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

OMNIBUS REPLY IN SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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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. A hearing on the preliminary injunction motion is scheduled for October 12.

This brief is an omnibus reply in support of Plaintiff's preliminary injunction motion. It addresses arguments raised in the County and Felony Judges' respective opposition briefs, ECF Nos. 101, 110.[1]

ISSUES TO BE RULED UPON

1. Is this a live controversy? This controversy is live because Plaintiff's release from jail does not moot the claims of the putative class, *see Cty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991), and Defendants have not met their "formidable burden" of proving that they have permanently stopped their unconstitutional practices, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

2. Does Plaintiff's evidence warrant a preliminary injunction? Plaintiff's evidence warrants a preliminary injunction because it shows that, as a matter of "standard

[1] The two briefs raising substantive arguments are Galveston County's opposition, ECF No. 101 ("County Opp."), and the Felony Judges' opposition, ECF No. 110 ("FJ Opp."). Plaintiff did not seek a preliminary injunction against the District Attorney or the Magistrates personally. For purposes of this brief, "Defendants" refers to the County and the Felony Judges.

operating procedure," Galveston County automatically imposes unaffordable bail amounts "without any 'meaningful consideration of other possible alternatives.'" *ODonnell v. Harris Cty.*, 892 F.3d 147, 155, 161 (5th Cir. 2018) (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978)).

SUMMARY OF ARGUMENT

The overwhelming weight of the evidence demonstrates that Galveston County automatically imposes unaffordable secured bail amounts without meaningful consideration of alternatives to pretrial detention. In all critical respects, Galveston County's system is identical to the system in Harris County, which the Fifth Circuit, applying heightened scrutiny, held to commit a "basic injustice: poor arrestees . . . are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond." *ODonnell*, 892 F.3d at 162.

Plaintiff's evidence demonstrating Galveston County's liability for unconstitutional pretrial detention practices is largely uncontested. Defendants have not introduced any evidence contesting that, at the time of filing: (1) Magistrates automatically adopted predetermined secured bail amounts in proceedings lasting less than a minute per person; (2) the Felony Judges knew of this widespread practice; and (3) the Felony Judges acquiesced in this practice by failing to issue corrective rules, despite the fact that (4) they had issued such rules to govern magistration in the past.

Plaintiff thus addresses Defendants' arguments in opposition to preliminary relief as follows: (1) this case presents a live controversy, despite the County's purported adoption of new bail procedures, *infra* pp. 3–8; (2) the County's pretrial detention

practices are unconstitutional, *infra* pp. 14–16; (3) the Felony Judges are final County policymakers, *infra* pp. 17–19; and (4) a preliminary injunction will best balance the parties' interests and serve the public, *infra* pp. 21–23.

ARGUMENT

I. The Putative Class Has a Live Controversy with Defendants

Defendants argue that Plaintiff does not have standing and that his claims are moot for two main reasons: (1) Plaintiff's case is resolved and (2) the County and Magistrate Judges implemented new procedures on July 1, 2018, that fixed their unconstitutional bail practices. Both arguments fail.

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

As discussed in Plaintiff's Omnibus Response in Opposition to Defendants' Motions to Dismiss,[2] Plaintiff's release does not moot this case. Both *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), and *Gerstein v. Pugh*, 420 U.S. 103 (1975), explicitly hold that release of a class representative does not moot class actions challenging pretrial detention procedures, which are by nature "inherently transitory." *McLaughlin*, 500 U.S. at 51–52 ("[T]he termination of a class representative's claims does not moot the claims of the unnamed members of the class." (quoting *Gerstein*, 420 U.S. at 110 n.11)). Plaintiff filed this lawsuit when he was in pretrial detention and suffering constitutional injuries that were "at that moment capable of being redressed through injunctive relief." *Id.* at 51. Thus, with respect to the class, Booth's challenge to unconstitutional pretrial

[2] ECF No. 111 at 6–7.

detention satisfies the Supreme Court's mootness exception for claims "capable of repetition, yet evading review." *Gerstein*, 420 U.S. at 110 n.11.

