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

DAVID DIXON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
V.	)	Case 4:19-cv-00112-AGF
	)	
CITY OF ST. LOUIS, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

For years, in the 22nd Judicial Circuit Court in St. Louis, judges routinely placed monetary conditions of release[1] on the warrants of arrested individuals. Under the process at the time this action was filed, these bail amounts were determined without any meaningful process—no opportunity to be heard nor any inquiry into the individual's ability to pay—and without any findings that pretrial detention was necessary for any governmental purpose. Those who paid were immediately released, while those who could not remained in deplorable conditions in a City of St. Louis jail, without a bail hearing or any other meaningful way to challenge their conditions of release, typically for weeks. This Court previously found that Plaintiffs were likely to succeed on their argument that Defendants' bail practices were unconstitutional. It should reach that conclusion on the merits now. The discovery process has only confirmed the truth of Plaintiffs' allegations, in many instances in the form of deposition testimony by Defendants' own officials. As the uncontroverted evidence demonstrates, consistent with the allegations in Plaintiffs' complaint, Defendants' practices violated Plaintiffs' constitutional rights to equal protection, substantive due process, and procedural due process.

Moreover, Defendants' conduct since the new Missouri Supreme Court Rules for bail took effect in July 2019 confirms that an injunction is in the public interest. Transcripts of initial appearances show that Defendants' bail process continues to be riddled with violations of the Rules and the Constitution. For example, Defendants maintain that the new Rules allow them to impose monetary conditions of release without any finding that detention is necessary, let alone one established by clear and convincing evidence, even when the amount is unaffordable and results in pretrial detention. And whether Defendants impose a cash bond or deny bond entirely—as they have been doing in a growing number of cases—they regularly flout the new Rules and constitutional requirements in other ways:

[1] Secured monetary conditions of release—that is, an amount of money that must be paid to the court before an arrestee can be released pretrial—are referred to by a variety of synonymous terms, including cash bail, money bail, cash bonds, money bonds, and financial conditions of release.

imposing conditions of release after initial appearances conducted with no notice, without sufficient consideration of relevant evidence, and without applying the evidentiary standards or making legal findings required by the Constitution and state law.

The Court should grant summary judgment, issue a declaratory judgment against the Judge Defendants, and order declaratory and permanent injunctive relief against the City Defendants.

II. FACTUAL BACKGROUND

At the time Plaintiffs filed this suit, hundreds of presumptively innocent individuals in the City of St. Louis ("the City") were confined in its jails because they could not afford to pay a cash bond required by the judges of the 22nd Judicial Circuit—Defendant Judges here—for their release. SUMF ¶ 2. Those conditions of release were set without any meaningful individualized proceedings. SUMF ¶¶ 26-79. People who had been arrested and could not afford to pay remained incarcerated for weeks without any opportunity to challenge their detention. SUMF ¶¶ 73-78. Every fact alleged by Plaintiffs about Defendants' unconstitutional bail process has been confirmed by evidence and testimony produced in discovery. Courts across the country, including this Court, have held that pretrial detention systems like Defendants' that fail to provide for individualized determinations made after hearings with exacting procedural and substantive safeguards cannot meet constitutional scrutiny.[2]

[2] *See. e.g.*, ECF No. 95; *O'Donnell v. Harris Cty.*, 251 F. Supp. 2d 1052 (S.D. Tex. 2018), *aff'd as modified*, 892 F.3d 147 (5th Cir. 2018); *McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-cv-33, 2019 U.S. Dist. LEXS 24357 (M.D. Tenn. Feb. 14, 2019); *Schultz v. Alabama* 330 F. Supp. 3d 1344 (N.D. Ala. 2018); *Daves v. Dallas Cty.*, 341 F.Supp. 3d 688 (N.D. Tex. 2018), *aff'd in part by*, 984 F.3d 381 (5th Cir. 2018), *pet'n for rehearing en banc granted by* No. 18-11368, 2021 U.S. App. LEXIS 5718 (5th Cir. Feb. 25, 2021); *Edwards v. Cofield*, No. 3:17-cv-321, 2017 WL 2255775 (M.D. Ala. May 18, 2017); *Walker v. City of Calhoun*, No. 4:15-CV-0170, 2017 WL 2794064, at *3 (N.D. Ga. June 16, 2017), *vacated in part by* 901 F.3d 1245 (11th Cir. 2018); *Rodriguez v. Providence Cmty. Corr.*, 155 F. Supp. 3d 758, 768-69 (M.D. Tenn. 2015); *Thompson v. Moss Point*, No. 1:15-cv-182, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); *Martinez v. City of Dodge City*, No. 15-cv-9344, 2016 U.S. Dist. LEXIS 190884, at *1-2 (D. Kan. Apr. 26, 2016); *Jones. v. City of Clanton*, No. 2:15-cv-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); *Cooper v. City of Dothan*, No. 1:15-cv-432, 2015 WL 10013003 (M.D. Ala. June 18, 2015); *Snow v. Lambert*, No. 15-cv-567, 2015 WL 5071981 (M.D. La. Aug. 27, 2015); *Pierce v. City of Velda City*, No. 4:15-cv-570, 2015 WL 10013006 (E.D. Mo. June 3, 2015).

The incontrovertible material facts underlying this motion are set forth in detail in the statement of facts accompanying this motion. The following is a brief summary.

A. St. Louis Bail Practices At the Time of Filing

Every person detained in the City of St. Louis on a state offense is held in one of the City's two jails: the City Justice Center ("CJC") or the Medium Security Institution (the "Workhouse"). SUMF ¶ 3. When this case was filed, employees of the Court's Pretrial Release Commissioner's Office (or "Bond Commissioner's Office") recorded the criminal history and current charges of each arrested person on a "Bond Commissioner's Report." SUMF ¶¶ 14. Although the reporting form contained space for additional information, these employees ("Bond Officers") did not interview the vast majority of arrestees as part of this process. SUMF ¶¶ 10-13. The great majority of reports therefore contained no information about family ties, financial circumstances, character, mental condition, or other factors relevant to conditions of release. SUMF ¶ 17. Even if an interview was conducted and some information was gathered from the arrestee, it was routinely limited to a brief statement about income (for example, just hourly wages or the words "food stamps") and did not contain information descriptive of the individual's actual available resources that could be used to post a bond. SUMF ¶ 19. Bond Officers conducted no outreach to family members or other contacts to gather more information before preparing their report. SUMF ¶ 21.

On the basis of this limited information, Bond Officers usually recommended a monetary condition of release. SUMF ¶ 15. Bond Officers were trained to make recommendations using a bail schedule with dollar amounts corresponding to charges and criminal history information. SUMF ¶ 9.

A "duty judge," a position filled on a rotating schedule established by the Presiding Judge, was responsible for formally setting conditions of release. SUMF ¶ 24. Without holding any type of hearing or having any contact with the arrested person, the duty judge set conditions of release on the warrant. SUMF ¶¶ 38-39. As with the Bond Officer's recommendation, most of the time the

conditions of release consisted of a money bail amount to be paid to secure release. SUMF ¶ 26. The information available to the duty judge at the time of bail setting was limited to the information in the Bond Officer's report, if available (and the report was not available in most cases); the information in the probable cause statement; basic biographical information on the arrest register; and criminal history. SUMF ¶ 33. Because of the deficiencies in the Bond Commissioner's Office interview process, duty judges set money bail amounts without knowing whether the arrestee had the ability to pay. SUMF ¶ 34. In some cases, duty judges would set high money bail amounts in the expectation that arrestees would not be able to pay. SUMF ¶ 27. Those who could pay the bail set by the duty judge were immediately released, while those who could not remained in jail. SUMF ¶ 31.

The first interaction an arrestee who could not pay her bail would have with the judge was at the initial appearance. SUMF ¶ 40. Arrestees were given no notice about the purpose of their initial appearance or that it would be an opportunity to speak to the judge about their conditions of release. SUMF ¶¶ 41-43. Initial appearances took place in Divisions 25 and 26 of the 22nd Judicial Circuit Court, and arrestees appeared by video from a room in the jail. SUMF ¶ 44.

Sheriff's deputies brought arrestees to the hearing room which consisted of a large open seating area and a second smaller room with video equipment. SUMF ¶¶ 50-51. Detained individuals were escorted one by one by Sheriff's deputies from the larger room to the smaller room, and the deputies instructed each arrestee not to talk to the judge. SUMF ¶¶ 51-52. Criminal assignment judges presided over initial appearances. SUMF ¶ 62. Like the duty judge, this judge had access to no information other than what was contained in the Bond Officer's report and the charging documents. SUMF ¶ 67. The initial appearance consisted of the judge informing the arrestee of the charges and money bail amount set by the duty judge without discussion. SUMF ¶ 68. Each initial appearance typically lasted fewer than five minutes (including the non-bail related portions), and often fewer than one minute. SUMF ¶ 66. The judge did not conduct a financial inquiry during this initial appearance and typically

did not question or elicit any information from the defendant. SUMF ¶ 69. The judge made no findings when pronouncing the bail. SUMF ¶ 70. Initial appearances were not recorded in any way. SUMF ¶ 64.

Other than the rare individuals who had already retained private counsel, arrestees were unrepresented at their initial appearances. SUMF ¶ 65. If an arrestee attempted to speak up on their own and raise the issue of bond or that they were unable to pay, the judge would tell the person to wait until an attorney was assigned who could file a motion on their behalf. SUMF ¶ 71. Once the judge was finished pronouncing the bail and charges, the Sheriff's deputy would instruct the arrestee to leave the room, even if the arrestee wanted to continue discussing their case. SUMF ¶ 57.

Arrestees could not challenge the conditions of their release pro se from jail. SUMF ¶ 78. Accordingly, in order to be heard on those conditions, arrestees would have to wait for an attorney to file a motion on their behalf. SUMF ¶ 73. For indigent arrestees who required representation by a public defender, the process of having an attorney enter an appearance in their case could take weeks. SUMF ¶¶ 74-75. For arrestees represented by public defenders, there was an average of 40 days between arrest and their first opportunity to be heard at a motion to modify the bail amount. SUMF ¶ 77. As a result, arrestees who could not pay bail spent weeks in jail, enduring inhumane conditions and suffering the collateral consequences of detention to their physical and mental health, children, employment, housing, and families. SUMF ¶¶ 80-87.

The named Plaintiffs' experiences were typical of other people arrested in the City of St. Louis at the time this lawsuit was filed. None were interviewed by a Bond Commissioner and each was held in jail on unaffordable money bail set by a duty judge. SUMF ¶¶ 89, 97, 105, 112. At the initial appearance, each was instructed by a Sheriff's deputy not to speak to the judge. SUMF ¶ 93, 99, 106, 113. None of their initial appearances provided any opportunity to challenge the money bail imposed by the duty judge and none of the Plaintiffs were afforded counsel or any opportunity to be heard,

much less an inquiry into ability to pay, findings about alternative conditions of release, or a determination that their detention was necessary. SUMF ¶ 94, 100, 108, 114. At the conclusion, each was returned to the jail, and because they could not pay, spent weeks suffering grievous harms associated with incarceration before the proceedings in this case resulted in their release. SUMF ¶¶ 95-96, 102-03, 110, 116-17.

