UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Aaron Booth, on behalf of himself and all others similarly situated, Plaintiff, v. Galveston County *et al.*, Defendants.	Civil Action No. 18-cv-0104

PLAINTIFF'S OMNIBUS RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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NATURE AND STAGE OF PROCEEDING

This lawsuit challenges Galveston County's two-tiered justice system, which imposes pretrial detention based solely on wealth. Plaintiff contends that (i) this system violates the federal Constitution, (ii) Defendants are responsible for these constitutional violations, and (iii) this Court has both the authority and the duty to redress these harms. Plaintiff filed this case seeking preliminary injunctive relief on behalf of himself and a putative class of people detained under Defendants' unconstitutional policies. A hearing on the preliminary injunction motion is scheduled for October 12.

This brief is an omnibus opposition to the Defendants' motions to dismiss, ECF Nos. 45, 46, 47, 48.[1] Those motions should be denied in all respects.

ISSUES TO BE RULED UPON

1. Should the Court dismiss this action under Rule 12(b)(1) for lack of subject matter jurisdiction? The Court should not dismiss the action, because Plaintiff has alleged subject matter jurisdiction, and none of the evidence submitted by Defendants contradicts those well-pleaded allegations. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

2. Should the Court dismiss this action under Rule 12(b)(6) for failure to state a claim? The Court must deny the motion because Plaintiff's allegations are more than

[1] ECF No. 45 is Galveston County's motion to dismiss ("County MTD"). ECF No. 46 is the Magistrates' motion to dismiss ("Mag. MTD"). ECF No. 47 is the Felony Judges' motion to dismiss ("FJ MTD"). ECF No. 48 is the District Attorney's motion to dismiss ("DA MTD").

enough to permit a reasonable inference that Defendants are liable for the conduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

SUMMARY OF ARGUMENT

In all critical respects, Galveston County's system is identical to the system in Harris County, which the Fifth Circuit held commits a "basic injustice: poor arrestees in Harris County are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond. Heightened scrutiny of the County's policy is appropriate." *ODonnell v. Harris Cnty.*, 892 F.3d 147, 162 (5th Cir. 2018). The same is true of Galveston County.

Like Harris County, Galveston County routinely detains arrestees by imposing unaffordable bail using a schedule without any inquiry into whether the arrestee can afford the bail amount, much less consideration of alternatives to unaffordable bail. Moreover, the County does not require the substantive finding that detention is necessary before it can completely deny the right to pretrial liberty, nor does it provide the procedural protections needed to ensure the accuracy of this substantive finding. Those who can afford to post bail may go free while awaiting trial, while those who cannot afford to post bail remain locked away from their families, jobs, and livelihoods. As a result, Galveston County jails hundreds of people who cannot afford bail—like Plaintiff, who was locked in Galveston County Jail at the time his claims were filed. Plaintiff's allegations state plausible claims for relief.

No Defendant contests Plaintiff's claims that Galveston County's practices violate the Due Process and Equal Protection Clauses. Instead, each group of Defendants

attempts to pass the blame onto the others. For the reasons laid out below, Galveston County and its officials are each liable for equitable relief. Specifically:

- The County is liable for the conduct and acquiescence of its final policymakers, including the Felony Judges, the Local Administrative Felony Judge, and the District Attorney, in an unconstitutional system that is so well-established that it has become "standard operating procedure." *ODonnell*, 892 F.3d at 155. *Infra* pp. 33–44.
- The Felony Judges are liable for their acquiescence in light of their "broad authority to promulgate rules that will dictate post-arrest policies consistent with the provisions of state law." *ODonnell*, 892 F.3d at 155. *Infra* pp. 33–35, 37–38.
- The Local Administrative Felony Judge is additionally liable for his acquiescence in light of his authority to, among other things, "supervise the expeditious movement of caseloads" and "set the hours and place for holding court in the county." Tex. Gov't Code § 74.092(a)(5), (a)(7). *Infra* pp. 33–34, 36–38.
- The District Attorney is liable for his felony bail schedule and his acquiescence in prosecutors' bail setting under that schedule, because he is "responsible for the county policy attacked and [has] conclusively demonstrated his ability to alter it by doing that very thing." *Crane v. Texas*, 766 F.2d 193, 195 (5th Cir. 1985). *Infra* pp. 37–42.
- The Magistrates are liable (for declaratory relief only) for their unconstitutional judicial actions. *Infra* p. 47.

BACKGROUND

Galveston County jailed the named Plaintiff, Aaron Booth, solely because he could not afford secured money bail. His bail was set prior to his first court appearance—called a "magistration"—under the County's bail schedule. Am. Compl. ¶¶ 16, 22, ECF No. 31. Prior to booking Mr. Booth into the Jail, a prosecutor directed the arresting officer to set Mr. Booth's bail at $20,000, the minimum amount permitted under the County's felony bail schedule. *Id.* ¶¶ 16, 29–30.

As in nearly every felony case in Galveston County, a Magistrate automatically adopted the prosecutor's bail amount at magistration—a perfunctory, scripted hearing that lasts less than sixty seconds for each person. Although Mr. Booth executed a "pauper's oath" stating he could not afford an attorney, the magistrate failed to make any inquiry into his ability to afford bail. The magistrate also failed to determine whether Mr. Booth would pose a flight risk or danger to the community if released, and the magistrate failed to make any finding that detention was necessary because no other condition of release would address these risks. No attorney was present to offer evidence on those issues. *Id.* ¶¶ 17–18, 23–24, 38–45, 49. The magistrate thus automatically adopted the prosecutor's bail amount, which was, in light of Mr. Booth's inability to pay, a de facto pretrial detention order. *See id.* ¶¶ 18–19, 25–26.

Mr. Booth's experience is just like that of the dozens of felony and misdemeanor arrestees who are booked into Galveston County Jail every week. *Id.* ¶¶ 27–68. These arrestees are detained indefinitely under the County's widespread and well-settled practices, which Plaintiff refers to as the "Bail Schedule Policy," permitting wealthier

defendants to purchase their freedom pending trial while similarly situated but less fortunate people remain locked in jail. *Id.* ¶ 28. The consequences to detainees too poor to purchase their freedom are devastating: they are less likely to have their charges dismissed and more likely to receive higher sentences. While they languish in jail, they can lose their jobs, their homes, and custody of their children. *Id.* ¶¶ 72–75. Despite these consequences, County policymakers have acquiesced in the Bail Schedule Policy, which is widely acknowledged and openly implemented. *Id.* ¶¶ 92–110.

ARGUMENT

Plaintiff's detailed allegations demonstrate that each Defendant plays a central role in Galveston County's unconstitutional pretrial detention practices. Defendants raise many jurisdictional, immunity, and procedural defenses—none of which applies. This brief begins by clearing away these inapplicable defenses. *Infra* pp. 5–20. The brief then sets out each constitutional violation caused by the Bail Schedule Policy, *infra* pp. 21–33, and concludes by discussing Galveston County's liability for these violations, *infra* pp. 33–44.

I. The Court Must Exercise Subject Matter Jurisdiction

A. The Putative Class Has a Live Controversy with Defendants

Defendants argue that Plaintiff lacks standing for three reasons: Plaintiff was released from jail, the District Attorney has changed the felony bail schedule, and many Defendants did not sign Plaintiff's bail order. The Court should reject each argument.

1. Plaintiff's Release from Jail Does Not Moot This Action

Plaintiff filed this action and moved for class certification while he was detained in Galveston County Jail because he couldn't afford his bail. Class Cert. Mot. at 6, ECF No. 2; Prelim. Inj. Mot. Ex. A, ECF No. 3-2. The District Attorney and the Magistrates argue that Plaintiff's release moots this case.[2] Controlling Supreme Court precedent compels rejection of that argument.

The Supreme Court has held that, in a class action challenging procedures for pretrial detention, the release of the named plaintiff does not moot the action. *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991). Because claims challenging pretrial detention procedures are "inherently transitory," such actions fit the Court's longstanding mootness exception for harms that are capable of repetition, yet evading review. *Id.* at 52. This case is indistinguishable from *Riverside*. Accordingly, to protect the court's ability to vindicate the rights of the proposed class of pretrial detainees, the class's claims relate back to the original filing. *Id.*

Plaintiff moved to certify a class of pretrial detainees while he was still detained and indisputably had standing. Class Cert. Mot. at 6; Prelim. Inj. Mot. Ex. A. Because the proposed class's claims concerning their pretrial detention are "inherently transitory," Plaintiff's subsequent release does not moot this case. *Riverside*, 500 U.S. at 51–52; *accord ODonnell v. Harris Cnty.*, No. H-16-1414, 2017 WL 1542457, at *7 (S.D. Tex.

[2] DA MTD at 17; Mag. MTD at 26.

Apr. 28, 2017) (certifying class of pretrial detainees challenging procedures for pretrial detention months after named plaintiffs were released).

The District Attorney asserts that *O'Shea v. Littleton*, 414 U.S. 488 (1974), supports his standing argument. DA MTD at 20. It does not. Unlike Plaintiff Booth, the plaintiffs in *O'Shea* lacked standing when they first filed their lawsuit. 414 U.S. at 495 (emphasizing that plaintiffs lacked standing to seek injunctive relief "at the time the complaint was filed").

2. The Post-Filing "Update" of the Felony Bond Schedule Does Not Moot Plaintiff's Claims

Plaintiff's claim against the District Attorney arises from Plaintiff's pretrial detention under a $20,000 secured bail, which was set by a prosecutor according to the District Attorney's minimum felony bail schedule. The District Attorney argues that Plaintiff's claims are moot because the written felony bond schedule has now been "updated" to reflect more accurately his policy, allegedly in place for at least seven years, that prosecutors have discretion "to recommend bail amounts either higher than or lower than what is listed on the schedule." DA MTD at 20; DA MTD Ex. 1 ¶ 3.