The Felony Judges cite one case in response: *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540–41 (2018). FJ Opp. at 16. But in *Sanchez-Gomez*, the Supreme Court found that the plaintiffs could not invoke this mootness exception because *they did not raise their claims on behalf of a class*. *Sanchez-Gomez*, 138 S. Ct. at 1534–35. *Gerstein* and *Riverside*—not *Sanchez-Gomez*—govern this case; Plaintiff's claims are not moot.

B. Defendants' Supposed New Procedures Do Not Moot This Action

Defendants do not contest that the bail procedures in effect at the time Plaintiff filed this lawsuit were constitutionally defective. Defendants instead assert that the County's new procedures adopted after the lawsuit was filed—collection of financial affidavits and future plans to hold bail review hearings—moot this action. Defendants are incorrect for two reasons. First, Defendants have not met their heavy burden of proving that they have irrevocably changed the County's unconstitutional practices, particularly because they vigorously defend the constitutionality of their original practices and intend their supposed changes to thwart Plaintiff's claims. Second, Defendants admit that their new procedures do not provide Plaintiff the preliminary injunctive relief he seeks.

1. Defendants Have Not Met Their Heavy Burden to Demonstrate That They Have Made Permanent Policy Changes

To the first point, the recognized rule is that "voluntary cessation of allegedly illegal conduct . . . does not make the case moot." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). This Court must retain jurisdiction unless Defendants carry their

"formidable burden" to demonstrate, *with evidence*, that it is "absolutely clear" that their unconstitutional practices will not reasonably recur, *Friends of the Earth, Inc. v. Laidlaw Envtl Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000), and that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

Defendants have not met this burden. They *cannot* meet it in light of the County's opposition brief, which continues to "vigorously defend[] the constitutionality" of its bail practices at the time of filing. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007); *see also Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 307 (2012) (holding case not moot where defendant "continues to defend the legality" of its conduct); Amended Scheduling Order at 3–4, *ODonnell v. Harris County*, No. 4:16-cv-1414 (S.D. Tex. June 25, 2018), ECF No. 423 ("[T]he County continues to defend the legality of its practices . . . showing that there is still a live controversy").

The County cites just one piece of evidence[3]: an unattributed, thirty-four-page document that purports to "describe[] the collection and flow of information resulting in bail determination," and describes procedures "for implementation" by multiple officials. Bail Procs. at 1, 5. Defendants have not offered any evidence revealing the author(s) of this document, the deliberative process for drafting it, the means by which it was promulgated, or the mechanisms by which it will be enforced. Defendants cannot moot

[3] County Opp. at 6–8 (citing document entitled "County of Galveston Bail Procedures," County Opp. Ex. 1, ECF No. 101-1); FJ Opp. at 12–13 (citing the same document, FJ Opp. Ex. H, ECF No. 110-1 at 119–152). Plaintiff cites this document as "Bail Procs."

cases by such hastily issued policy changes that are easily reversible. *E.g.*, *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73, 78 (5th Cir. 1973) (holding no mootness where challenged practice could be "resuscitated" when convenient); *United States v. Atkins*, 323 F.2d 733, 738–740 (5th Cir. 1963) (holding preliminary injunction warranted in light of openness of defendants' past discrimination and ability to resume discriminatory measures without going through any formalities).

Testimony from County officials demonstrates that these procedures are largely considered advisory and have only been partially implemented—and that no one knows who issued them. Judge Cox, the Local Administrative Felony Judge, does not know who drafted these procedures, nor does he believe they are in effect. Cox Tr. 105:12–108:12 (attached as Exhibit 1). The head clerk for the Magistrates, Dianna Reyna-Valdez, only learned of the procedures informally. Reyna-Valdez Tr. 136:10–137:5, 143:6–18 (attached as Exhibit 2). She also testified that Magistrate Judge Baker, who conducts the bulk of magistrations, does not stick to these procedures: he does not use the provided magistration script or conduct the referenced bail review hearings. *Id.* 134:25–135:20. Magistrate Judge Baker himself did not know who had promulgated these procedures, Baker Tr. 85:5–86:13 (attached as Exhibit 3); was not trained on the procedures, *id.* 89:2–4; testified that he considers the procedures to be merely advisory, *id.* 88:20–89:1, 109:18–111:5 ("I can't say that I'm looking at this and saying I'm attempting to follow these."), 117:17–19; and was unsure whether he had even read each page of the document, *id.* 88:11–19. *See also id.* 99:19–109:17 (expressing confusion about the meaning of the limitations on secured bail). The confusion surrounding the promulgation

of these procedures, the lack of training on them, and the judges' disregard for them all suggest that the only genuine purpose of the bail procedures is to attempt to moot this litigation.