B. St. Louis's Bail Process Since July 1, 2019

On July 1, 2019, the Missouri Supreme Court implemented new Rules for the bail process in state courts. SUMF ¶¶ 128, 159-60. The two applicable Rules revise standards for bail determinations at the initial appearance after arrest (Rule 33.01) and create a review hearing seven business days later for arrestees who remain detained after the initial appearance (Rule 33.05). Since these Rules went into effect, Defendants' practices have undergone varying changes, but none of these changes have cured the fundamental deficiencies in Defendants' practices at the time this case was filed.

Most importantly, since the new Rules took effect, judges have continued to impose cash bail at initial appearances without any inquiry into ability to pay, and often in amounts the arrestees were unable to afford. SUMF ¶ 283; *cf. id.* ¶ 225. In so doing, judges have not placed the burden of proof on the government or applied the clear and convincing evidence standard. SUMF ¶ 251-55, 258. Defendant Judges maintain that there is no burden of proof or standard of evidence they must follow when setting unaffordable money bail, even when such an order results in pretrial detention. SUMF ¶ 252, 254.

Further, contrary to the new Missouri Supreme Court Rules and to constitutional requirements of due process, judges issue transparent detention orders ("no-bond orders" or "no bonds") without making the requisite findings or applying the standard of clear and convincing evidence. SUMF ¶ 291. Contrary to the Rules, which allow pretrial detention only based on public safety, judges impose no-bond orders based on an arrestee's alleged risk of flight. SUMF ¶ 290. Defendant Judges maintain

that there is no burden on the government to justify no-bond orders, SUMF ¶ 254, and that there can be a finding of clear and convincing evidence justifying detention even when the prosecutor does not present any evidence at all. SUMF ¶ 255. Judges have continued to apply a presumption of correctness to the conditions of release set by the duty judge without any process, SUMF ¶ 257, thereby improperly shifting the burden to the arrestee to show why they should not be detained. Judges also continue, expressly and impermissibly, to presume an arrestee's guilt and use pretrial detention as punishment for an arrestee's perceived bad behavior. SUMF ¶¶ 357-63.

Since the new Rules took effect, the process from arrest until initial appearance has remained similar to the pre-Rules-change process in ways material to Plaintiffs' claims. Some arrestees are interviewed by a Bond Officer, who makes a recommendation to a duty judge, who sets cash bail on the warrant in a closed proceeding with no substantive findings or process. SUMF ¶¶ 139-144, 149. The Bond Commissioner's Office until very recently continued to use the bail schedule to train new employees. SUMF ¶ 145. Although the Bond Commissioner's Office has made efforts to interview more arrestees, some still are not interviewed. SUMF ¶ 139. For months after the new Rules went into effect, even when there was an interview, Bond Officers did not record information about ability to pay. SUMF ¶ 140. Only starting in early 2020 have Bond Officers attempted to collect more information about an arrestee's financial circumstances than they did before this case was filed, including a specific question about ability to pay. SUMF ¶ 141. After the implementation of the new Rules, Bond Officers continued to recommend conditions of release to the duty judge, which have typically consisted of money bail amounts. SUMF ¶ 144. Only in approximately June 2020 were Bond Officers instructed to stop using a bail schedule and not to recommend money bail amounts to the duty judge. SUMF ¶¶ 144-45.

Duty judges continue to set conditions of release on the warrant without contact with the arrestee and without providing any hearing, process, or findings. SUMF ¶ 149. Since the new Rules took effect, duty judges have routinely set money bail amounts on warrants. SUMF ¶ 149.

After the duty judge sets the bail, the next step is the initial appearance. Defendants continue to provide no notice to arrestees about what critical issues will be determined at the initial appearance, the factors that a judge will consider with regard to conditions of release, or the arrestee's rights to be heard, be represented by counsel, and present evidence and witnesses. SUMF ¶¶ 150-158.

Initial appearances, now also known locally as Rule 33.01 hearings, are still the first opportunity for an arrestee to speak to a judge about conditions of release. SUMF ¶ 159. They are not held on weekends or holidays, and accordingly, some arrestees are not afforded an initial appearance until more than 72 hours after their arrest. SUMF ¶ 161-162. Starting in July 2019, initial appearances were moved to a newly created court section, Division 16B. SUMF ¶ 163. Since the new Rules took effect, initial appearances have been recorded stenographically by court reporters. SUMF ¶ 166.

Starting in July 2020, the Judge Defendants entered into contracts with private attorneys to provide representation at initial appearances. SUMF ¶ 169. Eligibility criteria is limited to a bar license in good standing and not being delinquent on city taxes. SUMF ¶ 171. Contract attorneys are not provided any training, and their performance is not evaluated. SUMF ¶ 174. Representation by the on-duty contract attorney typically begins and ends at the initial appearance. SUMF ¶ 176.

Contract attorneys are not able to meet with their clients before the initial appearances. SUMF ¶¶ 187-189. The first time contract attorneys typically speak with their clients is on the record during the initial appearance hearing. SUMF ¶¶ 190, 196. Indeed, because the arrestee appears through video, their attorney is often introduced to them as "the person waving at you." SUMF ¶ 196. Thus, contract attorneys have access to only the limited information that the judge possesses, specifically, the Bond Commissioner's report, probable cause statement, and arrest record. SUMF ¶ 205-06. Fact gathering

by attorneys, if any, typically takes place through questions posed to the arrestee in front of the judge and prosecutor and on the record. SUMF ¶ 207. As a result, the initial appearance system is set up so that attorneys' advocacy—and judges' decisions—are based on incomplete information and without the benefit of an independent investigation into the circumstances of the offense, community ties, alternative conditions of release, medical and mental health considerations, and other relevant factors. For example, the transcripts show contract attorneys asking for higher bail amounts than the client can pay without there ever having been any private meeting between attorney and client. SUMF ¶¶ 213-16.

Judges use a template form at initial appearances, which was approved by Defendant Judge Burlison during his tenure as presiding judge of the 22nd Judicial Circuit Court, which lasted until January 2021. SUMF ¶¶ 226-27, 137. The forms do not require the judge to write down any reasons when setting conditions of release or to record any arguments, evidence, or testimony considered. SUMF ¶ 231-32. There are no check boxes for the statutory bail factors. SUMF ¶ 233. Judges using the form typically do not indicate in writing their reasons for reaching decisions on conditions of release. SUMF ¶ 241.

Those who cannot meet their conditions of release—either because of unaffordable bail or a no-bond order—must wait in jail at least another seven working days (between nine and eleven actual days) until they have a review hearing pursuant to Rule 33.05. SUMF ¶ 264. Although contract attorneys do not represent clients at Rule 33.05 hearings, both contract attorneys and judges view the Rule 33.05 hearing, not the initial appearance, as the "full" or "thorough" bail hearing. SUMF ¶ 262. Contract attorneys at initial appearances ask to leave a bail amount as is, or even waive the hearing, to allow the defendant to be represented by different counsel at the Rule 33.05 hearing, who will putatively have knowledge of their particular circumstances. SUMF ¶ 217-18. According to dockets produced by Defendants, since July 1, 2019, 54 percent of people detained at their initial appearances

on unaffordable money bail who had a subsequent Rule 33.05 hearing have been granted less-restrictive conditions at the second hearing, having spent an additional unnecessary seven business days in jail. SUMF ¶ 315.

Increasingly since the new Rules went into effect, duty judges and initial appearance judges have ordered arrestees to be held without bail, commonly called no-bond orders. SUMF ¶ 291. The template initial appearance form contains a check box with a boilerplate statement mirroring the language in the Rule for detention orders. SUMF ¶ 242. Judges at initial appearances are also provided a script with similar boilerplate language. SUMF ¶ 244. Judges use the form and the scripts to recite the statutory standard as a justification for their no-bond decisions. SUMF ¶¶ 245-246. In 39 percent of the cases for which Defendants provided transcripts, the Judges provided no specific rationale or reason justifying the imposition of de jure detention. SUMF ¶ 294.

III. PROCEDURAL HISTORY

Plaintiffs filed their complaint and motion for class certification on January 28, 2019. ECF Nos. 1, 3. Contemporaneously, Plaintiffs sought a temporary restraining order on behalf of the four named Plaintiffs. ECF No. 5. Pursuant to a stipulation with Defendants, Plaintiffs agreed to stay resolution of their motion for a temporary restraining order in return for Defendants providing each of the named Plaintiffs an individualized hearing on their conditions of release pursuant to the new Missouri Supreme Court Rules that had yet to take effect. ECF No. 19. At the ensuing hearings, the respective judges modified Plaintiffs Richard Robards and Aaron Thurman's conditions of release to allow for recognizance release but maintained the unaffordable money bail of Plaintiffs David Dixon and Jeffrey Rozelle. On February 5, 2019, a third-party charitable organization paid these Plaintiffs' money bail amounts, and they were released. ECF No. 39. On February 21, 2019, Plaintiffs moved for a class-

wide preliminary injunction against Defendant Commissioner Dale Glass. ECF No. 41.[3] Each Defendant filed a motion to dismiss.

On June 11, 2019, this Court granted Plaintiffs' motions for class certification and a preliminary injunction and denied Defendants' motions to dismiss. ECF No. 95. Defendants appealed to the Eighth Circuit, which issued a stay of the injunction pending appeal. On July 1, 2019, after this Court's order and while the Eighth Circuit appeal was pending, the new Missouri Supreme Court Rules relating to conditions of release took effect. These Rules impose some additional requirements on Defendant Judges when determining bail at initial appearances. *See infra*, p. 37 n. 20.

On February 28, 2020, the Eighth Circuit issued a ruling vacating this Court's preliminary injunction order. In so doing, the court determined that "[t]he Missouri Supreme Court, by initiating an update to the rules pertaining to cash bail, was presumably using its superintendence powers to signal to the lower state courts that the status quo was unacceptable." *Dixon v. City of St. Louis*, 950 F.3d 1052, 1056 (8th Cir. 2020). On remand, the Eighth Circuit instructed this court to consider, when determining the public interest factor for injunctive relief, the issue of comity between federal and state courts based on the effect of the new Rules and "the necessity of an injunction in light of the course of conduct since [the Eighth Circuit's] issuance of the stay pending appeal." *Id.*

Plaintiffs thereafter filed a renewed motion for a preliminary injunction. ECF No. 160. The motion was supported by updated evidence regarding Defendants' practices since the new Rules went into effect. As a result of delays related to the COVID-19 pandemic, Plaintiffs withdrew their renewed motion in favor of pursuing this dispositive motion. Defendants also filed motions to decertify the

[3] Plaintiffs entered into an agreement with Defendant Sheriff Vernon Betts not to seek a preliminary injunction against the City of St. Louis and Defendant Betts for telling arrestees not to speak prior to their initial appearances, provided that Sheriff's deputies would be instructed not to tell arrestees to be silent or not ask questions or seek adjustment of bond. ECF No. 92. Depositions of two Sheriff's deputies demonstrates that no such instructions were given. SUMF ¶ 59.

class and for judgment on the pleadings, which this Court denied on February 17, 2021. ECF Nos. 242 & 243. The parties have completed discovery, and this case is ripe for adjudication.

IV. STANDARD OF REVIEW

"A grant of summary judgment is proper 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Macklin v. FMC Transp., Inc.*, 815 F.3d 425, 427 (8th Cir. 2016) (quoting Fed. R. Civ. P. 56(a)).

