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

MICHELLE TORRES, ROBBIE JOHNSON-LOVEDAY, AMANDA CAMERON, and BETHANY EDMOND on behalf of themselves and those similarly situated, Plaintiffs, v. W. DOUGLAS COLLINS, in his official capacity as Hamblen County General Sessions Judge, TERESA WEST, in her official capacity as Hamblen County General Sessions Circuit Court Clerk, KATIE WEST MOORE, NANCY PHILLIPS, and KATHY ROBERTSON, in their official capacities as Judicial Commissioners of Hamblen County General Sessions Court, and ESCO R. JARNAGIN, in his official capacity as Hamblen County Sheriff, Defendants.	Case No. 2:20-cv-00026 (Class Action)

CLASS ACTION COMPLAINT

I. Introduction

1. Hamblen County operates a two-tier system of pretrial justice. In Hamblen County, people arrested for a criminal offense who can pay their money bail[1] are released from jail

[1] Throughout this Complaint, the terms "money bail" and "secured financial condition of release" are used interchangeably, and mean the same thing: a sum of money that an individual detained pretrial must pay before she is released from jail.

immediately. Those who cannot pay remain in jail for weeks before they have any opportunity to contest their pretrial detention or explain that they cannot pay. How quickly—or whether—a person is released from jail depends on her access to money. As a consequence, the Hamblen County Jail operates at over 150 percent capacity, and some of the poorest residents of Hamblen County are kept unclothed, shackled to walls and door handles, or forced to sleep in storage closets, simply because they are unable to pay for their release.

2. Plaintiffs Michelle Torres, Robbie Johnson-Loveday, Amanda Cameron, and Bethany Edmond (collectively, "Named Plaintiffs") are currently incarcerated at the Hamblen County Jail solely because they are too poor to pay money bail. Defendants informed Named Plaintiffs that they are eligible for immediate release, but that they must first pay $75,000, $6,000, $30,000, and $1,500, respectively, as financial conditions of pretrial release. In no case did Defendants consider their ability to pay or determine that pretrial detention serves any government interest at the time the money bail amount was set.

3. Defendants are responsible for discriminatory practices that strip people of their fundamental constitutional rights to pretrial liberty and to freedom from being jailed solely because of their poverty. Moreover, Defendants' policies and practices that detain presumptively innocent people prior to trial lack even the most basic procedural protections: a timely individualized hearing, notice of the issues to be determined, the opportunity to present and confront evidence and make arguments at a hearing with counsel, and findings on the record by clear and convincing evidence that the constitutional standard for pretrial detention has been met. Defendants do not provide any process for incarcerated individuals to contest their jailing until days or weeks have passed. Wealthier individuals who can pay money bail are released immediately. Those unable to pay remain in the jail, at significant cost to taxpayers.

4. Defendants violate Plaintiffs' rights to equal protection, substantive and procedural due process, and representation by counsel.

5. Defendants' unconstitutional policies and practices result in widespread pretrial detention based on poverty. Of the more than 400 people locked in Hamblen County Jail on any given day in 2019, an average of approximately 50 percent were awaiting trial.

6. Wealth-based pretrial detention exacts a heavy human toll. The standard use of financial conditions of release in a county where one in five people live in poverty[2] has resulted in a human rights catastrophe in the largely underground Hamblen County Jail. Detainees, shackled at the ankles, overflow from mold- and mildew-infested cells and some sleep nearly naked on the concrete jail floor. Many human beings are chained to benches, door handles, poles, and their own wheelchairs. Medical care is extremely limited. The jail's disregard for the humanity of those confined there is illustrated by a sign posted on the door that states the hours during which "the jail will be on lockdown for feeding." *See* Declaration of Ethel Rhodes, Assistant Public Defender for Tennessee's Third Judicial District (Rhodes Decl.), Ex. A ¶ 13.

7. In Defendant Sheriff Jarnagin's own words, the Hamblen County Jail is a "cesspool of a dungeon," where people are forced to live in "horrible conditions."[3] These conditions flow directly from Defendants' unconstitutional pretrial-detention practices.

8. The medical and mental health emergency at the jail is a result of Defendants' wealth-based detention practices. If Defendants employed constitutional bail practices, there would be no jail overcrowding in Hamblen County.

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[2] *See* U.S. Census Bureau, American FactFinder, Poverty Status in the Past 12 Months: 2013-2017 American Community Survey 5-Year Estimates, Table at 1 (Hamblen County, TN), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF.

[3] Richard A. Oppel Jr., *'A Cesspool of a Dungeon': The Surging Population in Rural Jails*, N.Y. TIMES (Dec. 13, 2019), https://www.nytimes.com/2019/12/13/us/rural-jails.html.

9. Named Plaintiffs bring this lawsuit on behalf of themselves and as representatives of the class of individuals that includes all people who are or will be arrested and charged with criminal offenses and who are or will be detained in the Hamblen County Jail because of Defendants' bail practices. Each Named Plaintiff is already suffering unlawful pretrial incarceration due to Defendants' actions.

10. On behalf of themselves and all others similarly situated, Named Plaintiffs seek a declaration that Defendants' policies and practices violate Plaintiffs' rights to equal protection, substantive due process, procedural due process, and representation by counsel. Plaintiffs further request that the Court issue appropriate injunctive and declaratory relief that will ensure that individuals in Hamblen County do not remain in jail prior to trial solely because of their poverty, and without the substantive findings and procedural safeguards that the Constitution requires before the government may deprive an individual of pretrial liberty.

11. Plaintiffs further ask that this Court grant their Motions for Temporary Restraining Order and Class-wide Preliminary Injunction and order Defendant Sheriff to cease enforcing unlawful orders to pay financial conditions of pretrial release against Plaintiffs unless Defendants Judge Collins, Judicial Commissioners, and Clerk West issue new conditions of release after affording Plaintiffs constitutionally compliant bail hearings.

II. Jurisdiction and Venue

12. This is a civil rights action arising under 42 U.S.C. § 1983, 28 U.S.C. § 2201, *et seq.*, and the Fourteenth and Sixth Amendments to the United States Constitution. The Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 2201 (Declaratory Judgment Act).

13. Venue is proper in this judicial district and division pursuant to 28 U.S.C. § 1391.

III. Parties

14. **Plaintiff Michelle Torres** is a 50-year-old woman. She has been incarcerated in the Hamblen County Jail for nearly three days solely because she cannot afford to pay the $75,000 money bail.

15. **Plaintiff Robbie Johnson-Loveday** is a 49-year-old woman. She has been incarcerated in the Hamblen County Jail for nearly six days solely because she cannot afford to pay the $6,000 money bail.

16. **Plaintiff Amanda Cameron** is a 36-year-old woman. She has been incarcerated in the Hamblen County Jail for more than two days solely because she cannot afford to pay the $30,000 money bail.

17. **Plaintiff Bethany Edmond**, is a 36-year-old homeless woman. She has been incarcerated in the Hamblen County Jail for five days solely because she cannot afford to pay the $1,500 money bail.

18. **Defendant Sheriff Esco Jarnagin** is the head of the Hamblen County Sheriff's Office and keeper of the Hamblen County Jail. Sheriff Jarnagin has custody over the individuals in the Jail during their booking and for the duration of their pretrial detention. The Sheriff's Office enforces secured financial conditions of release by detaining people who have been arrested and cannot pay the secured money bail required by the General Sessions Court. Sheriff Esco Jarnagin is sued in his official capacity for injunctive and declaratory relief.

19. **Defendant Doug Collins** is the Judge of the General Sessions Court in Hamblen County, which has jurisdiction over bail proceedings. Judge Collins, in his official capacity,

conducts initial-appearance hearings and is responsible for determining release conditions. *See* 9 Tenn. Prac. Crim. Prac. & Procedure § 3:2; Tenn. Code Ann. § 40-4-101(6). When a person is charged with a bailable offense, Judge Collins is authorized either to release that person on her own recognizance pursuant to Tenn. Code Ann. §§ 40-11-115, or to admit that person to bail pursuant to Tenn. Code Ann. §§ 40-11-117, - 118, and -122. Judge Collins retains authority to determine the conditions of bail "at any time prior to or at the time the defendant is bound over to the grand jury." Tenn. Code Ann. § 40-11-104. Judge Collins has a practice of requiring unattainable release conditions without any substantive findings or procedural safeguards, let alone the constitutionally required ones.

20. Judge Collins has supervisory authority over judicial commissioners in Hamblen County. *Cf.* Tenn. Code Ann. § 40-1-111(a)(1)(B)(iii). Alongside the other General Sessions judge in Hamblen County (who generally does not hear criminal matters), Judge Collins has authority to appoint and remove judicial commissioners of the court. Tenn. Code Ann. § 40-5-204. Additionally, under state law, Judge Collins maintains supervisory authority over the judicial commissioners, including over how they determine conditions of release in the first instance. Tenn. Code Ann. § 40-1-111(a)(1)(A)(iv). Judge Collins is sued in his official capacity for declaratory relief.

21. **Defendant Katie West Moore, Nancy Phillips, and Kathy Robertson** (collectively, "Judicial Commissioners") are judicial commissioners, whose duties include making probable cause and money bail determinations. Tenn. Code Ann. § 40-5-201(b). Judicial commissioners are authorized to make these bail determinations at the time of booking and at the initial appearance. Tenn. Code Ann. § 40-11-105(a). When determining financial conditions of release, Defendant Judicial Commissioners do not provide any notice or opportunity to be heard,

any opportunity to present or challenge evidence, or any findings by any legal or evidentiary standard concerning arrestees' ability to pay money bail or the necessity of pretrial detention, or an explanation of the reasons for their pretrial release and detention decisions on the record. They also do not provide counsel at or before the proceeding. The Judicial Commissioners are sued in their official capacities for declaratory relief.

22. **Defendant Teresa West** is the Circuit Court Clerk of the General Sessions Court in Hamblen County. As clerk, she is authorized to make pretrial release determinations when a judge is not present in court and the clerk reasonably believes he will not be present within three hours after the defendant is committed to jail. Tenn. Code Ann. § 40-11-105(a). Tenn. Code Ann. § 40-11-105(b) sets forth the maximum amounts of money bail that a clerk may set given the bailable offense. Clerk West is sued in her official capacity for declaratory relief.

IV. Relevant Non-Party

23. **John Dugger** is the Criminal Court Judge for the Circuit Court for the Third Judicial District, which encompasses Greene, Hamblen, Hancock, and Hawkins Counties. He sits in Hamblen County three terms a year. Judge Dugger presides over all Third District jury trials in criminal cases. In addition, all grand jury proceedings take place in the Circuit Court. Grand jury proceedings take place six times a year in Hamblen County.

V. Statement of Facts

A. The Named Plaintiffs Are in Jail Because They Cannot Pay the Monetary Amount Required For Their Pretrial Release

24. Plaintiff Michelle Torres is a 50-year-old woman who is currently detained in the Hamblen County Jail. She would be able to leave the jail if she could pay a $75,000 money bail.

25. On February 14, 2020, Ms. Torres was arrested on various drug charges and brought to the Hamblen County Jail late in the evening. She was not booked until the following morning.

26. At booking, a guard at the jail told her that she would have to pay a $75,000 money bail to be released. Ms. Torres has no idea how her money bail amount was determined, or why she has to pay that sum of money in order to be released.

27. Ms. Torres has not been before a judge or judicial commissioner. She has not told when she will have her initial appearance.

28. During previous incarceration terms in the Hamblen County Jail, Ms. Torres has had initial appearances. During those initial appearances, she recalls not being given the opportunity to ask for an alternative condition of release or a lower money bail amount.

29. Neither Ms. Torres nor anyone else in her life could afford to pay the money bail or even lesser amount to a bondsman. She is unemployed and her disability check was cut off several months ago and has not yet been reinstated. She would be homeless if she were not able to stay at a friend's house. She struggles to meet the basic necessities of life.

30. Ms. Torres is suffering at the Hamblen County Jail. She has serious medical issues including cancer. At the jail, she does not expect to receive adequate medical care. The jail is also not providing her with a liquid diet, as prescribed for her stomach cancer treatment. Ms. Torres is in an extraordinary amount of pain and discomfort.

31. Ms. Torres is sleeping on the jail floor in an overcrowded pod, on a plastic cover with a very thin strip of filling in it. She has no pillow.

32. Plaintiff Robbie Johnson-Loveday is a 49-year-old woman who is currently detained in the Hamblen County jail. She would be able to leave the jail if she could pay a $6,000 money bail.

33. On February 11, 2020, Ms. Johnson-Loveday was arrested on misdemeanor charges related to driving under the influence and brought to the Hamblen County jail between 6 and 7 PM. She was not booked until the following evening on February 12, 2020.

34. At booking, a corrections officer told Ms. Johnson-Loveday that her money bail was set at $6,000.

35. On February 14, 2020, Ms. Johnson-Loveday had an initial appearance with a Judicial Commissioner via video conference from a room in the jail. She did not have a lawyer during the proceeding.

36. The commissioner told Ms. Johnson-Loveday her charges and that she would need to pay her money bail in order to be released from jail.

37. The proceeding before the commissioner lasted less than two minutes. The commissioner did not ask Ms. Johnson-Loveday any questions about how much she should afford to pay, whether she had a job, or anything else about her financial resources.

38. Ms. Johnson-Loveday lives with her husband in a mobile home in Jefferson County, Tennessee.

39. Ms. Johnson-Loveday is indigent. She and her husband have no disposable income after paying their bills and child and spousal support, and buying food and other basic necessities.

40. Ms. Johnson-Loveday works at a book factory through a temporary staffing company, making $8.10 per hour. If she stays in jail because she cannot pay the $6,000 money

bail, she will lose her job, which she has had for ten months. Losing her job would cause her financial ruin.

41. At the jail, Ms. Johnson-Loveday is sleeping on a very thin mat placed on the floor in a very overcrowded pod. Because she is disabled and only has one hand, it is very difficult for her to get up from the floor.

42. Ms. Johnson-Loveday is not receiving her daily medication while in jail and is feeling unwell and cold as a result.

43. Ms. Johnson-Loveday's preliminary hearing in General Sessions Court is not until March 3, 2020—21 days after she was taken into custody.

44. Plaintiff Amanda Cameron is a 36-year-old woman who is currently detained in the Hamblen County Jail. She would be able to leave the jail if she could pay a $30,000 money bail.

45. On February 15, 2020, Ms. Cameron was arrested on various drug charges and brought to the Hamblen County Jail. She was not booked for several hours.

46. At booking, a guard told her that she would have to pay $30,000 money bail to be released. Ms. Cameron does not know why her money bail was set at this amount.

47. Ms. Cameron has not been before a judge or judicial commissioner. She was also not told when she would have her initial appearance.

48. Ms. Cameron cannot afford to pay $30,000 for her release. She also cannot afford to pay a lesser amount to a bondsman. No one in her family would be able to scrape together enough money to get her out of jail.

49. Ms. Cameron is the sole caregiver to her one-year-old daughter. Her only income is from occasional jobs she gets to make flower arrangements, amounting to about $300 per week. She relies on food stamps to feed herself and her daughter.

50. Being in the jail has taken a significant toll on Ms. Cameron's physical and mental health. She is agonizing over and anxious about being separated from her daughter. She also worried that she will not have access to any of her daily medications while in jail. Without these medications, she is in pain and at risk of having seizures.

51. Ms. Cameron sleeps on the floor of the jail in a very overcrowded cell, on top of a thin strip of foam, without a pillow.

52. Plaintiff Bethany Edmond is a 36-year-old woman who is currently detained in the Hamblen County jail. She would be able to leave the jail if she could pay a $1,500 money bail.

53. On February 12, 2020, in the morning, Ms. Edmond was arrested on misdemeanor charges for alleged drug possession and littering, and brought to the Hamblen County Jail. She was not booked until the early morning of the following day, February 13, 2020.

54. Prior to booking, a jail guard told Ms. Edmond that her money bail was set at $1,500.

55. On February 14, 2020, Ms. Edmond had an initial appearance with a Judicial Commissioner via video conference from a room in the jail. She did not have a lawyer during the proceeding.

56. The commissioner read Ms. Edmond her charges and told her when her next court date would be. The commissioner did not ask Ms. Edmond if she would be able to afford her bond.

57. The proceeding before the commissioner lasted less than two minutes. The commissioner did not ask Ms. Edmond any questions about her financial resources.

58. Ms. Edmond is homeless. She and her husband live in a tent. Both she and her husband have no money at all and no assets. At the time of her arrest, she recalls having only 36 cents in her pocket.

59. Ms. Edmond has been unemployed for over a year, but she was scheduled to begin orientation for a job at Koch Foods the week of her arrest and start working the following week. She fears that she will no longer have that job opportunity when she is released from jail.

60. Ms. Edmond is devastated that she cannot see her two children while in jail — she normally sees them every day.

61. Ms. Edmond is currently in tremendous pain because she has not received any of her prescribed medications since entering the jail. Because of this discomfort, she is not able to sleep or eat.

62. Ms. Edmond sleeps on a thin mat on the floor of the jail without a pillow. Her pod is severely overcrowded, and there is mold growing in it.

B. Because Defendants Do Not Provide a Constitutional Pretrial Release Process People Are Incarcerated Solely Due to Their Poverty

63. As a matter of practice, Defendants require secured financial conditions of pretrial release for almost all people arrested in Hamblen County.

The Pretrial Release and Detention Process in Hamblen County

64. When an arrest warrant is issued prior to arrest, a police officer presents an affidavit of complaint to the clerk or deputy clerk, who finds probable cause and signs off on the arrest. After the warrant is approved, a judicial commissioner, Judge Collins, or Clerk West sets a financial condition of release on the warrant.

65. In the case of warrantless arrests, after an individual is arrested and booked into the Hamblen County Jail, the arresting officer procures from the Clerk's office a post-arrest warrant on which a financial condition of pretrial release is affixed using the same procedure as for a pre-arrest warrant. Thus, all people arrested in Hamblen County have their conditions of release

initially determined—in their absence—by either Defendant Judge Collins, one of the Defendant Judicial Commissioners, or Defendant Clerk West (collectively, "initial bail-setters").

66. The initial bail-setters impose financial conditions of release without regard to the individual's ability to pay secured money bail, their ties to the community, or other constitutionally relevant factors. Despite lacking any knowledge of an individual's financial circumstances, the initial bail-setters have a practice of requiring monetary conditions of release in the vast majority of cases. Thus, the initial bail-setters determine an amount of money bail based only on the charges on which the arrested person has been booked and the nature of the allegations in the probable cause statement, and, when available, any prior convictions and jail-bookings in Hamblen County.

67. For people who cannot pay, the money bail order written on their warrant operates as a *de facto* detention order because they cannot obtain the amount of money required for their release.

68. Individuals who cannot pay the amount of money bail required for their release remain in jail and await their "initial appearance."[4] In Hamblen County, a judicial commissioner or Judge Collins conducts the initial appearance, typically by video conference between the judicial officer in chambers and the arrested person in a converted bathroom in the jail. Initial appearances take place only on Mondays, Wednesdays, and Fridays. Initial appearances are very brief proceedings at which the judicial officer informs arrested persons of the charges against them, their conditions of release, and their next court date. Indigent individuals are not represented by counsel at these proceedings and have no opportunity to raise any challenge to their ongoing pretrial detention.