Defendants cannot assure the Court that they will abstain from their old practices if the Court does not enter equitable relief, and their thirteenth-hour alterations amount to nothing "more than their mere profession that the conduct has ceased and will not be revived." *See Hall v. Bd. of Sch. Comm'rs*, 656 F.2d 999, 1000–01 (5th Cir. 1981) (citing *United States v. W. T. Grant Co.*, 345 U.S. at 632–33 (1953)). Many courts considering class action challenges to bail procedures have reached the same conclusion about belated procedural reforms. *Walker v. City of Calhoun*, 901 F.3d 1245, 1271 (11th Cir. 2018) (holding controversy over bail procedures still live despite judge's recently adopted procedural changes); *Schultz v. State*, No. 5:17-CV-00270, 2018 WL 4219541, at *8 (N.D. Ala. Sept. 4, 2018) (same); *Caliste v. Cantrell*, No. 17-cv-6197, 2018 WL 3727768, at *4 (E.D. La. Aug. 6, 2018) (same); Amended Scheduling Order, *ODonnell*, at 3–4 ("[T]he County continues to defend the legality of its practices . . . showing that there is still a live controversy").

2. The New Procedures Still Violate the Constitution

Even if Defendants' new procedures were made permanent, they are inadequate. First, the procedures do not require Magistrates to conduct individualized hearings before setting bail at magistration. Bail Procs. at 4–5. Instead, the procedures permit Magistrates to order unaffordable bail if they make an unrecorded determination that there is "cause to support a pretrial detention order." Bail Procs. at 4. The procedures do not specify the

criteria for a "pretrial detention order," which has led to confusion about how to enforce this provision. *E.g.*, Baker Tr. 108:12–109:17, 110:21–24.

The procedures provide for an individualized bail-reduction hearing 48 hours after arrest for those whose bail is set higher than the amount they predict they can raise from family and friends,[4] resulting in up to 24 hours of wealth-based pretrial detention for these arrestees.[5] Bail Procs. at 5–6. The procedures for the bail-reduction hearing place the burden of proof on the arrestee to demonstrate that bail should be lowered from the District Attorney's preset amount. *Id.* at 5 (describing the question at a bail-reduction hearing as whether "the decision-maker declines to lower bail from the prescheduled amount"). The procedures do not require findings concerning an arrestee's ability to pay or that the Magistrate consider alternatives to pretrial detention. *Id.* at 4–5.

These procedures also do not provide the substantive and procedural protections necessary to safeguard the fundamental rights against wealth-based detention and to pretrial liberty. As Plaintiff has briefed elsewhere, Prelim. Inj. Mot. at 17–23, these rights prevent Defendants from ordering unaffordable bail amounts unless they not only

[4] Arrestees who make an overly optimistic prediction about the money they can raise will likely be deprived of a bail review hearing. The procedures require an arrestee to answer the question, "What is the highest amount you could reasonably pay within 24 hours of your arrest, from any source, including the contributions of family and friends?" Bail Procs. App'x G at 5. Only arrestees whose bail is set higher than this estimate are entitled to a bail review hearing. Bail Procs. at 4, § 10(d). So if an arrestee estimates that she can raise (say) $500 within 24 hours, but she only raises $250, she won't get a bail review hearing—even if the magistrate ordered her bail at $500, which she is unable to pay.