V. ARGUMENT

As this Court previously held, pre-trial detention without individualized process and required findings violates class members' constitutional rights. Defendants' practices at the time of filing were (and current practices remain) unconstitutional on three distinct yet related grounds: equal protection, substantive due process, and procedural due process.[4] First, equal protection and due process have long forbidden the government from depriving someone of their liberty for inability to make a payment. *See Williams v. Illinois*, 399 U.S. 235, 242 (1970); *Bearden v. Georgia*, 461 U.S. 461 U.S. 660, 672-73 (1983); *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978); *Fant v. City of Ferguson*, 107 F. Supp. 3d 1016, 1031 (E.D. Mo. 2015). Second, substantive due process grants those who are accused but not convicted of crimes an interest in pretrial liberty that is "fundamental." *United States v. Salerno*, 481 U.S. 739, 750 (1987) (recognizing 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"); *see also, e.g.*, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014) (en banc) (Supreme Court decisions subsequent to *Salerno*

[4] The facts relevant to the merits are those that were in effect at the time the complaint was filed. Any post-complaint changes would be relevant to evaluating a defense that the case has since become moot, which carries a rigorous standard. If Defendants were to raise such a defense, they would bear the "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth v. Laidlaw Evtl. Servs.*, 528 U.S. 167, 190 (2000). Because Defendants continue to vigorously defend the constitutionality of their conduct at the time of filing, continue to violate the constitutional rights of class members, and maintain that many of the changes that they have made are discretionary, SUMF ¶¶ 148, 173, 222, 268, they cannot meet this standard.

"have confirmed that *Salerno* involved a fundamental liberty interest and applied heightened scrutiny"); *accord Valdez-Jimenez v. Eighth Judicial Dist. Court of Nev.*, 460 P.3d 976, 984-85 (Nev. 2020) ("Because bail may be set in an amount that an individual is unable to pay, resulting in continued detention pending trial, it infringes on the individual's liberty interest. And given the fundamental nature of this interest, substantive due process requires that any infringement be necessary to further a legitimate and compelling governmental interest."); *Simpson v. Miller*, 387 P.3d 1270, 1276 (Ariz. 2017) ("[I]t is clear from *Salerno* and other decisions that the constitutionality of a pretrial detention scheme turns on whether particular procedures satisfy substantive due process standards."). Third, the Constitution requires the government to provide procedural safeguards to protect against the erroneous deprivation of these substantive rights. *Washington v. Harper*, 494 U.S. 210, 228 (1990); *ODonnell*, 882 F.3d at 540.

A. Defendants' Practices Have Violated Class Members' Equal Protection Rights to be Free From Wealth-Based Detention

The Supreme Court has long recognized that a person may not be "subjected to imprisonment solely because of his indigency." *Tate v. Short*, 401 U.S. 395, 398 (1971); *see also*, *e.g.*, *Williams*, 399 U.S. at 242 (right to equal protection violated by imprisonment beyond statutory maximum for inability to pay a fine); *Bearden*, 461 U.S. at 672 (invalidating state practice of revoking probation for failure to pay a fine or restitution without considering ability to pay or whether alternative measures would meet the state's interests in punishment and deterrence); *Douglas v. California*, 372 US. 353, 355 (1963) (condemning the "evil" of "discrimination against the indigent"); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.").

The right to not be imprisoned based on poverty arises from equal protection and due process principles. *Bearden*, 461 U.S. at 665, 674; *see also Fant*, 107 F. Supp. 3d at 1031 ("[J]ailing persons who are unable to pay a court-ordered fine, without first inquiring into their ability to pay and considering alternatives to imprisonment, violates both Due Process and Equal Protection Clauses."). The Eighth

Circuit has repeatedly applied this bedrock principle of equal justice, finding that it is "clearly unconstitutional" to jail indigent persons for nonpayment of fines. *Campbell v. Cauthron*, 623 F.2d 503, 506 n.3 (8th Cir. 1980); *see also United States v. Mack*, 655 F.2d 843, 947 (8th Cir. 1981); *King v. Wyrick*, 516 F.2d 321 (8th Cir. 1975); *United States v. Hines*, 88 F.3d 661, 664 n.4 (8th Cir. 1996); *Lincoln v. United States*, 12 F.3d 132, 133 (8th Cir. 1993).

Although this precedent primarily addressed wealth-based jailing *postconviction*, the right to not be imprisoned solely for being poor applies with greater force to individuals detained pretrial, who enjoy the presumption of innocence and have not had their liberty interests diminished by a criminal conviction. *See Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) ("The incarceration of those who cannot [afford to pay monetary bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."); *accord O'Donnell*, 892 F.3d at 159; *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 311 n.5 (E.D. La. 2018). 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 pretrial. *Pugh*, 572 F.2d at 1057; *see also* ECF No. 95 (enjoining Defendants from enforcing a monetary condition of release unless accompanied by an order with a finding that detention is necessary because there are no less restrictive alternatives to ensure the arrestee's appearance or the public's safety).

Despite this fundamental constitutional principle—and even Defendants' "firm[] agree[ment] that . . . a person cannot be imprisoned solely due to indigence," ECF No. 95 at 26—Defendants' policies and practices have long been to reflexively impose financial conditions of release without any consideration of or findings about the individual's ability to pay or whether less restrictive conditions could reasonably assure the individual's return to court and the safety of the public. Each of the named Plaintiffs was subject to these practices: they had no opportunity to be heard on their ability

to pay before unaffordable financial conditions of release were set and received no explanation of the reasons for those conditions. SUMF ¶¶ 89, 94, 97, 100, 105, 108, 112, 114.

Named Plaintiffs' experiences were typical of Defendants' process at the time of filing. Under the operative facts, Bond Commissioners, having been trained to mechanically apply a monetary bail schedule, SUMF ¶ 9, recommended money bail amounts based on little more than the accusations in the charging documents and some criminal history. And duty judges, without a hearing or any contact with the arrestee, imposed money bail amounts based on the recommendation and the same limited set of information. SUMF ¶¶ 32-39. Arrestees' first hearing was nothing more than a pro forma recitation of the bail amounts and charges, and Defendant Judges imposed cash bail amounts without knowledge of the arrested individual's ability to pay. SUMF ¶¶ 68-71. Class members who could not afford to pay their bail and needed public defender representation were detained for weeks without seeing an attorney or having any chance to be heard. SUMF ¶¶ 73-78.

Money bail orders establishing conditions of release that class members cannot afford to pay because of their poverty constitute de facto detention orders that are "tantamount to setting no conditions at all." *United States v. Leisure*, 710 F.2d 422, 425 (8th Cir. 1983) (quoting *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969)); *see also* Pls' Resp. to the Ct's Order for Suppl. Briefing, ECF No. 28, at 1-2; *Valdez-Jimenez*, 460 P.3d at 987 ("[W]hen bail is set in an amount that results in continued detention, it functions as a detention order, and accordingly is subject to the same due process requirements applicable to a deprivation of liberty."); *cf. United States v. Mantecon-Zayas*, 949 F.2d 548, 551 (1st Cir. 1991) (under the Bail Reform Act, a condition of release that results in detention must meet the standards for a detention order). Because the financial conditions of release in the named Plaintiffs' cases were beyond what they could pay, they remained in jail for weeks, resulting in, among other harms, an inability to care for sick family members and children. SUMF ¶¶ 121, 298-99. If they had been wealthier, they would have been immediately set free. SUMF ¶ 31.

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, 892 F.3d at 163. Numerous other courts have agreed that these practices—which are materially indistinguishable from the Defendants' in this case—are unconstitutional. *See supra*, p. 2 n. 2.

As this Court held in ruling on Plaintiffs' motion for a preliminary injunction, detention based solely on inability to pay is constitutional only if it satisfies heightened scrutiny. ECF No. 95 at 29;[5] *see also*, *e.g.*, *O'Donnell*, 892 F.3d at 161 (heightened scrutiny is required when criminal laws "detain poor defendants *because* of their indigence." (citing *Tate,* 401 U.S. at 397-99, and *Williams*, 399 U.S. at 241-42)); *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (holding that a requirement to pay a fine or serve time in jail violates equal protection and due process unless it is "necessary to promote a compelling government interest" (quotation and citation omitted)).[6] Application of heightened

[5] This Court found that Defendants' conduct should be evaluated using heightened scrutiny, but that "even under rational basis review, Defendants' practices fall short of constitutional standards in that Defendants fail to articulate any governmental interest in detaining indigent defendants while releasing moneyed defendants facing the same charges, without any consideration of individual factors." ECF No. 95 at 29-30 (emphasis in original).

[6] *See also Bearden*, 461 U.S. at 666 (wealth-based detention requires "careful inquiry"); *Johnson v. Bredesen*, 624 F.3d 742, 748-49 (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."); *Buffin v. City & Cnty. of San Francisco*, No. 15-cv-04959, 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 in the 48-hour period prior to a hearing on conditions of release because it only implicated a "marginal increase in the length of

scrutiny demands that this Court look to whether Defendants' practices are narrowly tailored to achieve the government's two compelling interests related to pretrial detention: protecting public safety and ensuring arrestees appear for their court dates. *See United States v. Neal*, 679 F.3d 737, 741 (8th Cir. 2012).

Regardless what standard of scrutiny applies, Defendants' practice of requiring monetary conditions of release without any inquiry or findings cannot survive constitutional review. Under any standard, the principle of fundamental fairness requires Defendants to show that they have sufficiently "consider[ed] whether adequate alternative methods" would achieve the state's interests before imposing detention in any individual case. *Bearden*, 461 U.S. at 669. But, under the challenged practices, Defendants detained arrested individuals through the use of monetary conditions of release without making *any* findings that a given person would be a danger to public safety or a flight risk, nor any findings that less restrictive conditions of release could not advance the government's interests—both of which are constitutionally required.

Indeed, because Defendant Judges did not have information about arrestees' ability to pay, the imposition of money bail was completely disconnected from any rational purpose. Without that knowledge, it was impossible for Defendant Judges to know whether an arrestee would be detained or released on the cash bail. Without knowing whether a person would be detained, a judge could not consider less restrictive alternatives. Conversely, even if a person could post the amount of bond set,

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detention" for indigent defendants, 901 F.3d 1245, 1263 (11th Cir. 2018), its reasoning, even if adopted, would not apply to class members here, who were as a matter of course detained beyond 48 hours and faced weeks of wealth-based detention before any hearing on their conditions of release. SUMF ¶ 77; *Walker*, 901 F.3d 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 it surely is." *Id.* at 1274 (Martin, J., dissenting).

without knowledge of ability to pay, the judge could not know what incentive, if any, the monetary condition of release would provide to return to court.[7]

This Court should grant summary judgment on Plaintiffs' claim that Defendants' practices at the time of filing violated class members' rights to be free from wealth-based detention.[8]

B. Defendants Have Violated Class Members' Substantive Due Process Rights to Liberty

Defendants' practices at the time of filing also violated class members' substantive due process rights. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. This norm reflects longstanding foundational principles: as the Supreme Court has repeatedly said, "[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) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)); *accord Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). *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 the Supreme Court's words, the "interest in pretrial liberty" is "fundamental." *Id.*

Salerno addressed a facial challenge to the Bail Reform Act of 1984, a law that authorizes the pretrial confinement of dangerous individuals if a judge finds that pretrial detention is necessary to protect

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[7] The overwhelming majority of scholarship has condemned money bail systems like that of Defendants. *See e.g.*, *O'Donnell*, 892 F.3d at 154 (noting that the district court's "review of reams of empirical data" showed that "release on secured financial conditions does not assure better rates of appearance or of law-abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision."); *Caliste v. Cantrell,* No. 17-6197, 2020 U.S. Dist. LEXIS 149119, at *67 (E.D. La. Aug. 18, 2020) (citing "a plethora of scholarly articles supporting the conclusion that the cash bail system is arbitrary, disproportionately impacts indigent defendants and communities of color, does not actually ensure public safety, is statistically unnecessary to ensure future court appearance, routinely leads to worse outcomes for those detained before trial, and primarily serves the interests of the for-profit bail bond industry. . . ."); Br. For Am. Bar Ass'n as *Amicus Curiae* in Support of Plaintiffs-Appellees & Affirmance, pp. 12-23, Doc # 00514109926, *ODonnell*, 892 F.3d 147 (describing an academic consensus that money bail systems are ineffective and unjustly punish the poor).

