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

MOTION FOR PRELIMINARY INUNCTION
REQUIRING COUNSEL AT INITIAL BAIL HEARINGS

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NATURE AND STAGE OF PROCEEDING

This lawsuit challenges Galveston County's two-tiered justice system, which imposes wealth-based pretrial detention without providing a meaningful hearing or defense counsel. The Court has held as a matter of law that the Defendant Felony Judges are Galveston County policymakers for post-arrest practices, and that the Sixth Amendment right to counsel requires representation at initial bail hearings. ECF No. 151 (Mem.) at 28–29, 38–39. The Court has also held a hearing and oral arguments on Plaintiff's first preliminary injunction motion, which seeks an order requiring that Galveston County's unaffordable secured bail orders be issued consistent with equal protection and due process. ECF Nos. 190 (Hr'g Tr.), 202 (1st Arg. Tr.), 203 (2d Arg. Tr.). The Court's decision on that motion is pending.

This second preliminary injunction motion seeks an order requiring Galveston County to provide counsel at any initial bail hearing.

ISSUES TO BE RULED UPON

Whether Plaintiff is entitled to an injunction requiring appointment of counsel at initial bail hearings because he has demonstrated (1) a substantial likelihood of success on the merits of his Sixth Amendment claim, (2) a substantial threat of irreparable injury if the Court does not order the County to provide counsel, (3) that the threatened injury to arrestees if the injunction is denied outweighs any harm that will result from ordering the County to provide counsel, and (4) that requiring counsel will not disserve the public interest. *See Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011).

SUMMARY OF ARGUMENT

The Court should issue a preliminary injunction requiring Galveston County to provide defense counsel at initial bail hearings. Plaintiff is likely to succeed on the merits of his Sixth Amendment claim because it is the law of the case that initial bail-setting hearings are a critical stage of prosecution, and that the Felony Judges are Galveston County policymakers with respect to post-arrest procedures. It is also uncontested that, under the Felony Judges' written policy, the County does not provide defense counsel at initial bail hearings (magistration).

Deprivation of counsel at initial bail hearings causes arrestees irreparable harm, including a significant risk of uncounseled inculpatory statements and unnecessary pretrial detention, which in turn cause worse case outcomes and devastating collateral consequences. These harms significantly outweigh the administrative task of providing counsel, especially in light of the cost savings that results from increased release rates. Providing counsel at initial bail hearings also improves the fairness and efficiency of criminal proceedings, which is in the public interest.

BACKGROUND

Plaintiff incorporates all exhibits filed in support of his first preliminary injunction motion, ECF Nos. 3-2 to 3-32, 185-1 to 185-48, 186; the background section from his first preliminary injunction motion, ECF No. 3-1 at 2–16; and all testimony, argument, and proposed findings and conclusions regarding his first preliminary injunction motion, ECF Nos. 190, 201–03, by reference. The following basic facts are material to this motion.

First, it is uncontested that the County does not provide defense counsel at magistration. The County was not providing counsel at the time of filing, Galveston County Indigent Defense Plan (2016) at 5–6, 19, Ex. J; Recordings of May 2017 Magistrations, Ex. M Attachs. 1–5; Additional Video Recordings (April 2018 Magistrations), Ex. LL; nor is the County currently providing counsel under its revised procedures, *id.* (October–December 2018 Magistrations); Revised Bail Procedures at 3–5, Ex. JJJ; Amended Galveston County Indigent Defense Plan (2018) at 3, 18, Ex. KKK.

Second, it is uncontested that the County's failure to provide counsel is caused by a written policy, the Galveston County Indigent Defense Plan, which was officially adopted by the Felony Judges. Galveston County Indigent Defense Plan (2016) at 5–6; Amended Galveston County Indigent Defense Plan (2018) at 3, 18.