There are two reasons why this argument is unpersuasive. First, the District Attorney has provided no evidence to rebut Plaintiff's assertion that prosecutors only exercise this discretion to impose bail amounts higher than the minimum amounts provided in the schedule. His bare assertion to the contrary is not sufficient to contradict these well-pleaded facts, which the court must assume as true in the absence of evidence to the contrary. *Paterson*, 644 F.2d at 523.

More importantly, this change to the written policy does nothing to remedy the District Attorney's office's unconstitutional practices. DA MTD at 20 (claiming that the new policy "does not change the practice within the District Attorney's office") & Ex. 1 ¶ 3. Specifically, the District Attorney directs his prosecutors to set bail amounts in every case without regard to the arrestee's ability to pay, knowing that these amounts will be automatically adopted as secured bail orders in most cases. DA MTD at 19. The purported "update" does not cure this defect.[3]

3. Defendants Contributed to Plaintiff's Wealth-Based Pretrial Detention

Finally, the District Attorney and the Felony Judges claim Plaintiff lacks standing to bring claims against them because they did not sign his bail order. FJ MTD at 11–14; DA MTD at 21–30. This argument applies the wrong causation standard. Article III standing requires simply that Plaintiff's injury be "fairly traceable" to Defendants. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 455 (5th Cir. 2016), *petition for cert. filed*, No. 17-1492 (May 1, 2018). The question is not whether the Defendants' actions are the sole contributing factor, or even the last step in the causal chain, resulting in Plaintiff's pretrial detention. *Id.* at 455–56 ("The Supreme Court has warned against 'wrongly equating injury "fairly traceable" to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation.'")

[3] Even if the purported update did cure the District Attorney's acquiescence in constitutional violations, adding a sentence to the felony bail schedule—which can be changed back with the stroke of a pen—is nowhere near enough to meet the District Attorney's "heavy burden" to demonstrate that some post-filing voluntary change has mooted this action. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007).

(quoting *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997)). Instead, Plaintiff has standing because the District Attorney and Felony Judges substantially "contribute" to his unconstitutional pretrial detention. *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 558 (5th Cir. 1996) (affirming causation where defendant "*contributes*" to plaintiff's injury); *accord Gee*, 862 F.3d at 456 (upholding standing to challenge "injury produced by determinative . . . effect upon the action of someone else") (quoting *Bennett*, 520 U.S. at 169).

Plaintiff alleges that the District Attorney plays a primary role in setting bail amounts. Specifically, Plaintiff alleges that (i)"the District Attorney requires the duty prosecutor to set bail on each charge by referring to the felony bail schedule," (ii) the District Attorney "permits the duty prosecutor to set bail amounts that deviate upward from this schedule, but not down"; (iii) in setting the bail amount, the District Attorney makes no inquiry into the arrestee's ability to pay, and (iv) the District Attorney knows that the bail amounts set by his duty prosecutors are "automatically" adopted by the Magistrates. Am. Compl. ¶¶ 14, 30, 43. Plaintiff's injury was therefore "produced by determinative . . . effect" of the District Attorney's policy, "upon the action of" the magistrate who automatically adopted the recommended bail amount. *Gee*, 862 F.3d at 456; *accord* 13A Charles A. Wright, et al., Federal Practice and Procedure § 3531.5, at 372 (3d ed. West 2008) (observing plaintiffs have standing where "defendant's acts have caused others to react in a way that injures the plaintiff"). The District Attorney protests that he merely requests bail amounts and that "[r]ecommendations for prosecutors may be

accepted, increased or reduced by the officer overseeing magistration."[4] DA MTD at 19, 34–35. But he offers no evidence to suggest that magistrates do, in fact, review the bail amounts and make an independent assessment. In the absence of evidence on this point, the Court must accept Plaintiff's well-pleaded facts demonstrating that prosecutors' bail amounts are automatically adopted. Am. Compl. ¶¶ 30, 43, 83, 96, 98, 109. Setting the bail amounts that are later rubber-stamped as detention orders certainly "contributes" to Plaintiff's unconstitutional pretrial detention.

Likewise, the Felony Judges apply the wrong causation standard by claiming that they have no "direct role" in Plaintiff's unconstitutional pretrial detention. FJ MTD at 12. The question is whether the Felony Judges "contributed to" that injury. Plaintiff has amply alleged that the Felony Judges contributed to his injury by authorizing, maintaining, and enforcing the County's Bail Schedule Policy. Despite having actual knowledge of the constitutional deprivations caused by the Bail Schedule Policy *and* the power to prevent them, the Felony Judges "have not taken any action to require individualized bail hearings in Galveston County," Am. Compl. ¶ 107, and have failed to "implement[] any meaningful alternatives to pretrial detention, other than trying to collect money from people who are released." *Id*. ¶ 101(d). *See also infra* pp. 33–35, 37–38.

[4] The District Attorney also argues that he is not obligated to inquire into ability to pay. DA MTD at 19. Plaintiffs do not contend otherwise, and do not seek an injunction requiring the District Attorney to do so. But the lack of an ability to pay inquiry and consideration of alternatives to unaffordable bail—by the District Attorney or otherwise—demonstrates that Plaintiff's detention was unconstitutional, and an injunction ending the District Attorney's significant role in the Bail Schedule Policy, through setting bail amoutns which he knows will be automatically adopted, is warranted.

In addition, Defendant Judge Cox also contributed to Plaintiff's injury as the Local Administrative Felony Judge. Judge Cox has final authority to "supervise cases to ensure timely settings in court[.]" *Id*. ¶ 108; *see* Tex. Gov't Code § 74.092(a)(5), (a)(7). But, as Plaintiff alleges, he has "not issued administrative orders requiring, or even facilitating, individualized bail hearings in Galveston County." Am. Compl. ¶ 108. Judge Cox has also refused to use his administrative powers to expedite case assignments or hearings on bail reduction motions.[5] *Id.* Because Judge Cox has failed to require prompt case assignment and hearings on bail-reduction motions, criminal defendants in Galveston County "are jailed under the bail schedule for more than a week—often much more than a week—before the County offers a bail hearing with any of the required procedural protections." *Id*. ¶ 84.

Plaintiff alleges facts sufficient to show an injury that is causally connected to the District Attorney's and Felony Judges' conduct, and neither the District Attorney nor the Felony Judges have introduced evidence contradicting those allegations. Plaintiff

[5] The Felony Judges misquote *Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003), for the proposition that "[t]he requirement of a justiciable controversy is not satisfied where a judge acts in his administrative capacity." FJ MTD at 13. In fact, the cited passage states, "The requirement of a justiciable controversy is not satisfied where a judge acts in his *adjudicatory* capacity." *Bauer*, 341 F.3d at 359 (emphasis added). The difference matters. In *Bauer*, the question before the court was whether a state probate judge was properly a party to a federal suit challenging the constitutionality of the Texas Probate Code, which he had applied to adjudicate a state guardianship proceeding involving the plaintiff. *Id*. at 355–56. The state judge in *Bauer* was not alleged, as the Felony Judges are here, to have been a county policymaker acting in an "administrative" capacity, or to have authorized and maintained the statute at issue. *Id*. at 358–59. *Bauer* is irrelevant to this case. The Fifth Circuit has repeatedly held that courts may order relief where judges act in their administrative capacity. *See, e.g., ODonnell v. Harris Cnty.*, 892 F.3d 147, 155 (5th Cir. 2018).

therefore has standing. *Accord ODonnell v. Harris Cnty.*, 227 F. Supp. 3d 706, 723–24 (S.D. Tex. 2016), *rev'd in part on other grounds*, 892 F.3d 147 (5th Cir. 2018).

B. Younger Abstention Is Inappropriate

Defendants' argument that the Court may abstain from exercising jurisdiction under *Younger v. Harris*, 401 U.S. 37 (1971), is foreclosed by the Fifth Circuit's decision in *ODonnell*, 892 F.3d at 156–57.

Younger abstention is an exceedingly narrow exception to the federal courts' "virtually unflagging" obligation to vindicate federal rights. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013). *Younger* abstention is inappropriate unless the defendant demonstrates that (i) plaintiff seeks to enjoin an ongoing state-court proceeding, (ii) an important state interest is implicated by that proceeding, and (iii) plaintiff has an adequate opportunity to raise the relevant claim in that proceeding. *ODonnell*, 892 F.3d at 156 (citing *Middlesex Cnty. Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)).

Defendants cannot demonstrate the first or third elements. Taking the third prong first, *ODonnell* squarely held that state courts are inherently inadequate for Plaintiff's constitutional claims because "the relief sought . . .—*i.e.*, improvement of pretrial procedures and practice—is not properly reviewed by criminal proceedings in state court." *ODonnell*, 892 F.3d at 156 (citing *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975)). The Fifth Circuit further explained that abstention is inappropriate under these circumstances because the adequacy of state court procedures for ordering pretrial

detention is precisely what is at issue; thus "[t]o find that the plaintiffs have an adequate hearing on their constitutional claim in state court would decide [its] merits." *Id.*

Defendants also cannot establish *Younger*'s first prong of interference with the prosecution. As the Eleventh Circuit recently recognized, a plaintiff challenging a bail system "is not asking to enjoin any prosecution." *Walker v. City of Calhoun, Ga.*, -- F.3d --, 2018 WL 4000252, at *3 (11th Cir. Aug. 22, 2018). Nor are they seeking relief that would require federal intrusion into pretrial decisions on a case-by-case basis. *ODonnell*, 892 F.3d at 156. *Accord Pugh v. Rainwater*, 483 F.2d 778, 781–82 (5th Cir. 1973), *rev'd in part on other grounds*, *Gerstein v. Pugh*, 420 U.S. 103 (1975) (systemic pretrial detention challenge was not directed against pending or future court proceedings as such).[6] Therefore, as noted in *ODonnell*, a constitutional challenge to pretrial procedures does not implicate the policy concerns underlying *Younger* and articulated by *O'Shea v. Littleton*, 414 U.S. 488 (1974).