[4] This proceeding is sometimes referred to as an "arraignment" or "video arraignment" even though it does not take place in criminal court. *See* 9 Tenn. Prac. Crim. Prac. & Procedure § 3:2 (differentiating between an "initial appearance" before a magistrate and an "arraignment" before the criminal court following an indictment).

69. At the initial appearance, Judicial Commissioners and Judge Collins reaffirm the *de facto* detention orders set at the warrant stage without making any finding that pretrial detention is required to serve a compelling government interest, as is constitutionally required. And they do so without any meaningful process, let alone the detailed procedures required by the Due Process Clause, including: a timely individualized hearing; notice of the issues to be determined; representation by counsel; the opportunity to present and confront evidence and make arguments; findings on the record explaining the basis for any condition of release imposed and the evidence relied on; and, if such conditions will result in pretrial detention, a finding by clear and convincing evidence that pretrial incarceration is necessary because no alternative conditions or combination of conditions would reasonably ensure the individual's future court appearance or the safety of the community. As a result, the monetary conditions of release affixed at the warrant stage remain after the initial appearance and, because the arrestee cannot afford to pay, continue to function as *de facto* orders of pretrial detention.

70. Defendant Judicial Commissioners and Judge Collins do not provide at the initial appearance an opportunity to contest conditions of pretrial release, including money bail, and refuse to hear requests from arrestees to change the conditions. If individuals attempt to request a change to their conditions of release, they are not able to. Rather, they must wait for a public defender to be appointed and to contact them, and then to request that their attorney file a motion for review of their pretrial-release conditions. At the initial appearance, detainees are permitted to speak only to inform the court whether they plan to retain counsel or would like a public defender to be appointed to represent them.

71. If an individual requests and is appointed a public defender, the Clerk notifies the Hamblen County Public Defender Office of the appointment. This process can take several days.

Although an individual may know she was approved for a public defender if informed by the Judicial Commissioner or Judge Collins at the initial appearance, she typically will not know who her public defender is until her first appearance in General Sessions court.

72. After the initial appearance, individuals who cannot pay their financial conditions of release remain detained while awaiting their first appearance before Judge Collins in General Sessions Court. This preliminary hearing occurs as many as 14 business days from the initial appearance. This hearing is typically the first opportunity for indigent defendants to meet their court-appointed counsel. Because there is no mechanism in Hamblen County to request review of conditions of release until an individual meets with counsel, the preliminary hearing is also typically the first opportunity for defendants to attempt to challenge a *de facto* order of pretrial detention.

73. Even when—at or after the preliminary hearing—defense counsel seeks to modify the bail amount initially imposed at the warrant stage, Defendant Collins refuses to consider constitutionally required factors, including ability to pay, or to provide the substantive findings and procedural safeguards required by the Constitution.

74. Defendants Judge Collins and Judicial Commissioners routinely require money bail in amounts unattainable to the either class members or the average resident of Hamblen County, one-fifth of whom live below the poverty line.[5]

75. Judge Dugger, the Criminal Court Judge for the Circuit Court for the Third Judicial Circuit, sits in Hamblen County itself only three terms a year, and grand juries are convened only six times a year. As a result, individuals subject to *de facto* pretrial detention due to inability to pay will typically wait months before their case has been indicted by a grand jury.

[5] *See* U.S. Census Bureau, *supra* note 2.

76. Individuals who have not yet been indicted by the grand jury are not entitled to discovery in their case as a matter of local practice and state law. Those who cannot purchase their release are routinely desperate to resolve their cases in order to escape the inhumane and dangerous conditions at the Hamblen County Jail. Thus, the vast majority of pretrial detainees in General Sessions court in Hamblen County will plead guilty before their public defender has received any information about their case, done any investigation, received exculpatory evidence, or been able to evaluate the legal and factual defenses available.

77. As a result of Defendants' policies and practices, indigent individuals are subject to extended periods of wealth-based pretrial detention before being provided the hearing on their conditions of release that federal law requires.

C. Hamblen County's Unconstitutional Pretrial Policies and Practices Harm Individuals and Communities.

78. Due to Defendants' unconstitutional policies and practices, presumptively innocent individuals are detained in Hamblen County every day solely because they are too poor to pay the monetary release conditions imposed without any hearing, let alone a hearing that meets constitutional standards.

79. Pretrial incarceration harms individuals' lives beyond their loss of liberty and the degrading and life-threatening conditions they endure in jail. Other consequences of pretrial incarceration include loss of income because individuals often lose their jobs while detained; loss of housing and missed payments on utilities and other bills because individuals cannot make rent and other payments when jailed; loss of physical and/or legal custody of children; an increase in mental illness because conditions in jail can put an individual under extreme stress and restrict access to needed medications, exacerbating or even causing further trauma and mental illness; a high likelihood of assault, including sexual assault, especially in the first few days of incarceration;

exposure to communicable diseases; inability to exercise; deprivation of sunlight and fresh air; and forcible separation from children and family.

80. In addition, being detained pretrial has a significant impact on the legal outcome of a person's case. Detained individuals are more likely to plead guilty just to shorten their jail time, even if they are innocent.[6] They have a harder time preparing a defense, gathering evidence and witnesses, and meeting with their lawyers. Studies show that those detained pretrial face worse outcomes at trial and sentencing than those released pretrial, even when charged with the same offense and controlling for all other factors.[7] Controlling for other factors, a person who is detained pretrial is 13 percent more likely to be convicted and 25 percent more likely to plead guilty than a person who is not detained.[8] And those detained pretrial are more likely to receive longer jail sentences.[9] A person's pretrial detention thus has an irreparable impact on the outcome of a criminal case, and on the person's life for years afterward.

81. Thus, Defendants' practice of issuing *de facto* detention orders by requiring unattainable monetary conditions of pretrial release without substantive findings or procedural

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[6] *See* Arpit Gupta, Christopher Hansman, & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization* 15, 18–19 (May 2, 2016), https://goo.gl/OW5OzL ("Criminal defendants assessed bail amounts appear frequently unable to produce the required bail amounts, and receive guilty outcomes as a result. Entered guilty pleas by defendants unwilling to wait months prior to trial and unable to finance bail likely contribute to this result.").

[7] *See* CHRISTOPHER LOWENKAMP ET AL., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES, LAURA AND JOHN ARNOLD FOUNDATION 12, 14 (2013), https://university.pretrial.org/viewdocument/investigating-the-im (those detained for the entire pretrial period are more likely to be sentenced to jail and prison—and receive longer sentences—than those who are released at some point before trial or case disposition); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 535-36 (2018) ("Pretrial detention leads to an expected increase of 124 days in the maximum days of the incarceration sentence, a 42% increase over the mean.").

[8] *See* Stevenson, *supra* note 7, at 18; *see also* Gupta, et al., *supra* note 6, at 19 (finding a 12 percent increase in the likelihood of conviction using the same data).

[9] *See* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 786-87 (2017).

safeguards results in devastating life consequences to individuals based solely on their access to cash. To take one extreme example, a man died this past summer at the Hamblen County Jail while waiting to be booked.[10]

82. Wealth-based pretrial detention also makes the community less safe. First, wealth-based detention unnecessarily jails those who could be released safely into the community. Several studies have shown that just two or three days in pretrial detention increases the likelihood that an individual will commit a crime in the future, and increases the future risk level of even low-risk defendants.[11] People who are detained for a few days following arrest are also more likely to miss court dates in the future, all because of the destabilizing effects of short periods in jail.[12] In other words, detention based on poverty for just a few days increases recidivism. Second, wealth-based pretrial systems release individuals based only on their ability to pay and without any assessment of their risk of flight or dangerousness. Consequently, if the government believed that certain individuals needed monitoring or supervision to mitigate their risk of flight or dangerousness, they would receive neither if released by paying money bail.

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[10] Travis Dorman, *Man Dies While Waiting to Be Booked into Hamblen County Jail*, Knoxville News Sentinel (Aug. 12, 2019), https://www.knoxnews.com/story/news/local/2019/08/12/man-dies-while-waiting-booked-into-hamblen-county-jail/1993060001/.

[11] *See* Department of Justice, National Institute of Corrections, *Fundamentals of Bail*, 15-16 (2014), https://goo.gl/jr7sMg ("[D]efendants rated low risk and detained pretrial for longer than one day before their pretrial release are more likely to commit a new crime once they are released, demonstrating that length of time until pretrial release has a direct impact on public safety."); CHRISTOPHER T. LOWENKAMP ET AL., *supra* note at 7 (studying 153,407 defendants and finding that "when held 2–3 days, low risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours"); Paul Heaton et al., *supra* note 9, at 768 ("While pretrial detention clearly exerts a protective effect in the short run, for misdemeanor defendants it may ultimately service to compromise public safety," and finding that in a representative group of 10,000 misdemeanor offenders, pretrial detention would cause an additional 600 misdemeanors and 400 felonies compared to if the same group had been released pretrial).

[12] *See also* Gupta et al., *supra* note 6, at 19.

83. Other jurisdictions around the country do not detain people pretrial based on their access to cash. Instead of relying on money, these jurisdictions release arrestees with unsecured financial conditions, non-financial conditions, and pretrial supervision practices and procedures that can help increase court attendance and public safety without requiring detention. Such non-monetary conditions of release include, but are not limited to: unsecured bonds, reporting obligations, phone and text message reminders of court dates, rides to court for those without transportation or a stable address, substance abuse treatment, mental health treatment, counseling, alcohol monitoring devices, stay-away orders, or, in extreme cases of particular individualized risk, electronic monitoring, curfew, and home confinement.

84. Jurisdictions that rely on non-monetary conditions of release do not sacrifice public safety or court attendance; they enhance it. For example, the agency in charge of pretrial supervision in Washington, D.C., found that "[t]he high nonfinancial release rate has been accomplished without sacrificing the safety of the public or the appearance of people in court."[13] Specifically, "Agency data show that 90 percent of released people make all court appearances and that 91 percent complete the pretrial release period without any new arrests."[14]

85. The federal system also prohibits wealth-based detention, expressly preventing a judicial officer from imposing a financial condition of release that results in pretrial detention. 18 U.S.C. § 3142(c)(3). It further creates a requirement that an arrested person be released upon personal recognizance or execution of an unsecured appearance bond unless findings are made by a judicial officer that other conditions are necessary to assure appearance and public safety. 18 U.S.C. § 3142(b). Although pretrial detention is permitted, it may be imposed only after a hearing

[13] PRETRIAL JUSTICE INSTITUTE, THE PRETRIAL SERVICES AGENCY FOR THE DISTRICT OF COLUMBIA: LESSONS FROM FIVE DECADES OF INNOVATION AND GROWTH 2 (2018), https://perma.cc/8KAD-TY5H.

[14] *Id.*

with rigorous procedural protections, including the right to be represented by counsel; the opportunity to testify, present witnesses, and cross-examine witnesses; and a requirement that any pretrial detention order be based on a finding on the record that no conditions would ensure the person's appearance and the safety of the community. 18 U.S.C. § 3142 (f). The federal practice has not harmed court appearance rates or public safety.[15]

86. Pretrial detention based solely on wealth is consistently more expensive to administer than effective pretrial release programs.[16] Without relying on a person's ability to afford cash bail, pretrial release programs can save taxpayer expense while maintaining high public safety and court appearance rates associated with wealth-based practices like Defendants', which rely solely on access to money.

D. Defendants' Wealth-Based Detention Practices Have Resulted in Deplorable Conditions in the Hamblen County Jail.

87. The Hamblen County Jail is urgently overcrowded. Although it is certified for 255 individuals,[17] in December 2019, the most recent month for which data are available, 384 people were detained in the jail on a given day.[18] This means the Jail was operating at 150.6 percent

[15] *See* Thomas H. Cohen, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010*, Bureau of Justice Statistics Special Report 13 (Nov. 2012), https://goo.gl/hN99E7 (finding from 2008 to 2010, only 1 percent of federal defendants released pretrial failed to make court appearances and 4 percent were arrested for new offenses).

[16] *See, e.g.,* PRETRIAL JUSTICE INSTITUTE, PRETRIAL JUSTICE: HOW MUCH DOES IT COST? (2017), https://goo.gl/0lLtLM ("It has been estimated that implementing validated, evidence-based risk assessment to guide pretrial release decisions could yield $78 billion in savings and benefits, nationally."); UNITED STATES COURT, SUPERVISION COSTS SIGNIFICANTLY LESS THAN INCARCERATION IN FEDERAL SYSTEM (2013), https://goo.gl/dJpDrn (In 2012, "[p]retrial detention for a defendant was nearly 10 times more expensive than the cost of supervision of a defendant by a pretrial services officer in the federal system").

[17] Sheriff's Department and Jail, www.hamblencountytn.gov/sheriffs-department-and-jail/.

[18] TENN. DEP'T OF CORR., TENNESSEE JAIL SUMMARY REPORT (Dec. 2019), https://www.tn.gov/content/dam/tn/correction/documents/JailDecember2019.pdf.

capacity. The situation has been even worse in other months. In July and August 2019, the Jail detained more than 450 on a given day.[19]

88. This overcrowding is inhumane. Rather than beds, many individuals sleep chained to benches, door handles, poles, and their own wheelchairs. Converted storage closets are used as ersatz housing units, where detained people sleep shoulder-to-shoulder on mattresses on the floor. They lack adequate clothing—often less than enough to be fully covered. Detainees, packed into small unsanitary spaces, suffer from poor ventilation and face high risks of getting sick from the mold and mildew in the jail, which is not adequately cleaned because of the severe overcrowding. Lacking a dedicated meeting space, lawyers must speak to their clients in a converted supply closet. The conditions in the Hamblen County Jail therefore make it difficult for detainees to mount an effective legal defense.

[19] TENN. DEP'T OF CORR., TENNESSEE JAIL SUMMARY REPORT (July 2019), https://www.tn.gov/content/dam/tn/correction/documents/JailJuly2019.pdf; Tenn. Dep't of Corr., TENNESSEE JAIL SUMMARY REPORT (Aug. 2019), https://www.tn.gov/content/dam/tn/correction/documents/JailAugust2019.pdf.

Source: New York Times

Source: New York Times

89. From 2010 to present, the Tennessee Corrections Institute—the state government body responsible for establishing minimum standards for jails—has recommended the Hamblen County Jail for non-certification for failure to comply with its minimum standards.[20]

90. Defendant Sheriff Jarnagin has acknowledged that the jail fails to meet the minimum standards required by the TCI.[21] He notes: "We're trying to keep the jail clean but it's difficult to keep a cell block clean when you've got six beds and you've got 35 inmates in there."[22]

91. The extreme overcrowding in the jail is a direct consequence of Defendants' use of money bail to order the *de facto* detention of people accused of crimes. Few can afford to pay for their freedom, as one out of every five people in Hamblen County lives in poverty.[23] Only 4.5 percent of the population over the age of 16 worked full-time year-round in 2017, the last year for which data is available.[24] Over 26 percent of this population did not work at all in 2017.[25]

92. Fifty percent of the population of the Hamblen County jail is detained pretrial. The vast majority of that detained pretrial population is there solely because they cannot afford to pay for their release. Many pretrial detainees in the Hamblen County Jail are not only detained pretrial but also pre-indictment. Because grand juries convene only three times a year in Hamblen County,

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[20] Memorandum Opinion and Order, *Zackery Beck v. Hamblen County, TN and Esco Jarnagin*, No. 2:17-CV-178-TRM (E.D. Tenn. Apr. 12, 2019) 2 (2010-17); TENN. DEP'T OF CORR., TENNESSEE JAIL SUMMARY REPORT (September 2018), https://www.tn.gov/content/dam/tn/correction/documents/JailSeptember2018.pdf; TENN. DEP'T OF CORR., TENNESSEE JAIL SUMMARY REPORT (August 2019), https://www.tn.gov/content/dam/tn/correction/documents/JailAugust2019.pdf; *see also* Tenn. Code Ann. § 41-4-140(b)(1).

[21] *See* Amanda Garcia, *Concerns grow about overcrowding at Hamblen County Jail*, WATE.COM, (Aug. 10, 2018), https://www.wate.com/news/local-news/concerns-grow-about-overcrowding-at-hamblen-county-jail/.

[22] *Id.*

[23] *See* U.S. Census Bureau, *supra* note2.

[24] *Id.*

[25] *Id.*

this period can last for months, during which they do not receive discovery and cannot meaningfully assess the strength of their case for trial.

93. To escape prolonged detention in the Hamblen County Jail and the outrageous conditions there, most pretrial detainees choose to plead guilty before their case has even been indicted by a grand jury or they have received discovery.

VI. Class Action Allegations

94. Named Plaintiffs bring the Claims in this action, on behalf of themselves and all others similarly situated, as a class action under Federal Rules of Civil Procedure 23(a)(1)-(4) and 23(b)(2).

95. Under Federal Rule of Civil Procedure 23(a), certification of a class is appropriate where: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

96. Plaintiffs request that the Court certify a class composed of all people who are or will be arrested and charged with criminal offenses and who are or will be detained in the Hamblen County Jail because of Defendants' bail practices

A. Rule 23(a)

97. ***Numerosity.*** The precise size of the Class is unknown by Plaintiff because it is forward-looking, but it is substantial, given that hundreds of arrests are each made every year in the Hamblen County District Court. Joinder of these unknown future members is impracticable.

98. Many of the class members are low-income individuals who will likely lack financial resources to bring an independent action or to be joined in this action. Joinder of every member of the class would be impracticable.

99. ***Commonality.*** The relief sought is common to all class members. Named Plaintiffs seek relief from Defendants' money bail policies, practices, and procedures, which violate the rights of the Class members. Named Plaintiffs also seek relief declaring that Defendants' policies, practices, and procedures regarding the setting of bail violate the Class members' constitutional rights.

100. Among the most important, but not the only, common questions of fact are:

a. Whether Defendants impose monetary conditions of release that result in detention without consideration of class members' ability to pay;

b. Whether Defendants require pretrial conditions of release that result in detention without any substantive findings that detention is necessary;

c. Whether, when, and how Defendants determine what conditions of pretrial release should be and whether, for example, Defendants provide a timely individualized hearing; notice of the issues to be determined; representation by counsel; the opportunity to present and confront evidence and make arguments; findings on the record explaining the basis for any condition of release imposed and the evidence relied on; and, if such conditions will result in pretrial detention, a finding by clear and convincing evidence that pretrial detention is necessary because no alternative conditions or combination of conditions would reasonably ensure the individual's future court appearance and the safety of the community; and

d. How long individuals arrested must wait in jail after arrest before they have an opportunity to challenge pretrial release conditions, raise their inability to pay for their release or to request alternative, non-financial conditions.

101. Among the most important common question of law are:

a. Whether Defendants' detention of poor arrestees without the substantive findings the Constitution requires before a presumptively innocent person may be ordered Whether requiring an individual to pay money to secure release from pretrial detention without an inquiry into or findings concerning the individual's ability to pay the amount required, and without meaningful consideration of and findings

concerning less restrictive alternative conditions of release, violates the Fourteenth Amendment's Due Process and Equal Protection clauses;

b. Whether it is lawful to impose a secured financial condition of release that operates as a *de facto* order of pretrial detention because of a person's inability to pay without complying with the procedural safeguards, applying the correct legal standard, and making the substantive findings required for an order of preventive pretrial detention; and

c. Whether setting of pretrial release conditions without affording an individual counsel violates the Sixth Amendment and the Fourteenth Amendment's Due Process Clause.