Third, the lack of defense counsel at magistration causes irreparable harm. Defendants themselves have essentially made this case. Both the County and the Magistrates have repeatedly argued that an uncounseled colloquy between a magistrate and an arrestee is improper, and that arrestees are hesitant to advocate for themselves, in light of repeated admonitions of their right to remain silent. *E.g.*, Hr'g Tr. 42:18–43:7 (Mr. Poole: "It would be awkward for these magistrates to then start questioning the arrestee about his financial information and such."), 179:14–19, 207:12–25 (Judge Foley: "I'm not going force a defendant into a conversation with me, especially after I just told him he's got the right to not talk to anybody."); 1st Arg. Tr. 97:6–16 ("Mr. Nixon: Remember, it's being recorded. . . . You're going to have somebody—somebody is going to talk and incriminate themselves at that point. . . . The Court: You're just feeding—

you're just walking into [the] right to counsel argument right there."). In addition, Magistrate Judge Hindman testified that, after she ordered someone detained at his uncounseled magistration hearing, "they brought him back over on a bail review and come to find out, there was other information that could be elicited by the Defense that led me to reduce the bond and give him pretrial [release on personal bond]. But that information was not available to me at the Magistrate's hearing." Hr'g Tr. 401:18–23.

Remarkably, recognizing this reality, the Commissioners' Court has approved a grant application for provision of counsel of magistration, describing how counsel can solve these irreparable harms. Specifically, the application states that "provid[ing] all defendants with a lawyer during the bail hearing and 48-hour hearing" would solve the following "problems in Galveston County":

> [B]ail hearings are not meaningful examinations of ability to pay. Bail is set using a fixed schedule for felonies. Defendants without resources to make bond will stay in jail longer and risk losing whatever resources they did have prior to arrest such as housing, employment, vehicles, and custody arrangements. Additionally, defendants incarcerated prior to trial cannot participate in their defense strategy and may take plea deals to leave jail. An audit by the Texas Indigent Defense Commission showed that, in Galveston County, . . . a felony arrestee who cannot afford to pay bail is four times likelier to be sentenced to more than a year in prison and is half as likely to be sentenced to probation or deferred adjudication. . . .

Galveston County Commissioners' Court Minutes & Grant Application for Counsel at Magistration (May 4, 2018) at 5, Ex. UUU.[1]

Plaintiff has corroborated this noteworthy concession with a considerable body of evidence demonstrating that significant harm results from denial of the right to counsel at initial bail hearings. Professor Douglas Colbert has devoted his career to teaching and practice concerning the Sixth Amendment right to counsel at initial bail hearings. His declaration describes how in his experience, arrestees who are unrepresented at initial bail hearings are prejudiced by their lack of knowledge about factors bearing on pretrial release, lack of knowledge of criminal law, inability to gather evidence to support their release, the stress of incarceration that undermines the attorney/client relationship, the anchoring effect associated with the initial bail determination, and the risk of making inculpatory statements. Colbert Decl. ¶¶ 13, 15, 18–21, Ex. QQQ. Both empirical research and Professor Colbert's professional experience show that this prejudice results in unnecessary pretrial detention. *Id.* ¶¶ 14, 18, 20–23, *e.g.* ¶ 14 ("With defense counsel present, judges are 2 ½ times more likely to order release on recognizance . . . . [W]hen judges do order bail, they are 2 ½ times more likely to set a lower, affordable bail."). This unnecessary pretrial detention in turn leads to worse case outcomes and devastating collateral consequences for the arrestee. *Id.* ¶¶ 15–18, 22.

[1] Notably, the County has not produced this document to Plaintiff, despite Plaintiff's outstanding August 1, 2018 Requests for Production, including but not limited to No. 2 "All Documents concerning how, when, why, and how much secured bail is recommended or set for Arrestees who attend magistration in Galveston County," No. 7 "All Documents concerning Policies related to Magistration," and No. 15 "All Documents sent to or received from independent auditors concerning any aspect of Galveston County's criminal justice system, including but not limited to the Texas Indigent Defense [Commission] . . . since April 1, 2013."

