IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

SHANNON DAVES, *et al.*, On behalf of themselves and all others similarly situated, FAITH IN TEXAS, TEXAS ORGANIZING PROJECT, On behalf of themselves, Plaintiffs, v. DALLAS COUNTY, TEXAS, *et al.*, Defendants.	Case No. 3:18-cv-154

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs propose that the Court enter the following findings of fact and conclusions of law granting Plaintiffs' Motion for Preliminary Injunction.[1]

Findings of Fact

I. The Named Plaintiffs

1. Each of the named Plaintiffs was arrested, booked into, and detained in the Dallas County Jail at the time this case was filed on January 21, 2018, because they could not afford predetermined secured money bail amounts. Shannon Daves and Destinee Tovar were arrested and detained for alleged misdemeanor offenses. The rest of the named Plaintiffs were arrested and detained for alleged felony offenses.[2]

[1] *See* Dkt. 3 (Plaintiffs' Motion for Class-Wide Preliminary Injunction); Dkt. 75 (Plaintiffs' Brief in Support of the Named Plaintiffs' Motion for Class-Wide Preliminary Injunction); Dkt. 57 (Plaintiffs' Reply to Felony Judges' Response in Opposition to Motion for Preliminary Injunction); Dkt. 58 (Plaintiffs' Reply to County Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction).

[2] Dkt. 93-56, Pls.' Ex. 56 ¶¶ 2–3, 7, 13 (Decl. of Erriyah Banks); Dkt. 93-57, Pls.' Ex. 57 ¶¶ 2, 12 (Decl. of Shannon Daves); Dkt. 93-58, Pls.' Ex. 58 ¶¶ 2–3, 11 (Decl. of Patroba Michieka); Dkt. 93-59, Pls.' Ex. 59 ¶¶ 2–3, 7 (Decl. of Destinee Tovar); Dkt. 93-60, Pls.' Ex. 60 ¶¶ 2–3, 7 (Decl. of Shakena Walston); Dkt. 93-61, Pls.' Ex. 61 ¶¶ 2, 4, 9, 12 (Decl. of James Thompson).

2. At the Dallas County jail, each named Plaintiff appeared before a magistrate who announced the offense of arrest and informed the Plaintiff of the secured money bail amount required for release. Neither the magistrate nor any other official inquired as to whether any of the named Plaintiffs had the ability to pay the secured financial condition of release.[3]

3. None of the Plaintiffs could afford to pay the predetermined amount required for their release.[4]

4. If any of the Plaintiffs had paid the secured bail amounts required for release, she would have been freed from Dallas County custody.[5]

5. People who were booked into the jail with cash on them will be escorted to the vault to retrieve their money and pay for their release.[6] People who have enough money in their bank accounts can take out money from an ATM in the jail, pay the secured bail, and go home.[7]

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[3] Dkt. 93-56, Pls.' Ex. 56 ¶¶ 3–4 (Decl. of Erriyah Banks); Dkt. 93-57, Pls.' Ex. 57 ¶ 5 (Decl. of Shannon Daves); Dkt. 93-58, Pls.' Ex. 58 ¶ 6–7 (Decl. of Patroba Michieka); Dkt. 93-59, Pls.' Ex. 59 ¶¶ 3–4 (Decl. of Destinee Tovar); Dkt. 93-60, Pls.' Ex. 60 ¶¶ 4–5 (Decl. of Shakena Walston); Dkt. 93-61, Pls.' Ex. 61 ¶¶ 5–8 (Decl. of James Thompson).

[4] Dkt. 93-56, Pls.' Ex. 56 ¶¶ 7, 11–13 (Decl. of Erriyah Banks); Dkt. 93-57, Pls.' Ex. 57 ¶¶ 10–12 (Decl. of Shannon Daves); Dkt. 93-58, Pls.' Ex. 58 ¶¶ 7–11 (Decl. of Patroba Michieka); Dkt. 93-59, Pls.' Ex. 59 ¶¶ 6–7 (Decl. of Destinee Tovar); Dkt. 93-60, Pls.' Ex. 60 ¶¶ 6–7, 10 (Decl. of Shakena Walston); Dkt. 93-61, Pls.' Ex. 61 ¶¶ 9–11 (Decl. of James Thompson).

[5] Dkt. 93-56, Pls.' Ex. 56 ¶ 3 (Decl. of Erriyah Banks) ("I would have to pay . . . $50,000 . . . to get out of jail."); Dkt. 93-57, Pls.' Ex. 57 ¶ 4 (Decl. of Shannon Daves) ("The judge told me the charge and told me that I would have to pay $500 to be released from jail."); Dkt. 93-58, Pls.' Ex. 58 ¶ 6 (Decl. of Patroba Michieka) ("The Judge read me my charge and told me my money bail was $500 and I had to pay that amount of money to get out of jail."); Dkt. 93-59, Pls.' Ex. 59 ¶ 3 (Decl. of Destinee Tovar) ("After I got here, I saw another judge, who told me that I would have to pay a $1,500 money bail to be released."); Dkt. 93-60, Pls.' Ex. 60 ¶¶ 4, 7 (Decl. of Shakena Walston) ("I saw a Judge who told me that my money bond was $15,000. . . . I cannot afford to pay $15,000 to be released."); Dkt. 93-61, Pls.' Ex. 61 ¶ 7 (Decl. of James Thompson) ("He also told me that I will have to pay $135,000 to be released from jail.").

[6] Dkt. 93-1, Pls.' Ex. 1 ¶¶ 29–30 (Decl. of Clarissa Kimmey) ("After each arraignment docket, Sheriff's deputies ask arrestees whether they can access the money required for release. Arrestees who were booked into the jail with sufficient cash on hand are taken to a room referred to as the 'vault' in the jail to retrieve their money and pay for release.").

[7] Dkt. 93-1, Pls.' Ex. 1 ¶¶ 29–30 (Decl. of Clarissa Kimmey) ("Arrestees who can afford the money-bail amount but do not have cash on hand are escorted to an ATM machine in the booking area of the jail. If the arrestee has sufficient funds in a personal bank account and a debit card in her possession, she can withdraw the money and purchase release."); *see* Dkt. 93-56, Pls.' Ex. 56 ¶ 6 (Decl. of Erriyah Banks) ("There's an ATM in the jail. If a person has enough money to pay the bail, they can take out the money, pay, and go home."); Dkt. 116-3 (Decl. of Lieutenant David Guerra) ¶¶ 8–9 ("[T]he 'vault' referred to is on the second floor. . . . [A]rrestees have access to free phones . . . to call family, friends, or a bonding agent."); Dkt. 125-3, Pls.' Ex.64 ¶ 5(c)–(d) (Rebuttal Decl. of Clarissa Kimmey) ("To the extent that Paragraph 8 confirms that arrestees who can afford the money-bail amount imposed at magistration are allowed to pay the amount, and are released upon paying the amount, I agree. . . . Arrestees can use phones to call family, friends, or bonding agent[s] to help arrestees pay to secure their release from jail.").

6. The secured bail amounts required for the Plaintiffs' pretrial release were determined in a manner typical of all arrestees in Dallas County custody.[8] Each named Plaintiff was jailed for several days, without appointment of counsel and without a hearing[9] again, in a manner typical of all arrestees in Dallas County custody who cannot afford their release.[10]

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[8] *See* citations *supra* n.3; Dkt. 93-1, Pls.' Ex. 1 ¶¶ 4–5 (Decl. of Clarissa Kimmey); *id.* at 6 ("The Dallas County money bail schedules govern post-arrest procedures for all misdemeanor and felony arrestees. . . ."); *id.* at 7–10 (describing the arrest and transportation process); *id.* at 11–27 (describing the arraignment process; stating at ¶ 17 that "[m]agistrates do not collect information concerning ability to pay and make no inquiry into ability to pay," and (at ¶¶19–21) that magistrates make no findings concerning ability to pay or the necessity of detention; Dkt. 125-3, Pls.' Ex. 64 ¶¶ 4–5 (Rebuttal Decl. of Clarissa Kimmey) (explaining that the procedures described in Defendants' affidavits, submitted in July 2018, do not describe policies and practices that existed in January 2018).

Evidence of the bail process as of August 2018 is consistent with the evidence and testimony of the process as it existed in January 2018. *See e.g.*, Dkt. 125-1, Pls.' Ex. 62 (Magistration Videos from July 6, 2018); Dkt. 125-2, Pls.' Ex. 63 at 2 (Summary of Video Evidence) ("Bail hearings are perfunctory, routinely last fewer than 15 seconds, and are limited to Magistrates' asking arrestees about their citizenship status, informing arrestees of the offense for which they were arrested, and the secured financial condition of release they must pay in order to be released."); *see also* Dkt. 125-9, Pls.' Ex. 70 ¶¶ 6–11 (Decl. of Emily Gerrick) (describing August 2018 bail hearings, based on interviews with nine people arrested in August 2018 and detained in the Dallas County Jail on August 6, 2018, as "typically last[ing] about one minute," and explaining that arrestees were "not informed of the purpose of the hearing or told that their constitutional rights to equal protection and due process are at issue in the hearings," "are not asked any questions during the hearing," do not understand why they are being required to pay the secured financial condition of release," and are sometimes "informed simply that they do not qualify for release on anything other than a secured financial condition."); Dkt. 125-10, Pls.' Ex. 71 ¶¶ 6–10 (Decl. of Karly Jo Dixon) (similarly describing the perfunctory nature of bail hearings in August 2018); *see also* Declarations of nine individuals detained in the Dallas County Jail on August 5 and/or 6, 2018, describing the brief bail hearings and lack of inquiry or findings concerning ability to pay: Dkt. 125-11, Pls.' Ex. 72 ¶¶ 2, 4–7 (Decl. of Abel Arce); Dkt. 125-12, Pls.' Ex. 73 ¶¶ 2–10 (Decl. of Jeremie Athens Grant); Dkt. 125-13, Pls.' Ex. 74 ¶¶ 2, 5–10 (Decl. of Hariet Ogendi); Dkt. 125-14, Pls.' Ex. 75 ¶¶ 4–5, 7 (Decl. of Dequaceion Demarcus Jones); Dkt. 125-15, Pls.' Ex. 76 ¶¶ 5–8 (Decl. of Lawrence Calvin Durham); Dkt. 125-16, Pls.' Ex. 77 ¶¶ 4–6 (Decl. of Luis Miguel Westbrook); Dkt. 125-17, Pls.' Ex. 78 ¶¶ 3–6 (Decl. of Roderick Moore); Dkt. 125-18, Pls.' Ex. 79 ¶¶ 3–6, 9 (Decl. of Jesse James Ramirez); Dkt. 125-19, Pls.' Ex. 80 ¶¶ 3–6, 9 (Decl. of Fahad Shailsh).