102. ***Typicality.*** Named Plaintiffs' claims are typical of the claims of the other members of the Class, and they have the same interests in this case as all other Class members that they represent. Each of them suffers injuries from the failure of Defendants to comply with the Constitution: they are each confined in jail because they could not pay their secured monetary bond amount. Resolution of the constitutionality of Defendants' money bail practices will determine the claims of Named Plaintiffs and every other Class member.

103. If Named Plaintiffs succeed in the claim that Defendants' policies and practices concerning wealth-based detention violate their constitutional rights, that ruling likewise will benefit every other member of the Class.

104. ***Adequacy.*** Named Plaintiffs will fairly and adequately represent the interests of the proposed Class they seek to represent.

105. Named Plaintiffs have no interests separate from or in conflict with those of the proposed Class they seek to represent as a whole and Named Plaintiffs seek no relief other than the declaratory and injunctive relief, which is sought on behalf of the entire proposed Class they seek to represent.

106. ***Class Counsel.*** Named Plaintiffs are represented by attorneys from Civil Rights Corps and the Institute for Constitutional Advocacy and Protection, who have experience in litigating complex civil rights matters in federal court and extensive knowledge of both the details of Defendants' practices and the relevant constitutional and statutory law. Counsel have the resources, expertise, and experience to prosecute this action.

B. Rule 23(b)(2)

107. Class certification is appropriate because Defendants have acted in the same unconstitutional manner with respect to all class members: Defendants require all arrestees to pay for their release. Those who can pay are released and those who cannot are detained.

108. The Class therefore seeks declaratory and injunctive relief that Defendants violate the Named Plaintiffs' and Class members' rights under the Fourteenth and Sixth Amendments by requiring secured financial conditions of release without prompt and individualized release hearings that provide appropriate substantive findings and adequate procedural protections. Because the putative Class challenges Defendants' practices as unconstitutional through declaratory and injunctive relief that would apply the same relief to every member of the Class, Rule 23(b)(2) certification is appropriate and necessary.

C. Rule 23(g)

109. Federal Rule of Civil Procedure 23(g) requires that the court appoint class counsel for any class that is certified. Fed. R. Civ. P. 23(g)(1). Class counsel must "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4).

110. For reasons set forth in the contemporaneously filed Memorandum in Support of Motion for Class Certification, undersigned counsel meet the factors the court must consider under Rule 23(g): (1) "the work counsel has done in identifying or investigating potential claims in the

action"; (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" (3) "counsel's knowledge of the applicable law;" and (4) "the resources that counsel will commit to representing the class."

VII. Claims for Relief

COUNT I

Defendants Violate Plaintiffs'[26] Fourteenth Amendment Rights to Equal Protection and Due Process through a Policy and Practice that Jails Individuals Prior to Trial Based on their Access to Money

111. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

112. Plaintiffs have a right to be free from wealth-based detention. The Fourteenth Amendment's Equal Protection and Due Process Clauses forbid the government to detain individuals prior to trial based solely on lack of access to money. The constitutional principles that forbid jailing a convicted defendant solely because the person is unable to make a payment, *see, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (invalidating state practice of automatically revoking probation for failure to pay a fine or restitution, without considering probationer's ability to pay or whether other alternative measures meet state's interest in punishment and deterrence), apply with even greater force to an arrestee who is presumed innocent.

COUNT II

Defendants Violate Plaintiffs' Fundamental Fourteenth Amendment Due Process Right to Pretrial Liberty

113. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

[26] For each claim, the term "Plaintiffs" refers to both the Named Plaintiffs and members of the proposed class, unless otherwise specified.

114. Freedom from imprisonment lies at the heart of the liberty that the Due Process Clause protects. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action."). Pretrial detention infringes upon this right and may only be required if it is narrowly focused to serve compelling government interests.

115. The state's interest at the pretrial stage is limited to ensuring the accused will appear for trial and protecting the public from danger associated specifically with that individual's release.

116. Here, Plaintiffs have been detained on *de facto* detention orders and deprived of pretrial liberty through imposition of unattainable financial conditions without any court considering Plaintiffs' likelihood of appearing at future court appearances and whether Plaintiffs pose any danger to the community, and without any court making a substantive finding that no alternatives to such *de facto* pretrial detention would serve the government's interests.

COUNT III

Defendants Violate Plaintiffs' Fourteenth Amendment Right to Procedural Due Process

117. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

118. Procedurally, orders of pretrial detention may be entered only after rigorous procedures have been met. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976). These procedures include, but are not necessarily limited to: a timely individualized hearing; notice of the issues to be determined; representation by counsel; the opportunity to present and confront evidence and make arguments; findings on the record explaining the basis for any condition of release imposed and the evidence relied on; and, if such conditions will result in pretrial detention, a finding by clear and convincing evidence that pretrial incarceration is necessary because no alternative

conditions or combination of conditions would reasonably ensure the individual's future court appearance and the safety of the community. Procedural due process requires procedures sufficient to protect Plaintiffs' substantive rights to pretrial liberty and against wealth-based detention.

119. Here, Plaintiffs were provided none of these constitutionally required procedures before being detained because they could not pay.

COUNT IV

Defendants Violate Plaintiffs' Sixth Amendment Right to Counsel by Not Providing Them with Counsel at Proceedings Resulting in Pretrial Detention

120. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

121. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to counsel at each post-attachment critical stage of the criminal process. *See, e.g.*, *Lafler v. Cooper*, 566 U.S. 156, 165 (2012) ("The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. . . . The constitutional guarantee applies to pretrial critical stages . . . ."). Bail determinations are post-attachment critical stages for which counsel must be provided.

122. Defendants' failure to provide counsel at hearings that result in pretrial detention that prejudices both Plaintiffs' immediate liberty interests and the ultimate outcomes of their cases.

123. Defendants violate the Sixth Amendment by conducting critical pretrial release and detention proceedings without providing counsel.

VIII. Prayer for Relief

124. WHEREFORE, Plaintiffs respectfully request the following relief:

a. Certification of a class under Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure, represented by Named Plaintiffs;

b. A declaration that Defendants violate Named Plaintiffs' and Class members' rights under the Fourteenth Amendment by requiring secured financial conditions of release without inquiry into or findings concerning their ability to pay, or meaningful consideration of and findings concerning whether alternative non-financial conditions of release serve the government's interests;

c. A declaration that Defendants violate Named Plaintiffs' and Class members' due-process rights by imposing financial conditions of release that result in detention without conducting a prompt individualized release hearing with adequate procedural safeguards including the following:

- Notice to the individual arrested of the critical factual and legal issues at stake in the proceeding;

- If a financial condition of release is being considered, a determination of each individual's ability to pay money bail and the amount of money they can afford;

- An opportunity for the individual arrested to be heard concerning their ability to afford money bail and what nonmonetary release conditions, if any, are necessary.

- An opportunity for the individual arrested to present evidence, contest the government's evidence, and to make arguments concerning the imposition of conditions of release;

- The provision of counsel if the individual is unable to afford counsel;

- Before imposing pretrial detention, substantive findings on the record by clear and convincing evidence, including the evidence relied on and reasons for such findings, that detention is necessary because no less restrictive alternatives to detention address the state's compelling interests;

d. A declaration that Defendants violate Named Plaintiffs' and Class Members' right to counsel under the Sixth Amendment by failing to provide counsel to indigent people at pretrial release and detention hearings;

e. A temporary restraining order requiring the Sheriff to release Named Plaintiffs unless they are provided the procedures stated above;

f. An order and judgment preliminarily and permanently enjoining the Sheriff from enforcing financial conditions that result in *de facto* pretrial detention without findings that pretrial detention is necessary to meet a compelling government interest and without the procedural safeguards required for confidence in that substantive outcome;

g. An order and judgment granting reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and

h. Such other relief as the Court deems just and appropriate.

Dated: February 16, 2020

Respectfully submitted,

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**Pro Hac Vice application forthcoming.*

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

MICHELLE TORRES, *et al.*, on behalf of themselves and those similarly situated, Plaintiffs, v. W. DOUGLAS COLLINS, in his official capacity as Hamblen County General Sessions Judge, *et al.*, Defendants.	Case No. 2:20-cv-00026

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

Named Plaintiffs, Michelle Torres, Robbie Johnson-Loveday, Amanda Cameron, and Bethany Edmond, file this proposed class action motion contemporaneously with their Complaint challenging Defendants' unconstitutional pretrial bail practices, which jails Hamblen County's poorest residents because they cannot pay for their release. Named Plaintiffs, who seek injunctive and declaratory relief, move for class certification under Federal Rules of Civil Procedure 23(a) and 23(b)(2) to represent all people who are or will be arrested and charged with criminal offenses and who are or will be detained in the Hamblen County Jail because of Defendants' bail practices ("class members"). Plaintiffs also move for appointment of the undersigned counsel to represent the certified class under Rule 23(g) of the Federal Rules of Civil Procedure.

Class certification in this matter is appropriate. Plaintiffs' claims concern Defendants' unconstitutional bail and pretrial detention practices, which result in injuries to named Plaintiffs

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

Accordingly, Plaintiffs seek to certify and represent a class, defined as: all people who are or will be arrested and charged with criminal offenses and who are or will be detained in the Hamblen County Jail because of Defendants' bail practices.

II. BACKGROUND

A. Defendants' Money Bail Practices Violate Plaintiffs' Right to Pretrial Liberty and Against Wealth-Based Detention.

Plaintiffs challenge Defendants' practice of requiring financial conditions of release that result in pretrial detention without any inquiry into ability to pay, and without any of the substantive findings or procedural safeguards required for a lawful order of pretrial detention. Specifically, Defendants do not provide a timely individualized hearing; notice of the issues to be determined; representation by counsel; the opportunity to present and confront evidence and make arguments; findings on the record explaining the basis for any condition of release imposed and the evidence relied on; or, if such conditions will result in pretrial detention, a finding by clear and convincing evidence that pretrial detention is necessary because no other alternative conditions or combination of conditions would reasonably ensure the individual's future court appearance and the safety of the community. Compl. ¶ 69. In short, the proceedings lack the basic hallmarks of

the adversarial legal process in the American constitutional tradition, let alone the robust findings and safeguards required for the deprivation of the fundamental right to pretrial bodily liberty of a presumptively innocent person.

Individuals arrested in Hamblen County are jailed if they cannot pay a money bail amount set *ex parte*. The individual cannot participate in determining whether or how much money she must pay to purchase her liberty. *Id.* ¶¶ 64-68. In determining conditions of release *ex parte*, the judicial official does not inquire into or make findings concerning the individual's ability to pay, the individual's ties to the community, alternatives to pretrial detention, or other factors relevant to pretrial release. *Id.* ¶ 66.

If the arrestee cannot pay the secured money bail amount, the first time she will appear before a judicial officer is at an initial appearance via closed circuit television up to three days after arrest. *Id.* ¶ 68. At the initial appearance, the judicial officer does not determine conditions of release or modify the previously imposed financial condition. *Id.* ¶¶ 69-70. Instead, the detained person is simply informed of the charges and her right to a preliminary hearing, and the judicial officer determines whether the arrestee is entitled to appointed counsel. *Id.* ¶ 70-71. The next hearing is then scheduled for up to fourteen business days later. *Id.* ¶ 72.

The policy of detaining every individual who cannot buy release, in a county where one out of every five people live in poverty, has resulted in hundreds of poor people languishing in the Hamblen County Jail. *Id.* ¶ 87. The result is a human rights emergency. These individuals pack the floors of the jail cells, while those suffering from mental illness or who pose suicide risks are shackled (often half-naked) to walls, door handles, and wheelchairs in the jail's common area. *Id.* ¶ 88. In Hamblen County, whether a presumptively innocent individual is released or detained in inhumane and dangerous conditions turns on her access to cash. The failure to make basic

substantive findings and provide procedural safeguards violates the constitutional rights of class members.

B. The Named Plaintiffs Will be Kept in Jail Because They Cannot Pay the Money Bail Demanded for Their Release.

Named Plaintiffs Michelle Torres, Robbie Johnson-Loveday, Amanda Cameron, and Bethany Edmond were arrested on charges on February 12 (Johnson-Loveday and Edmond) and February 15 (Torres and Cameron), 2020, and are currently detained pretrial at Hamblen County Jail on secured money bail[1] ranging from $1,500 to $75,000, which they cannot afford to pay. Declaration of Plaintiff Michelle Torres ("Torres Decl.") ¶¶ 2, 4-5, Ex. 2 to Pls.' Mem. Supp. Mots. TRO & Prelim Inj.; Declaration of Plaintiff Robbie Johnson-Loveday ("Johnson-Loveday Decl.") ¶¶ 2, 13, 16, Ex. 3 to Pls..' Mem. Supp. Mots. TRO & Prelim. Inj.; Declaration of Plaintiff Amanda Cameron ("Cameron Decl.") ¶¶ 2, 4-5, Ex. 4 to Pls.' Mem. Supp. Mots. TRO & Prelim. Inj.; Declaration of Plaintiff Bethany Edmond ("Edmond Decl.") ¶¶ 2, 4-5, Ex. 5 to Pls.' Mem. Supp. Mots. TRO & Prelim. Inj. For each of these Named Plaintiffs, a secured money-bail amount was set by a judicial official who never inquired into their ability to pay or their ties to the community or made other individualized inquiry into alternatives to pretrial detention. Torres Decl. ¶¶ 4, 6-7; Johnson-Loveday Decl. ¶¶ 5-13; Cameron Decl. ¶¶ 6-7; Edmond Decl. ¶¶ 4, 6-8. None of the Named Plaintiffs received the assistance of counsel prior during their pretrial release and detention proceedings. Johnson-Loveday Decl. ¶ 9; Edmond Decl. ¶ 7. Thus, each of the Named Plaintiffs are being kept in jail solely because they are too poor to pay a secured financial condition of release without any determination that such pretrial detention serves any government interest and without procedural safeguards that the Constitution requires for confidence in such a

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

finding. As a result of being detained on unaffordable money bail, each Named Plaintiff has suffered or will suffer serious harm, including loss of jobs and income, loss of housing, and deterioration of mental and physical health due to the inhumane conditions at the Hamblen County Jail that stem directly from Defendants' unconstitutional pretrial detention practices. Torres Decl. ¶¶ 11-13; Johnson-Loveday Decl. ¶¶ 18-23; Cameron Decl. ¶¶ 9, 11-12; Edmond Decl., ¶¶ 11-14.

III. QUESTIONS PRESENTED

1. Whether Named Plaintiffs Michelle Torres, Robbie Johnson-Loveday, Amanda Cameron and Bethany Edmond may maintain this action as representative parties on behalf of all people who are or will be detained in the Hamblen County Jail post-arrest because they are unable to pay the monetary release conditions, where the named Plaintiffs have demonstrated that the prerequisites of Rule 23(a) and 23(b)(2) are satisfied.

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

IV. ARGUMENT

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

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

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

Fed. R. Civ. 23(a); *Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000).

Once those conditions are satisfied, the moving party must also demonstrate that the putative class falls within at least one of the subcategories of Rule 23(b). *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). Named Plaintiffs seek certification of the class under Rule 23(b)(2), which is commonly used in certifying civil rights class actions. Class certification under Rule 23(b)(2) is appropriate when a "single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011).

Although the Court must perform a "rigorous analysis" to determine whether to certify a class, *id.* at 351, Plaintiffs need not prove their claims at the class certification stage, *see Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). Rather, courts consider merits questions only to the extent that they are "relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 466. Thus, "[a]n evaluation of the probable outcome on the merits is not properly part of the certification decision." *Id.*

Class certification is particularly favored when, as here, the named plaintiffs assert civil rights claims that are transitory in nature, such that mootness concerns would make it difficult or impossible for individuals to litigate the issues outside of the class context. *See Gratz v. Bollinger*, 539 U.S. 244, 268 (2003) (noting that class-action treatment was "particularly important" in a case where the claims of the individual plaintiffs ran "the risk of becoming moot" because the "[t]he class action vehicle . . . provides a mechanism for ensuring that a justiciable claim is before the Court") (quotation marks and citation omitted)). Indeed, class-action treatment is favorable when a claim involves pretrial detention, which is inherently temporary. *See, e.g.*, *Hiatt v. Cty. of Adams*, 155 F.R.D. 605, 608–09 (S.D. Ohio 1994) (explaining that given the "short term nature of incarceration in a county jail," a class should be certified when it is the "only vehicle whereby the legality of [a jail's] operation can be reviewed").

As such, district courts around the country have consistently certified classes that, similar to the proposed class here, are composed of individuals who are arrested and subjected to bail policies that detain them solely because of their inability to pay secured money bail, in violation of due process and equal protection. *See, e.g.*, *Dixon v. City of St. Louis*, No. 4:19-cv-0112-AGF, 209 WL 2437026 (E.D. Mo. June 11, 2019); *Booth v. Galveston Cty.*, No. 3:18-CV-00104, 2019 WL 1129492 (S.D. Tex. Mar. 12, 2019); *Daves v. Dallas Cty.*, No. 3:18-CV-0154-N, 2018 WL 4537202 (N.D. Tex. Sept. 20, 2018); *Caliste v. Cantrell*, No. CV 17-6197, 2018 WL 1365809 (E.D. La. Mar. 16, 2018); *Edwards v. Cofield*, No. 3:17-CV-321-WKW, 2018 WL 4323920 (M.D. Ala. Sept. 10, 2018); *Buffin v. City & Cty. of San Francisco*, No. 15-CV-04959-YGR, 2018 WL 1070892 (N.D. Cal. Feb. 26, 2018); *ODonnell v. Harris Cty.*, No. CV H-16-1414, 2017 WL 1542457 (S.D. Tex. Apr. 28, 2017); *Walker v. City of Calhoun*, No. 4:15-CV-170-HLM, 2016 WL 361580 (N.D. Ga. Jan. 28, 2016). As discussed below, each of the requirements under Rule 23(a) and (b)(2) is met in this case, and the Court should grant Plaintiffs' motion for class certification. *See Phipps v. Wal-Mart Stores*, 792 F.3d 637, 652 (6th Cir. 2015) *abrogated on other grounds by China Agritech, Inc. v. Resh*, 138 S.Ct. 1800 (2018) ("By its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claims as a class action." (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010))).

1. Joinder of All Proposed Class Members Is Impracticable

Rule 23(a)(1) requires that the class be so numerous that joinder of all members would be impracticable. "There is no strict numerical test for determining impracticality of joinder." *In re Am. Med. Sys., Inc.*, 75 F. 3d 1069, 1079 (6th Cir. 1996). "When class size reaches substantial proportions, however, the impracticality requirement is usually satisfied by the numbers alone."

Id. The "sheer number of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy" numerosity. *Bacon v. Honda of Am. Mfg. Inc.*, 370 F.3d 565, 570 (6th Cir. 2004). However, numerosity can be satisfied with far fewer than one hundred class members. *See, e.g.*, *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 523 (6th Cir. 1976) (affirming a district court's class certification after the trial showed that the class consisted of 16 individuals); *Afro Am. Patrolmens League v. Duck*, 503 F.2d 294, 298 (6th Cir. 1974) (affirming certification of a class of 35 identifiable members).