The Chief Public Defenders of Harris and Bexar Counties, who successfully advocated for provision of counsel at magistration in their respective counties, describe similar experiences of prejudice to their clients throughout their careers, and similar benefits from their counties' provision of counsel at magistration. Bunin Decl. ¶¶ 8–24, 29, 30–31, Ex. RRR; Young Decl. ¶¶ 7–17, Ex. SSS. *E.g.*, Bunin Decl. ¶ 10 (describing widespread exonerations of people who pled guilty while detained), ¶ 11 ("They are unable to go to the scene of the alleged offense, review evidence, locate witnesses, attend office meetings, and access the internet."), ¶ 14 ("What a defendant 'reasonably could pay' is not just a matter of adding up numbers on a form."), ¶ 15 ("Defense lawyers can call . . . persons that pretrial officers [] cannot find or are unsure whether to disclose confidential information."), ¶ 18 ("After the defendant made an incriminating statement, the magistrate asked, 'are you done confessing?'"), ¶ 29 ("[D]efense counsel has greatly improved the fairness of the system and significantly contributed to the higher release rate."); Young Decl. ¶ 13 ("[Arrestees'] statements are often discounted by the magistrate as self-serving . . . ."), ¶ 14 ("[A]ttorneys can *verify* positive factors to present to the magistrate."), ¶ 17 ("77% of those represented . . . at the 15.17 hearing were released on a personal bond. For those arrested persons not represented by our office, only 57% were released."). Based on their experiences, they share Professor Colbert's opinion that the irreparable harm that results from uncounseled initial bail hearings far outweighs whatever administrative burden is caused by providing counsel. Colbert Decl. ¶¶ 22–23; Bunin Decl. ¶¶ 25–31; Young Decl. ¶¶ 16–26. *See generally* Early Appointment of

Counsel, Bunin Decl. Ex. 3 at 9–11 (discussing fairness and efficiency that results from early provision of counsel).

Fourth, it is uncontested that, even under the suggested bail procedures drafted after Plaintiff filed this lawsuit, the County categorically excludes many groups of arrestees from the bail review process.[2] If bail review hearings do anything to mitigate the irreparable harm caused by deprivation of counsel, that benefit accrues to only a fraction of the class, and it is dependent on "suggested" procedures that could be abandoned or overruled by the felony judges at any time. 1st Arg. Tr. 100:7–11; Pl.'s Proposed Findings ¶¶ 67–77 (collecting supporting evidence).

Finally, when the County does provide bail review hearings, County officials claim that counseled hearings are held within 24 hours of arrest. Henry Tr. 209:22–211:17, Ex. HH. If so, an injunction to provide counseled bail hearings within 24 hours of arrest will not require the County to implement a new process; the County need only adjust its existing system to provide counsel when bail is initially set, and not afterward.

ARGUMENT

I. Plaintiff Is Likely to Succeed on the Merits of His Sixth Amendment Claim

The Court has ruled as a matter of law that initial bail hearings are a critical stage of prosecution for purposes of the Sixth Amendment right to counsel. ECF No. 151 at

[2] At a minimum, the following arrestees are excluded from the bail review process: arrestees who incorrectly estimate that they can pay 10% or more of their bail amount within 24 hours, arrestees who cannot secure a 10% commercial bail bond, arrestees who are arrested under a warrant, arrestees who are magistrated before they are booked into Galveston County Jail, arrestees who are designated for suicide watch, and arrestees who are receiving medical treatment at the time they should be magistrated. Pl.'s Proposed Findings ¶ 88 (collecting supporting evidence). Plaintiff does not seek provision of counsel at Article 15.17 hearings outside Galveston County Jail.

28–29. Specifically, the Court determined that an initial bail hearing has the potential to prejudice the defendant, *id.* at 27–28 (citing *Bell v. Cone*, 535 U.S. 685, 695–96 (2002); *United States v. Ash*, 413 U.S. 300, 311 (1973); *McAfee v. Thaler*, 630 F.3d 383, 391 (5th Cir. 2011)), and that counsel is necessary to avoid that prejudice, *id.* (citing *Rothgery*, 554 U.S. at 212 n.16; *Ash*, 413 U.S. at 311; *McAfee*, 630 F.3d at 391). *Accord United States v. Wade*, 388 U.S. 218, 237 (1967) (holding 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"). The Court concluded, on the basis of both legal and empirical authorities, that "[t]here can really be no question that an initial bail hearing should be considered a critical stage of trial." *Id.* at 28.

The Court has also held as a matter of law that the Defendant Felony Judges are Galveston County policymakers for post-arrest practices. *Id.* at 38–39. It is uncontested that the Felony Judges adopted the Galveston County Indigent Defense Plan that was in effect at the time this case was filed and the amended plan that was adopted in October 2018. Both of these written policies instruct County officials to provide defense counsel, if at all, after magistration. Galveston County Indigent Defense Plan (2016) at 5–6, 19; Amended Galveston County Indigent Defense Plan (2018) at 3, 18. It is also uncontested that counsel was not provided for Mr. Booth at magistration, nor is counsel provided for any other arrestee at magistration.