Defendants assert that *ODonnell* does not apply because this case involves felony charges, which take longer to conclude than misdemeanors and thus would allow class members to file state habeas petitions. Mag. MTD at 15. But this distinction makes no difference. *ODonnell*'s *Younger* analysis was not based on the length of pretrial detention or the theoretical availability of habeas relief. More importantly, the Fifth Circuit and most other courts do not consider the availability of habeas relief—a hypothetical *future*

[6] *See also, e.g.*, *Walker*, 2018 WL 4000252 at *4; *Buffin v. City of S.F.*, No. 15-CV-04959, 2016 WL 374230, at *2 (N.D. Cal. Feb. 1, 2016); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 765–66 (M.D. Tenn. 2015).

state action, rather than an *ongoing* state action—for challenges to pretrial systems. *See Rainwater*, 483 F.2d at 782; *ODonnell*, 227 F. Supp. 3d at 735.

II. None of Defendants' Sundry Defenses Applies to Plaintiff's Claims

A. Plaintiff Does Not Seek Release from Custody, as Prohibited by *Preiser*

Defendants contend that Plaintiff's claims are barred by *Preiser v. Rodriguez*, 411 U.S. 475 (1973). County MTD at 22; Mag. MTD at 4–10; FJ MTD at 20–23; DA MTD at 32-33. *Preiser* held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Preiser* at 500. Subsequent decisions make clear that *Preiser* precludes § 1983 actions only "*if* success in that action would *necessarily* demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81–82 (2005) (second emphasis added). Claims that do not necessarily spell speedier release remain cognizable under § 1983. *Skinner v. Switzer*, 562 U.S. 521, 525 (2011). Plaintiffs are not barred from bringing a § 1983 claim merely because they "hope" or "believe that victory . . . will lead to speedier release from prison." *Dotson*, 544 U.S. at 78; *accord Skinner*, 562 U.S. at 534-35; *Heck v. Humphrey*, 512 U.S. 477, 486 (1994). As the trial court in *ODonnell* summarized,

> A party challenging nonconviction administrative decisions, such as decisions of a parole board, must exhaust habeas remedies "[i]f a prisoner challenges a single hearing as constitutionally defective." *Serio v. Members of La. State Bd. of Pardons*, 821 F.2d at 1112, 1118 (5th Cir. 1987). But "broad-based attacks," such as class actions challenging regulatory procedures that do not "automatically entitle" claimants to release but only

> "enhance eligibility for accelerated release," may be brought under § 1983 without a habeas exhaustion requirement.

ODonnell v. Harris Cnty., 260 F. Supp. 3d 810, 816 (S.D. Tex. 2017), *vacated in part on other grounds*, 892 F.3d 147 (5th Cir. 2018) (full citation added).

Here, Plaintiff does not assert any class member's "entitlement" to pretrial release or seek relief that necessarily demonstrates the invalidity of any arrestee's confinement or its duration. Rather, Plaintiff mounts a broad-based challenge to Defendants' use of automatic, wealth-based procedures to determine who is jailed and who is released after arrest, and he seeks an injunction requiring constitutionally adequate processes to determine post-arrest release or detention. Defendants actually acknowledge that Plaintiff's claims do not inevitably require release, as they (incorrectly) assert that relief in this case may "increase the time of detention for at least half of all arrestees." Mag. MTD at 4 (emphasis added); *see also id.* at 7 (asserting Plaintiff's request "would result in either the detention of *all* arrestees until a hearing where such an inquiry and findings were made, or the release of *all* arrestees").[7] Because Plaintiff's claims do not guarantee release, they are properly brought under § 1983.

Defendants' reliance on *Gerstein v. Pugh*, 420 U.S. 103 (1975), actually confirms that Plaintiff's claims are properly presented through § 1983.[8] Mag. MTD at 6. In

[7] Of course, the only arrestees detained pending a hearing would be the arrestees Defendants want to detain. There would be no provide a hearing for someone Defendants otherwise intended to release.

[8] The other decisions cited by Defendants do not support their argument because, like *Gerstein*, they distinguish claims that would merely enhance the prospect for accelerated release from those that would create entitlement to release. *See Serio v. Members of La. State Bd. of Pardons*, 821 F.2d 1112, 1119 (5th Cir. 1987); *Cook v. Texas Dep't of Crim. Just. Transitional Planning*, 37 F.3d 166, 168 (5th Cir. 1994); *Johnson v. Pfeiffer*, 821 F.2d 1120, 1123 (5th Cir. 1987).

Gerstein, pretrial detainees claimed that their detention violated the Fourth Amendment because they had not been afforded prompt probable cause determinations. 420 U.S. at 107. The State of Texas, as amicus curiae, argued as Defendants do today: that under *Preiser* the claim belonged in a habeas corpus proceeding because no "purpose could be served by a determination of probable cause" other than to release improperly held detainees. Br. of *Amicus Curiae* State of Texas, No. 73-477, 1974 WL 186448, at *8–10 (1974), *Gerstein v. Pugh*, 420 U.S. 103 (1975). The Supreme Court rejected this argument, declining to consider the plaintiff's subjective expectations and focusing instead on whether the injunction would necessarily require release. The Court concluded that by seeking a process to examine the validity of detention, "the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy." *Gerstein*, 420 U.S. at 107 n.6. As in *Gerstein*, Plaintiff here does not assert a general entitlement to pretrial release but challenges the policies and practices that make up the County's Bail Schedule Policy. *Preiser*, therefore, does not apply. *ODonnell v. Harris Cnty.*, 260 F. Supp. 3d 810, 816 (S.D. Tex. 2017) (rejecting preclusion because "[t]he plaintiffs mount a broad-based challenge to Harris County's administration of its bail procedures, but they do not seek or assert 'entitlement' to pretrial release"), *vacated in part on other grounds*, 892 F.3d 147 (5th Cir. 2018); *Walker v. City of Calhoun*, No. 15-CV-0170, 2016 WL 361612, at *13 (N.D. Ga. Jan. 28, 2016) (finding *Preiser* inapplicable in a similar challenge), *vacated on other grounds*, 682 F. App'x 721 (11th Cir. 2017).

Finally, Defendants suggest that the Fifth Circuit's ruling in *ODonnell* supports preclusion because the Fifth Circuit altered the portion of the district court's injunction

requiring Harris County to release all defendants still in custody 24 hours after arrest. Mag. MTD at 8-10. Defendants misread *ODonnell*. The Fifth Circuit found that Harris County had waived an affirmative defense under *Preiser*, so the court did not address this issue. *ODonnell*, 892 F.3d at 157 n.3. Second, the Fifth Circuit's proposed amended injunctive order unambiguously authorized the sheriff to release arrestees where Defendants did not comply with proper procedures for detention. *ODonnell*, 892 F.3d at 165; *see also id.* (instructing sheriff to release arrestees where Defendants violated court-ordered limitations period for indigent misdemeanor arrestees also subject to formal holds). Thus, if *ODonnell* is at all relevant to the *Preiser* analysis, it confirms that *Preiser* does not bar the constitutionally mandated procedures that Plaintiff requests here.

B. The *Parrat*/*Hudson* Doctrine Does Not Apply

Plaintiff's procedural due process claim (Count 2) is not foreclosed by the *Parratt/Hudson* doctrine, as the Magistrates assert. That doctrine holds that an official's "random, unauthorized" action depriving a person of liberty or property rights does not give rise to a § 1983 procedural due process claim unless the government also fails to provide an adequate post-deprivation remedy. *See Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981). The rationale for the doctrine is that a pre-deprivation remedy is impracticable for random and unauthorized misconduct, because by definition, "the state cannot know when such deprivations will occur." *Hudson*, 468 U.S. at 533; *see also Zinermon v. Burch*, 494 U.S. 113, 138–39 (1990) (explaining that the *Parratt/Hudson* doctrine does not apply when the deprivation of liberty is foreseeable).

The *Parratt/Hudson* has no application to this case because Plaintiff seeks redress against Galveston County's standard operating procedure. These practices Plaintiff challenges are systematic, deliberate policy choices of the County and its officials, rather than random or unauthorized actions. As *Hudson* itself explained, "postdeprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action." *Hudson*, 468 U.S. at 533. The additional decisions cited by the Magistrates are inapplicable for the same reason—they each involve random, unauthorized acts of governmental officials, not unconstitutional policies and procedures. *Martin v. Dallas Cnty*, 822 F.2d 553, 554–55 (5th Cir. 1987) (negligent or intentional failure to timely release plaintiff from jail); *Holloway v. Walker*, 784 F.2d 1287, 1288 (5th Cir. 1986) (conspiracy between state court judge and private parties to "fix" a private suit); *Luna v. Valdez*, No. 3:15-CV-3520, 2018 WL 684897, at *1–2 (N.D. Tex. Feb. 2, 2018), *aff'd*, 734 F. App'x 262 (5th Cir. 2018) (failure to discharge plaintiff from jail because he was mistakenly omitted from an emailed list).