Numerosity is satisfied in this case for three reasons. First, the number of people in the class is far greater than the minimum necessary for class certification. A December 2019 report from the Tennessee Department of Correction showed 384 men and women were detained in the Hamblen County Jail on a daily basis.[2] Over half were incarcerated pretrial. *Id*. These individuals are incarcerated solely because they cannot afford the monetary release conditions of their bail that have been imposed without the substantive findings and procedural safeguards required for a lawful order resulting in pretrial detention. The number of current and future individuals subject to Defendants' policies and practices—if not enjoined—amounts to thousands every year. Joinder of so many individual claims would be impracticable.

Second, class relief is appropriate where, as here, traditional joinder is not practicable because there is an indeterminate future stream of class members who will suffer the same injury, absent injunctive relief. *See, e.g.*, *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (finding impracticability of non-class joinder for a class including future members, who could not yet be identified); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 184 F.R.D. 583, 586 (N.D. Ohio 1998) ("In deciding whether joinder would be impracticable, factors such as

[2] Tenn. Dep't of Corr., *Tennessee Jail Summary Report* 1 (2019), https://www.tn.gov/content/dam/tn/correction/documents/JailDecember2019.pdf.

. . . requests for prospective and injunctive relief that could affect future class members are significant." (citing Moore's Federal Practice § 23.22[2], [5], [7] (3d ed. 1998)); Newberg on Class Actions § 25:4 (4th ed. 2002) ("Even a small class of fewer than 10 actual members may be upheld if an indeterminate number of individuals are likely to become class members in the future. . . ."). In this case, Defendants arrest and detain new people every day pursuant to its bail policies and practices. Thus, the numerosity requirement is met because the putative class seeks equitable relief against an ongoing policy, a resolution will affect numerous people in the future, and the composition of the class is fluid and unknown.

Third, in addition to the size of the class and the existence of a future stream of class members, other factors highlight the impracticability of joinder, including "judicial economy . . . and the practicality with which individual putative class members could sue on their own." *Cannon v. GunnAllen Fin., Inc.*, 2008 WL 4279858, at *4 (M.D. Tenn. Sept. 15, 2008). Adjudicating this case through individual lawsuits against Defendants, including repetitious litigation and discovery, would strain judicial resources and risk conflicting judgments. *See Hill v. Snyder*, 878 F.3d 193, 215 (6th Cir. 2017) (considering claims "in one class action will avoid patchwork decisions, promote consistency, conserve scarce judicial resources, and provide crucial guidance to the parties and the public alike"); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("[A] class action in the instant case avoided duplication of judicial effort and prevented separate actions from reaching inconsistent results . . . . "); *Harlow v. Sprint Nextel Corp.*, 254 F.R.D. 418, 423 (D. Kan. 2008) ("The alternative to a class action would be for many plaintiffs to bring individual suits against [the defendant]. This would be grossly inefficient, costly, and time consuming because the parties, witnesses, and courts would be forced to endure unnecessarily duplicative litigation.").

Finally, the ability of individual impoverished arrestees to file separate lawsuits is diminished because they are unlikely to have the resources to investigate and develop their constitutional claims, let alone to find a lawyer to represent them in the hours after their arrest. As a group, they are among the most marginalized and economically desperate members of the community. And, unlike those who, for example, have been injured by a defective product, indigent arrestees may not even be aware that they have a valid claim for challenging the practice of jailing the poor for the inability to make a monetary payment. *See Gerardo v. Quong Hop & Co.*, No. 08-CV-3953, 2009 WL 1974483, at *2 (N.D. Cal. July 7, 2009) (certifying class where "potential class members are not legally sophisticated," making it difficult for them to bring individual claims); *Jackson v. Foley*, 156 F.R.D. 538, 541–42 (E.D.N.Y. 1994) (finding numerosity and impracticable joinder when the majority of class members came from low-income households, greatly decreasing their ability to bring individual lawsuits); *Sherman v. Griepentrog*, 775 F. Supp. 1383, 1389 (D. Nev. 1991) (holding, in action brought for injunctive relief challenging Medicaid policy, that joinder was impracticable because the proposed class consisted of poor and elderly or disabled people who could not bring individual lawsuits without hardship).

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

Rule 23(a) also requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality "inquiry focuses on whether a class action will generate common answers that are likely to drive resolution of the lawsuit." *In re Whirlpool Corp. Front-Loading Washer Prods. Liabl. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013). Not *all* questions of law or fact at issue need to be common, for the Rule requires only "a *single* common question" that unites the proposed class. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (emphasis added) (quotation and alterations omitted); *see also Powers v. Hamilton Cty. Pub. Def. Comm'n*,

501 F.3d 592, 619 (6th Cir. 2007); *In re Am. Med. Sys., Inc*., 75 F.3d at 1080. ("[T]here need be only a single issue common to all members of the class.") (quotation and citation omitted). Moreover, "[c]ommonality does not require that Plaintiffs' claims be identical." *Eddleman v. Jefferson Cty., Ky.*, 96 F.3d 1448, 1448 (6th Cir. 1996) (unpublished). Rather, it "requires that the resolution of common questions affect all or a substantial number of the class members." *Id.*; *see also Sterling*, 855 F.2d at 1197 ("[T]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.").

Although there need not be *both* common issues of law and fact under Rule 23(a), here the entire case is pervaded by critical and dispositive issues of both law and fact that are common to the class. Among the most important, but not the only, common questions of fact are:

> (1) Whether Defendants impose monetary conditions of release that result in detention without consideration of class members' ability to pay;
>
> (2) Whether Defendants require pretrial conditions of release that result in detention without any substantive findings that detention is necessary;
>
> (3) Whether, when, and how Defendants determine what conditions of pretrial release should be and whether, for example, Defendants provide a timely individualized hearing; notice of the issues to be determined; representation by counsel; the opportunity to present and confront evidence and make arguments; findings on the record explaining the basis for any condition of release imposed and the evidence relied on; and, if such conditions will result in pretrial detention, a finding by clear and convincing evidence that pretrial detention is necessary because no alternative conditions or combination of conditions would reasonably ensure the individual's future court appearance and the safety of the community; and
>
> (4) How long individuals arrested must wait in jail after arrest before they have an opportunity to challenge pretrial release conditions, raise their inability to pay for their release or to request alternative, non-financial conditions.

Among the most common questions of law with respect to the Class are:

(1) Whether requiring an individual to pay money to secure release from pretrial detention without an inquiry into or findings concerning the individual's ability to pay the amount required, and without meaningful consideration of and findings concerning less restrictive alternative conditions of release, violates the Fourteenth Amendment's Due Process and Equal Protection clauses;

(2) Whether it is lawful to impose a secured financial condition of release that operates as a *de facto* order of pretrial detention because of a person's inability to pay without complying with the procedural safeguards, applying the correct legal standard, and making the substantive findings required for an order of preventive pretrial detention; and

(3) Whether setting of pretrial release conditions without affording an individual counsel violates the Sixth Amendment and the Fourteenth Amendment's Due Process Clause.

This case exemplifies the Supreme Court's explanation of commonality in *Dukes*, 564 U.S. at 349–51. There must be factual or legal questions the answers to which help to advance the legal claims of the Plaintiffs. *Id*. In this case, the fundamental common questions of fact and law listed above are the dispositive issues necessary to resolve the case as to all class members.

Named Plaintiffs, and other members of the class, are subject to Defendants' policies and practices of determining the amount of money required to secure pretrial release without the arrestee or her lawyer present for an adversarial hearing that considers ability to pay and alternatives to money bail, and all are subject to *de facto* pretrial detention without the findings and safeguards required for such detention. Every member of the proposed class will be subjected to monetary release conditions, meaning that a monetary amount will be imposed pursuant to the process described above; every class member will be detained in the Hamblen County Jail if she is unable to pay the amount; no class member will receive a timely inquiry into her ability to pay a particular amount set or consideration of alternative non-financial conditions of release; no class member will receive an adversarial hearing with counsel, an opportunity to be heard and to

confront evidence, findings by clear and convincing evidence that other alternative conditions cannot reasonably serve the State's interests, and a statement of reasons on the record.

Because Defendants engage in detention practices with the same constitutional flaws for each class member and cause the same harm to each class member, the proposed class easily meets the commonality requirement.

3. The Named Plaintiffs' Claims Are Typical of the Proposed Class

Rule 23(a)'s "typicality" requirement ensures that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Sys., Inc.*, 75 F.3d at 1082 (quoting 1 *Newberg on Class Actions* § 3:13, at 3-76). "To be typical, a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law." *Id.* (quoting *Senter*, 532 F.2d at 525 n.31); *see also Bauer v. Nortek Glob. HVAC LLC*, No. 3:14-CV-1940, 2016 WL 5724232, at *9 n.13 (M.D. Tenn. Sept. 30, 2016) ("Rule 23(a)(3) requires that the named plaintiffs' claims be 'based on the same legal theory' as the class claims . . . .") (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d at 1082)).

The named Plaintiffs are injured in the same way as the other class members: they each challenge *de facto* pretrial detention orders made without the substantive findings and procedural safeguards that the U.S. Constitution requires.

The Named Plaintiffs' legal theories will also advance the interests of the other putative class members who are also subjected to the Defendants' pretrial detention scheme. The proof concerning whether the Defendants engage in those policies and the legal argument about whether

those policies are unlawful are critical for each class member in this case to establish the Defendants' liability. Thus, if the Named Plaintiffs succeed in their claim that the Defendants' policies and practices concerning pretrial detention as alleged in the Complaint are unlawful, then that ruling will likewise benefit every other member of the class. That is the essence of Rule 23(a)'s typicality requirement.

4. The Named Plaintiffs Are Competent and Dedicated Class Representatives

Rule 23(a)(4) requires that the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). The Sixth Circuit has set forth two criteria for meeting the adequacy of representation requirement: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir. 2012) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d at 1083). "The first criterion requires that there be no antagonism or conflict between representative plaintiffs and the other members of the class that they seek to represent. The second criterion inquires into the competency of counsel." *In re Nortel Networks Corp. ERISA Litig.*, 2009 WL 3294827, at *10 (M.D. Tenn. Sept. 2, 2009) (citations omitted).

Named Plaintiffs are adequate representatives because they share completely the class members' interests in establishing the illegality of Defendants' policies and practices concerning pretrial release in Hamblen County. Their injuries arise from policies and practices to which all class members have been or will be subjected and they seek the same injunctive and declaratory relief for themselves as for the putative class. There are no known material conflicts of interest among members of the proposed class, which is comprised of individuals who have a common interest in vindicating their constitutional rights in the face of their unlawful treatment.

The Plaintiffs are represented by attorneys who "will vigorously prosecute the interests of the putative class." *Abadeer v. Tyson Foods, Inc.*, No. 3:09-00125, 2009 WL 4110295, at *8 (M.D. Tenn. Nov. 25, 2009), *modified* (Sept. 27, 2010). Plaintiffs are represented by counsel from Civil Rights Corps, the Institute for Constitutional Advocacy and Protection, and Baker, Donelson, Bearman, Caldwell & Berkowitz P.C. ("Baker Donelson"). Counsel are "qualified, experienced," and amply "able to conduct the litigation." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 757 (6th Cir. 2013) (citation and quotations omitted). Each organization has experience litigating complex civil rights matters in federal court and extensive knowledge of both the details of pretrial wealth-based detention schemes and the relevant constitutional law. *See* Exs. 1 & 2. As discussed in further detail below, *infra* section IV.B, Plaintiffs' counsel are qualified and experienced. with a history of zealous advocacy on behalf of their clients, and Rule 23(a)(4)'s adequacy requirement is thus met.

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

In addition to satisfying Rule 23(a), the proposed class in this case satisfies Rule 23(b)(2). Rule 23(b)(2) provides for class certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. Rule 23(b)(2). By its terms, Rule 23(b)(2) imposes two independent but related requirements. First, plaintiffs must show that defendants' actions or inactions are based on "on grounds generally applicable to the class." *Senter*, 532 F.2d at 525. Second, the "key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or to none of them." *Gooch* v. *Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012) (citation and

quotation omitted); *see also Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016) ("The main the purpose of a (b)(2) class is to provide relief through a *single* injunction or declaratory judgment.").

Moreover, the "precise identity of each class member need not be ascertained" for a Rule 23(b)(2) class. *Cole*, 839 F.3d at 542 (holding that "ascertainability is not an additional requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief"). Indeed, the Advisory Committee Notes to the 1966 amendment to Rule 23 demonstrate that subsection (b)(2) was intended to reach precisely the type of class proposed in this case: "Illustrative are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." 39 F.R.D. 69, 102 (1966); *see also Senter*, 532 F.2d at 525 ("Lawsuits alleging class-wide discrimination are particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive remedy.").

Here, the proposed class satisfies Rule 23(b)(2) on two grounds. First, Defendants, through the policies, practices, and procedures that make up their use of money bail, have acted and/or refused to act on grounds generally applicable to the entire class. *See Amchem Prods., Inc v. Windsor*, 521 U.S. 591, 614 (1997) ("Rule 23(b)(2) permits class actions for declaratory or injunctive relief where the party opposing the class has acted or refused to act on grounds generally applicable to the class. Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples." (quotations and citation omitted)). Thus, a declaration that the policy, pattern, and practice requiring pretrial conditions of release that result in detention without any substantive findings justifying that detention violates the Fourteenth Amendment's Due Process and Equal Protection clauses would benefit every member of the proposed class. The

same applies to legal rulings on the other claims, such as a declaration that setting of pretrial release conditions without sufficient procedural due process safeguards and without affording an individual counsel violates the Sixth Amendment and the Fourteenth Amendment's Due Process Clause.

Second, Plaintiffs' request for relief satisfies 23(b)(2) because the remedy they seek would provide relief to all current and future arrestees in Hamblen County. *See, e.g.*, *Wal-Mart v. Dukes*, 564 U.S. at 362-63 ("When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate. . . . Predominance and superiority are self-evident."); *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002) ("Rule 23(b)(2) certification is appropriate where plaintiffs seek declaratory or injunctive relief for class-wide injury."). For example, an injunction prohibiting the County from enforcing bail practices and orders of *de facto* or transparent pretrial detention that keeps arrestees in jail without the constitutionally required findings would provide relief to every member of the class, as would equitable relief on all of Plaintiffs' other claims. The injunctive relief that Plaintiffs seek would protect each member of the class from Defendants' unlawful policies and practices. For this reason, Defendants' systemic, unconstitutional money bail practices are particularly well-suited to a Rule 23(b)(2) class action.

Because all members of the proposed class have or will be injured by Defendants' unconstitutional conduct, and because the relief Plaintiffs seek would apply to all members of the class, the class meets the requirements of 23(b)(2). Having already met the threshold requirements of Rule 23(a), this class fulfills all the prerequisites for certification.

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

Federal Rule of Civil Procedure 23(g) requires that the court appoint class counsel for any class that is certified. Fed. R. Civ. P. 23(g)(1). Class counsel must "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In determining whether this requirement is met, courts must consider: (1) "the work counsel has done in identifying or investigating potential claims in the action;" (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" (3) "counsel's knowledge of the applicable law;" and (4) "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

Undersigned counsel satisfy these four requirements. First, Plaintiffs' counsel have interviewed Named Plaintiffs and other class members, performed relevant legal research and drafting, and investigated the facts and legal claims raised in this case for many months. *See* Ex. 1. Second, Plaintiffs' counsel have significant experience litigating class and civil rights actions, including claims concerning due process, equal protection, and the right to counsel, and have litigated challenges to unconstitutional bail practices in other jurisdictions across the country. *See* Exs. 1 & 2. Third, Plaintiffs' counsel are particularly familiar with the application of constitutional rights in criminal cases. *See* Exs. 1 & 2. Counsel have advocated for policy reform on the issues raised in this case with state and local officials and educated the public and other attorneys about preventing and remedying the type of constitutional violations exemplified by this case. *See* Exs. 1 & 2. Finally, Plaintiffs' counsel are prepared to contribute significant resources to the representation of this class.

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

CONCLUSION

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

Dated: February 16, 2020

Respectfully submitted,

/s/ Tara Mikkilineni
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**Pro Hac Vice application forthcoming.*

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 2020 I electronically filed the foregoing with the clerk of the court for the U.S. District Court, Eastern District of Tennessee, using the electronic case filing system of the Court. This Memorandum in Support of Plaintiffs' Motion for Class Certification will be served in accordance with the Federal Rules of Civil Procedure.

/s/ George T. Lewis

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

MICHELLE TORRES, *et al.*, on behalf of themselves and those similarly situated, Plaintiffs, v. W. DOUGLAS COLLINS, in his official capacity as Hamblen County General Sessions Judge, *et al.*, Defendants.	Case No. 2:20-cv-00026

DECLARATION OF TARA MIKKILINENI

1) My name is Tara Mikkilineni and, on behalf of Civil Rights Corps, I am one of the counsel for the named Plaintiffs and the putative Class members in this case. I submit this Declaration in support of the motion for class action treatment.

2) I am a senior attorney at Civil Rights Corps, a non-profit civil rights organization based in Washington, D.C.

3) Prior to my employment at Civil Rights Corps, I was Fair Lending Enforcement Counsel at the Consumer Financial Protection Bureau, where I investigated and litigated complex federal enforcement actions. Prior to that, I was habeas counsel at the Habeas Corpus Resource Center in California, where I represented capital habeas defendants in the state and federal courts. From 2010-2014 I was an attorney in the Special Litigation Division of the Public Defender Service for the District of Columbia, where I litigated constitutional civil rights cases, including class action cases, and complex criminal law issues in federal and District of Columbia trial and appellate courts. I was also an associate at the law firm Sidley Austin, where I worked on complex

government investigations and civil litigation, and a law clerk for the Hon. Emilio M. Garza of the Fifth Circuit Court of Appeals.

4) Civil Rights Corps, along with co-counsel, has conducted an investigation into the use of secured money bail to detain impoverished people in Hamblen County. This investigation has included interviews with witnesses, government employees, incarcerated people, local attorneys, community members, experts in the functioning of courts and jails, and national experts in post-arrest procedures and constitutional law.

5) I have studied the way that these systems function in other cities and counties in order to investigate the wide array of reasonable constitutional options in practice. As a result, I have devoted substantial resources to becoming intimately familiar with systems of wealth-based detention and with all of the relevant state and federal laws and procedures that relate to them. I have studied the way that these poverty-based post-arrest detention systems function in other cities and counties in order to investigate the wide array of reasonable constitutional options in practice for local systems like Hamblen County. I have therefore devoted significant time and resources to becoming familiar with the scheme in Hamblen County and with all of the relevant state and federal laws and procedures that can and should govern it.

6) Civil Rights Corps has been appointed class counsel in three materially identical lawsuits, challenging money bail practices in Harris County, Texas; *see ODonnell v. Harris County*, 2017 WL 1542457, at *7-8 (Apr. 28, 2017); Dallas County, Texas; *see Daves v. Dallas. County,* No. 3:18-CV-0154-N, 2018 U.S. Dist. LEXIS 160742 (N.D. Tex. Sep. 20, 2018); and St. Louis, Missouri; *see Dixon v. City of St. Louis*, No. 4:19-cv-0112-AGF, 2019 U.S. Dist. LEXIS 97327 (E.D. Mo. June 11, 2019).