[9] Dkt. 125-7, Pls.' Ex. 68 ¶ 10 (Decl. of Kali Cohn) (summarizing case histories of named Plaintiffs; stating that Shannon Daves was in jail for seven days, January 17–23, before being appointed a lawyer; Shakena Walston was in jail for five days, January 18–22, before being appointed an attorney; Erriyah Banks was in jail for four days, January 19–22, without being appointed a lawyer; Destinee Tovar was in jail for three days, January 19–21, without being appointed an attorney (she was appointed a lawyer on January 22, after being released); Patroba Michieka was in jail for three days, January 19–21, without being appointed an attorney (he was appointed a lawyer on January 22, after being released); James Thompson was in jail for seven days, January 18–24, without being appointed a lawyer).

[10] Dkt. 125-7, Pls.' Ex. 68 ¶ 6–8 (Decl. of Kali Cohn) (reviewing case records of people arrested on select days in January, June, and July of 2018 and were in jail for longer than 24 hours after a magistrate set a secured bond; finding that the arbitrary sample of arrestees spent a median of three days in jail between arrest and appointment of counsel; identifying eight people who waited four days or more to be appointed counsel). *See also* Dkt. 125-10, Pls.' Ex. 71 ¶ 9 (Decl. of Karly Jo Dixon) ("Everyone I interviewed [seven people] had been arrested more than two days ago. None of them knew whether an attorney had been appointed, and the County's website showed that none had been appointed when I met with each of them. None of them knew when they would be taken to court."); Dkt. 125-12, Pls.' Ex. 73 ¶¶ 2, 7 (Decl. of Jeremie Athens Grant) (in a declaration dated August 5, 2018: "I was arrested on Aug. 1, 2018 for criminal Trespass. . . . I have requested an attorney, but to my knowledge have not been assigned one and do not know when I will get one."); Dkt. 125-13, Pls.' Ex. 74 ¶¶ 2, 7 (Decl. of Hariet Ogendi) (in a declaration dated August 6, 2018: "I was arrested on August 4, 2018, early in the morning. . . . To the best of my knowledge, I do not have an attorney yet despite requesting one."); Dkt. 125-14, Pls.' Ex. 75 ¶¶ 2, 4 (Decl. of Dequaceion Demarcus Jones) (in a declaration dated August 6, 208: "On Aug 3, 2018, I was arrested by the DART police for Trespass. . . . To my knowledge I have not been appointed an attorney."); Dkt. 125-18, Pls.' Ex. 79 ¶¶ 2, 5 (Decl. of Jesse James Ramirez) (in a declaration dated August 5, 2018: "I was arrested on 7/30/18 by the Garland Police Dept. . . . To my knowledge

II. The Dallas County Jail

7. In 2016, the Dallas County jail booked a total of 67,122 people,[11] with an average of 179 people per day.[12] In 2017, the Dallas County jail booked a total of 66,207 people,[13] with an average of 182 people per day.[14]

8. The County's 2016 average daily jail population was 5,363.[15] Of the daily jail population, well over 3,000—about 71%—are pretrial detainees.[16]

9. At a rate of $59 per person per day, Dallas County spent $225,321 every day to jail presumptively innocent people in 2016.[17]

III. Post-Arrest Policies and Practices in Dallas County

A. Arrest, Arraignment, and Booking

10. The Dallas County Criminal Court at Law Judges ("misdemeanor judges"), voting en banc, promulgated a list of secured financial conditions of release that applies to all people arrested for misdemeanor offenses and booked into the Dallas County jail, referred to here as the "misdemeanor bail schedule."[18]

11. The Dallas County Criminal District Court Judges ("felony judges"), voting en banc, promulgated a list of secured financial conditions of release that applies to all people arrested for felony offenses and booked into the Dallas County jail, referred to here as the "felony bail schedule."[19]

12. Numerous agencies within Dallas County have authority to make arrests for misdemeanor and felony offenses. If Dallas County or the City of Dallas makes the arrest, the

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I have not been assigned an attorney. No one has told me when I have court or when I will get an attorney."); Dkt. 125-19, Pls.' Ex. 80 ¶¶ 2, 6 (Decl. of Fahad Shailsh) ("I was arrested on 7/31/18 by the Richardson Police Dept for Trespass. . . . I do not know when I go to court. I have not been appointed an attorney, but assume one will be available in the courtroom whenever court is scheduled.").

[11] Dkt. 125-6, Pls.' Ex. 67 at 3 (May 2018 Jail Population Report).

[12] *Id.* at 24.

[13] *Id.* at 3.

[14] *Id.* at 24.

[15] Dkt. 93-45, Pls.' Ex. 45 at 1 (Dallas County Data Sheet).

[16] *Id.* at 1; *see* Dkt. 125-4, Pls.' Ex. 65 ¶ 5(c) (Decl. of Arjun Malik); Dkt. 125-5, Pls.' Ex. 66 at 6 (January 2018 Jail Population Report).

[17] Dkt. 93-45, Pls.' Ex. 45 at 1 (Dallas County Data Sheet).

[18] Dkt. 93-1, Pls.' Ex. 1 ¶¶ 4, 6 (Decl. of Clarissa Kimmey); Dkt. 93-3, Pls.' Ex. 3 (Misdemeanor Bail Schedule).

[19] Dkt. 93-1, Pls.' Ex. 1 ¶¶ 5–6 (Decl. of Clarissa Kimmey); Dkt. 93-4, Pls.' Ex. 4 (Felony Bail Schedule).

person will typically be taken directly to the Dallas County Jail. If another agency makes the arrest, the person will typically be taken to the local lock-up run by the arresting authority.[20]

13. Each local lock-up has its own post-arrest policies.[21] In some jurisdictions, arrestees appear by videolink before a Dallas County magistrate located at the Dallas County jail, who informs the arrestee of the secured bail amount required for release according to the Dallas County judges' bail schedules.[22] In other jurisdictions, arrestees appear before local magistrates who inform the arrestee of the secured bail amount required for release according to that jurisdiction's own bail schedule.[23]

14. Any arrestee in a local lock-up who does not pay the secured bail amount required for release will be transported to the Dallas County Jail.[24] These arrestees routinely wait two to three days in local lock-up before their transfer.[25]

15. Usually within a few hours of arriving at the Dallas County Jail and prior to formal booking, Sheriff's deputies assemble groups of recent arrestees—ranging from one to twenty people—to appear in-person, in the jail, before a magistrate for a legal proceeding referred to as "magistration" or "arraignment."[26]

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[20] Dkt. 93-1, Pls.' Ex. 1 ¶ 7 (Decl. of Clarissa Kimmey); Dkt. 93-61, Pls.' Ex. 61 ¶ 3 (Decl. of James Thompson) ("I was taken to the lock-up in Garland and was kept there for a day or two."); Dkt. 125-18, Pls.' Ex. 79 ¶¶ 2, 4 (Decl. of Jesse James Ramirez) ("I was arrested on 7/30/18 by the Garland Police Dept and taken to the Garland Jail. . . When I got to the Dallas County jail 2 days later I was taken to booking & assigned housing."); Dkt. 125-19, Pls.' Ex. 80 ¶ 2 (Decl. of Fahad Shailsh) ("I was arrested on 7/31/18 by the Richardson Police Dept for Trespass. I was taken to the Richardson City jail. After 2 days, I was taken to the Dallas County Jail.").

[21] *See* Dkt. 93-1, Pls.' Ex. 1 ¶ 8 (Decl. of Clarissa Kimmey).

[22] *Id.* ¶¶ 8–9 (Decl. of Clarissa Kimmey) ("In municipal jurisdictions that apply the Dallas County bail schedule, arrestees appear by videolink before a Dallas County magistrate, who is located at the Dallas County jail."). Videolink is the term used for a type of two-way video conferencing that allows a magistrate at the Dallas County Jail to communicate with an arrestee at a local lock-up visually and aurally in real time.

[23] *Id.* ¶ 8 (Decl. of Clarissa Kimmey) ("Some of these municipal jurisdictions apply the Dallas County bail schedules; others apply their own local post-arrest policies.").

[24] *Id.* ¶ 10 (Decl. of Clarissa Kimmey) ("Dallas County typically transports arrestees from local jails to the Dallas County jail. (Sometimes the local jails transport arrestees to the Dallas County jail.) It can take two or three days for a person arrested by an agency other than Dallas County or the City of Dallas who cannot pay the predetermined secured-money-bail amount required for release to be transported to the Dallas County jail.").

[25] *Id.*; Dkt. 93-61, Pls.' Ex. 61 ¶ 3 (Decl. of James Thompson) ("I was taken to the lock-up in Garland and was kept there for a day or two."); Dkt. 125-18, Pls.' Ex. 79 ¶¶ 2, 4 (Decl. of Jesse James Ramirez) ("I was arrested on 7/30/18 by the Garland Police Dept and taken to the Garland Jail. . . When I got to the Dallas County jail 2 days later I was taken to booking & assigned housing."); Dkt. 125-19, Pls.' Ex. 80 ¶ 2 (Decl. of Fahad Shailsh) ("I was arrested on 7/31/18 by the Richardson Police Dept for Trespass. I was taken to the Richardson City jail. After 2 days, I was taken to the Dallas County Jail.").