[5] As Plaintiff discusses below, Defendants offer no evidence to justify this 24-hour period of wealth-based pretrial detention. Contrast *ODonnell*, which considered evidence that Harris County was incapable of providing hearings within 24 hours of arrest. 892 F.3d at 160.

consider an arrestee's ability to pay, but then make specific findings on the record that 1) the arrestee cannot afford the secured bail amount and 2) detention is necessary because alternative release conditions are insufficient. Most importantly, the government must prove these findings by clear and convincing evidence to ensure their accuracy. *See id.* at 27–30; *Caliste*, 2018 WL 3727768, at *10–11. *See also Schultz*, 2018 WL 4219541, at *19–21.

In addition to these inadequacies in the proposed procedures, the timing of the bail review hearing is also unconstitutional. The County contends that these procedures are presumptively valid under *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), because the procedures requires Magistrates to set bail and make probable cause determinations within 24 hours. County Opp. at 20. The County then complains that it should not be required to conduct bail hearings before probable cause determinations. The County is confused about its own procedures, and *McLaughlin* cannot help. While the procedures provide that Magistrates set bail at the same time as the probable cause determination, both of which occur within 24 hours after arrest, Magistrates are not required to conduct an individualized hearing at this proceeding. Bail Procs. at 5. These yet-to-be-implemented individualized hearings come within 48 hours after arrest, i.e., up to 24 hours *after* the probable cause finding, and are only for those who cannot afford their initial bail. *Id.* at 5–6.

Defendants have not provided even one piece of evidence to argue that this additional 24-hour period of wealth-based pretrial detention satisfies heightened scrutiny,

and they cannot rely on *McLaughlin*.[6] *McLaughlin* is centered on allowing jurisdictions flexibility to combine probable cause and bail hearings in cases involving warrantless arrest, and recognized that some additional time may be required to administer those combined hearings. *McLaughlin*, 500 U.S. at 58. But Defendants have not explained why an additional 24 hours of wealth-based detention *beyond* the probable cause determination is necessary—i.e., why they are unable to combine individualized bail determinations with probable cause determinations—or why they need this additional time for warrant arrests, which by definition do not require a probable cause hearing. They also have not explained why only those who cannot afford bail must be subject to a bail proceeding at which they may be detained based on an unattainable bail amount.

McLaughlin does not justify this discriminatory treatment. Just as the County may not convert a fine into even one day of jail time, it may not systematically prolong pretrial detention solely to determine if the indigent are too risky to release, while releasing without scrutiny those who can immediately purchase their liberty.[7] *See Frazier v. Jordan*, 457 F.2d 726 (5th Cir. 1972) (invalidating a law requiring individuals to choose between a fine or jail time). *See also Schultz*, 2018 WL 4219541, at *14 ("The system is discriminatory: not all criminal defendants who pose a real and present danger

[6] Compare *ODonnell*, which held that detention longer than 24 hours was permissible based on Harris County's evidence that it was administratively infeasible to guarantee bail review hearings on a shorter timeline. 892 F.3d at 160.

[7] Because indigent arrestees still face an absolute deprivation of their right to pretrial liberty under the County's alleged new system, this case is not governed by the rational basis standard of review ordinarily applicable to wealth-based classifications. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20–21 (1973).

to the public are indigent, but Cullman County detains only indigent criminal defendants who pose a real and present danger to the public. Dangerous defendants with means enjoy pretrial liberty.").

Defendants fall far short of their "formidable burden" to demonstrate voluntary cessation.

C. The Felony Judges Caused Plaintiff's Injury, and They Can Remedy It

Finally, the Felony Judges rehash arguments from their motion to dismiss that Plaintiff lacks standing to seek relief from the Felony Judges. Plaintiff primarily seeks an injunction against Galveston County. *See infra* pp. 17–19. But in the alternative, should the Court hold that the County is not liable, a preliminary injunction against the Felony Judges is warranted.

The Felony Judges argue that Plaintiff lacks standing to seek relief from them because the Felony Judges did not sign his bail order or issue the bail schedule, and because they lack the ability to control the Magistrates. As in their motion to dismiss, the Felony Judges' attempt to evade liability applies the wrong standard. Article III standing requires simply that Plaintiff's injury be "fairly traceable" to the Felony Judges. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 455 (5th Cir. 2017). Plaintiff therefore has standing because the Felony Judges substantially "contribute[d]" to his unconstitutional pretrial detention. *Sierra Club, Lone Star Chapter 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 455–456.