[8] In Plaintiffs' motion to modify the class definition, Plaintiffs propose a sub-class to which this claim would exclusively apply. ECF No. 258.

public safety. *See* 481 U.S. at 742; 18 U.S.C. § 3142(e)-(f), (i). The Supreme Court deemed the statute consistent with the Due Process Clause, but—given the "fundamental nature of th[e] right" at stake, 481 U.S. at 750—only after concluding that the law's provisions satisfied heightened scrutiny, *see id.* at 750-51 (describing the government interest in preventing pretrial crime by those charged with "extremely serious" federal felony offenses as "compelling" and "overwhelming" and the statute as "careful[ly] delineat[ing] . . . the circumstances under which detention will be permitted."). 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").

When money bail is set at "unpayable amounts," it operates "as [a] de facto pretrial detention order." *ODonnell* , 251 F. Supp. 3d at 1150. Indeed, the court in *ODonnell* 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. It is the same for Defendants here. Defendant Bond Commissioner Donald Kearbey, testifying on behalf of the 22nd Judicial Circuit Court as a Rule 30(b)(6) designee, conceded that money bonds set for thousands or tens of thousands of dollars for a largely indigent population served the same function as "no bond" detention orders and that the court "didn't ever think [arrestees] would possibly [be able to afford] 30,000 or 50,000 cash[.]" Ex. 7, Kearbey 30(b)(6) Dep. at 88:2-14. Under the *Salerno* line of cases, Defendants are required to establish that their use of money

bail to detain an indigent individual is "narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. at 302.[9]

Defendants' practices at the time this lawsuit was filed come nowhere close to meeting this requirement, for the same reasons stated above. They failed to make any findings whatsoever before ordering class members detained on unattainable financial conditions of release. *See, e.g.*, SUMF ¶¶ 70, 302-03.

Accordingly, Plaintiffs have demonstrated success on the merits of their claim that Defendants' detention of class members has violated their fundamental rights to liberty.

C. Defendants Have Violated Class Members' Procedural Due Process Rights

In addition to violating class members' substantive rights, Defendants have violated their procedural rights.

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, e.g.*, *Kroupa v. Nielsen*, 731 F.3 813, 818 (8th Cir. 2013). Here, as explained above, class members have a liberty interest against wealth-based detention and in their bodily liberty 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

[9] Increasingly in the past several months, Defendants have detained arrestees through no-bond orders in situations where they previously used high money bond amounts. SUMF ¶ 291-292. There is no question that these de jure detention orders fall squarely within the requirements of *Salerno* and must be narrowly tailored based on a finding that no other less restrictive conditions of release will satisfy the government's interest in public safety. In fact, such a requirement is codified in Missouri Law, requiring a court to "determine upon clear and convincing evidence that no combination of non-monetary conditions will secure the safety of the community or other person" before detaining an individual pretrial. Mo. Sup. Ct. R. 33.01(d). The court must make findings on the record supporting the reasons for detention. Mo. Sup. Ct. R. 33.01(f).

(1965)). What constitutes sufficiently "meaningful" procedure to satisfy the Due Process Clause varies depending on context. *See Riggins v. Bd. Of Regents of Univ of Nebraska*, 790 F.2d 707, 712 (8th Cir. 1986).

1. *Defendants Violated Class Members' Procedural Rights by Providing No Process at All*

As an initial matter, no elaborate analysis is necessary to determine that Defendants have violated class members' procedural due process rights. Under the operative facts, Defendants provided absolutely no mechanism for class members to be heard on their detention for weeks after their arrest. *See, e.g.*, SUMF ¶ 77. Although class members appeared in front of a judge at a first appearance during which a judge announced their conditions of release, class members were affirmatively told not to speak at the appearance, SUMF ¶ 52, and were interrupted if they did, SUMF ¶ 71; *see also* SUMF ¶ 57. That appearance, therefore, cannot be deemed a "meaningful" "opportunity to be heard" under any analysis. *Mathews*, 424 U.S. at 333. Class members instead waited an average of five weeks until counsel was appointed, filed a motion, and a hearing was scheduled. SUMF ¶ 77; *cf. Coleman v. Watt*, 40 F.3d 244, 261 (8th Cir. 1994) (detailing exacting procedures for impoundment of automobiles, including that a seven day-delay before a hearing is "clearly excessive").

2. *To Satisfy the Due Process Clause, Defendants Must Provide Notice, an Adversarial Hearing with Counsel on the Record, and apply a Heightened Evidentiary Standard*

The only question, then, is precisely what procedures Defendants must provide before detaining any arrestee pending trial on a de jure or de facto detention order. 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.

i. Private interest

Applying the first *Mathews* factor, the private interest at stake is substantial. Here, not only have class members been incarcerated in violation of their fundamental liberty interest in freedom from detention and their right against wealth-based detention, but these deprivations occurred for *weeks or months*. *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 due to inability to work; increased physical and mental illness; restricted access to counsel; decreased opportunity to prepare a defense; a resulting increased risk of a finding of guilt; and resulting longer sentences, among others. *See, e.g.*, *Schultz*, 330 F. Supp. 3d at 1361 (citing evidence showing that "pretrial detention hampers a defendant's ability to participate in his defense[,]" "increases the likelihood that the pretrial detainee will enter a guilty plea, receive a harsher sentence, and recidivate."); *see also* SUMF ¶¶ 119-24.

ii. Rigorous procedures are necessary to reduce the risk of erroneous deprivation and will not place an unreasonable burden on Defendants

Proper attention to the seriousness of this private interest 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").

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 and reasons on the record of "the evidence relied on."

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 constitutionally presumed innocent before trial. And, indeed, because individuals being detained pretrial—including class members and putative class members here—retain the presumption of innocence and thus the "absolute liberty" lacking in *Morrissey*, *id.*, some additional protections are due to account for the greater interest at stake. Specifically, in addition to the procedures outlined above, the gravity of the pretrial detention decision calls for the provision of counsel, a heightened evidentiary burden of proof on the government to justify detention,[10] consideration of alternative conditions of release that will not result in detention, and a prompt hearing including findings on the record.

Counsel. Procedural due process demands that counsel be made available to individuals facing pretrial detention and that counsel have a realistic opportunity to meet with their client before the hearings. In evaluating the Bail Reform Act, the Supreme Court expressly identified the "right to counsel at the detention hearing" as a key procedural safeguard against unlawful detention. *Salerno*,

[10] Under Missouri law, the only interest that may justify pretrial detention is the safety of the public or others. Mo. Sup. Ct. R. 33.01(d).

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. *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.").[11]

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* 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; *see also* Worden, *What Difference Does a Lawyer Make?* at 710–735. 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.

[11] *See also* 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 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), https://perma.cc/4882-7CFX (concluding that representation by counsel "had a significant impact on test clients' pretrial release status" in a study of the effect of public defender representation at bail hearings 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).

The significant risk of erroneous detention rulings in the absence of counsel with reasonable access to the defendant is a consequence of the complexity of bail decisions. Multiple factors are 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. Hearings on conditions of release involve specialized knowledge and skill that only counsel with access to a defendant can provide, especially in the days immediately following arrest, when a person is in crisis, removed from her family and community, and confined to a jail cell. Hence, counsel is necessary to make individualized hearings "meaningful."

Other courts have accordingly determined that procedural due process requires counsel at bail determinations. In *Caliste*, the court applied the *Mathews* analysis and determined that "without representative counsel the risk of erroneous pretrial detention is high. Preliminary hearings can be complex and difficult to navigate for lay individuals and many, following arrest, lack access to other resources that would allow them to present their best case." 329 F. Supp. 3d at 314; *see also Valdez-Jimenez*, 460 P.3d at 987 (finding procedural due process requires the provision of counsel at initial bail hearings).

Although Plaintiffs did not plead a Sixth Amendment violation in the initial complaint,[12] it is illustrative that in cases nearly identical to this one, courts have found that the Sixth Amendment right to counsel applies at pretrial detention hearings. *See, e.g.*, *Torres v. Collins*, No. 2:20-CV-00026-DCLC, 2020 U.S. Dist. LEXIS 245043 (E.D. Tenn. Nov. 30, 2020) ("Simply put, an arrestee has a right to representation at a bail hearing or at an initial appearance that also constitutes a bail hearing."); *Caliste*,

[12] Plaintiffs did not plead a Sixth Amendment violation because counsel is separately required by procedural due process. If the Court finds that procedural due process does not require counsel, Plaintiffs may request the opportunity to amend the pleadings for good cause pursuant to Federal Rule of Civil Procedure 15.

329 F. Supp. 3d at 314 (an initial bail hearing is a "critical stage" requiring counsel because "[t]here is no question that the issue of pretrial detention is an issue of significant consequence for the accused"); *Booth v. Galveston Cty.*, No. 3:18-cv-00104, 2019 U.S. Dist. LEXIS 133937, at *42 (S.D. Tex. Aug. 7, 2019) ("[A] hearing at which bail is set is a 'critical stage,' requiring the appointment of counsel for indigent defendants. Not only is a bail hearing *a* 'critical stage' in the criminal process, but it is arguably the *most* 'critical stage.'"); *cf. Smith v. Lockhart*, 923 F.2d 1314, 1319 (8th Cir. 1991) (hearing on bail reduction motion a "critical stage" requiring representation by counsel).

Moreover, Defendants have an interest in ensuring that individuals are adequately represented at their first appearances and have acknowledged this by entering into a contract for the provision of counsel at initial appearances. Although a court order might impose some future additional costs by requiring Defendants to continue to provide counsel after the expiration of the current contract, 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. Any cost to Defendants would be alleviated by an attendant reduction in the enormous expense of unnecessarily imprisoning people pretrial.[13]

As such, although this Court declined to impose a counsel requirement as part of the preliminary injunction, it should do so now.