7) In *ODonnell*, the district court entered, and the Fifth Circuit Court of Appeals affirmed, a preliminary injunction to cease unconstitutional money bail practices in one of the largest jurisdictions in the country. In *Daves* and *Dixon* the district courts entered similar preliminary injunctions, which are currently on appeal to the Fifth and Eighth Circuits, respectively.

8) Civil Rights Corps has been lead counsel in many constitutional civil rights class action lawsuits raising similar issues. A small sampling of these cases includes: *Schultz v. State*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018); *Edwards v. Cofield*, 265 F. Supp. 3d 1344 (M.D. Ala. 2017); *Caliste v. Cantrell*, No. 17-6197, 2018 U.S. Dist. LEXIS 43338 (E.D. La. Mar. 16, 2018); *Jones on behalf of Varden v. City of Clanton*, 2015 WL 5387219 (M.D. Ala. 2015); *Pierce et al. v. City of Velda City,* 2015 WL 10013006 (E.D. Mo. 2015); *Walker v. City of Calhoun*, 2016 WL 361612 (N.D. Ga. Jan. 28, 2016); *Rodriguez v. Providence Community Corrections, Inc.*, 2015 WL 9239821 (M.D. Tenn. 2015); *Cooper v. City of Dothan*, 2015 WL 10013003 (M.D. Ala. 2015); *Snow v. Lambert*, 2015 WL 5071981 (M.D. La. 2015); *Thompson v. City of Moss Point*, 2015 WL 10322003 (S.D. Miss. 2015).

9) Many of those cases have resulted in consent decrees requiring jurisdictions to change their post-arrest procedures to remove secured money bail for new arrestees. Many other jurisdictions have worked with us and others to change their practices voluntarily in the wake of these cases. Civil Rights Corps has worked with legislators, judges, Attorneys General, and community members to help identify problems with post-arrest systems and to design constitutional and effective solutions. I am also counsel in a number of ongoing class action lawsuits with substantial legal overlap with this one. *See e.g.*, *Graff v. Aberdeen Enterprizes II,*

Inc., 4:17-cv-606 (N.D. Okla. 2017); *Fant et al. v. City of Ferguson*, 15-cv-253-AGF (E.D. Mo. 2015); *Robinson v. Purkey*, 3:17–cv–1263-AAT (M.D. Tenn. 2017).

10) Civil Rights Corps is prepared to contribute significant resources to litigating this case. Plaintiffs' counsel have paid all costs associated with the investigation and litigation to date and will continue to do so.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge.

/s/ Tara Mikkilineni____ 2-16-2020
Tara Mikkilineni Date

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

MICHELLE TORRES, *et al.*, on behalf of themselves and those similarly situated, Plaintiffs, v. W. DOUGLAS COLLINS, in his official capacity as Hamblen County General Sessions Judge, *et al.*, Defendants.	Case No. 2:20-cv-00026

DECLARATION OF SETH WAYNE

1. My name is Seth Wayne and, on behalf of the Institute for Constitutional Advocacy and Protection at Georgetown University Law Center (ICAP), I am one of the counsel for the named Plaintiffs and the putative Class members in this case. I submit this Declaration in support of the motion for class certification.

2. ICAP is an institute based at the Georgetown University Law Center in Washington, D.C. ICAP is composed of experienced litigators and professionals, with a mission to defend American constitutional rights and values. ICAP is prepared to devote considerable and sufficient resources to prosecute this case.

3. I was first licensed to practice law in 2011 and have practiced continuously since then.

4. Prior to my employment as Senior Counsel at the Institute for Constitutional Advocacy and Protection, I worked as a trial attorney in the Special

Litigation Section of the Civil Rights Division in the United States Department of Justice for approximately two years. Prior to that, I worked as a special litigation staff attorney at the Orleans Public Defenders in New Orleans, Louisiana for approximately five years.

5. I have developed substantial experience related to the constitutionality of bail procedures. Specifically, I represent plaintiffs and have been appointed class counsel in a similar civil rights lawsuit challenging money bail practices in St. Louis, Missouri in *Dixon v. City of St. Louis*, No. 4:19-cv-0112-AGF, 2019 U.S. Dist. LEXIS 97327 (E.D. Mo. June 11, 2019). I have also authored amicus briefs discussing the legality of money bail practices in *In re Kenneth Humphrey*, No. S247278 (Cal. 2018), *Walker v. Calhoun*, 901 F.3d 1245 (11th Cir. 2018); and *Buffin v. Hennessy*, 15-cv-4959 (N.D. Cal. 2015).

6. I also have general expertise in the constitutionality of practices in the criminal justice system. I represent Plaintiffs in a multi-county putative class action challenging the use of fines and fees to jail court debtors, *Graff v. Aberdeen Enterprizes II, Inc.*, 4:17-cv-606 (N.D. Okla. 2017), a case with substantial legal overlap with this one. With the Department of Justice I represented the United States investigating, litigating, and negotiating settlements against law enforcement agencies in large jurisdictions engaged in a pattern or practice of civil rights violations, including *United States v. Police Department of Baltimore City*, 17-cv-99 (D. Md. 2017).

7. I have experience throughout my career in all stages of litigation, including multiple bench and jury trials.

/s/ *Seth Wayne*
Seth Wayne

February 16, 2020
Date

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

MICHELLE TORRES, *et al.*, on behalf of themselves and those similarly situated, Plaintiffs, v. W. DOUGLAS COLLINS, in his official capacity as Hamblen County General Sessions Judge, *et al.*, Defendants.	Case No. 2:20-cv-00026

[PROPOSED] MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTIONS FOR A TEMPORARY RESTRAINING ORDER AND CLASS-WIDE PRELIMINARY INJUNCTION

Every day, people in Hamblen County, Tennessee are detained pretrial in the county jail solely because they cannot afford to pay money bail. Defendants, who make and enforce Hamblen County's bail policies, routinely demand that people who have been arrested pay a sum of money to be released. They do so without giving them a meaningful opportunity to be heard on conditions of release, making any inquiry into or findings concerning their ability to pay, or providing them counsel. While those who can afford to pay are immediately released, those who cannot are forced to remain in jail until their case is resolved, which may take months or years. The result of Defendants' unconstitutional money bail practices is an ongoing humanitarian crisis in the Hamblen County Jail, which is so overcrowded that pretrial detainees are unclothed and handcuffed to door handles, forced to sleep shoulder-to-shoulder on mattresses in supply closets,

and shackled to their own wheelchairs. These individuals are forced to endure inhumane jail conditions solely because they cannot pay for their freedom.

Defendants' practices violate the constitutional rights of Plaintiffs[1] in several ways. First, they infringe on two overlapping but distinct substantive constitutional rights: (1) the equal protection and due process right against wealth-based detention, and (2) the fundamental due process right to physical bodily liberty before trial. Neither of these constitutional rights is absolute, but infringement on either requires the government to demonstrate that the wealth-based pretrial detention of a person is necessary to serve the government's interest in court appearance or public safety. Because Defendants make no inquiry into or findings about a person's ability to pay a financial condition of release and fail to consider whether alternative conditions of release would reasonably protect the government's interests, their bail practices are unconstitutional.

Second, Defendants' practices violate Plaintiffs' procedural due process rights by denying them any opportunity at all—let alone a constitutionally adequate hearing—to contest their jailing for weeks, if ever. Bedrock constitutional law requires that, before an individual's right to pretrial liberty or against wealth-based detention is infringed, the government must provide adequate procedural safeguards to ensure the accuracy of any finding that a person must be detained prior to trial. These minimal safeguards include a timely individualized hearing; notice of the issues to be determined; representation by counsel; the opportunity to present and confront evidence and make arguments; findings on the record explaining the basis for any condition of release imposed and the evidence relied on; and, if such conditions will result in pretrial detention, a finding by clear and convincing evidence that pretrial incarceration is necessary because no other alternative

[1] "Plaintiffs" refers to both Named Plaintiffs and proposed Class Members throughout this memorandum.

conditions or combination of conditions would reasonably ensure the individual's future court appearance and the safety of the community.

Absent intervention by this Court, Plaintiffs will remain unlawfully confined in the Hamblen County Jail for weeks with no opportunity to challenge their conditions of release. Because of their poverty, they will languish in a jail notorious for abhorrent conditions. This Court should issue a Temporary Restraining Order for the Named Plaintiffs and a Preliminary Injunction for the putative class, enjoining Defendant Sheriff Jarnagin from continuing to enforce orders that result in pretrial detention unless those orders include a finding, made after the required procedural safeguards have been provided, that pretrial detention is necessary.

FACTS

Every day, hundreds of presumptively innocent individuals in Hamblen County are confined in its jail because they cannot pay the sum of money required by Defendants for their release.[2] This amount of money is determined without an individualized hearing, and people remain incarcerated for weeks without any opportunity to challenge their conditions of release. Courts across the country—including courts in Tennessee—have held that practices materially identical to those followed by Defendants are unconstitutional and have ordered equitable relief to remedy them.[3]

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[2] Ex. 1, TENN. DEP'T OF CORR, DECISION SUPPORT: RESEARCH & PLANNING, TENNESSEE JAIL SUMMARY REPORT 1 (December 2019) (one-day snapshot of Hamblen County Jail population showing 202 individuals detained pretrial).

[3] *See*, *e.g.*, *McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-cv-33, 2019 WL 633012, at *16 (M.D. Tenn. Feb. 14, 2019) (granting preliminary injunction); *Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1376 (N.D. Ala. 2018) (granting preliminary injunction), *appeal filed sub. nom. Hester v. Gentry*, No. 18-13894 (11th Cir. Sept. 13, 2018); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 320 (E.D. La. 2018) (issuing declaratory judgment), *aff'd on other grounds*, 937 F.3d 525 (5th Cir. 2019); *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052 (S.D. Tex. Apr. 28, 2017) (*ODonnell I*) (granting preliminary injunction), *aff'd as modified*, 892 F.3d 147 (5th Cir. 2018); *Rodriguez v. Providence Community Corrections, Inc.*, 155 F. Supp. 3d 758, 761, 772 (M.D. Tenn. 2015) (granting

The Named Plaintiffs

Each of the Named Plaintiffs is currently detained in violation of their constitutional rights by Defendant Jarnagin in the Hamblen County Jail. Their detention is a result of money bail orders issued by one of Defendants Collins, West, Robertson, Phillips, or West Moore. None can afford to pay their money bail, nor have they been able to challenge their conditions of release. Absent intervention by this Court, each Named Plaintiff will remain detained indefinitely because of her inability to pay.

Michelle Torres

Plaintiff Michelle Torres, a 50-year-old woman, was arrested on February 14, 2020 on misdemeanor and felony drug charges. Ex. 2, Declaration of Michelle Torres ("Torres Decl.") ¶ 2. She was taken to the Hamblen County Jail where she waited shackled in the entry area for several hours before learning from a guard that her bond was set at $75,000.[4] *Id.* ¶¶ 3-4. She has no idea how or by whom her bond amount was determined. *Id.* ¶ 6. Ms. Torres cannot afford to pay to be released, as her only source of income is federal disability benefits, which were cut off several months ago. *Id.* ¶ 10. She has nobody in her life who can help her pay her bond. *Id.* ¶ 5. Ms. Torres has serious medical issues, including cancer, for which she does not expect to receive treatment or medication in the jail. *Id.* ¶¶ 11-12. She is in extraordinary pain and discomfort in the jail, where she is forced to sleep on the floor without a pillow or proper mattress in a room crowded with other women. *Id.* ¶¶ 12-13. She has yet to have counsel appointed or see any judicial official, and nobody

preliminary injunction); *Cooper v. City of Dothan*, No. 1:15-CV-425-WKW, 2015 U.S. Dist. LEXIS 78813, at *6 (M.D. Ala. June 18, 2015) (granting temporary restraining order).

[4] Throughout this brief, "bond," "bail," "money bail," and "secured financial condition of release" refer to the same thing: an sum of money that an individual detained pretrial must pay before she is released from jail. In Hamblen County, these often contemplate use of a commercial surety, which require a nonrefundable payment of 10% of the bail amount.

has told her when her initial appearance will be or when she will be able to request a lower bond or non-financial conditions of release. *Id.* ¶¶ 7-8.

Robbie Johnson-Loveday

Plaintiff Robbie Johnson-Loveday is a 49-year-old woman. Ex. 3, Declaration of Robbie Johnson-Loveday ("Johnson-Loveday Decl."), ¶ 1. She was arrested on February 11, 2020, on charges of driving under the influence and related charges, all misdemeanors, and taken to the Hamblen County Jail. *Id.* ¶¶ 2-3. She was not booked into the jail until the evening of February 12. *Id.* ¶ 4. At that time, a correctional officer told her that her bond was $6,000. *Id.* ¶ 13. That was the only time she was informed of the amount of her bond. *Id.* On the morning of February 14, she communicated with a court official by video conference in a room in the jail. *Id.* ¶ 5. The video interaction lasted less than two minutes. *Id.* ¶ 12. She did not have an attorney present. *Id.* ¶ 9. During the video conference, the court official did not ask Ms. Johnson-Loveday if she had a job, if she could afford a lesser bond amount, or anything else about her financial resources, nor did the court official consider any non-financial conditions for her release. *Id.* ¶ 10. Ms. Johnson-Loveday cannot pay her bail, and remains incarcerated. *Id.* ¶ 16. She is afraid that if she remains in jail, she will lose her job, which will cause financial ruin. *Id.* ¶ 19. As a result of being unable to afford her bail, she is trapped in an overcrowded cell where she is forced to sleep on the floor—from which it is especially difficult for her to rise because she has only one hand. *Id.* ¶¶ 21-22. She also does not have access to the medication she takes daily. *Id.* ¶ 23.

Amanda Cameron

Amanda Cameron is a 36-year-old woman. Ex. 4, Declaration of Amanda Cameron ("Cameron Decl."), ¶ 1. She was arrested shortly after midnight on February 15, 2020. *Id.* ¶ 2. She was charged with Schedule II, III, and IV drug violations, theft, and unlawful drug paraphernalia.

Id. After her arrest, she was taken to the Hamblen County Jail, where she waited for several hours to be booked. *Id.* ¶ 3. A guard informed her that her bond was set at $30,000. *Id.* ¶ 4. She has no idea how her bond was determined or why that is the amount of money she needs to pay to be released. *Id.* ¶ 6. She cannot afford to pay $30,000 or make a payment to a bondsman, and does not think anyone in her family will be able to help her. *Id.* ¶ 5. Her sole income comes from food stamps and flower arrangements she sells from her home. *Id.* ¶ 10. She is the primary caretaker for her one-year-old daughter, and the money she and her boyfriend earn is just enough to cover basic necessities. *Id.* ¶¶ 9-10. She is desperate to get home to her daughter, and is stressed and scared in jail, where she has to sleep on a thin strip of foam in an overcrowded pod. *Id.* ¶¶ 9, 12. She is concerned she will not be provided with her prescribed medications, without which she is at risk of having seizures. *Id.* ¶ 11.

Bethany Edmond

Plaintiff Bethany Edmond is a 36-year-old homeless woman who was arrested on February 12, 2020, and charged with aggravated criminal littering, a Schedule III drug violation, and a Schedule V drug violation, all misdemeanors. Ex. 5, Declaration of Bethany Edmond ("Edmond Decl."), ¶ 2. She was taken to the Hamblen County Jail, where a guard told her she had a bond of $1,500. *Id.* ¶ 4. She cannot afford her money bail, and her family is unable to give her financial assistance. *Id.* ¶ 5. When she was arrested, she had 36 cents in her pocket, the only cash she possesses. *Id.* ¶ 10. She and her husband currently live in a tent. *Id*. She has been unemployed for over a year. *Id.* On February 14, 2020, she had a video hearing conducted by a woman. *Id.* ¶ 6. The woman read Ms. Edmond the charges, appointed her a public defender, and told her that her next court date is March 3, 2020. *Id.* The entire video hearing took two minutes; no attorney was present. *Id.* ¶ 7. Because she cannot pay money bail, Ms. Edmond is forced to endure jail conditions

including mold, overcrowding that means she must sleep on the floor, and no access to her medication, which causes her pain, insomnia, and loss of appetite. *Id.* ¶¶ 13-14. She is also separated from her children, ages six and twelve, whom prior to her incarceration she saw every day. *Id.* ¶ 12.

The Initial Pretrial Release and Detention Process

Named Plaintiffs' circumstances are typical of pretrial detainees in Hamblen County. All people arrested in Hamblen County have their conditions of release first determined—in their absence—at the warrant stage by Defendant Collins, the Defendant Judicial Commissioners Moore, Phillips, and Robertson, or Defendant West (collectively, the "initial bail-setters"). Ex. 6, Declaration of Elizabeth Bou ("Bou Decl.") ¶ 6; Ex. 7, Declaration of Ethel Rhodes ("Rhodes Decl."), ¶ 6.

When a warrant is sought prior to arrest, a police officer presents an affidavit of complaint to Defendant West or one of her deputies, who signs off on the warrant. Bou Decl. ¶ 6. After the warrant is approved, one of the initial bail-setters affixes a money bail amount to the warrant. *Id.* ¶ 6; Rhodes Decl. ¶ 6. In the case of a warrantless arrest, after an individual is arrested and booked into the Hamblen County Jail, the arresting officer will go to the Clerk's office to follow the same bail-setting procedure as he would in the case of an arrest on a warrant. Bou Decl. ¶ 7.

In either case, the financial condition required for release is based solely on the charges on which an arrested person has been booked; the nature of the allegations in the affidavit of complaint and, when available, any information in the court's computer system, which may include an arrested person's previous criminal cases in Hamblen County, probation status in Hamblen County, missed court dates, and place of residence. *Id.* ¶¶ 8, 12. The initial bail-setters make no inquiry into and have no information about an individual's ability to pay money bail, their ties to

the community, or other relevant factors. *Id.* ¶ 9; *see also id.* ¶ 10 (noting that Defendant West said it is "not [the bondsetters'] business" how much money an arrestee has access to (alteration in original)). Although the initial bail-setters are authorized to release an individual on personal recognizance or with a citation to return to court, they rarely do so, instead requiring money bail in the vast majority of cases. *Id.* ¶ 13; Rhodes Decl. ¶ 5. Because they lack any financial information about the individual, the bail-setters do not know whether that person will be released immediately or remain in jail.

The Initial Appearance

Individuals who cannot immediately pay the amount of money bail required for their release remain in jail and await their "initial appearance."[5] In Hamblen County, one of the Defendant Judicial Commissioners or Defendant Collins presides over the initial appearance. This proceeding is off-the-record and behind closed doors, typically conducted by video conference between the judicial officer in chambers and arrested persons in the jail.[6] Rhodes Decl. ¶ 7. Initial appearances take place only on Mondays, Wednesdays, and Fridays. Initial appearances are very brief proceedings at which arrested persons are informed of the charges against them, their conditions of release, and their next court date. *See* Johnson-Loveday Decl. ¶¶ 6-8, 12; Edmond Decl. ¶¶ 6-7; Ex. 8, Declaration of Sonny Clendenin ("Clendenin Decl."), ¶¶ 4, 7; Ex. 9, Declaration of Richard Price, ("Price Decl.") ¶¶ 6-7. Defense counsel is not typically present at

[5] This proceeding is sometimes referred to as an "arraignment" or "video arraignment" even though no plea is entered and it does not take place in criminal court. *See* DAVID LOUIS RAYBIN 9 TENN. PRAC. CRIM. PRAC. & PROCEDURE § 3:2, Westlaw (differentiating between an "initial appearance" before a General Sessions judge or judicial commissioner and an "arraignment" before the criminal court following an indictment).