Specifically, the Felony Judges have the power to vote en banc to pass local rules of administration for felony cases in Galveston County. Tex. Gov't Code § 74.093. And as the Local Administrative Felony Judge, Judge Cox has final authority to provide for prompt bail reduction hearings. *See id.* § 74.092(a)(1), (a)(5), (a)(7). Yet the Felony Judges have failed to exercise this authority, in the face of overwhelming evidence of unconstitutional bail practices in Galveston County. Prelim. Inj. Mot. at 3–16 (summarizing evidence of unconstitutional bail practices). Both the Fifth Circuit and the Northern District of Texas recently recognized that plaintiffs can seek relief against such acquiescence. *ODonnell*, 892 F.3d at 156; *Daves v. Dallas Cty.*, No. 3:18-cv-0154-N, 2018 WL 4510136 (Sept. 20, 2018).

The Felony Judges claim that under *Ex parte Clear*, 573 S.W.2d 224 (Tex. Crim. App. 1978) (en banc), they lack the power to redress Plaintiff's injury. FJ Opp. at 18–20. They are incorrect. *Ex parte Clear* specifies that magistrates are subject to "the same rules" as felony judges when conducting magistration. 573 S.W.2d at 228. Accordingly, the Felony Judges could issue corrective administrative rules that would bind the magistrates in the same way that they bind the Felony Judges themselves. *E.g.*, *In re Mike Hooks, Inc.*, No. 01-12-00503-CV, 2012 WL 3629000, at *1 (Tex. App. Aug. 23, 2012) (issuing a writ of mandamus against a Galveston County Felony Judge for failure to follow the Galveston County local rules of administration).

In fact, the Felony Judges *have* issued administrative rules exercising this authority to control magistration.[8] Magistration is conducted in lockstep with the Felony Judges' "standing rules and orders," which were signed into effect by the Felony Judges as part of the Galveston County Indigent Defense Plan, including a duty to "set the Bond" using a form designed by the Felony Judges. Prelim. Inj. Mot., Ex. J (Galveston County Indigent Defense Plan) at 3 (describing the plan as containing "standing rules and orders"), 5–6 (setting forth ten duties the magistrate "shall perform" using five different forms designed by the Felony Judges); Ex. L (Sample Statutory Warnings by Magistrate) (demonstrating use of form #GC-3 to set bond, as mandated by the Felony Judges); Baker Tr. 28:18–25, 29:5–10, 31:13–24 (testifying that he performs magistration duties set out in the plan). The Felony Judges also recently issued a standing order that forbids the Magistrates from detaining arrestees for failure to pay an administrative fee. Standing Order Regarding Administrative Fees (attached as Exhibit 4) ("It is further ORDERED that failure to pay such an administrative fee shall not serve as grounds for pretrial detention of the arrestee."). *See also infra* pp 17–21. The Felony Judges cannot deny their legal authority to remedy constitutional deficiencies in magistration.

[8] For this reason, the Court should disregard the Felony Judges' fleeting reference to *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001), and their entirely unsupported assertion that they lack the power to redress Plaintiff's injury. FJ Opp. at 11.

II. Plaintiff is Substantially Likely to Succeed on the Merits

Plaintiff's evidence demonstrates that he is substantially likely to succeed on the merits of his claim. Specifically, the County's bail practices are unconstitutional, and there is no way to distinguish *ODonnell* to avoid county liability.

A. Automatic Imposition of Unaffordable Bail Violates Equal Protection and Due Process

The County makes a series of arguments defending the constitutionality of its bail practices. Nearly all of these arguments are either foreclosed by *ODonnell*, 892 F.3d at 157, or are simply incorrect.