Proof by clear and convincing evidence that alternative conditions of release are insufficient to meet the state's interests. Procedural due process also requires that the government

[13] Defendants agreed to shoulder costs by requiring counsel present at all initial hearings. SUMF ¶ 169. However, the evidence demonstrates that there are deficiencies in their current process that result in the functional denial of counsel and in the effective assistance of counsel. *See supra,* pp. 8-9; *infra*, pp. 39-42. Moreover, Defendants maintain that their provision of counsel is discretionary and could be terminated at the whim of the presiding judge. SUMF ¶ 222.

bear the burden of showing that pretrial detention, whether de facto based on unaffordable financial conditions or transparent based on a no-bond order, is justified by "clear and convincing" evidence showing that alternative conditions of release that do not result in detention would not suffice. Specifically, *Mathews* requires the application of this standard 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 burdens such a standard places 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 its seminal procedural due process decision *Addington v. Texas*, 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 concern of the second *Mathews* factor. 441 U.S. 418, 432-33 (1979) (analyzing the level of proof required to detain someone alleged to be mentally ill). The Court reasoned that the heightened evidentiary standard of clear and convincing evidence is necessary given the seriousness of detention as compared to the more minor disputes—such as the "loss of money"—to which the preponderance of the evidence standard applies. *Id.* at 424. 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. *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. *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 also Foucha*, 504 U.S. at 80 (striking down scheme for detaining persons acquitted by reason of insanity because it did not put the burden on the state to justify detaining acquittees by clear and convincing evidence); *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 286 (1966) (requiring

clear and convincing evidence to support a deportation order); *Cruzan by Cruzan v. Dir., 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); *cf. Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 784-85 (9th Cir. 2014) (striking down Arizona pretrial detention statute in part because Arizona law did not require the government to prove by clear and convincing evidence that detention was necessary); Mo. Sup. Ct. R. 33.01(d) (incorporating clear and convincing evidence standard for pretrial detention orders).

Because a de facto detention order is the functional equivalent of a transparent one, *see supra*, p. 15, these same standards apply whether class members are detained as a result of unaffordable money bail or no-bond detention orders. This Court found as much in including the "clear and convincing" evidence standard as a requirement in its preliminary injunction order. ECF No. 95 at 34. In other recent cases presenting nearly identical factual circumstances, federal district courts have concluded that the government must prove detention is necessary by clear and convincing evidence before a court may set unaffordable monetary bail. *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, as one court explained, 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]

It is clear that the burden of proving necessity by clear and convincing evidence must be on the government to justify any order resulting in pretrial detention. *Neal*, 679 F.3d at 741-42. In

[14] *See, e.g.*, *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 (N.J. 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).

meeting this burden, the government must make a showing negating the possibility that other less-restrictive conditions of release would satisfy the state's interests in protecting public safety and ensuring the arrestee returns to court. ECF No. 95 at 33 (requiring any monetary condition of release that results in detention be accompanied by a finding that "there are no less restrictive alternatives to ensure the arrestee's appearance or the public's safety"); *Salerno*, 481 U.S. at 741 (Bail Reform Act passes heightened scrutiny because it requires the government to "demonstrate[] by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'"); *see also Valdez-Jimenez*, 460 P.3d at 987 ("[G]iven the important nature of the liberty interest at stake, the State has the burden of proving by clear and convincing evidence that no less restrictive alternative will satisfy its interests in ensuring the defendant's presence and the community's safety."); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 535 (Cal. Ct. App. 1st Dist. 2018) ("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 restrict alternative will satisfy that purpose."); *cf. Neal*, 679 F.3d at 742 (vacating pretrial commitment order where the court did not "seriously consider" the alternative option of an outpatient competency evaluation).

Requiring Defendants to place a burden of clear and convincing evidence on the government to justify detention will not impose any additional burdens on Defendants, as it creates no obligations for judges or jailors.

A hearing on the record that includes a statement of the evidence relied on and the reasons for the decision. The hearings at which conditions of release are determined must be on the record. In an analogous case addressing pretrial detention in the civil immigration system, the Ninth Circuit applied *Mathews* to find that due process requires a recording or transcript at bond hearings for immigrant detainees facing "prolonged detention." *Singh v. Holder*, 638 F.3d 1196, 1200, 1208 (9th Cir.

2011); *see also Nguti v. Sessions*, 259 F. Supp. 3d 6, 14 (W.D.N.Y. 2017) (following *Singh*); *cf. M.L.B. v. S.L.J.*, 519 U.S. 102, 121 (1996) ("Only a transcript can reveal . . . the sufficiency, or insufficiency, of the evidence to support that stern judgment [terminating parental rights]."). Class members doubtlessly face "prolonged detention" if imprisoned for the duration of their criminal case. There is no additional burden on Defendants, as they are currently recording every initial appearance by court reporter stenography. SUMF ¶ 166. All *Mathews* factors favor full recording of all bail hearings.

Judges must place an adequate explanation for their reasoning on the record, including specific findings regarding why detention is necessary if the conditions will result in detention and the evidence relied on. *See Morrissey*, 408 U.S. at 489 (requiring parole revocation decisions to include "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole."); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (imposing the same requirement for decisions to revoke probation); *see also* ECF No. 95 at 34 (requiring any monetary conditions of release that will result in detention include "specific findings regarding the arrestee's ability to pay" and that "by clear and convincing evidence . . . no alternative conditions would reasonably assure the arrestee's future court appearance or the safety of others."); *Valdez-Jimenez*, 460 P.3d at 987 ("[T]he district court must make findings of fact and state its reasons for the bail decision on the record."); *cf. Kent v. United States*, 383 U.S. 541, 561 (1966) (waiver of juvenile jurisdiction must be justified by "a statement of the reasons motivating the waiver, including, of course, a statement of the relevant facts" which "set[s] forth the basis for the order with sufficient specificity to permit meaningful review.").

As the Supreme Court held in the landmark procedural due process decision *Goldberg v. Kelly*, a decision maker should "state the reasons for his determination and indicate the evidence he relied on" to demonstrate compliance with the "elementary requirement" that the decision "rest[ed] solely on the legal rules and evidence adduced at the hearing." 397 U.S. 254, 271 (1970). This reasoning applies in full force here, where Defendants have admitted to making improper and unfounded decisions,

including setting high money bail amounts in the hopes that the arrestee will not be able to pay, without making any findings about the necessity of detention or the individual's actual ability to pay. SUMF ¶¶ 27-28.

Prompt Hearing. Finally, procedural due process requires consideration not just of *whether* to have a hearing and *what* must occur at that hearing, but also *when*: because a "more expeditious hearing would significantly reduce the harm suffered," too lengthy of a delay gives rise to a due process violation. *Coleman*, 40 F.3d at 261. Consistent with this principle, the Fifth Circuit held that procedural due process requires hearings on conditions of release no later than 48 hours after arrest. *See O'Donnell*, 892 F.3d at 160. This Court agreed when ruling on the preliminary injunction, ordering Defendant Glass to desist from enforcing any order that did not reflect a hearing on the record within 48 hours of arrest. ECF No. 95 at 34.[15] The same prompt hearing should be afforded here.

With respect to the third *Mathews* factor, the additional burden on Defendants to provide timely hearings is minimal, if it exists at all. Before this lawsuit was filed and to this day, initial appearances for most arrestees have taken place within 48 hours.[16] Any additional burden imposed by providing the procedures required to conduct these hearings in line with constitutional requirements is *de minimis* and cannot outweigh the serious harms posed to the class members who are at risk of prolonged unconstitutional pretrial incarceration. Moreover, prompt and fulsome hearings likely will result in a significant number of individuals being released, meaning that Defendants will save the money that otherwise would be spent on unnecessarily incarcerating these individuals and will not have to hold a subsequent Rule 33.05 hearing seven days later.

[15] The Court provided seven days for Defendants to provide hearings for class members who were detained at the time the order issued, which was later extended on Defendants' motion. ECF No. 112.

[16] However, as discussed below, some arrestees are not afforded hearings until 72 hours or more after arrest. *See infra*, p. 38; SUMF ¶ 162.

This Court should grant summary judgment on Plaintiffs' claim of a violation of their rights to procedural due process.

D. The Evidence Shows That the Sheriff's Office Had a Custom of Instructing Arrestees Not to Speak At Their Initial Appearances

Finally, this Court should grant summary judgment on Plaintiffs' claims that, at the time this lawsuit was filed, Defendant Sheriff Betts, through his deputies, had an unofficial custom of instructing Plaintiffs not to speak at their initial appearances. These instructions were unconstitutional, as they contributed to the denial of named Plaintiffs' and class members' ability to be heard on their conditions of release at their initial appearances. *See* ECF No. 242 at 11-12 (rejecting "the suggestion that § 1983 offers Plaintiffs no relief from the City's own role in denying them an opportunity to be heard, separate from the Judges."). This claim for relief against Sheriff Vernon Betts in his official capacity[17] and the City of St. Louis is governed by *Monell v. Dep't of Soc. Servs.*, which allows liability to attach to a municipality if the violation resulted from, among other things, an unofficial custom. 436 U.S. 658, 691 (1978). As this Court previously stated,

> [a] plaintiff may establish liability through an unofficial custom by demonstrating (1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) deliberate indifference or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and (3) the plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was a moving force behind the constitutional violation.

ECF No. 95 at 22 (citing *Corwin v. City of Indep., Mo.*, 829 F.3d 695, 700 (8th Cir. 2016)).

The evidence demonstrates that Plaintiffs have established liability. First, a series of declarations from arrestees, including from named Plaintiffs and other witnesses—all of whom are unrelated to each other and were arrested on different dates—shows that there was a continuing and persistent practice of silencing arrestees prior to their initial appearances. The experiences of Plaintiffs Robards

[17] "A § 1983 action against an individual in her or his official capacity . . . is equivalent to a claim against the entity itself[.]'" *Doe v. City of Creve Coeur,* 666 F. Supp. 2d 988, 1000 (E.D. Mo. 2009).

and Thurman were confirmed at depositions conducted by Defendants. When asked to walk through his "arrest and Prisoner Processing experience," Mr. Robards recounted that "the sheriffs, they'd tell us not to—you know, just say yes, ma'am, they're just going to read you your charges and tell you your bond and you just step out, so that's what we did." Ex. 233, Robards Dep. at 9:24-10:2. Later, on questioning by Plaintiffs' counsel, Mr. Robards reiterated that "they instruct us not to say anything, they really just read us our charges, told us our bond and that was it. We were instructed by the sheriff to say just yes or no, sir, and get out of it and onto the next person." *Id.* at 21:9-13.

Plaintiff Thurman, who was brought for his initial appearance on a different date and with a different judge than Mr. Robards, had a similar experience. When asked by counsel for the City Defendants what happened with the Sheriff's deputies at his initial appearance, Mr. Thurman stated: "They told us that we was going to see the TV judge and that they was going to read us our charges and tell us our bond and we wasn't—we was not supposed to say anything back to the judge." Ex. 320, Thurman Dep. at 15:14-17. When asked by the Judge Defendants' counsel about not making any request to the judge about his bond at the initial appearance, Mr. Thurman responded: "I couldn't. The sheriffs told me that we couldn't talk to the judge." *Id.* at 20:20-21. Defendants have brought forth no evidence that disproves the statements of the named Plaintiffs or other arrestee declarants. Plaintiffs have accordingly shown "a continuing widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees." *Thelma D. ex rel. Delores A. v. Bd. Of Educ. Of City of St. Louis*, 934 F.2d 929, 932-33 (8th Cir. 1991).

With regard to the second prong of the liability standard, the evidence shows that leadership in the Sheriff's office knew of the practices at initial appearances and that no action was taken to correct it. Specifically, two Sheriff's deputies testified that department supervisors, including sergeants and lieutenants, were regularly present at initial appearances. SUMF ¶ 61. Senior staff, including Sheriff Betts himself, would also attend initial appearances to walk through and assess what was happening.