[6] Because the initial appearances are conducted by video link between the judicial officer's chambers and the jail, they are not accessible to the public, in violation of Tennessee law. *See* Tenn. R. Crim. P. 43(e)(2) (providing that if initial appearance occurs by audio-visual device, it must "be heard in the courtroom by members of the public" or "be contemporaneously accessible by the public").

the initial appearance. Rhodes Decl. ¶ 7; Johnson-Loveday Decl. ¶ 9; Edmond Decl. ¶ 7. Arrested persons have no opportunity to raise any challenge to their ongoing pretrial detention or modify the bail amount written on their warrant. Rhodes Decl. ¶ 7; Clendenin Decl. ¶ 6; Price Decl. ¶ 8.

At the initial appearance, the Defendant Judicial Commissioners and Defendant Collins make no alterations to the amounts affixed on the warrant by the initial bail-setters and make no inquiries for the purpose of determining conditions of release. Johnson-Loveday Decl. ¶¶ 10-11; Clendenin Decl. ¶¶ 4-5, 10; Price Decl. ¶¶ 6, 9-10. By setting conditions of release that are unattainable, the initial bail-setters thereby issue *de facto* detention orders without any individualized assessment and without considering non-monetary conditions that might serve the government's interests. Furthermore, they issue these *de facto* detention orders without any meaningful process, let alone the detailed procedures required by the due process clause, including a timely individualized hearing; notice of the issues to be determined; representation by counsel; the opportunity to present and confront evidence and make arguments; findings on the record explaining the basis for any condition of release imposed and the evidence relied on; and, if such conditions will result in pretrial detention, a finding by clear and convincing evidence that pretrial incarceration is necessary because no alternative conditions would reasonably ensure future court appearance and the safety of the community.

The Preliminary Hearing

After the initial appearance, individuals have a preliminary hearing before Defendant Collins in General Sessions court. This preliminary hearing occurs as many as 14 business days after the initial appearance (and therefore as many as 21 days from arrest) for individuals who have been unable to pay bail. Rhodes Decl. ¶ 8; *see also* Tenn. R. Crim. P. 5, 2018 Advisory Commission Cmt. This hearing is typically the first opportunity for indigent defendants to meet

their court-appointed counsel. Rhodes Decl. ¶ 8; Edmond Decl. ¶ 9. Because Defendants provide no mechanism to request review of conditions of release until an individual meets with counsel, the preliminary hearing is also typically the first conceivable opportunity for individuals to file a motion contesting their ongoing pretrial detention. Rhodes Decl. ¶ 8.

Prolonged Wealth-Based Pretrial Detention

Bail orders issued by Defendants Collins, West, Robertson, Phillips, and West Moore are enforced by Defendant Sheriff Jarnagin, who is in charge of the Hamblen County Jail.[7] As a result of Defendants' policies and practices, indigent individuals are subject to extended periods of wealth-based pretrial detention before being provided a hearing on conditions of release. *Id.* ¶ 9. Such hearings, if and when conducted by Defendant Collins, are routinely constitutionally inadequate.

Individuals who are detained because of Defendants' practices suffer immense irreparable harm beyond a deprivation of their constitutional rights, including loss of employment and housing, leading to long-term economic instability and poverty; harm to children and family members reliant on the support of individuals who are jailed; physical and mental health problems due to inhumane conditions at the jail; and a greater likelihood of being found guilty and receiving a harsher sentence. *See infra* Section II.

LAW AND ARGUMENT

"District courts consider four factors in deciding whether to issue a preliminary injunction: '(1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be

[7] Sheriff's Department and Jail, Hamblen County Tennessee, http://www.hamblencountytn.gov/sheriffs-department-and-jail/ (last visited Feb. 16, 2020).

served by granting injunctive relief.'" *Cooper v. Honeywell Int'l, Inc.*, 884 F.3d 612, 615 (6th Cir. 2018) (quoting *Entm't Prods., Inc. v. Shelby Cty.*, 588 F.3d 372, 377 (6th Cir. 2009)); *see also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The same standard applies for a temporary restraining order. *See Defoe ex rel. Defoe v. Spiva*, No. 3:06-CV-450, 2008 WL 2697342, at *2 (E.D. Tenn. July 1, 2008) (describing the same standard for both temporary restraining and preliminary injunction orders).

I. Plaintiffs Are Likely to Succeed on Their Claims That Defendants' Practices Violate Their Fourteenth and Sixth Amendment Rights

Defendants have violated both Plaintiffs' substantive and procedural due-process rights. As the Supreme Court has explained, a "substantive issue involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it." *Washington v. Harper*, 494 U.S. 210, 220 (1990) (alteration in original) (quoting *Mills v. Rogers*, 457 U.S. 291, 299 (1982)). Procedural issues, by contrast, "concern[] the minimum procedures required by the Constitution for determining that the individual's liberty interest is actually outweighed in a particular instance." *Id.* Here, Defendants' practices violate individuals' substantive rights against wealth-based detention and to pretrial liberty. Separately, Defendants' practice of setting conditions of release that result in detention without providing any meaningful opportunity to be heard violates Plaintiffs' procedural rights. Constitutionally adequate process must be provided to ensure that Plaintiffs are not detained in violation of their substantive rights. Finally, Defendants violate individuals' Sixth Amendment rights by failing to provide counsel at initial appearances.

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

The constitutional principle at issue is straightforward: A person may not be "subjected to imprisonment solely because of his indigency." *Tate v. Short*, 401 U.S. 395, 398 (1971); *accord Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (invalidating state practice of automatically revoking probation for failure to pay a fine or restitution, without considering probationer's ability to pay or whether other alternative measures meet state's interest in punishment and deterrence); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding right to equal protection violated by imprisonment beyond statutory maximum based solely on inability to pay a fine); *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) ("The incarceration of those who cannot [pay money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."); *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (holding that an order to pay a fine or serve time in jail violates equal protection and due process unless it is "necessary to promote a compelling governmental interest" (quotation and citation omitted)).[8] This principle has led the Supreme Court to strike down state and local practices jailing individuals solely due to their inability to pay a fine on three occasions—in *Tate*, *Williams*, and *Bearden*. In the last of these cases, the Court reiterated the core principle on which this substantive right rests: the "impermissibility of imprisoning a defendant solely because of his lack of financial resources." *Bearden*, 461 U.S. at 661.

The Sixth Circuit has applied this bedrock principle of equal justice, finding that the constitutional right against imprisonment for nonpayment of a sum of money is "well established" in the constitution. *Powers v. Hamilton County Pub. Defender Comm'n.*, 501 F.3d 592, 608 (6th

[8] *See also* Brief of Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 24, *ODonnell*, 892 F.3d 147 (2018) (No. 17-20333), 2017 WL 3536467 ("[A]ll the concerns that attend post-conviction deprivations based on indigence apply with even greater force where a defendant has not been convicted of a crime. . . . If a state may not imprison convicted indigent defendants solely 'on account of their poverty,' how can a state constitutionally detain presumably innocent persons for the same reason?" (citation omitted)).

Cir. 2007) (holding constitutional violation established by plaintiff who was imprisoned for nonpayment of a fine without inquiry into ability to pay); *Alkire v. Irving*, 330 F.3d 802, 816 (6th Cir. 2003) ("'[F]undamental fairness' requires that a court inquire into an individual's reasons for failing to pay a fine or court costs." (quoting *Bearden*, 461 U.S. at 672)); *United States v. Bichon*, No. 88–6288, 1989 WL 63268, at *2 (6th Cir. June 14, 1989) ("A probationer should not be placed in custody merely because he lacks the financial resources to pay a fine.").

Although this precedent primarily addresses post-conviction wealth-based jailing, the right not to be imprisoned solely for being poor applies with even greater force to individuals being detained pretrial, who enjoy the presumption of innocence and have not had their liberty interests diminished by a criminal conviction. The Fourteenth Amendment requires that, before detaining someone pretrial, with the attendant "deprivation of liberty of one who is accused but not convicted," there must be "meaningful consideration of . . . alternatives" to "incarceration" for those who cannot afford to pay for their freedom. *Pugh*, 572 F.2d at 1056–57 (5th Cir. 1978) (en banc). The application of the prohibition on wealth-based detention to the bail context has been repeatedly affirmed. *See Pugh*, 572 F.2d at 1057; *see also ODonnell v. Harris Cty.* (*ODonnell II*), 892 F.3d 147, 159 (5th Cir. 2018); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 311 n.5, 320 (E.D. La. 2018); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 528 (Ct. App. 2018).

In violation of the longstanding constitutional principle that one cannot be jailed solely because she cannot pay for her release, Defendants here routinely impose money bail without any consideration of or findings about an individual's financial circumstances, or whether there are alternative conditions that would reasonably assure the individual's return to court and the safety of the public. Johnson-Loveday Decl. ¶¶ 10-11; Edmond Decl. ¶ 6; Clendenin Decl. ¶¶ 5-6, 10; Price Decl. ¶¶ 6, 8-10. This practice was applied against each of the Named Plaintiffs, who had no

opportunity to be heard before unaffordable financial conditions of release were required, and who were not provided any explanation of the reasons for their detention. Torres Decl. ¶¶ 4, 6; Johnson-Loveday Decl. ¶¶ 6, 13; Edmond Decl. ¶¶ 4, 8; Cameron Decl. ¶¶ 4, 6.

The Named Plaintiffs' experiences are representative: because financial conditions of release in their cases were beyond what they could pay, they have remained in jail for days, resulting in lost employment, financial ruin, separation from family members, confinement in terrible conditions, and declining mental and physical health. Torres Decl. ¶¶ 11-13; Johnson-Loveday Decl. ¶¶ 18-23; Edmond Decl. ¶¶ 11-14; Cameron Decl. ¶¶ 9, 11-12. If these same individuals could afford to pay, however, they would be released. The Fifth Circuit has summarized the constitutional implications of this exact set of circumstances:

> [T]ake two . . . arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice . . . both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

ODonnell II, 892 F.3d at 163. Numerous other courts—including two in the Middle District of Tennessee[9]—have agreed that these practices, which are materially indistinguishable from the Defendants' in this case, are unconstitutional.[10]

[9] *McNeil*, 2019 WL 633012, at *16; *Rodriguez*, 155 F. Supp. 3d at 771–72.

[10] *See, e.g.*, *Daves v. Dallas Cty.*, 341 F. Supp. 3d 688, 694 (N.D. Tex. 2018), *appeal filed*, No. 18-11368 (5th Cir. Oct 23, 2018); *Schultz*, 330 F. Supp. 3d at 1374–75; *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *3 (N.D. Ga. June 16, 2017), *vacated in part by* 901 F.3d 1245 (11th Cir. 2018); *Edwards v. Cofield*, No. 3:17-CV-321-WKW, 2017 WL 2255775, at *1 (M.D. Ala. May 18, 2017); *ODonnell I*, 251 F. Supp. 3d at 1156–58; *Martinez v. City of Dodge City*, No. 15-CV-9344-DC-TJJ, 2016 U.S. Dist. LEXIS 190884, at *1–2 (D. Kan. Apr. 26, 2016); *Rodriguez*, 155 F. Supp. 3d at 768-69; *Thompson v. Moss Point*, No. 1:15cv182-LG-RHW,

Courts evaluating these practices have held that where Plaintiffs are detained based solely on their inability to pay, that detention is constitutional only if it satisfies heightened scrutiny. *ODonnell II*, 892 F.3d at 161 (heightened scrutiny is required when criminal laws "detain poor defendants *because of* their indigence") (citing *Tate v. Short*, 401 U.S. 395, 397-99 (1971), and *Williams v. Illinois*, 399 US. 235, 241-42 (1970)); *Johnson v. Bredesen*, 624 F.3d 742, 748-9 (6th Cir. 2010) (noting that *Griffin*, *Williams*, and *Bearden* applied a heightened standard of review, and "the fact that the case involved the denial of an indigent defendant's physical liberty appeared dispositive."); *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (requirement to pay a fine or serve time in jail violates equal protection and due process unless it is "necessary to promote a compelling governmental interest" (quotation and citation omitted)).[11] Application of heightened scrutiny demands that this court look to whether Defendants' practices are narrowly tailored to achieve the State's two compelling interests related to pretrial detention: protecting public safety

2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); *Jones. v. City of Clanton*, No. 2:15cv34-MHT, 2015 WL 5387219, at *3 (M.D. Ala. Sept. 14, 2015); *Snow v. Lambert*, No. 15-567-SDD-RLB, 2015 WL 5071981, at *2 (M.D. La. Aug. 27, 2015); *Cooper v. City of Dothan*, No. 1:15-CV-432-WKW [WO], 2015 WL 10013003, at *1 (M.D. Ala. June 18, 2015); *Pierce v. City of Velda City*, No. 4:15-cv-570-HEA, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015).

[11] *See also Bearden*, 461 U.S. at 666 (wealth-based detention requires "careful inquiry"); *Buffin v. City & Cty. of San Francisco*, No. 15-cv-04959-YGR, 2018 U.S. Dist. LEXIS 6853, at *21 (N.D. Cal. Jan. 16, 2018) ("[A]n examination of the *Bearden-Tate-Williams* line of cases persuades the Court that strict scrutiny applies to plaintiffs' Due Process and Equal Protection claims."). Although the Eleventh Circuit in *Walker v. City of Calhoun* held in a divided opinion that heightened scrutiny did not apply to the use of a money bail schedule during the 48-hour period prior to a hearing on conditions of release because it only implicated a "marginal increase in the length of detention" for indigent defendants, 901 F.3d 1245, 1263 (11th Cir. 2018), its reasoning, even if adopted, would not apply to the Plaintiffs, who have been jailed beyond 48 hours, and potentially face weeks of wealth-based detention before they may be heard on bail. *See id.* at 1277 n.6 ("[E]ven under the Majority's view, challenges to indigency-based jail stays warrant heightened scrutiny so long as they show that the challenged system, *in practice*, results in indigents being detained longer than 48 hours.") (Martin, J., dissenting). Moreover, the majority in *Walker* erred by "treat[ing] 48 hours in jail as a mere delay or 'diminishment' of the benefit of being released, instead of the deprivation of liberty it surely is." *Id.* at 1274 (Martin, J., dissenting).

and ensuring defendants appear for their court dates. Here, Defendants' policy and practice of requiring financial conditions of pretrial release without any inquiry or findings cannot pass any scrutiny, let alone heightened review. Poverty alone does not demonstrate a likelihood to miss a court date or present a threat to public safety that no alternative conditions could mitigate, just as wealth alone does not show that a person is more likely to appear or is not a danger to the community. *See Bearden*, 461 U.S. at 671 (discrediting the "naked assertion that a [defendant]'s poverty by itself indicates he may commit crimes in the future and thus that society needs for him to be incapacitated").

Defendants do not make any findings that would allow them to determine whether Plaintiffs will be able to pay the amount required for their pretrial release. Bou Decl. ¶ 10. Defendants have had no contact with the arrested individuals at the time they determine money bail and have no information about their financial circumstances. *Id.* ¶¶ 6-9. Thus, Defendants do not know, when setting financial conditions of release, whether those conditions will result in the arrestee being detained because she cannot pay her money bail. *Id.* ¶ 10. Even if a person states that they cannot pay at their initial appearance, which occurs one to three days after their detention, Defendants refuse to consider that information to modify the bail amount written on the warrant. Rhodes Decl. ¶ 7; Clendenin Decl. ¶ 6; Price Decl. ¶ 8; Johnson-Loveday Decl. ¶ 10; Edmond Decl. ¶ 6. And because Defendants never make any finding concerning ability to pay, they never engage in the constitutionally mandated analysis of alternatives to detention. If a court determines that an individual lacks the ability to pay money bail, it may not require a financial condition of release that results in detention without making the finding that alternatives to jailing are not sufficient to serve the government's interests. *See Bearden*, 461 U.S. at 669-70. This substantive requirement ensures that the right to be free from wealth-based detention cannot be bypassed by

merely jumping through the procedural hoop of bringing the individual before the court to announce monetary release conditions that cannot be met. *See Harper*, 494 U.S. at 220 (explaining that a "substantive issue involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it," and is distinct from what "minimum procedures" must be afforded to accurately determine that an "individual's liberty interest is actually outweighed in a particular instance" (alteration in original) (quoting *Mills*, 457 U.S. at 299)); *Caliste*, 329 F. Supp. 3d at 312-15 (*Bearden* line of cases requires substantive finding); *Schultz*, 330 F. Supp. at 1373 (same); Brief for the United States as Amicus Curiae in Support of Neither Party at 19, *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018) (No. 17-13139-GG), 2017 WL 4117379 (arguing that under cases like *Bearden* and *Pugh*, money bail may only be imposed on an indigent individual after an "individualized assessment of risk and a finding of no other adequate alternatives").

Plaintiffs are likely to prevail on their claim that Defendants violate their right to be free from wealth-based detention.

B. Defendants Violate Plaintiffs' Fundamental Right To Pretrial Liberty Because They Detain Plaintiffs Without Findings That Pretrial Detention Is Necessary

"In our society," the Supreme Court has explained, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 481 U.S. 739, 755 (1987). This norm reflects longstanding foundational principles: "[f]reedom from bodily restraint has *always* been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (emphasis added) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)); *accord Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Consistent with these other cases, *Salerno* recognized a "'general rule' of substantive due process that the government

may not detain a person prior to a judgment of guilt in a criminal trial." 481 U.S. at 749. In *Salerno*'s words, the "individual's strong interest in [pretrial] liberty is "fundamental." *Id.* at 750.

Salerno recited that rule in the context of a facial challenge to the Bail Reform Act of 1984, a law that authorizes the pretrial confinement of dangerous individuals if the government demonstrates that pretrial detention is necessary to protect public safety. *See* 481 U.S. at 742; *see also* 18 U.S.C. §3142(e)–(f), (i).[12] The Supreme Court deemed the statute consistent with the Due Process Clause, but only—given the "fundamental nature of th[e] right" at stake, 481 U.S. at 750—after concluding that pretrial detention was necessary to serve a compelling interest, *see id.* at 750-51. In particular, *Salerno* upheld pretrial detention only where a "'judicial officer finds that no condition or combination of conditions'" of release will satisfy the government's interests. *Id.* at 742 (quoting 18 U.S.C. § 3142(e)). Absent such a "sharply focused scheme," the Court has since stressed, a state may not detain a presumptively innocent person. *Foucha*, 504 U.S. at 81; *see id.* at 83 (striking down Louisiana's practice of detaining insanity acquittees who were no longer mentally ill because it, unlike the Bail Reform Act, was not a "carefully limited exception[] permitted by the Due Process Clause").

Applying *Salerno*, every appellate court to consider the question has held that an order requiring an unattainable financial condition of release is a *de facto* order for pretrial detention, and, as such, requires a finding that it is necessary because there is no other alternative. As the D.C. Circuit explained, for example, "the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all." *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) (per curiam); *see also United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir.