Plaintiff has thus proven a substantial likelihood of success on the merits of his Sixth Amendment claim against Galveston County: he has demonstrated that the Felony

Judges, acting as county policymakers, adopted the Galveston County Indigent Defense Plan as official county policy, which is the moving force behind the deprivation of arrestees' Sixth Amendment right to counsel at their initial bail hearing. *See Hampton Co. Nat'l Surety v. Tunica Cnty.*, 543 F.3d 221, 227 (5th Cir. 2008) (listing elements of municipal liability).

The post-filing changes to the County's system do not impact this analysis. For reasons discussed extensively elsewhere, these changes are based on nonbinding, advisory guidelines written by the County,[3] which the Felony Judges do not support.[4] But even if the changes were permanent and binding, they would not be enough to fix the Sixth Amendment violation. The County still refuses to provide arrestees with defense counsel at their initial bail hearings. The absence of counsel at this critical stage of prosecution is a violation of the Sixth Amendment.

II. Class Members Will Suffer Irreparable Harm in the Absence of an Injunction

"When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *ODonnell v. Harris*

[3] Pl.'s Proposed Findings ¶¶ 67–77 (collecting supporting evidence).

[4] *Id.* ¶ 50–51 (collecting evidence that felony judges retaliated against pretrial release reforms by delaying pretrial release, interfering with release of arrestees authorized for personal bond, and complaining of Commissioners' Court "meddling" in the local paper), ¶¶ 71–77 (collecting supporting evidence and describing felony judges' hostility to outside influence, the Local Administrative Judge's view that he is not required to carry out the revised bail procedures, his view that the prior system had no constitutional defects whatsoever, and his view that automatic bail review hearings before felony judges would be unlawful). Voluntary criminal court reforms are likelier to fail when facing this type of fractured leadership. Alissa Pollitz Worden *et al.*, *Court Reform: Why Simple Solutions Might Not Fail? A Case Study of Implementation of Counsel at First Appearance*, 14 Ohio State J. Crim. L. 521, 528–29 (2016), https://kb.osu.edu/bitstream/handle/1811/80796/OSJCL_V14N2_521.pdf?sequence=1&isAllowed=y (identifying factors important for success, including "those responsible for the program are in concurrence about the significance of the problem as well as the appropriateness of the reform" and "key actors across court organizations agree to collaborate").

Cnty., 251 F. Supp. 3d 1052, 1157 (S.D. Tex. 2017), *aff'd as modified*, 892 F.3d 147 (5th Cir. 2018) (quoting Wright & Miller, Fed. Prac. & Proc. Civ. 3d § 2948.1). *Accord Elrod v.* Burns, 427 U.S. 347, 373 (1976) (plurality opinion) (holding a First Amendment violation, even "for even minimal periods of time, unquestionably constitutes irreparable injury"); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) (quoting the same language as *ODonnell*); *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"). Galveston County's continuing Sixth Amendment violations are sufficient to demonstrate irreparable harm.

Even if the Court required a further showing of irreparable harm, the record evidence demonstrates it. Lack of counsel at bail-setting hearings leads to unnecessary pretrial detention: arrestees do not know how to advocate for their release, lack the resources to advocate for their release, and are (appropriately) fearful of advocating for release and saying something harmful. The declarations from Professor Colbert and Chief Public Defenders Alex Bunin (Harris County) and Michael Young (Bexar County) each attest that this is true based on their personal experience and empirical evidence. Colbert Decl. ¶¶ 13–14, 19–21; Bunin Decl. ¶¶ 8, 12–18; Young Decl. ¶¶ 7–14, 22. *Accord* Indigent Defense Innovation at 14–15 (describing 150% increase in personal bonds after counsel was provided at magistration), Ex. TTT. This is especially true in jurisdictions like Galveston County, which default to secured money bail at the initial bail hearing. Pl.'s Proposed Findings ¶ 82(a) (collecting supporting evidence). Mr. Booth himself

testified that the lack of counsel impacted his ability to advocate for himself when his bail was set. Hr'g Tr. 218:5–11 ("Q: Did you ask the magistrate any questions? Mr. Booth: No, I really didn't get the chance to. Q: Was there any other reason why you didn't ask questions? Mr. Booth: I was—I was kind of under informed. I didn't—overwhelmed, and I wasn't represented by any—an attorney or anything like that. I didn't know which direction to go.").