SUMF ¶ 61. Moreover, "as the number of incidents grow, and a pattern begins to emerge, a finding of tacit authorization or reckless disregard becomes more plausible." *Howard v. Adkison*, 887 F.2d 134, 138 (8th Cir. 1989). Given the frequency of the practice and the presence of supervisors and command staff at initial appearances, the undisputed evidence shows that the Sheriff had notice of the unofficial custom. Deliberate indifference or tacit authorization is further demonstrated by the complete lack of action taken by the City Defendants. Both deputies who testified confirmed that they were never given an instruction not to tell arrestees not to speak to the judge or ask about their Bonds. SUMF ¶ 59. This was so even after Plaintiffs entered into a stipulated agreement with the City Defendants that all deputies would be so instructed. *See* ECF No. 92, SUMF ¶ 59.

Finally, the evidence shows injury. Both Mr. Robards and Mr. Thurman testified that they did not speak to the judge about their unaffordable money bail *because* the Sheriff's deputy had instructed them not to. *See also* SUMF ¶¶ 107, 113. This is clear from other arrestees' declarations as well. SUMF ¶ 52. The Sheriff can be liable for ordering people not to speak even if the judges also routinely denied people the opportunity to contest bail conditions, because the acts of other intervening actors or events that also contribute to an injury do not immunize government agents who commit constitutional violations.[18] As this Court held, the Sheriff may be held liable for his role in the constitutional violation. ECF No. 242 at 11-12. The actions of the Sheriff's deputies were sufficiently causative to form a basis for equitable relief to prevent further constitutional injuries.

For these reasons, the Court should grant summary judgment against Defendant Sheriff Betts and the City of St. Louis for instructing class members not to speak at their initial appearances.

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[18] *Monell*'s "moving force" requirement has been equated to proximate cause. *See Harris v. Pagedale*, 821 F.2d 499, 507-08 (8th Cir. 1987) (finding that municipality's policy of ignoring reports of misconduct "proximately caused" subsequent assault, and therefore constituted the "moving force" behind the injury under *Monell*). And "[t]he possibility of an intervening cause does not generally defeat an inference of proximate cause as a matter of law." *Audio Odyssey, Ltd. v. Brenton First Nat'l Bank*, 245 F.3d 721, 739 (8th Cir. 2001).

VI. Suitability of Injunctive and Declaratory Relief

Plaintiffs seek only a declaratory judgment against the Defendant Judges and both injunctive and declaratory relief against the City Defendants. "[T]he traditional equitable prerequisites to the issuance of an injunction" need not "be satisfied before the issuance of a declaratory judgment." *Steffel v. Thompson*, 415 U.S. 452, 471 (1974). This is so because "a declaratory judgment will have a less intrusive effect on the administration of state criminal laws," *id.* at 469, and because to find otherwise "would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate." *Id.* at 472.

To warrant a declaratory judgment, Plaintiffs need show only that there is "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). This controversy requirement is the same as the Constitution's Article III standing requirement. *Cty. of Mille Lacs v. Benjamin*, 361 F.3d 460, 463 (8th Cir. 2004). As this Court has now twice held, Plaintiffs have standing to bring their claims. ECF No. 95 at 9; ECF No. 242 at 11. Accordingly, as Plaintiffs have demonstrated success on the merits of their claims, Plaintiffs are entitled to relief in the form of a declaratory judgment against each of the Defendants.

With regard to Plaintiffs' claims for injunctive relief against the City Defendants, "[a] court must consider the following factors in determining whether to issue a permanent injunction: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties; (3) whether the movant proves actual success on the merits; and (4) the public interest." *Forest Park II v. Hadley*, 336 F.3d 724, 731 (8th Cir. 2003). Plaintiffs have proved success on the merits of their claims. The remaining factors also favor an injunction.

A. Plaintiffs Have Established Irreparable Harm

As this Court previously held "[t]he threat of irreparable harm to the movants is obvious, not only in the form of prolonged incarceration itself, but also in the form of its severe collateral consequences such as physical illness and injury, mental trauma, loss of employment, loss of benefits, and family crisis." ECF No. 95 at 30. Given the obvious nature of the harm, Plaintiffs will not revisit the issue at length, but instead incorporate the briefing on irreparable harm in the memorandum of law in support of their motion for a preliminary injunction. ECF No. 44 at 33-37.

B. Class Members' Injuries Outweigh Any Potential Harm to Defendants Caused by a Permanent Injunction

Any harms that Defendants may face upon issuance of an injunction are minimal and cannot overcome the great irreparable harm faced by class members who are unjustly detained. The provision of constitutionally required process and substantive determinations regarding the necessity of detention causes no harm to Defendants. The costliest elements of relief sought by Plaintiffs—the provision of counsel at initial appearances and hearings on the record—have been undertaken by Defendants to some extent since the filing of this lawsuit. Moreover, "unnecessary pretrial detention burdens States, localities, and taxpayers." *Jones v. City of Clanton*, No. 2:15cv34-MHT, 2015 U.S. Dist. LEXIS 121879, at *9 (M.D. Ala. Sept. 14, 2015). By reducing unnecessary pretrial detention, Defendants not only would be relieved of the burden of detaining class members—which research establishes does not better ensure public safety or future court appearances, *see supra*, p. 18 n. 7—they also likely would save enough financial resources to offset any costs incurred. As this Court previously found, ECF No. 95 at 31, the balance of harms weighs substantially in favor of enjoining the City Defendants from enforcing unconstitutional bail orders and instructing detainees not to speak at their initial appearances.[19]

[19] Defendants previously argued that they would suffer harm from an injunction in the form of federal court interference in the state judiciary and a disruption in their ability to enforce state criminal laws.

C. An Injunction is in the Public Interest

As this Court previously found, an injunction serves the public interest, as "it is always in the public interest to prevent the violation of a party's constitutional rights." ECF No. 95 at 31 (citing *Melendres v. Arpaio*, 694 F.3d 990, 1002 (9th Cir. 2012)). "That is especially true here, where collateral consequences of incarceration affect not only arrestees but also, by ripple effect, the stability of their entire families and thus the community." *Id.* No countervailing interests outweigh the public benefits of the requested relief.

The Eighth Circuit instructed that when determining the propriety of an injunction, this Court should address the impact of the new Missouri Supreme Court Rules to determine whether their implementation—and Defendants' ensuing course of conduct—have successfully cured the "unacceptable" status quo, to the extent that a federal court order would no longer serve the public interest. *Dixon*, 950 F.3d at 1056.

The uncontroverted evidence is an overwhelming testament to the public interest of equitable relief. The evidence produced by Defendants and the testimony of Defendants' officials shows that Defendants routinely violate both the spirit and letter of the new Rules,[20] just as they did the old Rules,

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ECF No. 49 at 26-27. But, as this Court held, Plaintiffs' claims do not affect the underlying state criminal charges and do not interfere in any processes that apply to the merits of those charges. ECF No. 95 at 31. Federal-state comity is discussed below as an element of the public interest factor, in accordance with the Eight Circuit's guidance. *Dixon*, 950 F.3d at 1056.

[20]Missouri's Chief Justice explained that the amendments were driven by the reality that "[t]oo many who are arrested cannot afford bail even for low-level offenses and remain in jail awaiting a hearing[.]" Chief Justice Zel M. Fischer, State of the Judiciary (Jan. 30, 2019), *available at* https://www.courts.mo.gov/page.jsp?id=136253. The amended Rules were designed to ameliorate the problem by "ensur[ing] the determinations—and conditions—of pretrial release are made with the best information available." *Id.* The amended Rules create a clear rebuttable presumption that arrestees should be released pending trial: "A defendant charged with a bailable offense shall be entitled to be released from custody pending trial or other stage of the criminal proceedings." Mo. Sup. Ct. R. 33.01(a). The Rules require that an arrestee be released on her own recognizance "*unless* the court finds that such release will not secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person . . . ." Mo. Sup. Ct. R. 33.01(c).

in ways that continue to violate the federal Constitution. *See* ECF No. 95 at 27 ("Defendants' recognition of precedent and citation of written rules do not evidence the constitutional adequacy of the process afforded to Plaintiffs and other class members. The gravamen of Plaintiffs' complaint is that Defendants do not actually apply those principles or rules in practice.").

First, and most relevant here, Defendant Judges continue, just as at the time this action was filed, to set monetary conditions of release in a manner that violates both the Missouri Supreme Court Rules and the Constitution. Arrestees who remain detained after the duty judge sets conditions of release on the warrant ordinarily are provided an initial appearance—via video conference only—on the next Monday, Wednesday, or Friday after arrest. SUMF ¶ 161. Individuals arrested on a Friday may accordingly wait more than 72 hours before they are able to have a judge review the conditions of release on their warrant. SUMF ¶ 162. Because the rules exclude both weekends and holidays, individuals may be held even longer. Mo Sup. Ct. R. 22.07.

Arrestees are still given no prior notice about what will happen at the hearing, the importance of the ability-to-pay determination, the factors the judge will consider, or that they have a right to counsel. SUMF ¶¶150-58. Currently, the only notice that Defendants provide is a boilerplate recitation of a statement on the Bond Commissioner's interview form, notifying the arrestee that the information

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Even when such a finding is made, the court is still required to impose the least restrictive condition or combination of conditions for release. *Id.* The Court "shall first consider non-monetary conditions" and only upon a "determin[ation]" that non-monetary conditions will not ensure the appearance of the arrestee or the safety of the community may monetary conditions be considered. *Id.* Even then, before setting any monetary condition, the court must first consider the arrestee's ability to pay; the Rules are clear that a monetary condition fixed at more than is necessary to secure the appearance of the defendant at trial or the safety of the community "is impermissible." *Id.* Any determination of bail must be based on the individual characteristics of the arrestee, and there are a list of factors which the court "shall take into account" "[b]ased on available information," including family ties, the weight of the evidence against the defendant, and ability to pay, among others. Mo. Sup. Ct. R. 33.01(e). A judge may also order an arrestee detained pretrial, but only if the judge determines upon clear and convincing evidence that it is necessary for a person to remain detained in order to ensure the safety of the community. *Id.*, 33.01(d). Risk of flight, on its own, is not a permissible basis for pretrial detention. *See id.*

from the interview will be provided to the judge—if the arrestee is interviewed. SUMF ¶ 155. These facts alone—delays beyond 48 hours in providing bail hearings and a failure to provide notice—show that Defendants continue to fall short of even the most basic due process requirements and that federal court intervention is warranted. Both timely hearings and notice of critical issues are minimum requirements of due process. *See, e.g.*, *Morrissey*, 408 U.S. at 488-89; *Turner*, 564 U.S. at 131.