C. The District Attorney's Immunity Defenses Do Not Apply to Plaintiff's Claims For Prospective Relief

The District Attorney asserts sovereign immunity, prosecutorial immunity, and qualified immunity from suit. DA MTD at 7–17. None applies to Plaintiff's claims, which are exclusively requests for prospective relief.

First, sovereign immunity under the Eleventh Amendment does not apply to claims seeking prospective relief from ongoing violations of federal law.[9] *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citations omitted); *Idaho v. Coeur d'Alene Tribe of Ida.*, 521 U.S. 261, 281 (1997). Because Plaintiff seeks injunctive relief from an ongoing violation of federal law, the District Attorney cannot claim Eleventh-Amendment immunity.

Second, prosecutorial immunity is a judicially crafted doctrine that applies only to damages suits. *Van de Kamp v. Goldstein*, 555 U.S. 335, 341–42 (2009). The doctrine does not apply to claims seeking injunctive relief to prevent *future* constitutional violations. *Van de Kamp*, 555 U.S. at 345. *See also Tarter v. Hury*, 646 F.2d 1010, 1012–13 (5th Cir. 1981) ("[P]rosecutors do not enjoy absolute immunity from such claims [for equitable relief.]"). Because Plaintiff brings official-capacity claims for prospective relief, the District Attorney cannot claim prosecutorial immunity.

Finally, as with sovereign and prosecutorial immunity, qualified immunity does not apply to claims for prospective relief. *Williams v. Ballard*, 466 F.3d 330, 334 & n.7 (5th Cir. 2006) (discussing qualified immunity). Thus, qualified immunity also cannot shield the District Attorney from Plaintiff's official-capacity claims for prospective relief.

[9] Moreover, Plaintiff's claims are against the District Attorney as a *county* policymaker, *Crane v. Texas*, 759 F.2d 412 (5th Cir. 1985), as discussed in the county liability section below, *infra* pp. 33–34, 37–38. But regardless of whether the Court holds the District Attorney to be a state or county official, he cannot claim Eleventh-Amendment immunity from Plaintiff's constitutional claims for injunctive relief.

D. Plaintiff's Claims Are Not "Covered" Under The Fourth or Eighth Amendments

Citing *Graham v. Connor*, 490 U.S. 386 (1989), the Magistrate Judges argue that Plaintiff's Fourteenth Amendment claims must be asserted under the Fourth or Eighth Amendments. Mag. MTD at 21–23. Not so. The Fifth Circuit has expressly rejected this assertion and held that challenges to wealth-based pretrial detention are properly raised under the Fourteenth Amendment. *ODonnell v. Harris Cnty.*, 892 F.3d 147, 157 (5th Cir. 2018) (reaffirming that "[t]he incarceration of those who cannot [pay money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements") (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc)).

Neither *Mercado I* nor *Mercado v II*[10] alters this binding precedent. In *Mercado I*, plaintiffs alleged a due process violation and a Fourth Amendment violation that were co-extensive: their continued detention in absence of probable cause. *Mercado II*, 229 F. Supp. 3d 501, 505 (N.D. Tex. 2017). For that reason, the district court found the due process claim redundant and "covered" by the Fourth Amendment. *Id.* at 517–18. Here, Plaintiff's allegations are entirely different: Plaintiff does not contest probable cause; instead, he alleges that the Equal Protection and Due Process Clauses place *further* constraints on the government's authority to continue to detain them. Such claims are properly raised under the Fourteenth Amendment.

[10] *Mercado v. Dallas Cnty.* (*Mercado I*), No. 3:15-CV-3481-D, 2016 WL 3166306 (N.D. Tex. June 7, 2016); *Mercado v. Dallas Cnty.* (*Mercado II*), 229 F. Supp. 3d 501, 517–18 (N.D. Tex. 2017).

As for the Magistrates' claim that Plaintiff asserts a "right to affordable bail," they are wrong. Plaintiff asserts his federal constitutional right to pretrial liberty. *United States v. Salerno*, 481 U.S. 739, 746–47 (1987). The source of this right is the Due Process Clause, not, as the Magistrates contend, the Eighth Amendment.[11] *Salerno*, 481 U.S. at 746–55 (analyzing challenged reasons for pretrial detention under the Due Process Clause, and, separately, excessive bail claim under the Eighth Amendment). Unaffordable bail is consistent with this fundamental right, so long as the government makes a substantive finding of necessity with adequate procedural protections. *See Glucksberg*, 521 U.S. at 721; *Harper*, 494 U.S. at 228. This is because, as the Fifth Circuit has held, an unaffordable bail order is a de facto pretrial detention order. *United States v. McConnell*, 842 F.2d 105, 109 (5th Cir. 1988); *accord ODonnell*, 251 F. Supp. 3d at 1075–77. And pretrial detention orders, whether they are direct orders or orders in the form of unaffordable bail, are subject to the legal standard for denying a fundamental right.

III. Plaintiff Was Detained in Violation of His Constitutional Rights

A. Plaintiff Was Detained in Violation of His Fundamental Right to Pretrial Liberty and Right Against Wealth-Based Detention

Plaintiff in this case seeks to vindicate two substantive federal rights: one against wealth-based detention, arising out of a "converge[nce]" of equal protection and due

[11] The order issued yesterday in *Daves v. Dallas County*, No. 18-cv-0154, at *13 (N.D. Tex. Sept. 20, 2018) (ECF No. 164), fails to explain how substantive due process claims about pretrial detention can be "covered" under the Eighth Amendment in light of *Salerno*, which is controlling precedent that analyzes these claims separately under different standards.

process, *Bearden v. Georgia*, 461 U.S. 660, 665 (1983), and one against the deprivation of the "fundamental" interest in pretrial liberty, arising under due process alone, *Salerno*, 481 U.S. at 746–47, 750–51 (1987).[12]

In Count 1, Plaintiff contends Galveston County's Bail Schedule Policy violates the prohibition on "imprisonment solely because of indigent status." *Rainwater*, 572 F.2d at 1056. The County automatically jails people based on their lack of wealth by ordering predetermined amounts of secured bail without a hearing, and without any "meaningful consideration of other possible alternatives." *ODonnell*, 882 F.3d at 543 (quoting *Rainwater*, 572 F.2d at 1057). The Fifth Circuit has twice held that jailing people solely because they cannot afford bail violates due process and equal protection. *Id.* at 543–44; *Rainwater*, 572 F.2d at 1057. Galveston County's Bail Schedule Policy is materially indistinguishable from the practices condemned in *ODonnell* and *Rainwater*.

Along with challenging Galveston County's imposition of wealth-based incarceration, in Count 2, Plaintiff also contests the County's failure to make the substantive findings and to provide the procedural protections necessary before setting unaffordable secured bail amounts that function as de facto orders of pretrial detention. This claim is premised on the fundamental right to pretrial liberty. *Salerno*, 481 U.S. at 746. The government cannot infringe on this fundamental right absent a substantive finding, required by federal law and subject to heightened scrutiny, that detention is

[12] Plaintiff also refers the Court to his brief in support of his motion for a preliminary injunction at pages 17–23, ECF No. 3-1.

necessary.[13] *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Washington v. Harper*, 494 U.S. 210, 228 (1990). The Government cannot meet heightened scrutiny to detain arrestees unless it demonstrates that alternative conditions of release would not serve its interests in court appearance or public safety.

Procedural due process, in turn, dictates the requisite procedures to ensure the accuracy of the substantive finding that pretrial detention is necessary to achieve government's interests. Those procedures include: (1) notice of their hearing and its purposes, (2) an opportunity to present evidence, (3) a "clear and convincing evidence" standard to justify the setting of an unaffordable bond, (4) findings on the record as to the magistrate's reasons for setting an unaffordable bond, and (5) defense counsel. *Caliste v. Cantrell*, --- F. Supp. 3d ---, 2018 WL 3727768, at *10–11 (E.D. La. Aug. 6, 2018); *see also Schultz v. State*, --- F. Supp. 3d ---, 2018 WL 4219541, at *19–21 (N.D. Ala. Sept. 4, 2018).[14]

[13] For these reasons, the order issued yesterday afternoon in *Daves v. Dallas County*, No. 18-cv-0154 (N.D. Tex. Sept. 20, 2018), is contrary to Supreme Court precedent. The Court's order essentially says that as long as courts order "*some* condition of release," the order is constitutional, and does not require any substantive need to justify it. *Id.* at *12. But it is textbook constitutional law that a deprivation of a fundamental right must be narrowly tailored to a compelling state interest. *Salerno*, 481 U.S. at 750 (permitting pretrial detention that "narrowly focuses" on a "compelling" government interest); *see Reno v. Flores*, 507 U.S. 292, 302 (1993) (interpreting and applying *Salerno* as requiring strict scrutiny); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780–81 (9th Cir. 2014) (en banc) (recognizing pretrial freedom as "fundamental liberty interest," and applying strict scrutiny). And if courts order an unattainable condition of release—like unaffordable bail—the order deprives the arrestee of her fundamental right to pretrial liberty and must meet strict scrutiny. *McConnell*, 842 F.2d at 109 (describing high bail orders as "de facto" detention orders); *ODonnell*, 251 F. Supp. 3d at 1075–77 (same). Any pretrial detention order, "de facto" or otherwise, must meet strict scrutiny. That is the substantive finding Plaintiff seeks, and is also not one that is protected by the Eighth Amendment.

[14] Plaintiff also refers the Court to his brief in support of his motion for a preliminary injunction at pages 23–30, ECF No. 3-1.