Defendants' witnesses and argument support this conclusion. As discussed above, Magistrate Judge Hindman testified that her decision about whether to release an arrestee changed once counsel was appointed, because, "come to find out, there was other information that could be elicited by the Defense that led me to reduce the bond and give him pretrial [release on personal bond]. But that information was not available to me at the Magistrate's hearing." Hr'g Tr. at 401:19–23. Defendants also admit that, in light of the lack of defense counsel, they cannot conduct the full and fair hearing the Constitution requires in order to set unaffordable bail. *E.g.*, Hr'g Tr. 42:18–43:7 (Mr. Poole: "It would be awkward for these magistrates to then start questioning the arrestee about his financial information and such."), 179:14–19, 207:12–25 (Judge Foley: "I'm not going force a defendant into a conversation with me, especially after I just told him he's got the right to not talk to anybody."); 1st Arg. Tr. 97:6–16 ("Mr. Nixon: . . . Remember, it's being recorded. . . . You're going to have somebody—somebody is going to talk and incriminate themselves at that point. . . . The Court: You're just feeding—you're just walking into [the] right to counsel argument right there."). Both the Plaintiff and the

Defendants have demonstrated that violation of the right to counsel at magistration causes arrestees irreparable harm in the form of unnecessary pretrial detention.

Pretrial detention, in turn, has devastating collateral consequences. These consequences have been demonstrated and discussed at length in earlier briefing. Pl.'s Proposed Findings ¶¶ 40–42 (collecting supporting evidence); Colbert Decl. ¶¶ 15–17, 22; Bunin Decl. ¶¶ 8–11 ("I have seen clients lose jobs within 24 hours, fail to graduate, and have their parental rights terminated, all because they were stuck in pretrial detention."); Young Decl. ¶ 15; Early Appointment of Counsel at 9. The Commissioners' Court concedes that collateral consequences impacting arrestees' "housing, employment, vehicles, and custody arrangements," as well as negative impacts on case outcomes, could all be ameliorated by provision of counsel at magistration. Galveston County Commissioners' Court Minutes & Grant Application for Counsel at Magistration at 5. *Accord ODonnell*, 251 F. Supp. 3d at 1157–58 (listing harms of pretrial detention and concluding: "This factor weighs strongly in favor of granting the plaintiffs' request for the injunctive relief.").

The County will surely argue that their suggested bail review procedures, which call for a counseled bail review hearing within 48 hours of arrest, cure the harm resulting from deprivation of the right to counsel. This argument is incorrect for many reasons. First, the procedures cannot cure the prejudice resulting from uncounseled statements made at magistration. There is ample evidence that some arrestees understandably choose to speak at magistration, which has profound Fifth Amendment implications. Recordings of May 2017 Magistrations, Ex. M Attach. 3 at 25:40–25:44, Attach. 4 at 36:44–37:25,

Attach. 5 at 16:16–30, 39:35–39:55, 41:53–58; Additional Video Recordings (April, October–December Magistrations); Hr'g Tr. 179:19–25 ("[I]f they initiated a conversation with me [about release] . . . I would always engage them and try to find out what's going on."), Bunin Decl. ¶¶ 17–18 ([M]any were motivated to try to explain their situation in the hope that charges would be dismissed or bond would be set low. . . . [I]t was fairly common for defendants to attempt to speak on their own behalf in this way. . . . [D]efendants' desire to speak often overcame any formal warnings.").

Second, the revised procedures still impose a period of unnecessary wealth-based detention, which would be eliminated for many arrestees by counsel's presence at magistration. Hr'g Tr. 401:18–23 (Judge Hindman: "[T]hey brought him back over on a bail review and come to find out, there was other information that could be elicited by the Defense that led me to reduce the bond and give him pretrial [release on personal bond]. But that information was not available to me at the Magistrate's hearing."); Colbert Decl. ¶ 14 (("With defense counsel present, judges are 2 ½ times more likely to order release on recognizance . . . . [W]hen judges do order bail, they are 2 ½ times more likely to set a lower, affordable bail."), ¶¶ 18–23; Bunin Decl. ¶¶ 24, 29 ("[D]efense counsel has greatly improved the fairness of the system and significantly contributed to a higher release rate); Young Decl. ¶ 17 ("77% of those represented by the Bexar County Public Defender's Office at the 15.17 hearing were released on a personal bond. For those arrested persons not represented by our office, only 57% were released."). These releases have no negative effect on recidivism or appearance rates. Colbert Decl. ¶¶ 10, 14; Bunin Decl. ¶ 29; Young Decl. ¶¶ 17, 21, 16. *Accord* Indigent Defense Innovation at 14–15 (detailing