[26] Dkt. 93-1, Pls.' Ex. 1 ¶ 11 (Decl. of Clarissa Kimmey) (referring to the proceedings as "arraignment"); Dkt. 125-3, Ex. 64 ¶ 4(a) (Rebuttal Decl. of Clarissa Kimmey) (referring to the proceeding as "magistration"). *See also* Dkt. 93-56, Pls.' Ex. 56 ¶ 5 (Decl. of Erriyah Banks) ("I was with about 15 other people when I saw the judge."); Dkt. 93-57, Pls.' Ex. 57 ¶ 3 (Decl. of Shannon Daves) ("After waiting for several hours, a sheriff's deputy took me along with about 10 other people to see a judge."); Dkt. 93-58, Pls.' Ex. 58 ¶ 4 (Decl. of Patroba Michieka) ("Eventually, I was taken to see a Judge, along with about 20 other people."); Dkt. 93-61, Pls.' Ex. 61 ¶ 5 (Decl. of James Thompson) ("After I got to jail, I was taken with about ten other people to a room with a judge."); Dkt. 125-1, Pls.' Ex. 62

16. At the magistration docket, the magistrate calls each arrestee by name and informs her of the offense for which she was arrested, but not the factual allegations underlying the alleged offense or the facts on the basis of which the magistrate is making a bail decision.[27] The magistrate also announces the secured money bail amount required for release according to the judges' bail schedules.[28]

17. These hearings are closed to the public.[29] No defense attorney or prosecutor is present at the hearing.[30] Sheriff's deputies routinely instruct arrestees not to speak at these

(Magistration Videos from July 6, 2018) (showing magistrates conducting bail hearings for between one and about 20 people at a time).

[27] Dkt. 93-1, Pls.' Ex. 1 ¶¶ 15, 19–22 (Decl. of Clarissa Kimmey); *see also* Dkt. 93-60, Pls.' Ex. 60 ¶ 4 (Decl. of Shakena Walston) ("I saw a Judge who told me that my money bond amount was $15,000. She did not tell me anything about the allegations."); Dkt. 93-61, Pls.' Ex. 61 ¶ 6 (Decl. of James Thompson) ("The judge told me that I was charged with several felony offenses, but he did not tell me anything about the allegations. He also told me that I will have to pay $135,000 to be released from jail."); Dkt. 125-1, Pls.' Ex. 62 at 01:15:55 (Magistration Videos from July 6, 2018) (showing Magistrates reading the name of the offense and the bail amount, but not providing any additional information about the allegations or the reasons for the bond amount); Dkt. 125-2, Pls.' Ex. 63 at 2 (Summary of Video Evidence) (describing the hearings in Pls.' Ex. 62); Hr'g Tr. at 56:14-18 ("TRIGILIO: Is it standard practice for magistrates to make findings on the record when an arrestee cannot afford their money bail that pretrial detention is necessary to serve a compelling government interest? MCVEA: That's not discussed at that time, no."); *id.* at 56:5–10 (Testimony of Terry McVea) ("TRIGILIO: The question is whether the magistrate makes a finding in that system that says, I find the arrestee is able to pay this bond amount, or I find the arrestee is not able to pay this bond amount? MCVAE: No.).

[28] Dkt. 125-1, Pls.' Ex. 62 at 5:40:02 (Magistration Videos from July 6, 2018); Dkt. 125-2, Pls.' Ex. 63 at 2 (Summary of Video Evidence) (Magistrate Judge Turley (5:40:02)**:** In response to an arrestee's statement about getting his bond lowered at the hearing: "Sometimes [the money-bail amount is] lowered, sometimes its goes up. We have to standardize it according to our bond schedule."); Dkt. 93-1, Pls.' Ex. 1 ¶ 15 (Decl. of Clarissa Kimmey) ("At the 'arraignments,' the magistrate calls each arrestee individually by name, and informs her of the offense charged—but not the allegations underlying the charge—and the monetary payment required by the Dallas County bail schedule for release."); Dkt. 125-3, Pls.' Ex. 64 ¶ 4(b)–4(d) (Rebuttal Decl. of Clarissa Kimmey) (explaining that Magistrate Judge Terrie McVea's declaration does not describe the process in place when the lawsuit was filed); *see also* Declarations of the named Plaintiffs describing the bail hearings at which money bail was set consistent with the bail schedules: Dkt. 93-56, Pls.' Ex. 56 ¶ 3 (Decl. of Erriyah Banks); Dkt. 93-57, Pls.' Ex. 57 ¶ 5 (Decl. of Shannon Daves); Dkt. 93-58, Pls.' Ex. 58 ¶ 6 (Decl. of Patroba Michieka); Dkt. 93-59, Pls.' Ex. 59 ¶ 3 (Decl. of Destinee Tovar); Dkt. 93-60, Pls.' Ex. 60 ¶ 4 (Decl. of Shakena Walston); Dkt. 93-61, Pls.' Ex. 61 ¶ 7 (Decl. of James Thompson); Dkt. 32 at 8 (Dallas Cty. Defs.' Resp. to Pls.' Mot. for Prelim. Inj.) ("Plaintiffs complain that the Magistrate Judges most often set bail at the arraignment hearing in accordance with the bail schedules, which are promulgated by both the misdemeanor and the felony judges. This practice is constitutional.").

[29] Dkt. 93-1, Pls.' Ex. 1 ¶ 12 (Decl. of Clarissa Kimmey).

[30] *Id.* ¶ 13.

proceedings.[31] Sheriff's deputies routinely instruct arrestees not to ask questions unless given permission by the Magistrate at arraignment.[32]

18. In almost every case, pursuant to instructions from the misdemeanor and felony judges,[33] Magistrates require the monetary amount listed on the applicable local bail schedule.[34]

19. Magistrates do not inquire into or make any findings concerning an arrestee's ability to pay when determining conditions of release in any case.[35] When Plaintiffs' motion was filed, in January 2018, Magistrates *could not* consider ability to pay because they had no financial information about the arrestees who appear before them.[36] Magistrates make no inquiry into arrestees' ability to pay any particular secured bail amount; and arrestees are told that they may

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[31] Dkt. 116-3 ¶ 6 (Decl. of Lieutenant David Guerra) ("Arrestees are told that they should be quiet and listen to the magistrate."); Dkt. 93-1, Pls.' Ex. 1 ¶ 14 (Decl. of Clarissa Kimmey) ("Before an arraignment docket begins, Sheriff's deputies tell arrestees not to speak unless the magistrate gives them permission. Some deputies tell arrestees that the magistrate will increase the money-bail amount required for release if they say anything during the hearing."); Dkt. 93-56, Pls.' Ex. 56 ¶ 3 (Decl. of Erriyah Banks) ("Before the hearing, the officers told us all not to talk during the hearing."); Dkt. 93-57, Pls.' Ex. 57 ¶ 4 (Decl. of Shannon Daves) ("Before we went into the room with the judge, the deputy told us to be quiet."); Dkt. 93-59, Pls.' Ex. 59 ¶ 5 (Decl. of Destinee Tovar) ("The deputies told me not to speak at the hearing."); Dkt. 125-3, Pls.' Ex. 64 ¶ 5(a) (Rebuttal Decl. of Clarissa Kimmey) (responding to Lieutenant Guerra's declaration: "To the extent that the paragraph [6 in Guerra's declaration] asserts that Sheriff's officers do not ever tell arrestees not to speak at magistrations, that is inconsistent with my investigation.").

[32] Dkt. 93-58, Pls.' Ex. 58 ¶ 5 (Decl. of Patroba Michieka) ("The deputies told us not to ask any questions during the hearings."); Dkt. 125-1, Pls.' Ex. 62 at 05:15:16 (Magistration Videos from July 6, 2018) ("Nobody else ask me if you do [qualify for a personal recognizance bond], because you don't."); *id.* at 08:20:43 ("No one else did [qualify for a personal recognizance bond], so no one else ask me."); *id.* at 12:43:00 (in response to an arrestee's request for a bond reduction, "You just go through your lawyer and . . . have [her] schedule some type of hearing.").

[33] Dkt. 93-3, Pls.' Ex. 3 (Misdemeanor Bail Schedule); Dkt. 93-4, Pls.' Ex. 4 (Felony Bail Schedule); Dkt. 125-20, Pls.' Ex. 81 (February 16, 2018 Email from Magistrate Judge Steven Autry to Dallas County Magistrate Judges) ("Judge McVea has asked that I communicate with all of you so that everyone is clear on the new updates. As you have read in the earlier correspondence, the district judges have given us authority to grant PR bonds. . . . Please review section 17.03 for a list of charges where PR bonds are NOT ALLOWED to be granted by the magistrate judges."); Dkt. 125-21, Pls.' Ex. 82 (March 6, 2018 Email from Misdemeanor Judge Lisa Green to Chief Magistrate Judge Terrie McVea) ("Judge McVea, per our earlier discussion the magistrate judges have the discretion of approving PR bonds on misdemeanor cases, only when appropriate.").

[34] *See* citation *supra* n.28.

[35] Dkt. 93-1, Pls.' Ex. 1 ¶ 17 (Decl. of Clarissa Kimmey) ("Magistrates do not collect information concerning ability to pay and make no inquiry into ability to pay."); *id.* ¶ 22 ("The magistrates do not make any on-the-record finding concerning the arrestee's ability to pay.").