B. Plaintiff Does Not Rely on a State-Created Liberty Interest

The County and the District Attorney both argue that the Court should look to only those procedural remedies ordered in *ODonnell*. County MTD at 20–21; DA MTD at 39–40. Even if Defendants were correct, Galveston County's Bail Schedule Policy is patently unconstitutional under *ODonnell*, and the Court should order relief on that ground alone. But Defendants are not correct about the appropriate scope of relief.

As explained above, Plaintiff asserts rights derived from the Due Process and Equal Protection Clauses of the *federal Constitution*. *ODonnell*, by contrast, based its due process holding on the narrower liberty interest created by *state law*—a limitation that the panel repeated throughout its opinion. 892 F.3d at 157 (analyzing "the liberty interest created by state law . . . Here, our focus is the law of Texas . . . ."), 158 (analyzing the "state-made liberty interest": "Texas state law creates a right to bail . . . . Having found a state-created interest, we turn now to whether the procedures in place adequately protect that interest."). In fact, the *ODonnell* defendants argued successfully that plaintiffs had *not* raised a claim regarding the federal right to pretrial liberty at the preliminary injunction stage, limiting the scope of relief to procedures due to protect a liberty interest under state law. Br. of Appellant Judges at 47, *ODonnell*, 892 F.3d 147 (No. 17-20333) (urging the Fifth Circuit to decline ruling on the federal right to pretrial liberty: "[T]he district court looked to state law for its liberty interest."). On this basis, the Fifth Circuit declined to consider the argument Plaintiff advances here: that the federal Constitution prohibits pretrial detention unless a judge makes a substantive finding that detention is necessary. *ODonnell v. Harris Cnty.*, --- F. Supp. 3d. ---, 2018 WL 3913456, at *4 (S.D.

Tex. June 29, 2018), *on remand from* 892 F.3d 147 ("[T]he necessity requirement is substantive, not procedural, which places that requirement beyond what the Fifth Circuit remand order appears to allow."). Thus, the County and District Attorney's contentions about *ODonnell*'s scope of relief are irrelevant. The question in this case is whether Plaintiff's pretrial detention met *federal* constitutional standards. The answer is clearly no.

C. Plaintiff's Sixth Amendment Right to Counsel Was Denied at Magistration

The Sixth Amendment guarantees the right to counsel for "[a]ll criminal prosecutions." U.S. Const. Amend. XI. That guarantee of counsel extends to all "critical stages" of the prosecution. *Rothgery* v. *Gillespie Cnty.*, 554 U.S. 191, 194, 212 (2008). As discussed below, bail hearings are a "critical stage": the outcome of a bail hearing irrevocably prejudices arrestees' case outcomes, and counsel is necessary for a pretrial arrestee to avoid this prejudice. But Defendants do not appoint counsel for these proceedings.[15]

1. Bail Hearings Can Irrevocably Prejudice Case Outcomes

The Supreme Court has defined a critical stage as any proceeding at which counsel would help the accused in "coping with legal problems or . . . meeting his adversary." *United States v. Ash*, 413 U.S. 300, 312–13 (1973). Proceedings are therefore "critical" if

[15] The Felony Judges contend that "the facts alleged do not create the reasonable inference that they, specifically, violated the Sixth Amendment." FJ MTD at 18–20. The Magistrates claim that "declaratory relief claims under the Sixth Amendment attack judicial functions and are not cognizable under Section 1983," Mag. MTD ¶¶ 9.4–9.5; 10.3, which Plaintiff discusses *infra* p. 47.

their outcome may prejudice a defendant at a subsequent hearing or trial, and counsel is needed to avoid that prejudice. *United States v. Wade*, 388 U.S. 218, 237 (1967) (critical stage analysis turns on "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice"); *see also Hamilton v. Alabama*, 368 U.S. 52, 53-54 (1961) (holding that arraignment is a critical stage because "[w]hat happens there may affect the whole trial").

Applying this rubric, bail hearings are a critical stage. The outcome of a bail hearing may severely prejudice a defendant: it is one of the "steps of a criminal proceeding that hold significant consequences for the accused." *United States v. Collins*, 430 F.3d 1260, 1264 (10th Cir. 2005) (citing *Bell v. Cone*, 535 U.S. 685, 695–96 (2002)). *Accord Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (holding preliminary hearings entailing bail setting risk "substantial prejudice" to the accused). Unaffordable bail—or denial of bail altogether—results in pretrial detention, which significantly increases a defendant's likelihood of conviction and of receiving a harsher sentence. Am. Compl. ¶¶ 85–91. Because a defendant's pretrial liberty is at stake in bail hearings, these hearings can have a devastating effect on the fairness of at least three subsequent stages of the prosecution: plea bargaining,[16] trial,[17] and sentencing.[18]

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[16] *Lafler v. Cooper*, 566 U.S. 156, 169–70 (2012) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986)) (internal quotation marks omitted); *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012); *see also Padilla v. Kentucky*, 559 U.S. 356, 373–74 (2010); *Iowa v. Tovar*, 541 U.S. 77, 80–81 (2004).

[17] *United States v. Wade*, 388 U.S. 218 (1967); *United States v. Ash*, 413 U.S. 300 (1973).

[18] *Bandy v. United States*, 81 S. Ct. 197, 198 (1960) ("[I]n the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release. The wrong done by denying release is not limited to the denial of freedom alone. That denial may

As Plaintiff alleges and empirical research demonstrates, controlling for other factors, pretrial detention is greatest predictor of a conviction and a sentence to jail or prison. Am. Compl. ¶ 88 n.14. If a defendant is detained at magistration, there is an increased likelihood that she will plead guilty—not because she committed the crime alleged, but to avoid further devastation of her daily life, such as interruptions in housing, employment, education, treatment, and child care. Am. Compl. ¶ 86. Guilty pleas produced under such coercive pressures are inherently unreliable. *Id.* ¶¶ 85–91. *E.g.*, *Alabama v. Shelton*, 535 U.S. 654, 667 (2002) ("[T]he key Sixth Amendment inquiry [is] whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration."); *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972) (holding counsel necessary to protect against incarceration resulting from "assembly-line justice").

In Galveston County, the harm that results from the denial of counsel at magistration is clear. In fact, the primary effect of Galveston County's post-arrest money-based detention scheme is to coerce large numbers of guilty pleas prior to any legal or factual investigation, and to interfere with defendants' ability to assist with their defense. Am. Compl. ¶¶ 21-22, 85-89. Most detained misdemeanor and low-level felony arrestees will plead guilty at the next court hearing and accept a sentence of time-served to be released from jail that day. *Id.* ¶ 89. The effect of pretrial detention on case outcomes is drastic. The Texas Indigent Defense Commission determined that in Galveston County,

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have other consequences. In case of reversal, he will have served all or part of his sentence under an erroneous judgment." (citations omitted)).

47.1% of felony cases involving detained defendants result in a sentence of imprisonment, while just 24.7% of felony cases involving bonded defendants result in sentence of imprisonment. Am. Compl. ¶ 89; *see also* Prelim. Inj. Mot. Ex. I (Texas Indigent Defense Commission Audit) at 22, 25, ECF No. 3-10.

"Because ours 'is for the most part a system of pleas, not a system of trials,'" the mass of guilty pleas resulting from arrestees detained after bail determinations made without counsel threatens the very validity of the County's criminal legal system. *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (quoting *Lafler v. Cooper*, 566 U.S. 156, 170 (2012)). The threat is exacerbated by the reality that even Defendants who refuse to plead guilty are more likely to be convicted at trial because being detained hampers their ability to consult with their attorney and to assist with the investigation. Am. Compl. ¶¶ 75, 86, 89.

2. Counsel is Necessary to Avoid Prejudice from a Bail Hearing

The assistance of counsel is necessary to avoid these significant harms. *See Caliste*, 2018 WL 3727768 at *11 ("Considering the already established vital importance of pretrial liberty, assistance of counsel is of the utmost value at a bail hearing."). Appointment of a defense attorney more than doubles the chance that a judge will release the accused on her own recognizance. In cases where judges do choose to order bail, appointment of a defense attorney can more than double the chance that the judge would lower the bail to an affordable amount.[19] Am. Compl. ¶ 90. *Accord Coleman*, 399 U.S. at

[19] 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 (2002).

9 (holding that counsel is "essential" to make effective arguments in a hearing that entails bail setting). *Cf. Argersinger*, 407 U.S. at 36 (describing prejudice that resulted from lack of counsel where "[m]isdemeanants represented by attorneys are five times as likely to emerge . . . with all charges dismissed").

A bail determination is also a critical stage because, when conducted according to state and federal requirements, the hearing is substantively and procedurally complex. *See Higazy v. Templeton*, 505 F.3d 161, 173 (2d Cir. 2007) ("'[B]ail hearings fit comfortably within the sphere of adversarial proceedings closely related to trial.'") (quoting *United States v. Abuhamra*, 389 F.3d 309, 323 (2d Cir. 2004)); *Ditch v. Grace*, 479 F.3d 249, 253 (3rd Cir. 2007); *Rojas v. City of New Brunswick*, No. 04-CV-3195, 2008 WL 2355535, at *17 (D.N.J. June 4, 2008). In Galveston County, Defendants routinely enter de facto orders of detention, which, under federal law, must be accompanied by stringent procedural protections and substantive findings. *Supra* pp. 21–24. Texas law places additional requirements on bail hearings at magistration. Contrary to Defendants' Bail Schedule Policy, Texas law prohibits Hearing Officers and County Judges from "mechanically applying the bail schedule to a given arrestee."[20] The Texas Code "requires officials to conduct an individualized review based on five enumerated

[20] *ODonnell v. Harris Cnty.*, 892 F.3d 147, 153 (5th Cir. 2018).

factors, which include the defendant's ability to pay, the charge, and community safety."[21] *Id.*; *see also* Tex. Code Crim. Proc. art. 17.15.