[12] The federal Bail Reform Act also allows for pretrial detention where a court concludes after a hearing that no condition or combination of conditions will reasonably assure the appearance of the person as required. 18 U.S.C. § 3142 (e)(1).

1991) (per curiam); *United States v. Leisure*, 710 F.2d 422, 425 (8th Cir. 1983) ("[T]he amount of bail should not be used as an indirect, but effective, method of ensuring continued custody."); *Humphrey*, 228 Cal. Rptr. 3d at 517; *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017). The district court in *ODonnell I* reached the same conclusion, stating that when secured-money bail is set "at unpayable amounts," it operates "as [a] de facto pretrial detention order." 251 F. Supp. 3d at 1150. Indeed, the court found that Harris County had a "policy and practice of imposing secured money bail *as* de facto orders of pretrial detention." *Id.* at 1059-1060 *aff'd as modified*, 892 F.3d 147 (emphasis added). Under these cases, Defendants (like the government in *Salerno*) must establish that *de facto* pretrial detention through unattainable conditions of release is "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993).

Making that constitutionally required substantive showing is neither novel nor unmanageable. It has been required in federal court since the Bail Reform Act's enactment in 1984 and is likewise the law in other jurisdictions. *See, e.g.*, N.M. Const. art. II, § 13; D.C. Code § 23-1321; N.J. Stat. Ann. § 2A:162-15 to -21. To justify pretrial detention, in short, the government must demonstrate that there are no other alternatives sufficient to mitigate a specifically identified risk posed by the individual.

Defendants in Hamblen County come nowhere close to meeting this requirement. They fail to make any finding whatsoever before detaining Plaintiffs on unattainable financial conditions of release. Bou Decl. ¶¶ 6-10, 12. In particular, they do not make findings about whether Plaintiffs pose any danger to the community or risk of non-appearance and do not make any findings concerning whether alternative conditions of release could mitigate those risks. *Id.* The result is

that Plaintiffs are routinely detained without any determination that pretrial detention is necessary to serve *any* government interest.

Accordingly, Plaintiffs have demonstrated they have more than a "fair chance of succeeding" on their claim that Defendants' detention of Plaintiffs on *de facto* detention orders violates their fundamental right to liberty.

C. Defendants Violate Plaintiffs' Procedural Due Process Rights

In addition to violating Plaintiffs' substantive rights, Defendants violate their procedural rights: Defendants fail to provide the necessary procedural safeguards that would ensure that any substantive findings are reliable. *See Harper*, 494 U.S. at 220 (distinguishing between substantive rights and the procedural safeguards that protect them).

A procedural due-process claim proceeds in two steps. The first asks whether the person claiming a constitutional violation has asserted a protected liberty or property interest. *See Crosby v. Univ. of Ky.*, 863 F.3d 545, 552 (6th Cir. 2017). Here, as explained above, Plaintiffs have a fundamental liberty interest against wealth-based detention and in their freedom from pretrial incarceration.

At the second step, a court must determine what process is due. *Id.* "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). What constitutes sufficiently "meaningful" procedures to satisfy the Due Process Clause varies depending on context. *See Silvernail v. Cty. of Kent*, 385 F.3d 601, 604 (6th Cir. 2004). To make that context-specific determination, courts weigh (1) "the private interest that will be affected by the official action;" (2) "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 (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

1. Defendants Have Violated Plaintiffs' Procedural Due Process Rights By Providing No Process At All

No elaborate analysis is necessary to determine that Defendants have violated Plaintiffs' procedural due-process rights. Defendants provide absolutely no mechanism for Plaintiffs to challenge their detention for weeks after incarceration begins. Rhodes Decl. ¶¶ 7-8. Although Plaintiffs appear in front of Defendant Collins or a Defendant Judicial Commissioner at a first appearance during which their conditions of release are announced, Defendants do not permit individuals to argue for bail modification during this proceeding. *Id.* ¶ 7. That appearance, which lasts no more than three minutes (and at times less than one), Clendenin Decl. ¶ 7; Price Decl. ¶ 7; Johnson-Loveday Decl. ¶ 12; Edmond Decl. ¶ 7, cannot be a "meaningful" "opportunity to be heard," *Mathews*, 424 U.S. at 333, on the critical issue of the arrestee's ability to afford her bond. *See, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 447 (2011) (applying the *Mathews* test and holding that, before the state may jail a person for not paying child support, the government must provide notice that ability to pay is a "critical issue," an opportunity to be heard, and "an express finding by the court that the defendant has the ability to pay"); *Bearden*, 461 U.S. at 673 (holding that, before the state can revoke probation for nonpayment, it must determine whether the person could afford to pay such that the nonpayment was willful); *ODonnell I*, 251 F. Supp. 3d at 1144–45 (concluding that Harris County's automatic use of secured money bail, without an inquiry into ability to pay, presents an intolerably high risk of erroneous deprivation of a fundamental right, and that Defendants failed to demonstrate an interest in not providing these procedural safeguards); *id.* at 1161 (requiring an inquiry into ability to pay and notice to arrestees about the significance of the

financial information they are asked to provide); *Caliste*, 329 F. Supp. 3d at 311-15 (finding that due process requires an inquiry into ability to pay, consideration of alternative conditions of release and findings on the record applying the clear and convincing standard, and representative counsel at bail hearings).[13]

Federal district judges in Tennessee have affirmed this basic principle. In *McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-CV-00033, 2019 WL 633012 (M.D. Tenn. Feb. 14, 2019), the court granted a preliminary injunction, holding that the policies of the Giles County General Sessions and Criminal Court judges of setting secured financial conditions on misdemeanor violation-of-probation (VOP) warrants were likely unconstitutional under the Equal Protection and Due Process precedents discussed *infra*. The district court preliminarily enjoined the "County, the Sheriff, and their officers, agents, employees, servants, attorneys and all persons in active concert or participation with them from detaining any person on misdemeanor probation" based on a secured bail amount on a VOP warrant without notice and an opportunity to be heard, and findings by a judicial officer concerning the arrestee's "ability to pay, alternatives to secured bail, and whether

[13] In failing to provide any process to class members, Defendants are also in violation of Tennessee law. The Supreme Court of Tennessee has held that the explicit provision of the right to pre-trial bail in the Tennessee Constitution embodies similar procedural protections and guarantees provided by the Due Process Clause of the Fourteenth Amendment. *State v. Burgins,* 464 S.W.3d 298, 307 (Tenn. 2015). Thus, in *Burgins*, the Court mandated that bail cannot be revoked without notice and an opportunity to be heard, and an evidentiary hearing at which the state is required to prove the grounds to support revocation. *Id*. at 310-11. Under Tennessee's bail statutes, if a General Sessions judge or judicial commissioner finds that there are no conditions other than money bail that will ensure the defendant's return to court, he is *required* to consider a number of factors in determining the bail amount, such as the defendant's financial condition, employment status, family and community ties, and record of court appearances. Tenn. Code. Ann. 40-11-118(b). At a minimum, Tennessee law requires the court to apply a presumption in favor of release, and if that presumption is overcome, to conduct an evidentiary hearing at which it must undertake a thorough and searching inquiry—considering several statutorily enumerated factors, including the defendant's financial circumstances—into the least restrictive conditions that would ensure the defendant's return to court consistent with public safety.

pre-revocation detention is necessary to meet a compelling government interest." *Id.* at *16; *see also Rodriguez*, 155 F. Supp. 3d at 772.

2. Defendants Must Provide an Inquiry into Ability to Pay and, If Warranted, an Adversarial Hearing, at Which Counsel Is Made Available and a Heightened Evidentiary Standard Is Applied

The procedures Defendants must provide to remedy the procedural due-process violation in this case are informed by the substantial private interest at stake—the first *Mathews* factor. Here, not only are Plaintiffs incarcerated in violation of their fundamental liberty interest in freedom from detention and their right against wealth-based detention, but these deprivations occur for *weeks* before their first opportunity to be heard, and oftentimes for months thereafter. *See Mackey v. Montrym*, 443 U.S. 1, 12 (1979) ("The duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved."). Moreover, the collateral consequences of detention are grave: loss of employment; loss of physical or legal custody of children; loss of housing or property; increased physical and mental illness; restricted access to counsel; decreased opportunity to prepare a defense; a resulting increased risk of a finding of guilt, and resulting longer sentences, among others. Pretrial detention causes some of the most profound harms possible for a human life to endure.

The seriousness of the private interests at stake here demands that rigorous procedures be provided. *See, e.g.*, *Zadvydas*, 533 U.S. at 690-91 ("[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and *subject to strong procedural protections*." (emphasis added)); *Turner v. Rogers*, 564 U.S. 431, 445 (2011) (discussing the importance of robust procedural protections to ensure "accurate decisionmaking" before a person is jailed); *Neal*, 679 F.3d at 742 (invalidating pretrial commitment order because district court failed to "conduct a hearing, require the government to present evidence to justify the

inpatient commitment, seriously consider the defendant's alternative request for an outpatient evaluation, or make findings of fact concerning the need for commitment"). Specifically, application of the *Mathews* factors establishes that, before imposing a financial condition of release, the government must provide notice and an inquiry into and findings regarding ability to pay. If the financial condition is unaffordable and will result in *de facto* detention (or if preventive pretrial detention is sought), the government must also provide an adversarial hearing on the record at which the individual is represented by counsel and has an opportunity to be heard, to present evidence, and to contest evidence offered by the government; and the court must make findings on the record, based on clear and convincing evidence, that pretrial detention is necessary to serve a specific compelling government interest.

a. There Must First be an Inquiry into Ability to Pay and Findings on the Record Concerning Ability to Pay

Before imposing a financial condition of release, the procedures employed must allow the court to determine whether such financial condition will result in *de facto* detention. As the Supreme Court has held, if the government seeks to condition physical liberty on a monetary payment, procedural due process requires notice of the nature and significance of the financial information to be provided; an inquiry into the person's ability to pay; and findings on the record as to whether the person has the ability to pay. *See Turner*, 564 U.S. at 447–48 (applying the *Mathews* test and holding that, before the state may jail a person for not paying child support, the government must provide notice that ability to pay is a critical issue, an opportunity to be heard on the issue, and "an express finding by the court that the defendant has the ability to pay"); *Bearden*, 461 U.S. at 673 (holding that the state must inquire into whether nonpayment is willful before revoking probation); *see also ODonnell I*, 251 F. Supp. 3d at 1161 (requiring an inquiry into ability to pay and notice to individuals about the significance of the financial information they are asked to provide).

Here, Defendants' complete lack of inquiry prior to imposition of financial conditions of release creates an unwarranted risk of erroneous deprivation of Plaintiffs' rights to pretrial liberty, as Defendants cannot know whether the condition will result in detention or release.

b. If an Individual Is Unable to Pay, There Must Be Additional Procedural Safeguards to Ensure the Accuracy of the Pretrial Detention Decision

If the financial condition is determined to be unaffordable, it may not be imposed without further procedures—required by *Mathews'* second factor—to ensure that the resulting wealth-based detention is necessary to serve a compelling interest in any particular case. The floor of constitutionally required procedures for a deprivation of liberty similar to that at issue here already has been established. In *Morrissey v. Brewer*, the Supreme Court explained what due process requires at a parole revocation hearing:

(a) "notice" of the critical issues to be decided at the hearing;

(b) "disclosure" of the evidence presented by the government at the hearing;

(c) an "opportunity to be heard in person and to present witnesses and documentary evidence";

(d) "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)";

(e) a "neutral and detached" factfinder; and

(f) findings on the record of "the evidence relied on" and reasons for revocation.

408 U.S. 471, 488–89 (1972). These procedures are due to persons on parole who have a diminished "conditional liberty" interest as a result of their convictions. *Id.* at 480. It necessarily follows that, at the very least, these minimum procedures must be provided to persons who are constitutionally presumed innocent before trial. And, indeed, because individuals being detained pretrial—and

Plaintiffs here—retain the presumption of innocence and thus the "absolute liberty" lacking in *Morrisey*, *id.*, some additional protections are due to account for the greater interest at stake. Specifically, the gravity of the pretrial detention decision calls for—in addition to the procedures outlined above—a prompt hearing, a heightened evidentiary burden, the provision of counsel, and a hearing on the record.

Prompt Hearing. Although Defendants usually conduct initial appearances by video within 48 hours after the bond is set on the warrant, those proceedings are utterly nominal, and exhibit none of the necessary due-process safeguards. They last no more than a few minutes, the arrestee is not permitted to make any statements or arguments regarding their ability to pay their money bail, and the presiding officers make no effort to the justify the bond amount. Rhodes Decl. ¶ 7; Johnson-Loveday Decl. ¶¶ 6-8, 10-12; Edmond Decl. ¶¶ 6-8; Clendenin Decl. ¶¶ 4-7, 10; Price Decl. ¶¶ 6, 10. They are, in short, nothing approaching the meaningful hearing required by *Mathews*.

Actual prompt, meaningful hearings likely will result in a significant number of individuals being released, meaning that Defendants will save the resources that otherwise would be spent on unnecessarily incarcerating these individuals, and that some of the inhumane overcrowding at the Hamblen County Jail will be alleviated. *See* Richard A. Oppel, Jr., *'A Cesspool of a Dungeon': The Surging Population in Rural Jails*, N.Y. TIMES (Dec. 13, 2019), https://www.nytimes.com/2019/12/13/us/rural-jails.html (describing overcrowding at the Hamblen County Jail leading to rising operating expenses). Any additional burden imposed on Defendants by providing the procedures required to convert initial appearances into actual hearings is insignificant and cannot outweigh the serious harms posed to the Plaintiffs who are at risk of prolonged unconstitutional pretrial incarceration. Further, because Defendant Collins and the

Defendant Judicial Commissioners all have the authority to set conditions of release, there are several judicial actors equipped to share any burden of providing timely and meaningful hearings. Rhodes Decl. ¶ 6; Bou Decl. ¶ 4. Finally, Defendants have an interest in ensuring that only those who merit pretrial detention are actually detained after arrest. Accordingly, procedural due process requires a prompt, meaningful hearing for all Plaintiffs.

Clear and Convincing Evidence. Procedural due process also requires that pretrial detention, whether *de facto* based on unaffordable financial conditions or transparent based on the government's request for preventive pretrial detention, must be justified by "clear and convincing" evidence. Under *Mathews*, this standard is required due to the vital liberty interest at stake, the attendant risk of erroneous imprisonment should a lower standard be employed, and the lack of additional burden on Defendants.

The Supreme Court has never permitted an evidentiary standard lower than "clear and convincing" evidence in any case involving the deprivation of bodily liberty. As the Supreme Court explained in *Addington v. Texas*, 441 U.S. 418 (1979), the deprivation of the fundamental right to bodily liberty requires a heightened standard of proof beyond a mere preponderance in order to ensure an accurate decision, the focus of the second *Mathews* factor. *See id.* at 432-33. The Court reasoned that the heightened evidentiary standard of clear and convincing evidence is necessary given the seriousness of detention. *See id.* at 423-24. The clear-and-convincing standard, unlike the preponderance standard, "impress[es] the factfinder with the importance of the decision" and reduces the risk of erroneous detention. *See id.* at 427. At the same time, because the government has "no interest" in wrongly confining individuals—the third *Mathews* factor—it was "unclear" how the state could be harmed by the higher standard. *See id.* at 426.

Since *Addington*, "[i]n cases where physical liberty is at stake in all kinds of situations, the Court consistently applies the clear and convincing standard." *Caliste*, 329 F. Supp. 3d at 313 (collecting cases). *See Foucha*, 504 U.S. at 81-82 (striking down scheme for detaining persons who had been acquitted by reason of insanity because it did not provide an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community); *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) ("This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'"); *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 285-86 (1966) (requiring clear and convincing evidence to support a deportation order); *Cruzan by Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 282-83 (1990) (noting clear and convincing evidence required in deportation, civil commitment, denaturalization, civil fraud, and parental termination proceedings).

The rationale underlying these decisions tracks the *Mathews* factors and applies equally to the pretrial context, as courts around the country have held in applying the clear and convincing standard to pretrial detention. In *Lopez-Valenzuela*, the Ninth Circuit struck down the Arizona pretrial detention statute in part because the Arizona law, unlike the federal Bail Reform Act, did not require the government to prove by clear and convincing evidence that an individual's detention was necessary. 770 F.3d at 784-85; *see also* 18 U.S.C. § 3142(f) ("The facts the judicial officer uses to support a finding . . . that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence."). And federal courts addressing nearly identical factual circumstances to the case at bar, in which the *de facto* detention order resulting from the imposition of unaffordable

money bail operated as an order of preventive detention, have similarly applied the clear and convincing standard. *See, e.g.*, *Schultz*, 330 F. Supp. 3d at 1372 ("[B]efore ordering an unaffordable secured bond, a judge must find by clear and convincing evidence that pretrial detention is necessary to secure the defendant's appearance at trial or to protect the public."). Doing so is necessary to account for the "vital importance of the individual's interest in pretrial liberty recognized by the Supreme Court." *Caliste*, 329 F. Supp. 3d at 313. Various state courts have reached the same result.[14]

Counsel. Although Plaintiffs have a standalone claim under the Sixth Amendment, due process also creates a separate demand that counsel be made available to individuals facing pretrial detention. In evaluating the federal Bail Reform Act, the Supreme Court expressly identified the "right to counsel at the detention hearing" as a key procedural safeguard against unlawful detention. *See Salerno*, 481 U.S. at 751-52. The risk of erroneous pretrial detention—the second *Mathews* factor—is high in the absence of counsel. Empirical evidence has demonstrated that counsel is the single most important factor determining the length of pretrial detention, protecting against self-incrimination, and ensuring that evidence can be marshaled as necessary to cogently articulate why an individual should not be detained.[15]

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[14] *See, e.g.*, *Humphrey*, 19 Cal. App. 5th at 1037 ("If [a] court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose."); *Kleinbart v. United States*, 604 A.2d 861, 870 (D.C. 1992) (emphasizing that the constitutional requirement of clear and convincing evidence for pretrial detention applies equally whether such detention is based on risk of flight or dangerousness); *State v. Ingram*, 165 A.3d 797, 803, 805 (NJ 2017); *Wheeler v. State*, 864 A.2d 1058, 1065 (Md. Ct. Spec. App. 2005); *Brill v. Gurich*, 965 P.2d 404, 409 (Okla. Crim App 1998). *But see Weatherspoon v. Oldham*, No. 17-CV-2535-SHM-CGC, 2018 WL 1053548 at *8 (W.D. Tenn. Feb. 26, 2018) (affirming use of preponderance of the evidence standard in pretrial release proceedings); *Hill v. Hall*, No. 3:19-CV-00452, 2019 WL 4928915 at *17 (M.D. Tenn. Oct. 7, 2019) (same).

[15] *See* Douglas L. Colbert et. al., *Do Attorneys Really Matter? The Empirical and Legal Case For The Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719, 1720, 1773 (2002) ("legal representation

Providing counsel is important not only because counsel is critical to an individual's ability to gain release in the short term, but also because there is a demonstrated negative effect of pretrial detention on the chance of a successful outcome in the underlying criminal case. One "rigorous" study credited by the district court in *ODonnell I* found that defendants detained pretrial "were 25 percent (14 percentage points) more likely to be convicted, and 43 percent (17 percentage points) more likely to be sentenced to jail than those who bonded out earlier." 251 F. Supp. 3d at 1106[16]; *see also* Worden, *supra*, at 710–35. A denial of counsel at the time a determination is made on conditions of release thus infects the entire criminal proceeding, increasing the significance of the individual's private interest and the gravity of the harms of an erroneous decision.