Bexar County's success, including 150% increase in personal bonds with no negative effect on recidivism or appearance rates); Galveston County Commissioners' Court Minutes & Grant Application for Counsel at Magistration at 5 (arguing harms of pretrial detention could be avoided by provision of counsel at magistration). There is no evidence demonstrating why counsel cannot be provided at magistration, when counsel is present for the subsequent bail review hearing, often just 12 hours later. *See* Jones Supp. Decl. ¶¶ 26–27, Ex. Y ("There would be no need for additional review hearings if unaffordable secured money bail amounts were not set at magistration as they are in Galveston County. . . . When judicial officers reduce the money bond amounts in 86% of review hearings, that is an indication that the original amounts are unnecessarily high. . . . Bail review hearings . . . are a system inefficiency that increases workload for . . . staff. "); Early Appointment of Counsel at 10–11 ("The early appointment of counsel . . . helps to prevent inefficiency and delay."); Young Decl. ¶ 22 (noting provision of counsel at magistration avoided 6,255 days of pretrial detention since 2015).

Third, the revised procedures require magistrates to order an initial bail amount without counsel present. This number has an anchoring effect that cannot be cured by a subsequent counseled bail review hearing; defense counsel will be saddled with the effect of the initial bail order. Colbert Decl. ¶¶ 18, 20; Bunin Decl. ¶¶ 30–31 ("[N]o written findings or record from the first hearing appear to be available for this review. . . . It is basic human psychology that once something is decided it is easier to let it stand than change it.").

Fourth, the revised bail procedures provide no remedy for those arrestees who are excluded from the bail review process altogether, Pl.'s Proposed Findings ¶ 88 (listing group of arrestees who are excluded from bail review and collecting supporting evidence). Providing counsel at magistration ensures that all arrestees get a prompt, counseled bail hearing. *Accord* Young Decl. ¶ 15 ("[C]ourt-appointed attorneys, who are pressed for time, . . . will rarely file bond-reduction motions . . . ."); Galveston County Commissioners' Court Minutes & Grant Application for Counsel at Magistration at 5.

Finally, for reasons discussed at length elsewhere, Pl.'s Proposed Findings ¶¶ 67–77 (collecting supporting evidence), Defendants have not demonstrated that bail review hearings are permanent. They were "suggested" by the County's counsel to moot this litigation. 1st Arg. Tr. 99:13, 100:7–12. The complete lack of political will—to put it mildly[5]—for a collaborative solution between the Commissioners' Court and the Felony Judges leads to the inevitable conclusion that, in the absence of an injunction, suggested bail review procedures do little to mitigate the substantial risk of irreparable harm faced by the arrestees in Galveston County Jail.

[5] Pl.'s Proposed Findings *Id.* ¶ 50–51 (collecting evidence that felony judges retaliated against pretrial release reforms by delaying pretrial release, interfering with release of arrestees authorized for personal bond, and complaining of Commissioners' Court "meddling" in the local paper), ¶¶ 71–77 (collecting supporting evidence and describing felony judges' hostility to outside influence, the Local Administrative Judge's view that he is not required to carry out the revised bail procedures, his view that the prior system had no constitutional defects whatsoever, and his view that automatic bail review hearings before felony judges would be unlawful). As mentioned above, voluntary criminal court reforms are likelier to fail when facing this type of fractured leadership. Worden *et al.* at 528–29 (identifying factors important for success, including "those responsible for the program are in concurrence about the significance of the problem as well as the appropriateness of the reform" and "key actors across court organizations agree to collaborate").