Thus, without counsel, Plaintiff was not only exposed to immediate detention, but was also forced to navigate a proceeding governed by complex constitutional and statutory requirements. A non-lawyer will not realistically know, understand, and employ all of the applicable law and rules necessary to advocate effectively for release. Indeed, the absence of defense counsel is undoubtedly a major reason why Magistrates ignore binding federal and state law for setting bail and instead automatically affirm the amount of secured money bail set by the District Attorney. *Cf. Shultz*, 2018 WL 4219541, at *22 (finding that "the lack of counsel in Cullman County exacerbates each procedural defect in Cullman's bail system"). The assistance of counsel is indispensable for an arrestee to secure pretrial release and to avoid the inherent prejudice from the unnecessary pretrial

[21] Texas law additionally provides that "any magistrate . . . may release a defendant eligible for release on personal bond . . . on his personal bond where the complaint and warrant for arrest does not originate in the county wherein the accused is arrested if the magistrate would have had jurisdiction over the matter had the complaint arisen within the county wherein the magistrate presides. The personal bond may not be revoked by the judge of the court issuing the warrant for arrest except for good cause shown." *See* Tex. Code Crim. Proc. art. 17.031 (a).

Additionally, "a magistrate shall release a defendant on personal bond unless good cause is shown otherwise if . . . the magistrate finds, after considering all the circumstances, a pretrial risk assessment, if applicable, and any other credible information provided *by the attorney representing* the state or *the defendant*, that release on personal bond would reasonably ensure the defendant's appearance in court as required and the safety of the community and the victim of the alleged offense." *See id.* art. 17.032(b)(5) (emphasis added).

detention, discussed above.[22] *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."). Magistration in Galveston County is therefore a critical stage.

3. The Felony Judges Misread *Rothgery* and Plaintiff's Argument

The Felony Judges argue that, under *Rothgery*, there is no Sixth Amendment right to counsel at magistration. FJ MTD at 18–20. They are wrong. *Rothgery*'s narrow ruling does not foreclose a Sixth Amendment right to representation at the magistration hearing. The sole question before the Court was "when the right attaches"—when adversarial proceedings commence that trigger the Sixth Amendment *at all*—and not whether magistration was a "critical stage" requiring appointment of counsel. 554 U.S. at 212 & n.17. The Court decided only this "threshold issue" concerning attachment and remanded the case to the Fifth Circuit, which specifically observed that "the Court did not decide whether Rothgery's Sixth Amendment right had been violated." *Rothgery v. Gillespie Cnty.*, 537 F.3d 716, 716 (5th Cir. 2008) (per curiam). If anything, *Rothgery* implied that the Sixth Amendment does require counsel at magistration, because the Court refused Gillespie County's invitation to "ignore prejudice to a defendant's pretrial liberty" for purposes of the Sixth Amendment analysis. 554 U.S. at 208.

[22] Texas law also recognizes the necessity of counsel for bail hearings. At the magistration hearing: "The magistrate *shall* allow the person arrested reasonable time and opportunity to consult counsel and shall, after determining whether the person is currently on bail for a separate criminal offense, admit the person arrested to bail if allowed by law. A record of the communication between the arrested person and the magistrate shall be made." *See* Tex. Code Crim. Proc. art. 15.17 (a) (emphasis added). This consultation requirement plainly mandates counsel at magistration for the purpose of setting bail.

Second, the Felony Judges note that providing representation at magistration would require formal appointment of counsel to take place before the moment the Sixth Amendment attaches, in preparation for magistration. But providing representation at magistration does not require *formal appointment* before attachment. Defendants improperly conflate representation—ensuring that an individual has a competent advocate for a criminal proceeding—with appointment—assigning an attorney to an arrestee for the duration of the case. The County could easily provide counsel at magistration for the limited purpose of representing an arrestee for the bail determination; formal appointment of permanent defense counsel could continue to follow after magistration.[23]

Finally, the Felony Judges argue that they are not involved in the magistration process and therefore could not have violated the Sixth Amendment. FJ MTD at 18–20. But the Felony Judges are indisputably responsible for what happens at magistration, including the provision of counsel. *See* Tex. Code Crim. Proc. art. 26.04(b)(1) (Texas law "authorizes only the judges of the county courts, statutory county courts, and district courts trying criminal cases in the county, or the judges' designee, to appoint counsel for indigent defendants in the county.").

In sum, Plaintiff has plausibly alleged that denial of counsel at magistration violates the Sixth Amendment.

[23] Moreover, it is uncontroversial that representation may be required at the same moment the Sixth Amendment attaches, if attachment coincides with a critical stage—critical stages such as arraignment, *Hamilton v. Alabama*, 368 U.S. 52 (1961), and other preliminary hearings where bail is set, *Coleman*, 399 U.S. at 9. Magistration is no different.

IV. Galveston County Is Liable for Violating Plaintiff's Constitutional Rights

A county is liable under § 1983 when its policies deprive a plaintiff of his constitutional rights. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690–91 (1978). County liability has three elements: a policymaker, a policy, and a constitutional violation resulting from that policy. *Id.*; *Hampton Co. Nat'l Surety v. Tunica Cnty.*, 543 F.3d 221, 227 (5th Cir. 2008). An official's status as a county policymaker is "a question of state law." *ODonnell*, 892 F.3d at 155 (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)). County policymakers may adopt a "policy" without issuing a formal written document. *Id.* (quoting *Johnson v. Moore*, 958 F.2d 92, 94 (1992)). Instead, when county policymakers "acquiesce[] in a longstanding practice or custom which constitutes the standard operating procedure" of the county, they effectively adopt that standard operating procedure as county policy. *Id.* (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)).

Plaintiff has alleged that Galveston County has an unconstitutional standard operating procedure for ordering pretrial detention, which he refers to as the "Bail Schedule Policy." State law designates the Felony Judges and the District Attorney as final policymakers who have the authority to correct the Bail Schedule Policy in Galveston County. Instead of taking action, these policymakers have acquiesced in the Bail Schedule Policy, which violates constitutional rights of anyone who cannot afford their bail. *See ODonnell*, 892 F.3d at 157–63. The County is therefore liable for constitutional violations resulting from the Bail Schedule Policy.

A. The Felony Judges, the Local Administrative Felony Judge, and the District Attorney Are Final Policymakers for Galveston County

Contrary to the County's claims, County MTD at 19, Galveston County has the ability to remedy the Bail Schedule Policy through the board of Felony Judges, the Local Administrative Felony Judge, and the District Attorney.[24] Am. Compl. ¶¶ 107–09. Because these officials each have power under state law to set final policy remedying different aspects of the Bail Schedule Policy, they are policymakers for the County. *See ODonnell*, 892 F.3d at 155 (holding that Harris County judges are final county policymakers concerning post-arrest policies for misdemeanor cases).

As laid out in more detail below, the board of Felony Judges, the Local Administrative Felony Judge, and the District Attorney each has final policymaking authority on distinct aspects of the County's Bail Schedule Policy: the County's argument concerning separation of powers simply fails.[25]

[24] Plaintiff does not contend that the Magistrates are final policymakers. Plaintiff has brought claims against the Magistrates in their official capacities for declaratory relief only. Am. Compl. ¶ 13 & p. 3. Plaintiff address the Magistrates' liability for declaratory relief in further detail i*nfra* p. 47.

[25] For this reason, the County's reference to *Cain v. New Orleans*, No. 15-CV-4479, 2016 WL 2849478, at *7 (E.D. La. May 13, 2016), is inapplicable. Unlike in *Cain*, where the Court found that Plaintiffs had not set forth allegations attributing the unconstitutional policy to municipal policymakers, Plaintiffs have identified final policymakers that render the County liable for the Bail Schedule Policy. Likewise, the County misleadingly characterizes *Harris v. City of Austin*, No. 15-CV-956, 2016 WL 1070863 (W.D. Tex. Mar. 16, 2016), as a case about unaffordable bail—but the case concerned jail commitments by municipal judges for failure to pay fines. County MTD at 17–19.

1. The Felony Judges Have the Power to Set Final Post-Arrest Policies for Galveston County

State law grants the Felony Judges final authority to set post-arrest policies in Galveston County. Tex Gov't Code § 74.093. The Fifth Circuit has long held that separate from their judicial power to apply state law in individual cases, judges also have an administrative power to create generally applicable county policies. *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992). Citing *Moore*, *ODonnell* held that misdemeanor judges are county policymakers for post-arrest practices, in light of their "broad authority to promulgate rules that will dictate post-arrest policies consistent with the provisions of state law." 892 F.3d at 155. In this case, the Felony Judges have nearly identical authority. *Compare ODonnell*, 892 F.3d at 155 (citing Tex. Gov't Code § 75.403(f) ("The judges may adopt rules . . . for practice and procedure in the courts.")) *with* Tex. Gov't Code § 74.093 ("The district . . . judges . . . shall . . . adopt local rules of administration.").

The *ODonnell* trial court recognized that these nearly identical grants of authority support "a finding that, in the particular function of regulating countywide pretrial processes and bail settings, [felony] judges act as local policymakers." *ODonnell v. Harris Cty.*, Civ. A. No. H-16-1414, 2017 WL 784899, at *3 & n.1 (S.D. Tex. Mar. 1, 2017). Because "[n]o law or policy justifies treating" misdemeanor judges differently than felony judges "when both entities make functionally identical determinations," *ODonnell* requires treating the Felony Judges as Galveston County policymakers for

post-arrest policies.[26] *Skelton v. Camp*, 234 F.3d 292, 297 (5th Cir. 2000) (holding that, where two officials make "functionally identical determinations," it is not sensible to call one a local actor and another a state actor). And just yesterday afternoon, a district court in Dallas agreed, holding that Felony Judges are county policymakers in light of their administrative authority to promulgate rules governing post-arrest practices in each county. *Daves*, No. 18-cv-0154, at *7–8 (ECF No. 164).