[36] Dkt. 125-22, Pls.' Ex. 83 (Judge Amber Givens-Davis Email) (apparent email notification from a felony judge to other felony and misdemeanor judges letting them know that "[o]n Sunday, February 11, 2018, the Dallas County Sheriff's Office will *start* providing the Financial Affidavit Form to all individuals arraigned at Lew Sterrett." (emphasis added)); *see* Dkt. 116-2 ¶ 6 (Decl. of Terrie McVea) ("Prior to magistration, an affidavit of financial condition is provided to arrestees… The affidavit was added to the post-arrest process early this year."); Dkt. 93-1, Pls.' Ex. 1 ¶¶ 17–18 (Decl. of Clarissa Kimmey) ("Magistrates do not collect information concerning ability to pay. . . . Magistrates cannot consider ability to pay because they have no financial information about arrestees who appear before them; they do not ask arrestees whether they can afford the amount of money bail listed on the schedule; and arrestees are told that they may not speak at the proceedings."); Dkt. 125-3, Pls.' Ex. 64 ¶ 4(b) (Rebuttal Decl. of Clarissa Kimmey) ("Magistrates had no financial information about arrestees who appeared before them at magistration hearings prior to the filing of this lawsuit.").

not speak during the hearings at which Magistrates determine conditions of release.[37] Moreover, the misdemeanor bail schedule does not list ability to pay as a circumstance Magistrates may consider when setting bail, even though it lists other factors to consider.[38] Similarly, the felony bail schedule states only that "[b]onds may be set higher or lower than the amounts shown if justified by the facts of the case and the circumstances of the defendant," without mentioning ability to pay.[39]

20. Magistrates do not consider alternatives to secured financial conditions of release.[40]

21. Magistrates do not make any findings on the record concerning the arrestee's ability to pay, or that secured financial conditions are necessary to meet any governmental interest.[41]

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[37] *Supra* notes 31–32; *see* Dkt. 93-1, Pls.' Ex. 1 ¶¶ 14, 19, 22–23 (Decl. of Clarissa Kimmey); Dkt. 93-60, Pls.' Ex. 60 ¶ 5 (Decl. of Shakena Walston) ("The Judge did not ask me if I could pay that amount of money."); Dkt. 93-61, Pls.' Ex. 61 ¶ 8 (Decl. of James Thompson) ("No one ever asked me if I could pay that amount of money."); Dkt. 125-3, Pls.' Ex. 64 ¶¶ 4(b), 4(d), 5(a) (Rebuttal Decl. of Clarissa Kimmey).

[38] *See* Dkt. 93-3, Pls.' Ex. 3 (Misdemeanor Bail Schedule).

[39] Dkt. 93-4, Pls.' Ex. 4 (Felony Bail Schedule).

[40] Dkt. 93-2, Pls.' Ex. 2 ¶ 1 (Defendants' Admissions) (Defendant Judge Gracie Lewis: "Giving the authority to magistrates [to grant personal recognizance bonds] is 'something that the judges have not been willing to do.'"); Dkt. 93-3, Pls.' Ex. 3 (Misdemeanor Bail Schedule) ("All bonds are cash or surety unless otherwise specified by the Judge."); Dkt. 93-4, Pls.' Ex. 4 (Felony Bail Schedule) (setting forth a standard schedule of secured monetary conditions for all offenses); Dkt. 93-1, Pls.' Ex. 1 ¶¶ 20–21 (Decl. of Clarissa Kimmey) ("The magistrates do not make any on-the-record findings concerning the necessity of pretrial detention in light of any government interest. The magistrates do not make any on-the-record finding that alternative, less-restrictive conditions of release are insufficient to serve any government interest.").

See also evidence of the bail process as of August 2018: Dkt. 125-1, Pls.' Ex. 62 at 01:15:55 (Magistration Videos from July 6, 2018) (in response to an arrestee who asked "How much is it to get out?", a Magistrate responded, "$5,000 or you can go to a bail bondsman but I cannot tell you exactly how much they are going to charge you."); *id.* at 20:29:36 (in response to an arrestee who asked, "If I can't pay the bond, do I [stay in jail]?", a Magistrate responded, "You have to stay in jail until at least your first court date."); Dkt. 125-2, Pls.' Ex. 63 at 2 (Summary of Video Evidence); Dkt. 125-20, Pls.' Ex. 81 (February 16, 2018 Email from Magistrate Judge Steven Autry to Dallas County Magistrate Judges) (stating that "the district judges have given [the magistrate judges] authority to grant PR bonds" except for "a list of charges where PR bonds are NOT ALLOWED. . . ."); Dkt. 125-21, Pls.' Ex. 82 (March 6, 2018 Email from Misdemeanor Judge Lisa Green to Chief Magistrate Judge Terrie McVea) ("Judge McVea, per our earlier discussion the magistrate judges have the discretion of approving PR bonds on misdemeanor cases, only when appropriate. . . . [F]or now, please move forward with this.").

[41] Hr'g Tr. at 56:5–10 (Testimony of Terry McVea) (TRIGILIO: The question is whether the magistrate makes a finding in that system that says, I find the arrestee is able to pay this bond amount, or I find the arrestee is not able to pay this bond amount? MCVEA: No.); *id.* at 56:14-18 (TRIGILIO: Is it standard practice for magistrates to make findings on the record when an arrestee cannot afford their money bail that pretrial detention is necessary to serve a compelling government interest? MCVEA: That's not discussed at that time, no.); *see* Dkt. 93-1, Pls.' Ex. 1 ¶ 19–22 (Decl. of Clarissa Kimmey) ("[M]agistrates make no on-the-record finding concerning whether the arrestee can pay the secured-bail amount set as a condition of release or the reasons for the specific amount of money bail required for release. The magistrates do not make any on-the-record finding concerning the necessity of pretrial detention in light of any government interest."); Dkt. 125-1, Pls.' Ex. 62 at 01:15:55 (Magistration Videos from July 6, 2018) ("[Y]ou can go to a bail bondsman but I cannot tell you exactly how much they are going to charge you."); *id.* at 20:29:36 (Magistrate telling an arrestee that if he cannot pay the bond "you have to stay in jail until at least your first court date"); Dkt. 125-2, Pls.' Ex. 63 at 2 (Summary of Video Evidence).

22. If an arrestee ignores the admonition not to speak during arraignment and asks for a lower secured bail amount or for release on non-financial conditions, magistrates do not deviate from the predetermined schedule. Instead, magistrates tell arrestees they must speak with their lawyer.[42] But indigent arrestees do not yet have a lawyer, and typically will not have a lawyer for several days after the hearing.[43]

23. The portion of the magistration proceeding during which financial conditions of release are determined lasts a few seconds.[44]

24. The judges know that the magistrates do not provide notice of the critical issues to be decided at the hearing, an opportunity to present or confront evidence, or findings on the record either orally or in writing concerning the basis for their decisions that result in detention.[45]

25. After arraignment and before booking, sheriff's deputies distribute a form that arrestees can use to request appointed counsel.[46]

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[42] Dkt. 125-1, Pls.' Ex. 62 at 12:43:00 (Magistration Videos from July 6, 2018) (in response to an arrestee's request for a bond reduction, Magistrate Judge Turley states: "You just go through your lawyer and . . . have [her] schedule some type of hearing."); Dkt. 125-2, Pls.' Ex. 63 at 2 (Summary of Video Evidence); *see* Dkt. 93-1, Pls.' Ex. 1 ¶¶ 23–24 (Decl. of Clarissa Kimmey) ("In addition to making no affirmative inquiry into or on-the-record finding concerning ability to pay, magistrates affirmatively refuse to hear any evidence or argument from any arrestee who tries to offer it. If an arrestee asks for a lower secured-money-bail amount or for release on non-financial conditions, the magistrate refuses to change the secured-money-bail amount required by the schedule and tells the person to speak with her lawyer when a lawyer is appointed later."); Dkt. 125-3, Pls.' Ex. 64 ¶ 6(a)–6(e) (Rebuttal Decl. of Clarissa Kimmey) (explaining that there are routinely delays of days or a week between arrest and appointment of counsel for people who remain detained in the Dallas County jail due to their inability to pay money bail).

[43] *See* citations *supra* nn. 9–10.

[44] Dkt. 93-1, Pls.' Ex. 1 ¶ 25 (Decl. of Clarissa Kimmey) ("On average, the hearing lasts approximately a minute for each person."); Dkt. 93-56, Pls.' Ex. 56 ¶ 4 (Decl. of Erriyah Banks) ("Each hearing lasted about a minute."). *See also* evidence of the bail process in August 2018: Dkt. 125-1, Pls.' Ex. 62 (Magistration Videos from July 6, 2018) (audio-visual recordings of bail hearings that took place on July 6, 2018, many of which lasted between 10 and 15 seconds); Dkt. 125-2, Pls.' Ex. 63 at 2–5 (Summary of Video Evidence); Dkt. 125-9, Pls.' Ex. 70 ¶ 6 (Decl. of Emily Gerrick) ("The magistration hearings where conditions of release are determined typically last about one minute."); Dkt. 125-10, Pls.' Ex. 71 ¶ 6 (Decl. of Karly Jo Dixon) (same); Dkt. 125-16, Pls.' Ex. 77 ¶ 4 (Decl. of Luis Miguel Westbrook) ("My magistration only lasted about 60 seconds."); Dkt. 125-19, Pls.' Ex. 80 ¶ 5 (Decl. of Fahad Shailsh) ("The hearing was about a minute and I did not ask any questions.").

[45] Dkt. 93-1, Pls.' Ex. 1 ¶ 26 (Decl. of Clarissa Kimmey) ("It is widely known among Dallas County officials that orders of release on financial conditions do not involve any inquiry into or findings concerning ability to pay and do not involve any finding that pre-trial detention is necessary or findings concerning the adequacy of alternative conditions of release."); Hr'g Tr. at 38:16–19, (Testimony of Defendant Misdemeanor Judge Roberto Cañas) (TRIGILIO: Is it standard practice that arrestees receive notice that their right against wealth-based detention is at issue in magistrations? CAÑAS: I don't think it's put in that terms, no); *id.* at 40:9–12 (TRIGILIO: Are arrestees informed in any way that their likelihood of appearing in court determines the outcome of the magistration, or is that an issue in the magistration? CAÑAS: I don't think it's put to them in that way); *id.* at 41:17–24 (TRIGILIO: Is it standard practice that magistrates grant arrestees an opportunity to confront the facts used against them at magistration? CAÑAS: It's not done at that time, no. . . . TRIGILIO: Is it standard practice that magistrates grant arrestees an opportunity to present evidence at magistration? CAÑAS: It's not done at that time.); *see also* Dkt. 125-15, Pls.' Ex. 76 ¶ 5 ("[T]he judge told me my charge and said my bond was set at $25,000. I don't know why it was set at $25,000.").