The County contends that it does not violate the fundamental right to pretrial liberty, arguing that its pretrial detention procedures satisfy strict scrutiny. County Opp. at 17. But the County merely makes an unsupported, conclusory claim that Magistrates "determine[] . . . appropriate conditions of release" and "make an informed decision" about release. *Id.* The evidence demonstrates this is not true. Prelim. Inj. Mot. at 3–17; Cox Tr. 24:18–25:4 (describing magistration as a "ministerial" proceeding and explaining how it is not an "evidentiary hearing"). But even if the Court credited these unsupported assertions, they would not be enough to satisfy strict scrutiny as required by this Circuit. *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972); Prelim. Inj. Mot. at 17–30. The County also baselessly claims that "*Salerno* is implicated only after some period of prolonged detention." County Opp. at 21. The County is clearly imposing "prolonged detention" by ordering bail amounts that arrestees cannot afford. In any case, nothing in

United States v. Salerno, 481 U.S. 739 (1987) authorizes any period of wealth-based detention prior to a bail hearing.[9]

As for Plaintiff's wealth-based detention claim, it is enough that the County has conceded that *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978), controls this case. It makes no sense, if *Pugh* controls, for the County to dispute that wealth-based detention triggers heightened scrutiny, or that a bail reform case impermissibly raises a disparate impact claim. County Opp. at 13–15. *Pugh* recognizes that incarcerating arrestees on unaffordable bail requires not only individualized hearings, but also that those hearings provide "meaningful consideration of other possible alternatives" to determine if the arrestee's appearance or the public's safety "could reasonably be assured by one of the alternate forms of release." *Pugh*, 572 F.2d at 1057–58. *Accord ODonnell*, 892 F.3d at 161–62. The County does not even claim to conduct the searching inquiry required by *Pugh*.[10] The County implies that the procedural protections in Texas law are sufficient to satisfy the requirements of *Pugh*, County Opp. at 19, but Plaintiff's claim is about

[9] The County also mischaracterizes Plaintiff's argument to be that "any amount of bail is 'excessive' when a detainee is indigent." County Opp. at 16, 21–23 (characterizing Plaintiff as seeking a right to "affordable bail"). Plaintiff does not raise any claim under the Eighth Amendment Excessive Bail Clause. In fact, Plaintiff has conceded that unaffordable bail is permissible, so long as it is imposed in a manner consistent with the constitutional standards for a pretrial detention order.

[10] Plaintiffs do not claim an absolute right to affordable bail or against unaffordable bail, as Defendants contend. County Opp. at 24–26. Plaintiff instead seeks the basic recognition that intentionally setting unaffordable bail is the equivalent of issuing a pretrial detention order, and must be justified by the same constitutional principles. In other words, the County's authority to impose unaffordable bail extends only as far as its power to deny bail altogether.

Galveston County practices. Regardless of what Texas law provides for on paper, the evidence shows that in practice, Galveston County is falling short of the procedural floor set by *Pugh* and the federal Constitution.[11] Prelim. Inj. Mot. at 3–13 (describing the County's bail practices), 23–30 (describing federal procedural due process requirements).

None of the County's foregoing arguments raises any doubt that automatic imposition of unaffordable bail, without meaningful consideration of alternatives, violates due process and equal protection.

B. Plaintiff Has Demonstrated that Magistrates Automatically Adopt Prescheduled Bail Amounts Without Considering Alternatives

The County argues that magistration is held within 24 hours of arrest, and the Magistrates "regard" ability to pay in this proceeding. County Opp. 23–25. There are two problems with this argument.

This argument depends on an unsupported assertion about a change in County practices. For reasons described above, *supra* pp. 5–11, the Court should disregard any reference to the bail procedures promulgated after this case was filed. At the time of filing, Magistrates were not actually considering ability to pay before assessing bail at magistration. Plaintiff has filed ample evidence—including declarations, independent

[11] The County argues that bail schedules permit the speedy release of arrestees who can pay, and that individualized determinations will slow down their release. Plaintiff does not challenge the speedy release of arrestees who can afford their set bail; Plaintiff's point is that arrestees who cannot afford their bail amounts and for whom a pretrial detention order is not justified should also have access to speedy release.

audits, testimony, and videos[12]—demonstrating the summary nature of these hearings. Prelim. Inj. Mot. at 5–9, 13, 15. Magistrates did not ask questions about ability to pay, and they did not otherwise have financial information to consider. Reyna-Valdez Tr. 106:9–12. It is indisputable that the Magistrates did not consider ability to pay, and Defendants have presented no evidence that they have fixed this deficiency.