2. The Local Administrative Felony Judge Has the Power to Set Final Policies for Scheduling Bail Review Hearings in Galveston County

State law also grants the Local Administrative Felony Judge final authority to set hearing scheduling policies in Galveston County. Tex. Gov't Code § 74.092. The Local Administrative Judge, Defendant Judge Cox, is elected locally to set administrative policies for Galveston County courts. Tex. Gov't Code § 74.091. State law imbues him with broad authority to "supervise the expeditious movement of caseloads" and "set the hours and place for holding court in the county." Tex. Gov't Code § 74.092(a)(5), (a)(7). Under that statute, the Local Administrative Judge has final authority to remedy the Bail Schedule Policy by automatically scheduling prompt, individualized bail review hearings.

Plaintiff has briefed the Local Administrative Judge's status as a county policymaker in his preliminary injunction motion, Prelim. Inj. Mot. at 37–42, ECF No. 3-1, and incorporates those arguments here.

[26] In the alternative, Plaintiffs seek injunctions against each Judge for their role in the Bail Schedule Policy as state actors, pursuant to *Ex Parte Young*. *Infra* pp. 44–47.

3. The District Attorney Has the Power to Set Final Policies Determining Bail Amounts in Galveston County

Finally, state law also grants the District Attorney final authority to set administrative policies determining bail amounts in Galveston County. When a District Attorney sets administrative policy for his office, the Fifth Circuit routinely concludes that he acts as a policymaker for the County. *E.g.*, *Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997) (specifying that counties are liable for District Attorney's final administrative policies); *see also Crane v. State of Texas*, 766 F.2d 193, 195 (5th Cir. 1985) (holding county liable for District Attorney's office's practice of issuing illegal capias warrants). This case is no different.[27]

B. The Felony Judges, the Local Administrative Judge, and the District Attorney Acquiesce in the Bail Schedule Policy

Plaintiff's allegations leave no question that the Bail Schedule Policy is standard operating procedure in Galveston County, and the County policymakers all know it. The County detains arrestees under automatically adopted bail amounts routinely, frequently, and flagrantly, without any inquiry into ability to pay bail or the potential flight risk or danger posed by each individual person. Am. Compl. ¶ 28. County officials apply the Bail Schedule Policy to dozens of arrestees booked into Galveston County Jail every week, and jails anyone who afford their bail on that basis alone. *Id.* ¶ 50, 112–13. This is a "pattern of abuses that transcends the error made in a single case"; it represents the

[27] In the alternative, Plaintiff seeks an injunction against the District Attorney as a state actor, pursuant to *Ex Parte Young*. *Infra* pp. 44–47.

"expected, accepted practice" of county employees. *Peterson v. City of Fort Worth*, 588 F.3d 838, 850–51 (5th Cir. 2009).

The Felony Judges, the Local Administrative Judge, and the District Attorney all have actual knowledge of the Bail Schedule Policy—if not from the obviousness of the policy itself, from explicit third-party reports on the policy. Am. Compl. ¶¶ 93–110. These Defendants are each in possession of formal reports from the Texas Indigent Defense Commission and the Council on State Governments detailing the County's Bail Schedule Policy. *Id.* ¶¶ 101–103. The Policy has been the subject of significant public discussion in local news outlets. *Id.* ¶ 104. The Felony Judges, the District Attorney, and members of the County Commissioners Court are even quoted in these articles. *Id.* ¶ 105. These Defendants' inaction in the face of such reports is more than sufficient to demonstrate acquiescence.

C. The District Attorney's Bail "Recommendation" Was a Moving Force Behind Plaintiff's Unconstitutional Pretrial Detention

Defendants generally do not dispute that Plaintiff's injury resulted from the Bail Schedule Policy. But the District Attorney disputes that his specific policies and practices are a "moving force" in violating Plaintiff's rights because the "District Attorney does not set bail." DA MTD at 25. This argument overstates the causation standard for liability under § 1983.

The Supreme Court has held that officers are liable under § 1983 when they advocate for unconstitutional outcomes—even if the ultimate injury results from an intervening court order. In *Malley v. Briggs*, 475 U.S. 335 (1986), a police officer sought

an arrest warrant from a magistrate knowing that the facts in his application were insufficient. The magistrate nevertheless approved the application, and the people wrongfully arrested sued the police officer for an unreasonable seizure. *Id.* at 337–39. The Supreme Court rejected the officer's argument that that the magistrate's order broke the causal chain and insulated the officer from liability. *Id.* at 339. "It is true," the Court observed,

> that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this damage by exercising reasonable professional judgment.

Id. at 345. The Court specifically noted that allowing officials to use a judicial order as a shield would be inconsistent with the Court's prior § 1983 precedent that makes defendants "'responsible for the natural consequences of [their] actions.'" *Id.* at 344 n.7 (quoting *Monroe,* 365 U.S. 167, 187 (1961)).

Though *Malley* involved qualified immunity, courts consistently apply the decision to support *Monell* liability where an improper judicial order is the reasonably foreseeable consequence of a local official's policy to make blanket "recommendations." *E.g.*, *Warner v. Orange Cnty. Dep't of Probation*, 115 F.3d 1068 (2d Cir 1997), *reinstated after opinion vacated*, 173 F.3d 120, 121 (2d Cir. 1999) (finding *Monell* liability for probation office's policy of recommending Alcoholic Anonymous for alcohol-related offenses where court's entry of condition was the natural consequence of the recommendation); *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592 (6th

Cir. 2007) (finding *Monell* liability where court's failure to provide indigency hearing was the reasonably foreseeable result of the public defender office's "across-the-board policy" of failure to request such hearings).

Plaintiff's allegations of causation here are even stronger than in *Malley*. Rather than taking the *chance* that the magistrate would fail to "perform as a magistrate should," the District Attorney *knows* that the magistrate will automatically adopt bail set by his prosecutors. *Id.* at 345; Am. Compl. ¶¶ 94, 96–106. That is the entire point of the Bail Schedule Policy. Prosecutors do not even attend magistration, likely because the District Attorney knows this is unnecessary: magistrates will set bail as prosecutors have already directed. The resulting detention of those who cannot these afford these preset bail amounts is the "natural consequence" of the District Attorney's policy to preset bail prior to magistration. *Malley*, 475 U.S. at 344 n.7. The District Attorney's policy in no way reflects a reasonable profession judgment because the bail schedule inherently fails to provide an individualized assessment of bail.

Wagenmann v. Adams, 829 F.2d 196, 211–213 (1st Cir. 1987), firmly establishes that the District Attorney is culpable for unconstitutional bail orders entered pursuant to his Bail Schedule Policy. There, the First Circuit found an arresting officer liable for requesting an excessive bail amount that the court subsequently adopted. The court recognized that a law enforcement officer's lack of statutory authority to set bail "does not provide an impenetrable shield" to liability. *Id.* at 211. Instead, the court distinguished between situations where an officer is merely "letting an independent judicial officer set bail," which would not support liability, with those situations where

the plaintiff alleges that the officer was "helping to shape, and exercising significant influence over, the bail decision," which would support liability. *Id.* Under the latter circumstances, the intervening court order does not break the chain of causation, in major part because the court's "reliance on the facts and recommendation furnished to him by [the officer] was routine—to be expected by all concerned." *Id. Wagenmann* is a nearly identical case and disposes of the District Attorney's arguments.

The District Attorney cites only *Galen v. County of Los Angeles*, 477 F.3d 652 (9th Cir. 2007), which held that a judge's "exercise of independent judgment" breaks the causal chain. But *Galen* does not compel a different result. As a threshold matter, a separate Ninth Circuit panel has (appropriately) expressed doubts about whether *Galen* is consistent with *Malley*. *See Peace v. Kerlikowske*, 237 F. App'x 157, 161 n.1 (9th Cir. 2007) ("Our holding in *Galen* may be in tension with *Malley v. Briggs.*"). More fundamentally, whether an unconstitutional judicial order is the reasonably foreseeable result of an officer's request is a factual question. *Warner*, 115 F.3d at 1073. Thus, the best way to reconcile *Malley* and *Galen* is to limit *Galen* to its particular facts, i.e., a situation where a judge's bail order could not reasonably be seen to result from the officer's otherwise proper conduct. *See Peace*, 237 F. App'x at 161 n.1 ("The facts before us clearly indicate that the judge did not simply approve what was submitted to the court, as in *Malley*, but instead independently came up with the questionable form of order issued."). *Cf. Patterson v. Van Arsdel*, 883 F.3d 826, 831 (9th Cir. 2018) (holding that officer may be held liable for submission of an unsigned warrant to a judge, which "should be seen as making a recommendation that the warrant be signed, just like . . . a

police officer submitting documentation for an arrest warrant to a judge, as in *Malley*"). Because Galveston County magistrates do not exercise "independent judgment" in bail determinations, and instead rubberstamp the prosecutor's bail amounts, *Malley*—and not *Galen*—should control.