[46] Dkt. 93-1, Pls.' Ex. 1 ¶ 27 (Decl. of Clarissa Kimmey); Dkt. 125-3, Pls.' Ex. 64 ¶ 6(d) ("Arrestees make requests for appointed counsel on written forms."); Dkt. 93-57, Pls.' Ex. 57 ¶ 6 (Decl. of Shannon Daves) ("Before the judge

26. After arraignment and before booking, sheriff's deputies ask arrestees whether they can afford the amount required for release. Arrestees who can afford the amount required for release can pay and be released from Dallas County custody. Arrestees who were brought to jail with sufficient cash on hand to pay the secured bail amount required for release are taken to a vault in the jail to retrieve their money and pay for release. And arrestees who can afford the amount required, but do not have cash on hand, are escorted to an ATM machine in the booking area, where they can withdraw the funds required for release. Arrestees who cannot afford to pay the amount required for release can call friends or family to pay the amount, or they can contact a for-profit commercial bonding company to seek a quote for what it would cost for the company to secure their release.[47]

27. But arrestees who cannot ultimately afford the payment, or the percentage of the payment required by bonding companies, will be kept in the jail and assigned to a housing unit, where they will be confined to a cell.[48]

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was finished talking to everyone, a deputy asked me if I needed an attorney. I said yes because I cannot afford an attorney, and I saw him write yes on a piece of paper."). *See also* evidence of the bail process as of August 2018: Dkt. 125-12, Pls.' Ex. 73 ¶ 7 (Decl. of Jeremie Athens Grant) ("I have requested an attorney. . . ."); Dkt. 125-13, Pls.' Ex. 74 ¶ 7 (Decl. of Hariet Ogendi) ("To the best of my knowledge, I do not have an attorney yet despite requesting one."); Dkt. 125-16, Pls.' Ex. 77 ¶ 5 (Decl. of Luis Miguel Westbrook) ("I requested an attorney but as far as I know I haven't received one."); Dkt. 125-18, Pls.' Ex. 79 ¶ 4 (Decl. of Jesse James Ramirez) ("I filled out financial paperwork to request an attorney.").

[47] Dkt. 93-1, Pls.' Ex. 1 ¶¶ 28–29 (Decl. of Clarissa Kimmey); Dkt. 93-56, Pls.' Ex. 56 ¶ 6 (Decl. of Erriyah Banks) ("There's an ATM in the jail. If a person has enough money to pay the bail, they can take out that money, pay, and go home."); Dkt. 125-1, Pls.' Ex. 62 at 01:15:55 (Magistration Videos from July 6, 2018) (Arrestee: "How much is it to get out"? Magistrate Turley: "[$]5,000 or you can go to a bail bondsman but I cannot tell you exactly how much they are going to charge you."); Dkt. 125-2, Pls.' Ex. 63 at 2 (Summary of Video Evidence).

[48] Dkt. 93-1, Pls.' Ex. 1 ¶ 31 (Decl. of Clarissa Kimmey) ("Arrestees who cannot access enough money will be kept in the jail and assigned to a housing unit, where they will be confined to a jail cell."); Dkt. 125-3, Pls.' Ex. 64 ¶ 5(c) (Rebuttal Decl. of Clarissa Kimmey) ("I am aware of at least two people charged with misdemeanors in January 2018 who had been in the jail for nine days when this lawsuit was filed and who did not have a lawyer or a court date."); Dkt. 93-56, Pls.' Ex. 56 ¶ 7 (Decl. of Erriyah Banks) ("I can't afford to pay my money bail amount. So I was booked into the jail."); Dkt. 93-57, Pls.' Ex. 57 ¶ 12 (Decl. of Shannon Daves) ("I cannot afford to buy my release from jail. I do not know when I will be released."); Dkt. 93-58, Pls.' Ex. 58 ¶ 11 (Decl. of Patroba Michieka) ("I cannot afford to buy my release from jail."); Dkt. 93-59, Pls.' Ex. 59 ¶ 7 (Decl. of Destinee Tovar) ("I cannot afford to buy my release from jail."); Dkt. 93-60, Pls.' Ex. 60 ¶ 7 (Decl. of Shakena Walston) ("I cannot afford to pay $15,000 to be released."); Dkt. 93-61, Pls.' Ex. 61 ¶ 9 (Decl. of Bryan Thompson) ("I am indigent and cannot afford to pay [$135,000].").

See also evidence of the bail process as of August 2018, *e.g.*, Dkt. 125-1, Pls.' Ex. 62 at 20:29:36 (in response to an arrestee who asked, "[I]f I can't pay the bond, do I sit it [in jail]"?, Magistrate Wolff replied, "[Y]ou have to stay in jail until at least your first court date."); Dkt. 125-2, Pls.' Ex. 63 at 2 (Summary of Video Evidence); Dkt. 125-9, Pls.' Ex. 70 ¶ 4 (Decl. of Emily Gerrick) ("People are routinely kept in the Dallas County Jail for days after arrest because they cannot afford to purchase their release."); Dkt. 125-10, Pls.' Ex. 71 ¶ 3 (Decl. of Karly Jo Dixon) (stating that, of the seven detained individuals Ms. Dixon interviewed, "[a]ll of them reported to me that they were there because they could not afford to pay the secured financial condition required for the release, and that if they could afford to pay the money bail amount, they would pay it so they could go home. None of them wanted to be in the jail."); Dkt. 125-11, Pls.' Ex. 72 ¶¶ 5, 7 (Decl. of Abel Arce) ("I cannot afford to pay the $1,000 bond. . . . I do not know when I will get out. . . ."); Dkt. 125-12, Pls.' Ex. 73 ¶¶ 9–10 (Decl. of Jeremie Athens Grant) ("I cannot afford to pay the money bail required for my release. I do not know when I will go to court or get out of here."); Dkt. 125-13, Pls.' Ex. 74 ¶ 9 (Decl. of Hariet Ogendi) ("I have a bank account and I think I may have enough money to pay the bail amount, but I don't have my debit card with me. . . . I have to stay in jail because I don't have access to the money

28. The result of this system is that Dallas County detains thousands of arrestees solely because they cannot afford to purchase their release.[49]

B. The Process After Arraignment

29. An arrestee who cannot afford to pay the bail amount set at magistration must wait in jail for a defense attorney to be appointed, interview her, move for a bail reduction, and schedule a hearing with the trial judge. Misdemeanor Judge Roberto Cañas testified that it is "very routine" for trial judges to grant defense attorneys' requests to lower bond set at magistration,[50] which means it is "very routine" for misdemeanor arrestees to be detained in jail for days or weeks after arrest due to inability to pay the predetermined amount required at magistration.[51] In felony cases, the delays are even longer because the Felony Judges refuse to address the issue of bail until after formal charges are filed, which can take weeks or months.[52]

I need to get out."); Dkt. 125-14, Pls.' Ex. 75 ¶¶ 5–7 (Decl. of Dequaceion Demarcus Jones) ("I do not know when I will go to court or when I will get out of here. . . . I cannot afford to pay the money bail required for my release."); Dkt. 125-15, Pls.' Ex. 76 ¶ 5 (Decl. of Lawrence Calvin Durham) ("I cannot afford to pay the bond and so I am still in jail."); Dkt. 125-16, Pls.' Ex. 77 ¶¶ 7 (Decl. of Luis Miguel Westbrook) ("I am homeless and I struggle to afford the basic necessities of life. I am in jail because I am unable to pay the bond."); Dkt. 125-17, Pls.' Ex. 78 ¶¶ 6–7 (Decl. of Roderick Moore) ("I do not know when I will go to court or when I will get out of here. My family is trying to get the money to bond me out, but we have bills to pay and it is hard."); Dkt. 125-18, Pls.' Ex. 79 ¶¶ 7–8 (Decl. of Jesse James Ramirez) ("I plan to plead guilty when I go to court so that I can get out of jail. I struggle to meet the basic necessities of life. I cannot afford to pay the money bail required for my release."); Dkt. 125-19, Pls.' Ex. 80 ¶¶ 7–9 (Decl. of Fahad Shailsh) ("I plan to plead guilty when I go to court so that I can get out of jail. I struggle to meet the basic necessities of life. I cannot afford to pay the money bail required for my release."); Dkt. 125-7, Ex. 68 ¶ 8(a)–(c) (Decl. of Kali Cohn) (identifying sample arrestees in January, June, and July who were detained in the Dallas County jail who would have been released if they had paid a secured money bail amount).

[49] *Supra* nn. 11–16, 48; Dkt. 93-2, Pls.' Ex. 2 ¶ 5 (Defendants' Admissions) ("County Judge Clay Jenkins: "It makes no sense that a person of affluence who is accused of a violent crime may be able to bond out within hours of arrest, but a person who is homeless and charged with trespassing or vagrancy, or a single mom who failed to pay her parking tickets, should be incarcerated for days and be taken away from their family . . . .We spend tens of millions of dollars a year incarcerating poor people."); *id.* ¶ 6 (Defendant Judge Nancy Mulder: "There's a lot of people who end up in jail who can't afford a bond, who lose their jobs, lose their apartment and end up homeless."); *id.* ¶ 8 (Defendant Judge Roberto Cañas: "Over the past year, the criminal court judges have been working to reform the bail system away from a money-based system in determining who can be released from jail. A money-based system obviously penalizes low-income people."); *id.* ¶ 10 ("Defendant: Judge Jennifer Bennett "Additionally we are working on improving our pretrial system in Dallas County, and bail reform so that no one stays in jail just because they are poor.").

[50] Hr'g Tr. 45:24–46:12 (Testimony of Defendant Misdemeanor Judge Roberto Cañas).

[51] Dkt. 125-3, Pls.' Ex. 64 ¶ 6(f) (Rebuttal Decl. of Clarissa Kimmey) ("Because of these procedures, if everything is working perfectly for an arrestee, and the arrestees is appointed a diligent lawyer, it typically takes several days after arrest—at the earliest—to even file a motion [] to have conditions of release reviewed or changed.").