III. Harm Resulting From Deprivation of the Right to Counsel Outweighs the Administrative Burden of Providing Counsel

"When plaintiff is claiming the loss of a constitutional right, courts commonly rule that even a temporary loss outweighs any harm to defendant and that a preliminary injunction should issue." Wright & Miller, Fed. Prac. & Proc. Civ. 3d § 2948.2. There is no reason to deviate from the ordinary rule in this case. Most importantly, Galveston County already has the infrastructure in place to provide defense counsel for bail review hearings that, according to the County, almost always occur less than 24 hours after arrest. Henry Tr. 209:22–211:17, Ex. HH. Adjusting this system to provide counsel for everyone who is magistrated will impose little additional costs, and Defendants have presented no contrary evidence. *Cf.* Jt. Def. Exs. D1–D12 (demonstrating money already spent on infrastructure necessary to provide counseled hearings within 24 hours of arrest). There is no legitimate purpose for the two-step magistration-review process and resulting delay. Providing counsel at magistration would largely eliminate the need for a second hearing to review bail. Colbert Decl. ¶ 18 (describing "additional hours or days in jail [] could have been avoided with an upfront appointment of counsel"), ¶¶ 20–23; Bunin Decl. ¶¶ 24, 29 ("[D]efense counsel has . . . significantly contributed to the higher release rate."); Young Decl. ¶ 17 (describing 20% higher release rate for arrestees represented at magistration). *See* Ready Tr., Ex. KK 197:9–20, 200:20–201:1 & Ex. 18 (Fabelo Presentation) at 13 (reporting that 90% of bail review hearings resulted in the arrestee's subsequent release); Jones Supp. Decl. ¶¶ 26–29 ("[D]efense counsel's presence during [initial] bail setting hearings substantially reduces the need for

subsequent review . . . .").[6] Hr'g Tr. at 401:19–23 (testimony of Judge Hindman). The increased release rate that would result from early provision of counsel would also save the County from unnecessarily paying to detain arrestees. Colbert Decl. ¶ 23 ([I]t spares taxpayers from paying the high and unnecessary expense of incarceration. . . . The [Baltimore] data revealed projected cost savings of 4.5 million dollars . . . ."); Young Decl. ¶ 22 (reporting that Bexar County has avoided paying for 6,255 days of confinement, saving $1.2 million); Galveston County Commissioners' Court Minutes & Grant Application for Counsel at Magistration at 5 (seeking provision of counsel at magistration: "Galveston's approach to bond is not only creating bad outcomes for defendants, but also for the county through additional jail bed need."). Even to the extent that the financial cost of providing counsel is not offset by the reduction in pretrial detention, the cost of providing counsel cannot outweigh the irreparable harm that arrestees will suffer in the absence of an injunction.

Many courts considering Sixth Amendment claims for injunctive relief have reached the same conclusion. Three injunctions that issued here in the Fifth Circuit are particularly instructive: *Green v. City of Tampa*, 335 F. Supp. 293, 297 (M.D. Fla. 1971); *Bramlett v. Peterson*, 307 F. Supp. 1311 (M.D. Fla. 1969); and *Phillips v. Cole*, 298 F. Supp. 1049, 1050 (N.D. Miss. 1968). The lesson of these cases is this: the government will almost inevitably maintain that it lacks the resources, the infrastructure, or fair notice

[6] "[B]ail review hearings should rarely ever occur. They are inefficient and an indication of ineffective pretrial decision-making from the outset. There would be no need for additional review hearings if unaffordable secured money bail amounts were not set at magistration as they are in Galveston County. . . . When judicial officers reduce the money bond amounts in 86% of review hearings, that is an indication that the original amounts are unnecessarily high. . . . Bail review hearings . . . are a system inefficiency that increases workload for . . . staff. "

to begin providing court-appointed counsel in new contexts. But as these three Fifth Circuit district court decisions hold, the cost of providing counsel at critical stages of prosecution is far outweighed by the harm caused by denying counsel. Having chosen to initiate criminal prosecutions, it is the County's burden to appropriate the resources necessary to carry each prosecution out in a manner consistent with the Constitution.

Bramlett, the most detailed case on point, concerned county judges' widespread refusal to appoint defense counsel for misdemeanor cases. On the balance of harm, the court observed that where the right to counsel is concerned, "even the specter of potential cost in substantial amounts has been found to be not too burdensome." 307 F. Supp. at 1316–17. The court also noted that in response to litigation, the government had actually explored the possibility of funding counsel, yet delayed in apparent hopes that the court would not order them to spend the resources—much like the County may have done here.[7] *Id.* at 1317. In light of the foregoing, the court held that local inertia cannot militate against enforcing the right to counsel, concluded that "[i]njunctive relief for deprivation of sixth amendment rights is not unique in federal jurisprudence," and entered a lengthy injunction detailing the step-by-step process judges must follow and requiring appointment of counsel for all class members. *Id.* at 1322–1325.