What happens at the initial appearances paints an even more complete picture of Defendants' failure to cure their previous "unacceptable" bail practices. Although Defendants have provided contract counsel to represent arrestees, the structural design of the process renders counsel unable to present argument or evidence to the judge about crucial factors relevant to conditions of release, including ability to pay, community ties, alternatives to incarceration, and other mandatory statutory bail factors. Specifically, contract attorneys cannot do any pre-hearing investigation or preparation, or even meaningfully speak to their clients. They receive as little as one-hour, and never more than four-hours' notice of the identities of the arrestees they are to represent at the hearings, who often number in the double digits. SUMF ¶ 187. The attorneys are required to seek out information about their clients' cases through Case.net, which contains only the information in the court file—typically the Bond Officer's interview form (if an interview was conducted) and the charging documents. SUMF ¶ 182. Because they do not have enough time, contract attorneys do not meet with their clients before the hearings, SUMF ¶ 190, nor do they make any efforts to call their clients' contacts. SUMF ¶ 201. Because of the lack of notice given to arrestees and the inability of contract attorneys to do even brief preparation for the hearings, contract attorneys are not able to do many of the things that a functional counsel could do at a hearing: discuss the nature of the offense using information independent from the prosecution's proffer, present evidence from family members who could sponsor recognizance, present evidence from employers or social service providers who could speak

on someone's behalf, or arrange for treatment programs or other resources.[21] Notably, in 10 different hearings among the transcripts produced by Defendants, contract attorneys consented to the imposition of cash bonds in excess of what the arrestee stated they could pay. SUMF ¶ 301.

Contract attorneys instead speak to their clients for the first time on the record through the video link in open court (or now, through the web application for online hearings), after the hearing has already commenced. SUMF ¶ 196.[22] Defendants volunteer that months after the new Rules went into effect they provided a phone in the courtroom for attorneys to speak semi-privately[23] with their clients, said they would clear the courtroom upon request, and/or allow attorneys to use a private "breakout room" through the web application; but the evidence shows that use of these resources is vanishingly rare. SUMF ¶¶ 197-99. Instead, the vast majority of communications between attorney and client—including questions related to the bail factors and discussion of sensitive personal information and information about the criminal charge—occurs on the record during the hearing, in front of the judge and prosecutor. SUMF ¶¶ 207-08. As a result, contract attorneys often fail to elicit, and judges fail to consider, crucial evidence that could support arrestees' release or reduce the severity of the imposed conditions. In 32% of the hearing transcripts produced by Defendants, contract attorneys failed to propose any conditions of release that were less restrictive than those imposed by the judge. SUMF ¶ 295. Sometimes contract attorneys will accordingly ask to waive hearings or maintain the conditions of release set by the duty judge because they do not have enough information

[21] Since the beginning of the COVID-19 pandemic, the Rule 33.01 and Rule 33.05 hearings have been moved online. As this Court is aware from the briefing surrounding Plaintiff's Motion to Compel, the link to the hearings is private and inaccessible to the public absent special permission, precluding family members or others from speaking or participating. SUMF ¶ 167.

[22] It was "immediately apparent" to the court that contract attorneys were not speaking to their clients before their hearings, and the Judge Defendants' Court Administrator expressed concern at the time. SUMF ¶ 200. Defendants nevertheless took no actions to fix the problem. SUMF ¶ 202.

[23] The conversations are never truly private, as the arrestee is located in a room with a Sheriff's deputy and there are other Sheriff's deputies and arrestees immediately outside the open door. SUMF ¶¶ 55-56.

to advocate for their client. SUMF ¶ 217. For example, in one case, the attorney's advocacy was limited to the following exchange:

> [ATTORNEY]: Your bond currently you have to come up with $750. It's my advice to you today we don't disturb that bond at all. If you cannot come up with that, it's going to be set for a hearing in another week. We waive your right to this hearing today. THE DEFENDANT: Yes, ma'am.

SUMF ¶ 218. In others, contract attorneys have advocated for bail amounts higher than their clients have stated that they could pay. SUMF ¶¶ 213-16. Notably, contract attorneys are completely prevented from meaningfully contesting the "weight of the evidence" bail factor, as their only communication is public, and arrestees are instructed on the record not to speak about the facts of their cases. SUMF ¶ 205.

The result is that arrestees who are ordered detained on unaffordable money bail or no-bond orders are often released at their subsequent Rule 33.05 hearing, by which time a public defender who can make an adequate presentation has usually entered the case. SUMF ¶¶ 266, 315-20. By that time the arrestee has already spent seven business days or more unnecessarily incarcerated, suffering incarceration's attendant harms. *Cf. Coleman*, 40 F.3d at 261 (seven-day delay in hearing on impoundment of automobile "clearly excessive").

Judges acknowledge on the record the inadequacy of contract attorneys' presentation of evidence at the initial appearance. For example, in one case, the contract attorney spoke to his client for the first time on the record only after the prosecutor had presented his case. SUMF ¶ 262. The attorney's presentation was limited to what was in the court file and a handful of questions asked of the arrestee on the record during the hearing. SUMF ¶ 262. In ordering pretrial detention, the judge noted that he lacked information on the critical question of whether the arrestee was likely to return to court:

> . . . . what I'm going to do today is deny bond right now. I think that, if you have a public defender and they can maybe give some more information and present a fuller picture of where you are right now and how you will be able to show up to court and these kinds of issues, I think that might satisfy the next Judge on a full detention hearing.

SUMF ¶ 262. As often happens, at his subsequent Rule 33.05 hearing the arrestee was released on his own recognizance after spending seven unnecessary days in jail. SUMF ¶ 262. This case demonstrates two clear violations. First, by basing a no-bond decision on the risk of missing court and not the danger to the community, the judge violated Rule 33.01; and second, the judge failed to consider adequately the arrestee's ability to return to court because of Defendants' failure to provide functioning counsel, in violation of the Constitution. *See supra*, pp. 23-26. Notably, the judge did not consider the initial appearance a "full detention hearing." Judges and contract attorneys have in multiple cases admitted on the record that they do not consider the initial appearance to be a full detention hearing, in comparison to the subsequent Rule 33.05 hearing. *See, e.g.,* SUMF ¶ 261 ("The idea of a seven day hearing is that an attorney is going to come to see you. That's the person that you can talk to about the facts of the case and anything that you want the Court to know and then the hearing that you have . . . you will have your own attorney who can argue on your behalf to the Court and so it's a longer proceeding."); SUMF ¶ 262; SUMF ¶ 263 (describing subsequent Rule 33.05 hearing as a "formal hearing" after setting $20,000, 10% bond for man who states he is homeless and unemployed). The public interest favors an injunction to avoid these problems that harm both arrestees and the communities of which they are a part.

In addition to the deficiencies in the contract attorney program, there are multiple substantive and procedural defects in the bail determinations themselves. First, judges continue to set monetary conditions of release without any inquiry regarding ability to pay (16 cases out of the 175 money bail transcripts produced by Defendants), SUMF ¶ 300; above what arrestees state they can pay (90 cases), SUMF ¶ 298; with facially insufficient explanation of their reasons (40 cases), SUMF ¶ 303; or with no explanation at all (79 cases), SUMF ¶ 302. Judges often give inadequate explanations for why alternative conditions of release are not appropriate. In 100 of the 213 hearings where the arrestee or her counsel proposed a less restrictive alternative, the judge denied those less restrictive conditions

without a finding or explanation why those lesser conditions were not acceptable. SUMF ¶ 296; *see also*, *e.g.*, SUMF ¶ 326 (judge set $30,000 bail without explanation for why that amount was appropriate for arrestee who could only afford to post $500). Judges have demonstrated indifference to whether a bond is affordable or not; for instance, in one case, the defense attorney argued that the amount requested by the prosecutor was inappropriate because the prosecutor did not know what the arrestee could afford. Nevertheless, the judge set a $25,000, 10% money bail. When the arrestee asked what would happen if he could not pay, the judge simply said, "If you can't pay it, then you're not going anywhere." SUMF ¶ 355.

Judges have also justified the setting of unaffordable money bail because of arrestees' purported danger to the community—a practice that is neither narrowly tailored nor rational because Defendants have admitted that monetary conditions of release are not forfeited for new arrests or criminal activity.[24] SUMF ¶ 287. In one case, the judge made the following statement: "What I've done is I've kept the bond the exact same. Despite your inability to pay, I found you're a danger to the community, so you're going to have another hearing in this division with a different judge to review your bond again. . . ." SUMF ¶ 288. The case was eventually dismissed after the arrestee spent 43 days in jail. *Id.*; *see also, e,g.*, SUMF ¶ 348 ("I ain't concerned that you won't be coming back and forth to court. I know you will, because you have shown you can do that. But I'm concerned for the public safety.").

Judges have also set bail that an arrestee cannot pay on her own, with the explanation that The Bail Project, an independent non-profit organization, will likely pay it. SUMF ¶ 270. But The Bail project is not able to pay for every person who asks for assistance, and even when they are able to assist, may take a week or more to post bail. SUMF ¶¶ 275, 277-78. For example, in one case, The

[24] When questioned on the subject of how money bail protects public safety when bonds are only forfeited for missing court and not a new arrest, Bond Commissioner Kearbey suggested that the theory is apparently premised on arrestees' ignorance of the process and blind hope, stating that "it's all tied together, they don't want to miss court, they don't want to get in trouble, you're hoping that's what's going to occur." Ex. 1, Kearbey Dep. at 141:14-16.

Bail Project was unable to post the detainee's bail until 77 days had passed from the individual's initial appearance. SUMF ¶ 279. The following transcript excerpt is demonstrative of judges' improper reliance on The Bail Project to account for their imposition of unaffordable money bail:

> THE COURT: . . . You know, if somebody can pony up three grand for you and get you out, great. There's also organizations like there's an organization called The Bail Project which can help people, you know, with the money to put up. I don't know who talks to you. . . . But they tell me that the folks from The Bail Project know what's going on and they'll probably come talk to you. . . . I'm not going to put any other special conditions on there because again I mean you've been through this before. I don't think you're a danger to anybody. You know, I don't need you on house arrest or locked up. You just need a little skin in the game, that's all.

SUMF ¶ 272; *see also, e.g.*, SUMF ¶ 273 (setting $3,000 cash only bail for arrestee who says he is unable to pay any amount, "with the hope that The Bail Project will undertake [the] payment of that bond").

Second, Defendant Judges maintain that the clear and convincing evidence standard does not apply to unaffordable monetary conditions of release, in direct refutation of the constitutional requirements set out in this Court's vacated preliminary injunction order. SUMF ¶¶ 250-51; *see* ECF No. 95 (enjoining enforcement of any money bail order without "specific findings . . . by clear and convincing evidence, that no alternative conditions would reasonably assure the arrestee's future court appearance or the safety of others). Consistent with this, the form that Defendant Judges use to record conditions of release includes a check box for clear and convincing evidence when no bond is imposed but not when a cash bond is imposed. SUMF ¶¶ 242-43.

Because of these practices, Plaintiffs have calculated that between July 1, 2019 and December 18, 2020, class members spent a combined 9,754 days—over 26 years—detained in St. Louis' jails because of their inability to pay a monetary condition of release, at significant cost to themselves, their families, taxpayers, and the community at large. SUMF ¶ 310. Eighty-five of those individuals eventually won their case, but only after spending a combined 1,562 days in jail because of poverty. *Id.*

There are a number of illustrative examples of how money bail continues to be misused in St. Louis. In one instance, an arrestee told the judge that she could afford to post only a $500 bond and

that she had custody of and cared for her five-year-old grandson. The judge set the bond at $150,000. After the arrestee spent an unnecessary week in jail, she was released on her own recognizance at the Rule 33.05 hearing. SUMF ¶ 328.