[52] Hr'g Tr. at 103:12–20 (Closing Argument of Attorney Eric Hudson, counsel for the Felony Judges) (Felony judges have "no jurisdiction until there's a criminal instrument filed that allows the felony judges to take the case."); *see* Dkt. 93-1, Pls.' Ex. 1 ¶¶ 41–43, 50–51 (Decl. of Clarissa Kimmey) (explaining that felony arrestees are not scheduled for first appearances until about two weeks after arrest, if they waive indictment, and about two to three months after arrest, if they do not; describing the lengthy process for filing a bond reduction motion at or after first appearance).

30. Even the relatively few arrestees—about six per day in January 2018, and twelve per day in April 2018[53]—who are granted release on personal recognizance bonds, which require no upfront payment,[54] must wait in jail for days before they are released. In January 2018, the month this case was filed, arrestees released on personal recognizance bonds spent an average of 16 days in jail due to their inability to pay the money-bail amount required by the County's bail schedule.[55] In April 2018, arrestees released on personal recognizance bonds spent an average of five days in jail due to their inability to pay the money-bail amount required by the County's bail schedule.[56]

31. If an arrestee remains in jail after magistration, the judge to whom the arrestee's case is assigned typically concludes that the arrestee is indigent and appoints a lawyer.[57] A lawyer is typically not appointed until several days after a person is arrested and jailed.[58]

32. Even after a defense lawyer is appointed, arrestees typically do not meet their lawyer until their first appearance.[59]

33. Most judges instruct their court coordinators not to schedule first appearances until after the District Attorney has filed a case.[60] By local rule, the misdemeanor judges allow the District Attorney's office up to four business days to decide whether to file charges.[61] The felony judges allow the District Attorney's office up to five business days to decide whether to file most

[53] Dkt. 125-4, Pls.' Ex. 65 ¶ 6(d)–(e) (Decl. of Arjun Malik) (summarizing data from the May 2018 Jail Population Report; *see* Dkt. 125-6, Pls.' Ex. 67).

[54] Dkt. 125-4, Pls.' Ex. 65 at 2 n.4 (Decl. of Arjun Malik) (citing Dkt. 93-1 at ¶ 40) ("Personal recognizance bond or personal bonds are unsecured bonds; they require no upfront payment.").

[55] Dkt. 125-4, Pls.' Ex. 65 ¶ 7(c)(ii) (Decl. of Arjun Malik); Dkt. 125-6, Pls.' Ex. 67 at 13 (May 2018 Jail Population Report).

[56] Dkt. 125-4, Pls.' Ex. 65 ¶ 7(c)(iii) (Decl. of Arjun Malik); Dkt. 125-6, Pls.' Ex. 67 at 13 (May 2018 Jail Population Report).

[57] Dkt. 93-1, Pls.' Ex. 1 ¶ 32 (Decl. of Clarissa Kimmey) ("The judges presume that people who remain in jail until the next court appearance are indigent and appoint counsel to represent them.").

[58] *See* citations *supra* nn. 9–10.

[59] Dkt. 93-1, Pls.' Ex. 1 ¶ 33 (Decl. of Clarissa Kimmey) ("Arrestees who cannot afford a lawyer typically met their court-appointed lawyer for the first time at first appearance.").

[60] Dkt. 125-7, Pls.' Ex. 68 ¶ 8(b) (Decl. of Kali Cohn) (reviewing criminal case records of people arrested on select days in January, June, and July of 2018, and who were in jail for longer than 24 hours after a magistrate set a secured bond, and finding that, for arrestees within the arbitrary sample, in January 2018, felony arrestees were detained for a median of 54 days between arrest and first appearance, and misdemeanor arrestees were detained for a median of 9 days. In June 2018, felony arrestees were detained for a median of 35 days, and misdemeanor arrestees were detained for a median of 13 days.); *see* Dkt. 125-3, Pls.' Ex. 64 ¶ 6(j) (Rebuttal Decl. of Clarissa Kimmey) ("Arrestees are typically not brought to first appearance until after a case is filed and/or the grand jury has issued an indictment."); Dkt. 93-1, Pls.' Ex. 1 ¶¶ 40–43 (Decl. of Clarissa Kimmey) (describing the delays between arrest and first appearance; stating that "[m]isdemeanor arrestees must typically wait between four and ten days for their first appearance," and felony arrestees must wait two weeks, or two to three months, depending on whether they waive indictment).

[61] Dkt. 125-3, Pls.' Ex. 64 ¶ 6(j) (Rebuttal Decl. of Clarissa Kimmey).

felony charges, and up to ten or thirty business days to decide whether to file categories of more serious felony offenses.[62]

34. Misdemeanor arrestees who cannot pay for their release routinely wait in jail for four to ten days before being brought to court for first appearance.[63] One misdemeanor judge refers to this period of time after arrest and before a first appearance as the "black hole."[64] Felony arrestees, who are entitled to indictment, typically wait in jail two to three months for first appearance if they refuse to waive their right to indictment before prosecution. Even those who waive indictment typically wait in jail for two weeks for first appearance.[65]

C. First Appearance

35. Arrestees are transported from the jail to a holding cell on the so-called "jail chain." "Jail chain" is the term used, primarily in the misdemeanor courts, to refer to the group of impoverished detained arrestees who are brought to court, shackled with metal chains or in handcuffs, for their first appearance. These arrestees are brought to a holding cell connected to, but outside of, the courtroom, on the day of their first appearance. They are not permitted to enter the courtroom unless they agree to plead guilty.[66]

36. Judges decline to hold an on-the-record evidentiary hearing at the first appearance or to make any on-the-record findings concerning ability to pay or the necessity of pretrial detention, or the adequacy of alternative conditions of release to serve a government interest.[67]

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[62] *Id.*

[63] Dkt. 93-1, Pls.' Ex. 1 ¶ 41 (Decl. of Clarissa Kimmey); Dkt. 125-3, Pls.' Ex. 64 ¶ 6(j) ("Arrestees are typically not brought to first appearance until after a case is filed and/or the grand jury has issued an indictment."); Dkt. 125-7, Pls.' Ex. 68 ¶ 8(b) (Decl. of Kali Cohn) (finding a median of 13 days between arrest and first appearance for a sample group of misdemeanor arrestees detained in August 2018).

[64] Dkt. 93-1, Pls.' Ex. 1 ¶ 41 (Decl. of Clarissa Kimmey).

[65] Dkt. 93-1, Pls.' Ex. 1 ¶ 42–43 (Decl. of Clarissa Kimmey); Dkt. 125-3, Pls.' Ex. 64 ¶ 6(j) ("Arrestees are typically not brought to first appearance until after a case is filed and/or the grand jury has issued an indictment."); *see also* Dkt. 125-7, Pls.' Ex. 68 ¶ 8(b) (Decl. of Kali Cohn) (finding a median of 54 days in January, and 35 days in June, between arrest and first appearance for a sample group of felony arrestees detained in each of those months).

[66] Dkt. 93-1, Pls.' Ex. 1 ¶¶ 44–46 (Decl. of Clarissa Kimmey).

[67] Dkt. 93-1, Pls.' Ex. 1 ¶¶ 48–49 (Decl. of Clarissa Kimmey); Hr'g Tr. at 42:8–11 (Testimony of Roberto Cañas) (TRIGILIO: Is it standard practice that magistrates make findings on the record about whether an arrestee has the ability to pay the money bail amount required for their release? CAÑAS: I don't know if that happens on the record.); *id.* at 56:19–24 (Testimony of Terrie McVea) (TRIGILIO: Is it standard practice for arrestees to be informed of all the facts magistrates rely on to set conditions of pretrial release? Is it standard practice for magistrates to grant arrestees an opportunity to present evidence at magistration? MCVEA: No. TRIGILIO: The question is whether the magistrate makes a finding in that system that says, I find the arrestee is able to pay this bond amount, or I find the arrestee is not able to pay this bond amount? MCVEA: No. TRIGILIO: Okay. And are the notes that are made in the AIS system available to arrestees? MCVEA: No.).

D. Bail-Reduction Hearings

37. In order to obtain a hearing, an arrestee must wait for her defense attorney to be appointed and then wait for her attorney to contact her, interview her, and file a motion for bond reduction.[68] Judge Roberto Cañas testified that, typically, conditions of release are reviewed only if defense counsel requests it.[69] Once defense counsel is appointed and she is able to prepare and make her request for a bail hearing, the judge will typically schedule a hearing for a week after the motion is filed.[70] Even then, after a week of delay, judges ruling on bail-reduction motions do not make findings concerning ability to pay or findings that pretrial detention is necessary.[71]

38. Dallas County has a pretrial services agency, but it is understaffed and under-resourced, and cannot meet best practices for pretrial supervision of arrestees who are released on pretrial release bonds.[72]

39. Most misdemeanor and low-felony arrestees plead guilty at first appearance, and most misdemeanor and low-felony arrestees who plead guilty at first appearance accept a sentence of time-served and are released from jail that day. Many other arrestees who plead guilty at first appearance accept sentences that result in their release prior to when any subsequent hearing would be scheduled.[73]

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[68] Dkt. 93-1, Pls.' Ex. 1 ¶¶ 48–49 (Decl. of Clarissa Kimmey); Dkt. 125-3, Pls.' Ex. 64 ¶ 6(h)–6(i) (Rebuttal Decl. of Clarissa Kimmey); Dkt. 125-7, Pls.' Ex. 68 ¶ 8(a) (Decl. of Kali Cohn).

[69] Hr'g at Tr. 45:23–24 (Testimony of Roberto Cañas) (STEPHENS (Counsel for Dallas County): And those bail review hearings, how are they initiated? CAÑAS: Typically, it's a request of defense counsel.)