D. The County's Remaining Defenses Are Without Merit

The County makes three additional arguments against liability. The County first suggests that the existence state laws establishes that the judges are state actors. *See* County MTD at 10, 12. But the mere existence of state law requiring county actors to engage in particular activities does not convert those county actors into state actors. *Skelton*, 234 F.3d at 296 ("The mere fact that the aldermen acted in accordance with state law, however, does not resolve the question dispositively."). For example, the Open Meetings Act—a law passed by the Texas legislature—sets out various rules that County Commissioners must follow when holding public meetings. No one would argue that the existence of these requirements converts a County Commissioner voting on a matter of county administration into a state legislator.

The County's citation of *Bigford v. Taylor*, 834 F.2d 1213, 1221 (5th Cir. 1980), is misplaced. *Bigford* held that a justice of the peace acted on behalf of the state and not the county in enforcing a facially unconstitutional state statute. *Id.* at 1223. Plaintiff makes no such challenge here. He challenges local bail-setting practices within Galveston County, not the enforcement of a statute that applies statewide. Unlike *Bigford*, nothing in state law compels the Felony Judges, the Local Administrative Judge, or the District Attorney to enforce or acquiesce in an unconstitutional scheme.

Second, contrary to the County's argument, it is irrelevant that the arresting officers, line prosecutors, and Magistrates executing the Bail Schedule Policy are not final policymakers for the County. Their unconstitutional actions are so widespread, consistent, and flagrant that they constitute a policy that has "the force of law *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997); *see also id.* at 403 (distinguishing liability on this ground from liability on a respondeat superior theory). No matter who is personally executing this policy, it is the acquiescence of final county policymakers that renders Galveston County liable. *Peterson*, 588 F.3d at 850 (explaining that county liability based on acquiescence is premised on conduct occurring "so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees") (quoting *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc)).

Finally, the County incorrectly characterizes Plaintiff's claims as challenging judicial conduct. Plaintiff does not challenge particular bail settings in particular cases, which is a judicial act. *See*, *e.g.*, County MTD at 9 (characterizing Plaintiff's allegations as complaints about "admitting the defendant to bail"). Instead, as in *ODonnell*, Plaintiff challenges the generally-applicable, post-arrest procedures that apply uniformly to every arrestee in Galveston County custody. The County's argument that Plaintiffs challenge judicial conduct contravenes binding Fifth Circuit precedent. *See ODonnell*, 892 F.3d 147, 155-56 (concluding that misdemeanor judges were liable and not acting in their judicial capacity when they "acquiesced in an unwritten, countywide process for setting bail that violated both state law and the Constitution").

E. Should the Court Conclude that Defendants Are State Actors, They Are Nonetheless Liable

1. The Felony Judges and the District Attorney Are Liable Under *Ex Parte Young*

Even if the Court concludes that the Felony Judges or the District Attorney acts on behalf of the State and not the County, they can nevertheless be enjoined. Federal courts have equitable power to enjoin unconstitutional executive action by state actors. *Ex parte Young*, 209 U.S. 123 (1908); *K.P. v. LeBlanc*, 729 F.3d 427, 439 (5th Cir. 2013) (describing *Ex parte Young* doctrine as a "rote principle[]"). The applicability of *Ex parte Young* is "straightforward": courts may enjoin any state actor with "some connection" to enforcing an ongoing constitutional violation. *Ex parte Young*, 209 U.S. at 157 (describing causal requirement as "some connection"); *Air Evac EMS, Inc. v. Texas Dep't of Ins.*, 851 F.3d 507, 519 (5th Cir. 2017) (discussing "straightforward" inquiry and enjoining state officials on the bases of their "connection to [] enforcement"). These equitable principles have been applied repeatedly to government actors of all stripes, including local, state, and federal officials.

Plaintiff has adequately alleged the Felony Judges' and District Attorney's involvement in the unconstitutional acts.[28] Because of these Defendants' strong

[28] *See* ECF No. 31 ¶¶ 11, 12 (the Felony Judges promulgate a money bail schedule that is used to determine conditions of release for every felony arrestee in Galveston County prior to an individualized hearing); *id.* ¶¶ 14, 94, (the District Attorney has instructed prosecutors to use the bail schedule as a minimum schedule); *id.* ¶ 107 (the Felony Judges could act to correct the bail policy); *id.* ¶ 109 (the District Attorney has the authority to rescind the felony bail schedule and instruct prosecutors to stop setting minimum bail amounts, which are later automatically transformed into de facto pretrial detention orders).

connection to the Bail Schedule Policy, they may be individually enjoined from violating Plaintiff's constitutional rights, should the Court find that they act on behalf of the state.[29]

2. Plaintiff Has Made Specific Allegations Concerning the Felony Judges' Unconstitutional Actions

The Felony Judges contend that Plaintiff makes generalized allegations that do not state a claim against the individual judges. This assertion ignores that Plaintiff's claims are against the Felony Judges as an administrative body; they are not against the Felony Judges as individual judges.[30] *E.g.*, Am. Compl. ¶ 107 (alleging that the Felony Judges have "authority to set policy for magistration procedures and pretrial release. They have repeatedly exercised this authority by voting, *en banc* as an administrative body, to issue standing orders governing magistration procedures and pretrial release. But the Judges have not taken any action to require individualized bail hearings in Galveston County."). A plaintiff may properly allege unconstitutional behavior by an administrative body. *Cf. Patsy v. Bd. of Regents*, 457 U.S. 496, 498 (1982) (a §1983 case concerning allegations of discrimination on the basis of race and sex against an educational board). Plaintiff also pled sufficient allegations against Judge Cox in his capacity as the Local Administrative Judge for failing to correct the Bail Schedule Policy. Am. Compl. ¶ 11. Thus, the

[29] Indeed, *Ex parte Young* authorizes injunctive relief against these Defendants' ongoing constitutional violations regardless of whether the they are acting on behalf of the state or the county.

[30] For this reason, dismissal of Judge Anne Darring is inappropriate, even if she serves as a family law judge only. Judge Darring is part of the administrative body that has final policymaking authority to promulgate local rules of administration under Texas Government Code Section 74.093.

Amended Complaint provides sufficient notice to the Felony Judges of their actions that Plaintiff asserts are unconstitutional.

None of the cases cited by the Felony Judges compels a different conclusion. Each case they cite discusses generalized allegations against individuals, rather than allegations regarding the acts of an administrative body or collective action.[31]

3. Plaintiff Has Made Specific Allegations Concerning the District Attorney's Unconstitutional Actions

The District Attorney also asserts, incorrectly, that Plaintiff failed to identify his specific conduct that violated Plaintiff's constitutional rights. As detailed above, Plaintiff's complaint alleges specific conduct that the District Attorney engages in, knows about, and fails to correct a wide-spread, well-settled policy of setting bail in felony cases ex parte, without any individualized assessment of a person's ability to pay. *E.g.*, Am. Compl. ¶¶ 30, 94. Where the Amended Complaint makes allegations against Defendants generally, it describes actions taken by Defendants collectively and without exception. A plaintiff may collectively refer to multiple defendants in allegations where the same conduct is alleged of all the defendants, so long as the allegations put defendants on notice of the actions of which they are accused. *Hudak v. Berkley Grp.*, No. 13-CV-0089, 2014 WL 354676, at *4 (D. Conn. Jan 23, 2014) ("Nothing in Rule 8 prohibits collectively referring to multiple defendants where the complaint alerts defendants that identical claims are asserted against each defendant."); *Ritchie v. N. Leasing Sys.*, 14 F.

[31] *See generally Jacquez v. Procunier*, 801 F.2d 789, 792-93 (5th Cir. 1986); *Jolly v. Klein*, 923 F. Supp. 931, 945–47 (1996); *Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008).

Supp. 3d 229, 236–37 (S.D.N.Y. 2014) (recognizing that a complaint with some collective allegations against all defendants can fulfill Rule 8's requirements as long as defendants are put on notice of what they did or did not do). The collective allegations against Defendants easily meet this standard.

None of the cases the District Attorney cites compels a different conclusion. *Dudley v. Angel*, 209 F3d 460, 463 (5th Cir. 2000), concerns qualified immunity, not pleading standards. *Murphy v. Kellar* also did not address collective allegations, but the court actually *reversed* the dismissal of a pro se prisoner's § 1983 claim who could not identify the corrections officers who allegedly assaulted him in prison. 950 F.2d 290, 292 (5th Cir. 1992). Plaintiff has adequately alleged his claims against the District Attorney—for this reason, the Court should deny his motion to dismiss, as well as his motion to stay discovery and for attorney's fees.

4. Plaintiff Has Made Specific Allegations Concerning the Magistrates' Unconstitutional Actions

Should the Court find, despite the foregoing analyses, that none of the other Defendants are liable for the Bail Schedule Policy, the Court should enter declaratory relief against the Magistrates. Plaintiff has alleged throughout his complaint that the Magistrates cause unconstitutional pretrial detention by automatically adopting the District Attorney's bail amounts. *E.g.*, Am. Compl. ¶¶ 13, 43, 47–48. Section 1983 explicitly contemplates declaratory relief against judges who violate the Constitution. The Magistrates' argument against their own liability boils down to an argument that they are not policymakers—but an individual official need not be a policymaker to be liable

under § 1983. The only binding cases the Magistrates cite on point concern § 1983 claims against municipalities, not individual officials. *Truvia v. Julien*, 187 F. App'x 346 (5th Cir. 2006); *Burge v. Parish of St. Tammany*, 187 F.3d 452 (5th Cir. 1999); *Rhode v. Denson*, 776 F.2d 107, 110 (5th Cir. 1985).

CONCLUSION

For all of the foregoing reasons, Defendants' motions to dismiss should be denied. In the alternative, Plaintiff requests leave to amend his complaint.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I will file this document via the ECF system, which serves the filing on all counsel of record.

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