C. Galveston County is Liable for These Constitutional Violations

1. The County Is A Proper Defendant

Defendants argue that granting Plaintiff's motion for a preliminary injunction against Galveston County "would be meaningless" because "Galveston County cannot order or direct magistrates' actions because they act under a judicial capacity." County Opp. at 8. Not only does the County make an argument that is confused about municipal liability under Section 1983, the County also tries to have it both ways. Galveston County cannot simultaneously protest that it lacks the power to fix the constitutional defects in the County's bail procedures and, at the same time, hold up its newly adopted "Galveston County Bail Procedures" as evidence that those defects have now been remedied. County Opp. at 6–8 ("[B]ecause Galveston County has implemented the foregoing procedures, Plaintiff's claim is moot."). The County *can* in fact implement new procedures, through the Felony Judges as final policymakers.

[12] The videos need not achieve a science-fiction-level "glimpse into what is in the magistrates' mind", County Opp. at 25, to serve as evidence that Magistrates are not considering ability to pay.

The Felony Judges are Galveston County policymakers because they "speak with final policymaking authority" for the County regarding "the particular constitutional … violation at issue." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *accord ODonnell*, 892 F.3d at 155–56; *Daves*, 2018 WL 4510136, at *7. For that reason, the Felony Judges *are* the County for purposes of § 1983.[13] *ODonnell*, 892 F.3d at 155–56. Far from being "meaningless," granting an injunction against Galveston County will ensure the "implement[ation of] the constitutionally-necessary procedures to engage in a case-by-case evaluation of a given arrestee's circumstances." *Id.* at 163; *see also Daves*, 2018 WL 4510136, at *7.

2. Defendants Cannot Distinguish *ODonnell* or *Daves*

Defendants attempt to distinguish this case from *ODonnell v. Harris County* and *Daves v. Dallas County* by listing immaterial differences between the cases. But the only

[13] Plaintiff addresses this issue in his Omnibus Response to Motion to Dismiss, ECF No. 111 at 42–43, and incorporates those arguments herein. 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 at 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."). The cases the County cites to the contrary compel no different result: they involve facts distinct from those at issue here. *Compare Bigford v. Taylor*, 834 F.2d 1213, 1221–22 (5th Cir. 1988) (involving individualized decisionmaking through the enforcement of an allegedly unconstitutional state statute); *Briscoe v. Familias Unidas*, 619 F.2d 391 (5th Cir. 1980) (holding that the challenged conduct was outside the judge's policymaking authority, as defined by state law); *Eggar v. City of Livingston*, 40 F.3d 312, 316 (9th Cir. 1994) (bringing claims that did not involve any allegations that conduct was so widespread that it carried the force of law for the county).

relevant questions are whether the Felony Judges have final policymaking authority to promulgate local rules of administration for Galveston County (they do) and whether Galveston County Magistrates are bound to follow such rules (they are).

There is no material difference between the policymaking authority state law grants to judges in Harris County, Dallas County, and Galveston County. The Felony Judges' extended discussion of various subchapters in the Texas Government Code has no bearing on this question.[14] The Fifth Circuit held in *ODonnell* that the judges' final policymaking authority turned on one provision: their authority to promulgate administrative rules.

The authority granted to judges in Harris County, which the Fifth Circuit held to be final policymaking authority for purposes of Section 1983, is to:

> [A]dopt rules consistent with the Code of Criminal Procedure, 1965, and the Texas Rules of Civil Procedure for practice and procedure in the courts.

Tex. Gov't Code § 75.403(f). The authority granted to judges in both Dallas County and Galveston County is just as broad:

> The district . . . judges in each county shall, by majority vote, adopt local rules of administration. . . . The rules may provide for . . . any [] matter necessary to . . . improve the administration and management of the court system and its auxiliary services.

[14] Contrary to the Felony Judges' assertion, the Fifth Circuit did not rely on the ability to hire or fire magistrate judges in determining whether judges act as final policymakers for the county, but rather on their authority to promulgate rules governing post arrest practices. *ODonnell*, 892 F.3d at 155–56.