In another instance, the amount of bail was derived from the amount that might be applied in restitution after conviction: "I like the idea of having the $4000 cash available because that's the amount that the victim is claiming as lost, so I'll set the bond at $40,000, secured by 10 percent cash only." The arrestee was unable to pay and unnecessarily remained in jail until a reduction was applied at the Rule 33.05 hearing over a week later. SUMF ¶ 349. In another case where the arrestee was accused of nonpayment of child support, the judge set bail at the amount of child support payments the arrestee allegedly owed, with "an order that the payment go to child support, so [the arrestee] won't be able to get that money back." SUMF ¶ 361. The judge set this bond even though the detainee was actually current on his child support payments. *Id.*

Judges have interrupted and threatened arrestees who attempt to advocate for themselves when their counsel did not adequately present their case. In one instance, the judge told the arrestee: "Go ahead and say something and I'll jack your bond up even more, okay? It's my suggestion not to speak." SUMF ¶ 364. In another, after the arrestee spoke up because he believed the prosecutor had misrepresented the prior record, the judge used the imposition of a detention order as punishment for speaking:

> THE COURT: I am now going to reconsider that bond and, in fact, I'm going to rescind my previous order, and I am going to decide that the Court, and the State, and you, [arrestee], have convinced me beyond clear and convincing evidence that no combination of non-monetary conditions and monetary conditions will secure the safety of the community or other persons and, therefore, I'm going to order that you be held with no bond. You are entitled—
>
> THE DEFENDANT: Your Honor, Your Honor—
>
> THE COURT: Let me finish. Let me finish. Pursuant to Missouri Supreme Court Rule 33.05 you have a right to a second hearing. . . . That will be the Court's order. That will complete the record.

SUMF ¶ 359. In another case, the arrestee told the judge that he was able to post a $1,000 bond. The judge set a higher amount. When the arrestee attempted to ask about it, there was the following exchange:

> THE DEFENDANT: $1000? THE COURT: $1000? Are you—you must be— THE DEFENDANT: No, I'm asking you is that what you said? THE COURT: Are you all smoking crack over there? No. Right now it's $25,000 cash. I'll allow you to get a bondsman. I'll do $25,000 secured. That way if you get a bondsman, you can make payments to him.

SUMF ¶ 365. In another, the judge threatened to issue a detention order because the arrestee shook his head: "THE COURT: . . . "[I]f you keep shaking your head, it's only going to get worse for you, [arrestee], so I don't appreciate the reaction. If you read the impact statement that I read, it might be a no bond. So, if you want to continue to have a reaction to this proceeding, go ahead. Do you understand me?" SUMF ¶ 366.

Defendants' cash bail practices fail constitutional scrutiny even when prolonged detention does not result. The case of Kyri Morgan is illustrative. Mr. Morgan, a 19-year-old, was accused of participating in the looting of a pawn shop during recent racial justice protests. SUMF ¶ 360. His bail had been set at $10,000, 10 percent, by the duty judge, which he had not paid. *Id.* By the initial appearance, the prosecutor and Mr. Morgan's defense attorney had reached an agreement on a recognizance release, because, in the words of the prosecutor, "[g]iven the facts of the case, the fact that he doesn't have any history of violence, isn't considered a flight risk, the State felt that [recognizance release] was appropriate." *Id.* Mr. Morgan's mother also appeared in court, and stated that she would be home with him and would monitor him if released. *Id.* The court disagreed, and—evidently presuming Mr. Morgan's guilt—stated that although "he just went in there trying to steal some stuff," "releasing him this quickly is not going to do anything. It's not going to serve any purpose." *Id.* The judge further explained on the record that pretrial detention would serve to punish Mr. Morgan for his alleged wrongdoing, addressing Mr. Morgan's mother directly:

> Well, you know, [Mr. Morgan's mother], my problem with it is if he's released so quickly, I don't think that teaches him any lesson whatsoever, and I am just shocked at the prosecutor's recommendation of a personal recognizance. You know, I think he needs to sit a while to meditate on his transgressions.

Id. The court continued:

> Well, I'm going to leave the bond as it is. . . . Because I think he needs to sit for a few weeks so it will sink in that this is serious. I mean, he's just building a criminal history for himself. But [Morgan's mother], if you want to scrape up the thousand dollars, you know, that's your prerogative. But I'm just suggesting that maybe you let him sit a while. . . . I think getting him out so quickly would be a mistake. It just doesn't teach him anything other than my parents are going to get me out of stuff.

Id. Turning to Mr. Morgan, the judge remarked,

> I have advised your mother—but I don't know whether she'll listen to me or not—not to get you out. I'm not reducing your bond. You need to sit and think about your conduct. I don't know what your problem is, but obviously something is not going right in your head with the way you're thinking. You were given the opportunity to do this diversion program, and then while you're on that, you get involved in looting the pawn shop . . . . [Y]ou don't need to go anywhere. I'm not changing it to a personal recognizance, and I hope your mother does not scrape up the thousand dollars to let you out because you need to sit and meditate on your actions.

Id. Morgan's mother was able to "scrape up" the thousand dollars to pay bail, and Morgan was released from jail after the hearing upon payment.

Mr. Morgan's recent case from November 2020 demonstrates judges' continued willingness to flout both the Rules and the Constitution. The judge imposed cash bail without findings on the record about either Mr. Morgan or his mother's ability to pay and indicated that the court presumed Mr. Morgan to be guilty. Indeed, the bail was imposed with the express purpose and hope that he would be detained as a form of impermissible pretrial punishment—to teach him a lesson. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) ("Due process requires that a pretrial detainee not be punished."). There were no findings made by any standard about the necessity of the bail imposed, nor the intended detention. The $10,000, 10 percent bail ultimately served no legitimate governmental purpose at all; it only imposed an unnecessary financial burden on the young man's mother. *See also* SUMF ¶ 363 (imposing a detention order with the purpose of having the arrestee "try[] to get some

things figured out in [his] own head" between the initial appearance and the Rule 33.05 hearing, at which time the judge thought he would "maybe . . . get a different result and probably get a bond.").

Increasingly in recent months, Defendants have detained arrestees on no-bond orders in lieu of the high monetary bail amounts that previously served the same purpose by imposing de facto detention. SUMF ¶ 291-92. Plaintiffs have sought modification of the class definition to account for this shift and to ensure that Defendants are not able to evade constitutional scrutiny by effecting a cosmetic change in their bail practices. *See* ECF No. 258. Like de facto detention, transparent no-bond detention orders are also unconstitutional when they fail to satisfy due process. In particular, Defendants' failure to provide effective counsel applies equally to initial appearances that result in no-bond orders, as the discussion above demonstrates. *See supra*, pp. 39-42. Moreover, while Defendants concede that Rule 33.01 requires findings by clear and convincing evidence that detention is necessary to protect public safety, 22nd Judicial Circuit judges fail to apply that standard. Of the 118 transcripts that Defendant Judges produced in which a no-bond order was imposed at an initial appearance held after July 1, 2020, the judge failed to make a finding by clear and convincing evidence in 48, or 39% of such cases. SUMF ¶ 294. In many others, judges ordered detention without actual consideration of the required factors given the paucity of the evidence before them and their failure to address or consider less restrictive means. SUMF ¶¶ 305-07. In part, this is because Defendants have provided all judges with a "bench book" containing a boilerplate script of the applicable standard to recite when imposing no-bond orders. SUMF ¶ 244. Judges have regularly used this barebones boilerplate language alone to justify orders of pretrial detention, but the words "clear and convincing evidence" excuses them from actually hearing evidence and linking it to specific findings and conclusions setting forth why detention is necessary, as the Constitution requires. *See, e.g.*, SUMF ¶ 245-246.[25]

[25] Additionally, like the example above, judges issue no-bond orders based on an arrestee's apparent risk of flight, in violation of Rule 33.01's clear limitation of such orders to individuals presenting a risk

Finally, while Defendants admit that the clear and convincing *standard* of proof applies to detention orders, they confusingly maintain that there is no *burden* of proof on the government to justify conditions of release that result in detention, de jure or de facto. SUMF ¶¶ 250, 254. By failing to apply a burden to the government, Defendants negate the clear and convincing standard, as standards of evidence only have meaning as applied to burdens of persuasion. Defendants accordingly state that the clear and convincing evidence standard can be met when the government presents *no evidence at all*. SUMF ¶ 255. This demonstrates a serious misunderstanding of the requirements of both their own Rules and the Constitution. *See, e.g.*, *Neal*, 679 F.3d at 741 (vacating commitment order because "the government offered no evidence to establish the presence of compelling governmental interests which would require" an inpatient competency evaluation for an arrestee who had been released pretrial). To the extent they apply any burden at all, judges shift the burden to arrestees to justify why the conditions of release set by the duty judge without any process at all should be modified. *See, e.g.*, SUMF ¶ 258 ("THE COURT: . . . It looks like your present bond condition is a no bond allowed. . . . It is going to be [the contract attorney]'s job today, Mr. Rice, to see if she can convince me to set a bond actually in this matter, and so we are going to let her make an argument on your behalf."); SUMF ¶ 257 (admitting that judges give "weight" to the conditions set by the duty judge). To ensure that these serious constitutional defects do not result in the continued unlawful detention of class members and its attendant harms, the public interest weighs heavily in favor of an injunction.

Finally, concern about "comity between the state and federal judiciaries," *Dixon*, 950 F.3d at 1056, does not undermine the substantial public interest supporting an injunction. The Eighth Circuit's order did not disturb this Court's discretion to issue an injunction after considering those interests. Indeed, in *In re SDDS Inc.*, 97 F.3d 1030 (8th Cir. 1996), the case that the Eighth Circuit cited to

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to public safety. *See, e.g.*, SUMF ¶ 290 ("THE COURT: . . . I'm going to have to make it no bond allowed because you're not going to appear in court based on the previous failures to appear.").

establish that comity should be considered as part of the public interest, the court ultimately held, after accounting for federalism concerns, that an injunction *should* issue. *Id.* at 1041.

For multiple reasons, the federalism interest here is weak. First, the Supreme Court has explained that principles of comity are diminished when a "suit . . . involve[s] any fundamental right or classification that attracts heightened judicial scrutiny." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 431 (2010). As this court already held, such is the case here. ECF No. 95 at 29. Second, Defendants continue to defy the Missouri Supreme Court's Rules. Although respect for our system of federalism asks that "needless friction with state policies" be avoided, *Dixon*, 950 F.3d at 1056 (citation omitted), any such "friction" is absent where Defendants are not following either the Constitution or state law. We now have an unmistakable record of continued violations of important federal rights. Defendants have been provided the opportunity to correct their own conduct and have failed to adequately accomplish that goal—they have continued to fail to follow even their own state rules. *Cf. ODonnell*, 260 F. Supp. 3d at 821 (rejecting that the public interest warranted a stay of injunction where state law "d[id] not permit the type of pretrial preventive detention in misdemeanor cases that [defendants] . . . routinely accomplishe[d]"). Finally, Plaintiffs' requested relief still leaves Defendant Judges with the full ability to ensure that the State's most compelling interests are served. *Cf. Purnell v. Mo. Dep't of Corr.*, 753 F.2d 703, 709 (8th Cir. 1985) ("Deference is due the states, as governmental units, not their courts, their executives, or their legislatures, save as these bodies represent the state itself." (citation omitted)). As this Court found, nothing in this litigation interferes with the merits of the State's criminal prosecutions. Thus, Defendants remain fully capable of vindicating the State's most compelling interests, even if an injunction issues.

VII. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion.

Dated: March 10, 2021

Respectfully submitted,

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