[70] Dkt. 93-1, Pls.' Ex. 1 ¶ 49 (Decl. of Clarissa Kimmey); Dkt. 125-3, Pls.' Ex. 64 ¶¶ 6(a)–(h) (explaining the lengthy delay between arrest, appointment of counsel, and the first opportunity to challenge conditions of release).

[71] Hr'g. Tr. at 43:02–09 (Testimony of Roberto Cañas) (TRIGILIO: When you issue a bail order, do you typically make findings on the record about whether an arrestee has the ability to pay the money bail amount required for the release? CAÑAS: I don't make that specific finding on the record. TRIGILIO: Do you make findings on the record when an arrestee can't afford the money bail amount that pretrial detention is necessary to serve a compelling government interest? CAÑAS: I don't make that specific finding on the record.); Dkt. 93-1, Pls.' Ex. 1 ¶ 51 ("When ruling on such motions, judges do not make findings concerning ability to pay and do not make findings that pretrial detention is necessary considering alternative conditions of release.").

[72] Dkt. 93-2, Pls.' Ex. 2 ¶ 3 (Defendants' Admissions) (Former County Criminal Justice Director Ron Stretcher: "[W]e do not provide any supervision to those released on pretrial release bonds."); Dkt. 141-40, Defts.' Ex. 40 at 2, ¶ 1(c) ("Dallas County also commits to providing the necessary staffing to supervise arrestees released on unsecured bonds.").

[73] Dkt. 93-1, Pls.' Ex. 1 ¶ 47 (Decl. of Clarissa Kimmey) ("Most misdemeanor and low-level felony arrestees who are detained at first appearance plead guilty. Most of those pleading guilty accept sentences of time served, and are released from jail that day. Many others who plead guilty at first appearance accept sentences that result in their release prior to when any subsequent appearance would be scheduled."); Dkt. 125-7, Pls.' Ex. 68 ¶ 8(c) (Decl. of Kali Cohn) ("Misdemeanor arrestees who are detained at first appearance often plead guilty at that court date. Of the 15 misdemeanor arrestees in the January spreadsheet, 11 pled guilty at their first appearance."); Dkt. 125-19, Pls.' Ex. 80 ¶ 7 (Decl. of Fahad Shailsh) ("I plan to plead guilty when I go to court so that I can get out of jail.").

40. After first appearance, arrestees who do not plead guilty are returned to the jail, where they will remain if they do not pay the secured bail amount required for release. It can take weeks or months for a subsequent appearance to be scheduled.[74]

IV. Options for Pretrial Release

41. In Dallas County, there are four types of bonds an arrestee can post to secure release from jail after arrest and before disposition: cash bonds, surety bonds, pre-trial release bonds, and personal bonds.[75]

42. A cash bond requires the arrestee to pay the full amount up-front.[76]

43. A surety bond requires a person to contract with a for-profit bonding company. The arrestee must typically pay a non-refundable percentage of the full amount of the bail set. In many cases, the amount is 10%.[77] People released on surety bonds are jailed an average of four or five days prior to release.[78] Thus, because it can often take low-income people and families significant time to obtain or borrow enough money for the non-refundable premium, even those people who are eventually able to access money to purchase their release can remain in jail for significant periods of time.[79]

44. Pretrial-release bonds are unsecured bonds, but Dallas County requires an upfront payment of $20 or 3% of the total bond amount, unless the Director of Pretrial Services decides, in his discretion, to waive the fee.[80] If the fee is not waived and the person cannot afford $20, the person would be kept in jail.[81]

45. Eligibility for pre-trial release bonds is dictated by criteria set forth by the Dallas County Commissioners Court in a generally applicable Order issued in 1999.[82] Because of the criteria set out in the order, most arrestees, including all arrestees who do not have a verifiable

[74] Dkt. 93-1, Pls.' Ex. 1 ¶ 50 (Decl. of Clarissa Kimmey).

[75] Dkt. 93-1, Pls.' Ex. 1 ¶ 34 (Decl. of Clarissa Kimmey).

[76] Dkt. 93-1, Pls.' Ex. 1 ¶ 35 (Decl. of Clarissa Kimmey).

[77] Dkt. 93-1, Pls.' Ex. 1 ¶ 36 (Decl. of Clarissa Kimmey).

[78] Dkt. 125-4, Pls.' Ex. 65 ¶ 7(b) (Decl. of Arjun Malik) (summarizing data set forth in the County's January 2018 and May 2018 Jail Population Committee Reports, Dkts. 125-5 & 125-6, Pls.' Exs. 66 & 67; stating that people released in January 2018 and April 2018 on surety bonds spent an average of four and five days in jail, respectively).

[79] Dkt. 125-7, Pls.' Ex. 68 ¶¶ 9 (Decl. of Kali Cohn) (finding that individuals who were not released on a personal recognizance or pretrial release bond experienced 5 days of wealth-based detention at the least, and 201 days of wealth-based detention at the most).

[80] Dkt. 93-1, Pls.' Ex. 1 ¶ 37 (Decl. of Clarissa Kimmey).

[81] *Id.*

[82] Dkt. 93-1, Pls.' Ex. 1 ¶ 38 (Decl. of Clarissa Kimmey); Dkt. 93-5, Pls.' Ex. 5 at 2–3 (1999 Commissioners' Ct. Order).

address—for example, those experiencing homelessness—are ineligible for release on pre-trial release bonds.[83]

46. At the time this case was filed, people released on pretrial-release bonds were jailed an average of 3 days prior to release due to their inability to pay the automatic secured money bail required under the bail schedule.[84] In April 2018, people were jailed an average of 24 days before being released on pre-trial release bonds.[85]

47. A personal bond, otherwise known as a personal recognizance bond, is an unsecured bond.[86] It is very uncommon for Magistrates to grant personal bonds, and at the time this case was filed, Magistrates did not have the *authority* to grant personal bond.[87] Misdemeanor and felony judges do not issue this type of bond unless a defense attorney asks the judge to consider granting one, meaning that an indigent arrestee cannot be released on personal bond until after her attorney is appointed and a subsequent motion is filed and heard.[88]

48. In January 2018, the month this case was filed, arrestees released on personal recognizance bonds spent an average of sixteen days in jail due to their inability to pay the money-bail amount required by the County's bail schedule.[89] In April 2018, arrestees released on personal

[83] Dkt. 93-1, Pls.' Ex. 1 ¶ 39 (Decl. of Clarissa Kimmey) ("Under Dallas County policies, the majority of arrestees—including all arrestees who are experiencing homelessness—are ineligible for release on pretrial-release bonds."); *id.* ¶ 38 ("If a pretrial services agent recommends someone for a pretrial-release bond, a judge will sign the bond to approve release."); Dkt. 93-5, Pls.' Ex. 5 at 2 (1999 Commissioners' Ct. Order) (stating that in order to be eligible for a pre-trial release bond, a "defendant must currently be a resident of Dallas County or an ADJOINING county; however, no requirement shall be established for length of residency in the immediate area if a pattern of stability can be determined in a previous community or through local employment/ties.").

[84] Dkt. 93-1, Pls.' Ex. 1 ¶ 39 (Decl. of Clarissa Kimmey).

[85] Dkt. 125-3, Pls.' Ex. 64 ¶ 6(h) (Rebuttal Decl. of Clarissa Kimmey); Dkt. 125-6, Pls.' Ex. 67 at 13 (May 2018 Jail Population Committee Report).

[86] Dkt. 93-1, Pls.' Ex. 1 ¶ 40 (Decl. of Clarissa Kimmey).

[87] Dkt. 125-20, Pls.' Ex. 81 (February 16, 2018 Email from Magistrate Judge Steven Autry to Dallas County Magistrate Judges) ("Judge McVea has asked that I communicate with all of you so that everyone is clear on the *new updates*. As you have read in the earlier correspondence, the district judges have given us authority to grant PR bonds. . . . Please review Section 17.03 for a list of charges where PR bonds are NOT ALLOWED to be granted by the magistrate judges.") (emphasis added); Dkt. 125-21, Pls.' Ex. 82 (March 6, 2018 Email from Misdemeanor Judge Lisa Green to Chief Magistrate Judge Terrie McVea) ("Judge McVea, per our earlier discussion the magistrate judges have the discretion of approving PR bonds on misdemeanor cases, only when appropriate… [F]or now, please move forward with this."); *see* Dkt. 93-2, Pls.' Ex. 2 ¶ 1 (Defendants' Admissions) (Defendant Judge Gracie Lewis: "[giving the authority to magistrates [to grant personal recognizance bonds] is 'something that the judges have not been willing to do.'"; *id.* ¶ 2 (Chief Magistrate Terri McVea: "We are hoping very soon, perhaps as early as the beginning of next year, that we will have in place criteria to allow more defendants to be released on personal bond.").

[88] Dkt. 93-1, Pls.' Ex. 1 ¶ 40 (Decl. of Clarissa Kimmey) ("A judge can also grant an arrestee a 'personal recognizance bond' or a 'personal bond,' which is an unsecured bond that requires no upfront payment. A defense attorney must ask a judge to issue this type of bond.")

[89] Dkt. 125-4, Pls.' Ex. 65 ¶ 7(c)(ii) (Decl. of Arjun Malik) (summarizing data set forth in Dkt. 125-6, Pls.' Ex. 67 at 13 (May 2018 Jail Population Report)).

recognizance bonds spent an average of five days in jail due to their inability to pay the money-bail amount required by the County's bail schedule.[90]

49. Secured bail (by cash and surety bonds) is a condition of release in virtually every case.[91] Although secured money bail is a condition of release in almost every case, only a fraction of arrestees are able to make the payment required.[92]

V. Dallas County's Bail System Post-Lawsuit

50. The evidence concerning Dallas County's policies and practices at the time this lawsuit was filed and for months afterward is not in dispute.

51. Dallas County asserts that it has made certain changes to its practices since the lawsuit was filed.[93]

52. Dallas County has not identified when or how or by whose directive those changes occurred.[94]

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[90] Dkt. 125-4, Pls.' Ex. 65 ¶ 7(c)(iii) (Decl. of Arjun Malik) (summarizing data set forth in Dkt. 125-6, Pls.' Ex. 67 at 13 (May 2018 Jail Population Report)).