Id. § 74.093. If anything, the authority granted to Galveston County judges is broader. Both of these provisions grant judges "broad authority to promulgate rules that will dictate post-arrest policies consistent with the provisions of state law." *ODonnell*, 892 F.3d at 155 (citation omitted). The Felony Judges cannot meaningfully distinguish them.

In addition, Plaintiff argues that state law grants final policymaking authority to the Local Administrative Felony Judge, who has authority to:

> [S]upervise the expeditious movement of court caseloads, subject to local, regional, and state rules of administration; . . . set the hours and places for holding court in the county; . . . [and] supervise the employment and performance of nonjudicial personnel.

Tex. Gov't Code § 74.092(a). Defendants have not made any argument about why this law, specifically, does not grant final policymaking authority to the Local Administrative Felony Judge.

The Felony Judges have exercised this policymaking authority to issue many rules and standing orders. *E.g.*, Prelim Inj. Mot. Exs. G & J, ECF Nos. 3-8 (Local Rules of the District Courts for Galveston County), 3-11 (Texas Fair Defense Act – Galveston County Plan). The Local Administrative District Judge has likewise promulgated various rules using that authority. *Id.* Ex. H, ECF No. 3-9 (Order Regarding Release of Certain Offenders on Bond). Any local rules of administration, whether promulgated by the Felony Judges en banc or by the Local Administrative Judge, are binding upon the judges in that jurisdiction. *E.g.*, *In re Mike Hooks, Inc.*, 2012 WL 3629000, at *1 (issuing a writ of mandamus against a Galveston County Felony Judge for failure to follow the Galveston County local rules of administration). Because Galveston County Magistrates

are subject to "the same rules" as Galveston County Felony Judges when magistrating felony cases, they are bound by the local rules as a matter of law when magistrating felony cases in Galveston County. *Ex parte Clear*, 573 S.W.2d at 228; *see supra* pp. 11–14.

The Felony Judges' arguments to the contrary—that they did not hire or fire the Magistrates, or promulgate the bond schedule—miss the point. *See* FJ Opp. at 24–26. The Felony Judges' and Local Administrative Judge's rules are binding on every judge operating in the jurisdiction, including the Magistrates. Despite the Magistrates' widespread, flagrant, automatic adoption of bail amounts in violation of the Constitution, the Felony Judges as a body and the Local Administrative Judge have failed to promulgate any corrective rules or orders. Because they are final policymakers regarding post-arrest practices in Galveston County, their acquiescence in the policy renders the County liable.

III. Galveston County Is Substantially Likely to Continue Causing Class Members Irreparable Harm By Locking Them in Jail Cells

The wrongful denial of class members' fundamental right to pretrial liberty, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (addressing First Amendment harms); *accord Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 630 n.12 (5th Cir. 1985) (noting that harm is irreparable "where the rights at issue are noneconomic, particularly constitutional rights"). Defendants do not contest these principles, and instead merely assert that Plaintiff has not yet established irreparable

harm. As Plaintiff has demonstrated, the proposed class will continue to suffer irreparable injury if this Court does not enjoin Galveston County's Bail Schedule Policy. Prelim. Inj. Mot. at 2–17.

IV. The Harm of Being Unlawfully Locked in Jail Outweighs the Cost of Individualized Hearings, and Ending Such Harm is in the Public Interest

As discussed in Plaintiff's Motion for Preliminary Injunction, the balance of hardships weighs heavily in favor of a preliminary injunction. Defendants point primarily to the unspecified administrative burden of holding robust release hearings. But, as Plaintiff will demonstrate, that injury is outweighed by the financial benefit of avoiding unnecessarily jailing arrestees. In any case, any administrative burden pales in comparison to the arbitrary and discriminatory detention that the class members will continue to suffer should the Court not intervene.

The public interest also supports preliminary relief here. "[T]he public interest always is served when public officials act within the bounds of the law and respect the rights of the citizens they serve." *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 93 (5th Cir. 1992) (quoting 767 F. Supp. 801, 821 (N.D. Tex. 1991)). Preliminary relief requiring the County to comport with the Constitution only serves to further this goal.

CONCLUSION

For all of the foregoing reasons, the Court should grant Plaintiff's Motion for Preliminary Injunction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

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