The significant risk of erroneous detention rulings in the absence of counsel is a consequence of the complexity of bail decisions, which involve the application of a multitude of state laws and federal constitutional rules. Hearings on conditions of release involve specialized knowledge and skill that only counsel can provide, especially in the days immediately following

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at bail often makes the difference between an accused regaining freedom and remaining in jail prior to trial," while delaying appointment of counsel is the most powerful cause of lengthy pretrial detention); ERNEST J. FAZIO, JR. ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NCJ 97595, *Early Representation by Defense Counsel Field Test: Final Evaluation Report* 208, 211 (1985), http://www.ncjrs.gov/pdffiles1/Digitization/97595NCJRS.pdf (concluding that representation by counsel "had a significant impact on test clients' pretrial release status" in a study of the effect of public defender representation at bail hearings in three counties across the U.S.); *see also* WAYNE R. LAFAVE, ET AL., 4 CRIM. PROC. § 12.1(c) (4th ed. 2016) (finding that 75 percent of represented defendants at bail hearings are released on their own recognizance, compared to 25 percent of non-represented defendants); Worden, A. P. et al., *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, 29 CRIM. JUSTICE POLICY REV. 710, 710-735 (2018) (finding that a Counsel at First Appearance in three New York cities led to significant decreases in pretrial detention and bail amounts as well as an increase in the number of people who spent no time in jail pretrial because of cash bail); *see also, e.g.*, *Caliste*, 329 F. Supp. 3d at 314 ("Considering the . . . vital importance of pretrial liberty, assistance of counsel is of the utmost value at a bail hearing.").

[16] The study controlled for "the defendant's charge, criminal history, [and] other variables." *ODonnell I*, 251 F. Supp. 3d at 1106.

arrest, when a person is in crisis, removed from her family and community, and confined to a jail cell. Bail determinations often involve detailed discussions of the merits of the state's case and technical discussions about possible penalties that are not feasible for a recently arrested individual required to proceed *pro se*. Moreover, multiple factors must be considered in a rigorous evaluation of a person's likelihood of returning to court or potential risk to public safety, including, among other considerations, unmet needs such as transportation, housing, and healthcare, and whether alternatives to incarceration exist in the particular jurisdiction, such as court appearance reminders, or drug and mental health treatment. Defense counsel, as repeat players in a jurisdiction, are often familiar with programs and alternative options that may help meet the state's goals without resorting to incarceration. Hence, counsel is necessary to make individualized hearings "meaningful."

Although provision of counsel necessarily presents some financial cost, the third *Mathews* factor nonetheless favors provision of counsel, because, like Plaintiffs, Defendants have an interest in ensuring that individuals are adequately represented at their first appearances. Courts have recognized that, although it is "a financial burden on [Defendants] to provide attorneys for the indigent . . . this burden is outweighed not only by the individual's great interest in the accuracy of the outcome of the hearing, but also the government's interest in that accuracy and the financial burden that may be lifted by releasing those individuals who do not require pretrial detention." *Caliste*, 329 F.Supp. 3d at 314 (applying *Mathews* to conclude that "due process requires representative counsel at pretrial detention hearings"). Moreover, the cost to Defendants is alleviated by an attendant reduction in the enormous expense of unnecessarily imprisoning people pretrial. *See* Oppel, *supra*; ALENA YARMOSKY, THE IMPACT OF EARLY REPRESENTATION: AN ANALYSIS OF THE SAN FRANCISCO PUBLIC DEFENDER'S PRE-TRIAL RELEASE UNIT 32 n.87 (2018),

http://public.sfpdr.com/wp-content/uploads/sites/2/2018/05/The-Impact-of-Early-Representation-PRU-Evaluation-Final-Report-5.11.18.pdf (describing a program that provided early representation to arrested individuals saved San Francisco over $800,000 in incarceration costs during first five months of operation).

D. Defendants Violate Plaintiffs' Sixth Amendment Right to Counsel

Defendants violate Plaintiffs' Sixth Amendment right to counsel by failing to provide counsel at the initial appearance. The Sixth Amendment requires that a person facing criminal prosecution be provided counsel at all "critical stages" of their case. *See Bell v. Cone*, 535 U.S. 685, 695-96 (2002); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). A "critical stage" is one that holds "significant consequences for the accused," *Bell*, 535 U.S. at 695-96, and includes preliminary proceedings "where certain rights may be sacrificed or lost," *Coleman v. Alabama*, 399 U.S. 1, 7 (1970); *see also Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961) (right to counsel at arraignment); *Missouri v. Frye*, 566 U.S. 134, 139 (2012) (right to counsel at plea negotiations). The Supreme Court has defined a critical stage as any proceeding at which counsel would help the accused in "coping with legal problems or . . . meeting his adversary." *United States v. Ash*, 413 U.S. 300, 312–13 (1973). The Sixth Circuit, reviewing Supreme Court precedent, has concluded that the entire "pre-trial period" is critical for purposes of the Sixth Amendment. *Mitchell v. Mason*, 325 F.3d 732, 748 (6th Cir. 2003).

As one district court in Texas recently held, in light of Supreme Court precedent "there can really be no question that an initial bail hearing should be considered a critical stage." *Booth v. Galveston Cty.*, 352 F. Supp. 3d. 718, 738 (S.D. Tex. 2019); *see also Higazy v. Templeton*, 505 F.3d 161, 172-73 (2d Cir. 2007); *Caliste*, 329 F.Supp.3d at 314. When conducted in accordance with the Constitution, a bail hearing is substantively and procedurally complex, and holds

significant consequences for the accused, as they may lose their fundamental right to pretrial liberty. In Hamblen County, the bail-setting proceedings routinely result in *de facto* orders of detention, which, under federal law, must be accompanied by stringent procedural protections and substantive findings. *See supra* sections I.B and I.C.

In *Van v. Jones*, 475 F.3d 292, 311-13 (6th Cir. 2007), the Sixth Circuit performed an exhaustive analysis of the various standards that have been applied to determine what is a critical stage. It determined that for a proceeding to be a critical stage, "[t]here must be a reasonable likelihood that . . . prejudice will arise from the complete absence of counsel." *Id.* at 313. If there is a "reasonable probability" of consequences, the stage is critical. *Id.* That standard is more than met here. Each of the Named Plaintiffs has suffered significant consequences—indefinite pretrial detention—that reasonably could have been avoided with representation at the initial appearance. Moreover, as established *supra*, section I.C.2.b, multiple studies have shown that unaffordable bail that results in pretrial detention has significant downstream consequences for the outcome of an individual's criminal case. Accordingly, "bail hearings fit comfortably within the sphere of adversarial proceedings closely related to trial." *Higazy*, 505 F.3d at 173 (quoting *United States v. Abuhamra*, 389 F.3d 309, 323 (2d Cir. 2004)); *see also Ditch v. Grace*, 479 F.3d 249, 253 (3d Cir. 2007); *Rojas v. City of New Brunswick*, No. 04-CV-3195, 2008 WL 2355535, at *17 (D.N.J. June 4, 2008). Because the critical question of an individual's freedom before trial is determined at the initial appearance and significant personal and legal consequences result from this determination, the initial appearance is precisely the type of hearing "where rights are preserved or lost," *id.* at 312 (quoting *White v. Maryland*, 373 U.S. 59, 60 (1963)), and holds "significant consequences for the accused," *id.* (quoting *Bell*, 535 U.S. at 696).

Plaintiffs are therefore likely to succeed on their Sixth Amendment right to counsel claim.

II. Plaintiffs Will Suffer Irreparable Harm Without Injunctive Relief

The deprivation of constitutional rights alone is sufficient to establish irreparable harm. *See*, *e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). On that basis, this element is satisfied, as Plaintiffs face an ongoing violation of their constitutional rights.

Even were this rule not to apply, Plaintiffs face irreparable harm as a result of their imprisonment. Every additional night in jail causes harm to a person that cannot be later undone. *See, e.g.*, *United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988) ("unnecessary deprivation of liberty clearly constitutes irreparable harm"); *Matacua v. Frank*, 308 F. Supp. 3d 1019, 1025 (D. Minn. 2018) ("[L]oss of liberty . . . is perhaps the best example of irreparable harm"). Depriving persons of their fundamental right to pretrial liberty may cause psychological and economic harm and undermine their ability to prepare a defense. As the Supreme Court explained, pretrial incarceration

> has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.

Barker v. Wingo, 407 U.S. 514, 532-33 (1972); *see also Pugh*, 572 F.2d at 1056-57; *ODonnell II*, 892 F.3d at 155, 162-63; *Schultz*, 330 F. Supp. 3d at 1375 ("[I]ndividuals who, by law, are presumed innocent suffer irreparable injury when they are detained because they cannot afford to

pay secured bond and are deprived of constitutionally adequate procedures for examining potential nonmonetary conditions of release.").

Here, Plaintiffs are suffering such irreparable harms including:

Long-term economic instability and poverty due to Plaintiffs' inability to work while incarcerated and risk of losing jobs. For example, Plaintiff Robbie Johnson-Loveday is likely to lose her job at a bookbinding factory because of her pretrial detention. Johnson-Loveday Decl. ¶¶ 15, 19. Loss of employment would not only deprive Robbie and her husband of their acutely needed income but also force the couple into debt, unwinding years of work improving their credit. *Id.* ¶¶ 17-20. Plaintiff Bethany Edmond has missed orientation for a new job as a result of her pretrial detention, potentially depriving her and her husband of a pathway out of homelessness. Edmond Decl. ¶¶ 10-11.

Harm to families that are reliant on jailed Plaintiffs for support. For example, Plaintiff Robbie Johnson-Loveday's husband is struggling to afford household expenses while Robbie is detained. Johnson-Loveday Decl. ¶ 18. Plaintiffs Bethany Edmond and Amanda Cameron have been separated from their children since being arrested, causing them great emotional distress. Edmond Decl. ¶ 12; Cameron Decl. ¶ 9.

Risk of serious physical and mental health problems due to inhumane conditions inside the Hamblen County Jail. Plaintiffs describe horrendous conditions inside the Hamblen County Jail. Large numbers of inmates are forced to sleep on thin mats on the ground because of severe overcrowding—a direct result of Defendants' unconstitutional bail practices. Torres Decl. ¶ 13; Johnson-Loveday Decl. ¶ 21; Edmond Decl. ¶ 14; Cameron Decl. ¶ 12. Sleeping on the floor is especially difficult for Plaintiff Johnson-Loveday because she is disabled and has only one hand. Johnson-Loveday Decl. ¶ 22. Mold and mildew are rampant throughout the facility. Edmond

Decl. ¶ 14; Rhodes Decl. ¶ 13. Even Defendant Sheriff Jarnigan admits inmates are forced to endure "horrible conditions" at his jail, which he describes as a "cesspool of a dungeon." Oppel, *supra*. Furthermore, Plaintiffs have not been given prescribed medications during their detention at the Jail, causing them pain and discomfort. Torres Decl. ¶ 12; Johnson-Loveday Decl. ¶ 23; Cameron Decl. ¶ 11; Edmond Decl. ¶ 13. Plaintiff Michelle Torres's medical situation is particularly dire. She suffers from cancer, among other serious medical conditions. Torres Decl. ¶ 11. Because Michelle is not receiving her prescribed medication or liquid diet while she is being detained, she is in extraordinary pain and discomfort. *Id.* ¶ 12. Without her daily medication, Plaintiff Amanda Cameron is at risk of seizures. Cameron Decl. ¶ 11.

Worse case outcomes and pressure to plead guilty because of the potential for prolonged unconstitutional pretrial detention. Individuals who cannot afford to pay for their release on bail can wait several months and up to a year in pretrial detention before they are even indicted. Rhodes Decl. ¶ 10. Because defense counsel is not entitled to discovery prior to indictment, they usually cannot meaningful investigate the claims against their clients, evaluate possible legal defenses, or assess the strength of the State's case. *Id.* ¶ 11. People held on money bail therefore face enormous pressure to reach plea deals just to escape the nightmarish conditions at the Jail. *Id.* ¶ 12.

For these reasons, Plaintiffs have established that Plaintiffs will suffer irreparable injury unless this Court enjoins Defendants' actions.

III. Plaintiffs' Injuries Outweigh Any Potential Harm to Defendants Caused by Injunctive Relief

The previously discussed ongoing serious harms to Plaintiffs as a result of unconstitutional pretrial detention considerably outweigh any potential harm to Defendants. The provision of constitutionally required process to recently arrested individuals and substantive determinations regarding the necessity of their *de facto* detention—the sole relief sought by Plaintiffs in this

motion—causes no cognizable harm to Defendants. Further, Defendants will save the cost of unnecessarily detaining Plaintiffs if this Court grants the requested injunctive relief. As one federal judge recently explained, "unnecessary pretrial detention burdens States, localities, and taxpayers, and its use appears widespread: nationwide, about 60% of jail inmates are pretrial detainees, and the majority of those people are charged with nonviolent offenses." *Jones v. City of Clanton*, No. 2:15cv34-MHT, 2015 WL 5387219, at *3 (M.D. Ala. Sept. 14, 2015). Defendants' nearly automatic detention of Plaintiffs imposes an unnecessary burden on Hamblen County, and ending Plaintiffs' wealth-based detention is more likely to benefit Defendants than cause them harm. Thus, the balance of harms weighs substantially in favor of the Plaintiffs who suffer serious long-term injury from the imposition of unaffordable financial conditions without any finding of necessity, while providing no real benefit to Defendants. *See, e.g.*, *Daves*, 341 F. Supp. 3d at 697 (finding balance of harms weighed in favor of enjoining use of secured money bail without the requisite substantive findings and procedural safeguards); *Schultz*, 330 F. Supp. 3d at 1375-76 (finding balance of harms weighed in favor of an injunction, in part, because "alternative pretrial detention policies are cost effective").

IV. Injunctive Relief Serves the Public Interest

"'[I]t is always in the public interest to prevent the violation of a party's constitutional rights.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted); *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004) ("[T]he public interest is served by preventing the violation of constitutional rights."). Accordingly, the public interest would be served by issuance of injunctive relief prohibiting the detention of Plaintiffs unless they are accorded adequate procedures and substantive findings to protect their constitutional rights.

Moreover, as explained throughout this memorandum, the unnecessary detention of indigent individuals has significant negative consequences for the public. Even brief periods of detention disrupts employment and family life. *ODonnell II*, 882 F.3d at 155. It leads to worse outcomes at trial, increases poverty, harms families, and causes recidivism. *See supra* Section II.

At the same time, detaining indigent people solely because that cannot afford to pay financial conditions of release is expensive, draining public coffers of money that could be spent on other needs. *Jones*, 2015 WL 5387219, at *3. Moreover, there is no evidence that financial conditions of release (even for those who can afford to pay) are more effective than alternative measures for ensuring court appearance and public safety. *ODonnell II,* 892 F.3d at 154 (finding "reams of empirical data" showing that "release on secured financial conditions does not assure better rates of appearance or law-abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision"); *see also McNeil v. Community Probation Services*, 1:18-cv-33, at *27 (M.D. Tenn. Feb. 14, 2019) (finding no evidence "that arrestees who are able to pay the secured bail amount are more likely to appear for their revocation hearing and less likely to commit crime"); *Schultz*, 330 F.Supp.3d at 1363 ("[T]he evidence demonstrates that secured bail is no more effective than other conditions to assure a criminal defendant's appearance at court proceedings, and secured bail is not necessary to secure a criminal defendant's appearance."); *Id.* at 1364 (citing "expert testimony and research studies which demonstrate that prolonged pretrial detention is associated with a greater likelihood of re-arrest upon release, meaning that pretrial detention may *increase* the risk of harm to the community").[17]

[17] *See, e.g.*, Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization* 21 (2016), http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf ("[M]oney bail has a negligible effect or, if anything, increases failures to appear.").

These factors amply demonstrate that the public interest is undermined by Defendants' current unconstitutional procedures and would benefit from a system that grants Plaintiffs the freedom they could enjoy were they wealthy enough to purchase it.

* * *

Because all of the factors that inform the consideration of preliminary injunctive relief weigh in favor of both a temporary restraining order as to the Named Plaintiffs and a preliminary injunction as to the entire Plaintiff class, this Court should grant Plaintiffs' motions for relief and order Defendant Jarnagin to release Plaintiffs unless they are provided constitutionally adequate procedures.

V. The Court Should Use Its Discretion to Waive the Posting of Security

Federal Rule of Civil Procedure 65(c) provides that courts normally require the moving party to post security to protect the other party from any financial harm that is likely to be caused by a temporary injunction, if that party is later found to have been wrongfully enjoined. The rule, however, provides district courts broad discretion to determine the amount of bond required or to waive the bond requirement altogether. *See Moltan Co. v. Eagle-Picher Indus.*, 55 F.3d 1171, 1176 (6th Cir. 1995) ("[T]he rule in our circuit has long been that the district court possesses discretion over whether to require the posting of security.").

Waiver is appropriate in this case because Defendants are unlikely to suffer any harm from an injunction that requires them to follow the constitution and provide Plaintiffs with relief that vindicates their fundamental constitutional rights. This alone is reason to waive the security requirement. *See, e.g.*, *Council on American-Islamic Rels. v. Graubatz*, 667 F.Supp. 2d 67, 81 (D.D.C. 2009) (requiring no bond where the defendant would not be substantially injured by the issuance of an injunction); 11A CHARLES A. WRIGHT, ARTHUR R. MILLER ET AL., FEDERAL

PRACTICE AND PROCEDURE § 2954 (2d ed.) ("[T]he court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant."). Plaintiffs are also "engaged in public-interest litigation, an area in which the courts have recognized an exception to the Rule 65 security requirement." *City of Atlanta v. Metro. Atlanta Rapid Transit Auto*, 636 F.2d 1084, 1094 (5th Cir. 1981).

Moreover, Plaintiffs are indigent, and their lack of financial resources is a central issue in this case. Many courts have waived bond requirements for indigent litigants in civil rights suits. *See, e.g., Fowler v. Johnson*, 2017 No. 17-11441, 2017 U.S. Dist. LEXIS 209949, at *5 (E.D. Mich. Dec. 21, 2017) (waiving bond requirement because "Plaintiffs claim to be indigent and to have suffered injuries because of their lack of financial resources").

Finally, as explained above, Plaintiffs are likely to succeed on the merits of their claims. The outcome of any trial, if necessary, is likely to reaffirm the well-established principle that a person may not be jailed on a monetary amount that he cannot afford. *See Moltan*, 55 F.3d at 1176 ("no security was needed because of the strength of [Plaintiff's] case and the strong public interest involved").

CONCLUSION

For all of the foregoing reasons, this Court should grant Plaintiffs' Motions for a Temporary Restraining Order and Preliminary Injunction.

Dated: February 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 2020 I electronically filed the foregoing with the clerk of the court for the U.S. District Court, Eastern District of Tennessee, using the electronic case filing system of the Court. This Memorandum in Support of Plaintiffs' Motions For a Temporary Restraining Order and Class-Wide Preliminary Injunction will be served in accordance with the Federal Rules of Civil Procedure.

/s/ George T. Lewis