arrestee. SUMF ¶ 20. No hearing is provided at the time of the deprivation, even when the NCBF has requested a hearing prior to garnishment. SUMF ¶ 21. Further, no process exists for third-party depositors like the NCBF to seek relief when fines and fees are set by a sentencing judge. Though individuals convicted of a criminal offense can request a waiver of certain fees due to indigence at or after sentencing, a third-party depositor such as the NCBF has no notice of such hearings, and

no right to be heard at them: after all, it is not their indigence to invoke. *See* Tenn. Code Ann. § 40-25-123. Nothing in Rule 10(B) or in Gentry's Policies provides a process by which depositors can challenge the legality of the garnishment during the case, nor is there any forum or mechanism by which the depositor can contest the garnishment after the fact. SUMF ¶ 22-24.

Rule 10(B) and Gentry's Policies fail to provide any process at all, let alone constitutionally sufficient process, before depriving the NCBF and other bail bond payors of their money. This due process violation injures the NCBF by depriving it of its financial resources without any opportunity to challenge the deprivation. Rule 10(B) and Gentry's Policies enforcing it are unconstitutional, and the NCBF is entitled to summary judgment in its favor on Count III.

IV. A Permanent Injunction Is Merited

A permanent injunction is appropriate if a party "can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Women's Med. Prof'l Corp.*, 438 F.3d at 602. Rule 10(B) and Gentry's Policies are unconstitutional and cause continuing injury to both the NCBF and its participants, as well as other third-party bail payors and those for whom they seek to pay bail.

Clear harms occur when pretrial liberty is impeded. *Burgins*, 464 S.W.3d at 303 ("Denying bail can create serious and long-lasting adverse effects on an arrestee. These adverse effects, when possible, should be mitigated in light of the constitutional principle that a defendant is innocent until proven guilty."). When notified that their deposit will be automatically garnished even if the arrestee appears at all court dates, would-be depositors may be unwilling or unable to pay bail, leaving pre-trial arrestees incarcerated. Indeed, in order to preserve its operations under Rule 10(B), the NCBF lowered its previous bail ceiling and instituted a monthly cap on the total amount of bail it would post. SUMF ¶¶ 25-26. As a result, individuals for whom the NCBF would have

posted bail but for the garnishment scheme remained incarcerated. SUMF ¶ 29.

Absent a permanent injunction prohibiting enforcement of Rule 10(B), the NCBF's ability to post bail for individuals will be permanently curtailed. SUMF ¶ 35. Additionally, other third parties—particularly those unable to risk the permanent financial losses that come with the garnishment scheme—are likely to be deterred from posting bail when they otherwise would. The result will be more people in pre-trial detention suffering the worst harms of all. Arrestees detained prior to trial are more likely to plead guilty than those who are released, are more likely to receive jail sentences, and on average receive longer sentences. Megan Stevenson, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention* (July 2016) (Dkt. 4-13). They cannot work or make money, and they lose the ability to care for and spend time with family members. *See* PI Order at 7; SUMF ¶ 37. Unlike arrestees who are released pre-trial, they also have less opportunity and ability to assist in their defense. *See* PI Order at 7; SUMF ¶ 38.

CONCLUSION

Gentry's enforcement of Rule 10(B) results in the imposition of excessive bail in violation of the Eighth Amendment. Gentry also violates the Fourteenth Amendment by (1) imposing unconstitutional conditions on an arrestee's protected liberty interest in pretrial release, and (2) depriving the NCBF of its property interest without sufficient due process. These conclusions of law are supported by the undisputed facts in this case. Therefore, for all the reasons set forth above, the NCBF respectfully requests that this Court grant summary judgment in its favor on Counts I, II, and III alleged in its Complaint and issue a permanent injunction ordering Gentry to cease enforcement of Rule 10(B) and his related policies of requiring use of a Clerk's Form before accepting cash bail as well as automatically garnishing court debts from cash bail deposits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served on counsel for Howard Gentry identified below via this Court's CM/ECF system on this the 11th day of November 2020:

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