[7] The Commissioners' Court has already prepared a grant application and proposed five-year budget for providing counsel at magistration, which was approved for submission on May 4, 2018. Galveston County Commissioners' Court Minutes & Grant Application for Counsel at Magistration at 1–2. It is unclear whether the application was ever submitted. The County has not produced any responsive documents about this grant application, despite Plaintiff's outstanding August 1, 2018 Requests for Production, including but not limited to No. 2 "All Documents concerning how, when, why, and how much secured bail is recommended or set for Arrestees who attend magistration in Galveston County," No. 7 "All Documents concerning Policies related to Magistration," and No. 15 "All Documents sent to or received from independent auditors concerning any aspect of Galveston County's criminal justice system, including but not limited to the Texas Indigent Defense [Commission] . . . since April 1, 2013."

The *Phillips* and *Green* cases reached the same conclusion on balance of harms. The *Phillips* court grappled with the "ultimate problem" that there was no existing "method of clearly employing and compensating court-appointed counsel," but ultimately laid responsibility at the government's feet, holding that "[i]naction, or failure to act in passing necessary legislation to meet this problem will not militate against the maintenance of the constitutional right," and that any harm from lack of infrastructure was attributable to "continued local inertia." *Id.* at 1053. The *Green* court reached the same conclusion. Despite the government's argument that the Sixth Amendment case law was previously unclear, and the defendants' promise to follow the law in the future, the court held that an injunction appointing counsel was "necessary" because "this Court has unmistakenly indicated that there is an absolute right to counsel" and "still defendants are not in compliance therewith." *Id.* The same rationale requires an injunction here.[8]

IV. Providing Counsel is in the Public Interest

"It is always in the public interest to prevent the violation of a party's constitutional rights." *ODonnell*, 251 F. Supp. 3d at 1159 (citation omitted); *Daves v. Dallas Cnty.*, 341 F. Supp. 3d 688, 697 (N.D. Tex. 2018). *Accord Jackson v. Women's*

[8] Two similar Sixth Amendment cases from outside the Fifth Circuit also bear mention. In *New York County Lawyers' Association v. New York*, 192 Misc. 2d 424 (N.Y. County 2002), the court ordered preliminary injunctive relief raising compensation rates for all appointed defense counsel in New York City, concluding that "the balancing of the equities favors NYCLA" because the existing system "presumptively subjects innocent indigent citizens to increased risks of adverse adjudications and convictions merely because of their poverty." *Id.* at 437.

In *Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013), the court ordered detailed systemwide supervision of public defense in municipal courts. Acknowledging sensitivity to "the Cities' interests in controlling the manner in which they perform their core functions, including the provision of services and the allocation of scarce resources," the court nevertheless held that "defendants are obligated to comply with the dictates of the Sixth Amendment, and the Court will 'not shrink from its obligation to enforce the constitutional rights of all persons.'" *Id.* at 1134 (quoting *Brown v. Plata*, 563 U.S. 493, 511 (2011)).

Health Org., 940 F. Supp. 2d 416, 424 (5th Cir. 2013) (holding public interest prong is "an element that is generally met when an injunction is designed to avoid constitutional violations"). The public has an interest in more than just finances; it benefits the public to operate a fair criminal legal system with adversarial legal testing. *Wilbur*, 989 F. Supp. 2d at 1133. *See Knowles v. Horn*, No. 08-cv-1492, 2010 WL 517591, *8 (N.D. Tex. Feb. 10, 2010) ("The public interest cannot be measured solely in financial increments and must account for the dignity of life and the preservation of families."); Colbert Decl. ¶ 23; Early Appointment of Counsel at 10 (describing public interest in an "an impartial, fair, and accurate outcome"). Even taking finances into account, it makes no sense to spend public funds to jail people who should be released on less restrictive conditions, but lack the resources to hire an attorney to make that argument. *See ODonnell*, 251 F. Supp. 3d at 1159 (crediting district attorney's testimony that there is no sense in paying to jail arrestees pretrial whose alleged crimes may not merit jail time). The public interest weighs strongly in favor of vindicating arrestees' right to counsel at magistration.

Finally, for the same reasons described in Plaintiff's first preliminary injunction motion, ECF No. 3-1 at 41, the Court should not require Plaintiff to post a bond under Rule 65(c) of the Federal Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court issue the attached proposed preliminary injunction requiring provision of defense counsel at initial bail-setting hearings.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

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