[91] *See, e.g.*, Dkt. 93-1, Pls.' Ex. 1 ¶ 15 ("At the 'arraignments,' the magistrate calls each arrestee individually by name, and informs her of the offense charged—but not the allegations underlying the charge—and the monetary payment required by the Dallas County bail schedule for release."); *see also* evidence of the bail process as of August 2018: Dkt. 125-1, Pls.' Ex. 62 (Magistration Videos from July 6, 2018); Dkt. 125-2, Pls.' Ex. 63 at 2–5 (Summary of Video Evidence).

[92] Dkt. 93-2, Pls.' Ex. 2 ¶ 6 (Defendants' Admissions) (Defendant Judge Nancy Mulder: "There's a lot of people who end up in jail who can't afford a bond, who lose their jobs, lose their apartment and end up homeless."); *id.* ¶ 11 (Defendant Judge Jeanine Howard: "[I]ndigent defendants . . . [sit] in the county jail for months, because they are low income residents and don't have the money to post a bond."); Hr'g Tr. at 49:21–50:4 (Testimony of Roberto Cañas) (TRIGILIO: You also testified on redirect that it's routine for you to hear bail reduction motions from defense counsel and to lower bond amounts that were set at magistration. Correct? CAÑAS: Correct. TRIGILIO: So that implies that from the time secured bail is set at a magistration until that hearing people are detained under bond amounts they can't afford. Is that correct? CAÑAS: Well, I don't know if they can afford it or not, but they are being detained on whatever bond was set."); *see supra* nn. 47–49.

[93] Dkt. 116-2 ¶ 6 (Decl. of Terrie McVea) ("Prior to magistration, an affidavit of financial condition is provided to arrestees . . . . The affidavit was added to the post-arrest process early this year."); Dkt. 125-22, Pls.' Ex. 83 (email from Defendant Felony Judge Amber Givens-Davis to Chief Magistrate Judge Terri McVea and the felony and misdemeanor judges purporting to state Judge Givens-Davis's understanding that the Sheriff's Office would begin offering a financial affidavit to arrestees on February 11, 2018, but without providing any information as to whether that was the actual start date to the policy); Dkt. 125-20, Pls.' Ex. 81 (February 16, 2018 Email from Magistrate Judge Steven Autry to Dallas County Magistrate Judges) (stating that "the district judges have given us authority to grant PR bonds," with the exception of "a list of charges [in T.C.C.P. 17.03] where PR bonds are NOT ALLOWED to be granted by the magistrate judges."); Dkt. 125-21, Pls.' Ex. 82 (March 6, 2018 Email from Misdemeanor Judge Lisa Green to Chief Magistrate Judge Terrie McVea) ("[P]er our earlier discussion the magistrate judges have the discretion of approving PR bonds on misdemeanor cases, only when appropriate. I will place this on the agenda for our next meeting, but at least for now, please move forward with this.").

[94] *See* Dkt. 125-3, Pls.' Ex. 64 ¶¶ 3–4 (Rebuttal Decl. of Clarissa Kimmey) (noting that Defendants "do not indicate when any specific change in practice is purported to have occurred."); Dkt. 116-2 ¶ 6 (Decl. of Terrie McVea) (bare assertion that the provision financial affidavits to arrestees "is a permanent change in policy and practice"; unsupported by any other evidence); *id.* at ¶ 13 (bare assertion that "[i]n all cases, both misdemeanor and felony, Magistrates may

53. The Felony Judges do not claim to have made any changes to their conduct.

54. Dallas County asserts that it has made three sets of changes relevant to Plaintiffs' claims.

a. First, Dallas County asserts that Terri McVea received emails stating that the Magistrates have now been given some discretion to grant unsecured bonds and to determine alternative conditions of pretrial release.[95] However, the felony judges dispute that this policy change occurred, arguing that in a wide range of cases only the assigned elected judge may grant unsecured release, that the judges have *not* delegated this authority to magistrates for those offenses, and that the judges themselves have no jurisdiction to change conditions of release from those required by the bail schedule until after formal charges are filed.[96]

b. Second, Dallas County asserts that bail-setting magistrates now "consider" ability to pay by reviewing an affidavit of financial condition that they claim to provide to "every" arrestee.[97]

c. Third, Dallas County asserts that its Commissioner's Court has passed several resolutions that will provide more resources to pretrial services, provide representation of counsel at bail hearings, make bail hearings observable to the

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grant unsecured bonds in their full discretion," which assertion is undermined by emails authorizing PR bonds only when "appropriate" (without defining what that term means) in misdemeanor cases, *see* Dkt. 125-21, Pls.' Ex. 82, and excluding a lengthy list of felony offenses from consideration for release on anything other than secured bonds, *see* Dkt. 125-20, Pls.' Ex. 81).

[95] Dkt. 125-20, Pls.' Ex. 81 (February 16, 2018 Email from Magistrate Judge Steven Autry to Dallas County Magistrate Judges) ("Judge McVea has asked that I communicate with all of you so that everyone is clear on the new updates. As you have read in the earlier correspondence, the district judges have given us authority to grant PR bonds. All PR bonds should still have the minimum conditions (random UAs) or any further conditions that you feel are relevant . . . Please review Section 17.03 for a list of charges where PR bonds are NOT ALLOWED to be granted by the magistrate judges."); Dkt. 125-21, Pls.' Ex. 82 (March 6, 2018 Email from Misdemeanor Judge Lisa Green to Chief Magistrate Judge Terrie McVea) ("[P]er our earlier discussion the magistrate judges have the discretion of approving PR bonds on misdemeanor cases, only when appropriate.").

[96] Hr'g Tr. at 103:12–20 (Closing Argument of Attorney Eric Hudson, counsel for the Felony Judges) (stating that the Felony Judges have "no jurisdiction until there's a criminal instrument filed that allows the felony judges to take the case."); Dkt. 125-20, Pls.' Ex. 81 (February 16, 2018 Email from Magistrate Judge Steven Autry to Dallas County Magistrate Judges) ("Please review Section 17.03 for a list of charges where PR bonds are NOT ALLOWED to be granted by the magistrate judges."); *see* Dkt. 93-1, Pls.' Ex. 1 ¶¶ 42–43 (unrebutted testimony that felony arrestees who waive indictment must wait two weeks for a first court appearance, and those who do not waive indictment must typically wait two to three months for a first appearance); *id.* at ¶¶ 50–51 (Decl. of Clarissa Kimmey) (explaining that arrestees who do not plead guilty at first appearance can ask their lawyer to file a bond-reduction motion, and that such a hearing is typically scheduled for at least a week in the future).

[97] Hr'g Tr. at 60:19–61:3 (Testimony of Terrie McVea) (MCVEA: So prior to going into the courtroom, we've already considered all the pertinent information, so -- and set an appropriate bond. However, that can change during the hearing. [Counsel for Dallas County] DAVID: Q. And you mentioned the financial affidavit, that that's one of the things that's considered both in phase one and phase two of the process. Is it your understanding that currently every arrestee in Dallas County receives that financial affidavit? MCVEA: That's true.").

public by video, and provide resources necessary to ensure that bail hearings can be adversarial.[98]

55. Notwithstanding these assertions, unrebutted evidence establishes that none of the County Defendants' purported or proposed changes is occurring in practice in a consistent or meaningful manner.

56. The following evidence regarding the County's system as of the preliminary injunction hearing on August 10, 2018, is unrebutted.

57. First, notwithstanding any purported discretion Magistrates presently have, Magistrates continue to adhere rigidly to the bail schedule. Specifically, video evidence from a single day of bail hearings (July 6, 2018),[99] demonstrates that magistrates refuse to exercise their discretion in at least the following ways:

a. Informing arrestees that secured bail amounts must be "standardized" according to a schedule.[100]

b. Informing arrestees that they do not "qualify" for unsecured release and refusing to consider them for a personal bond.[101]

c. Requiring people to wait until a later date to raise a request for release on alternative conditions.[102]

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[98] Dkt. 141-41, Defs.' Ex. 41 (2018 Commissioners' Ct. Order – Mag. Portal Project) (authorizing funds for new software program); Dkt. 141-40, Defs.' Ex. 40 at 2–4 (authorizing funding for, among other things, an expanded pretrial services agency, provision of a financial affidavit, acquisition and implementation of a pretrial assessment tool, an "individualized assessment of appropriate release conditions" within 48 hours of arrest, a live video feed of the bail hearings into an area accessible to the public, a bail review hearing before the judges, and "technological upgrades").

[99] The videos were produced in response to Plaintiffs' expedited discovery request. Defendants initially opposed Plaintiffs' request for production of bail hearing videos, but produced them in response to a court order that required production of three days of video recordings of bail hearings that occurred between July 1-8, 2018 (Dkt. 113). Defendants produced videos from July 6–8, 2018 on the evening of Thursday, August 2 and the morning of Friday, August 3, just days before Plaintiffs' rebuttal evidence was due on Monday, August 6. Plaintiffs, therefore, had only one weekend to review the video evidence, much of which was corrupted or unviewable. Plaintiffs' team was able to view one day's worth of hearings, and submitted the majority of the full hearings that were recorded on that day.

[100] Dkt. 125-1, Pls.' Ex. 62 at 5:40:02 (Magistration Videos from July 6, 2018) (in response to an arrestee's question about having his bond lowered at the hearing, Magistrate Turley responded, "Sometimes [the money-bail amount is] lowered, sometimes it goes up. We have to standardize it according to our bond schedule."); *see* Dkt. 125-2, Pls.' Ex. 63 at 2 (Summary of Video Evidence).

[101] Dkt. 125-1, Pls.' Ex. 62 at 20:25:56 (Magistration Videos from July 6, 2018) ("I only do PR bonds if there's absolutely nothing of the record."); *id.* at 05:15:16 ("Nobody else ask me if you do [qualify for a personal recognizance bond], because you don't."); *id.* at 8:20:43 ("No one else did [qualify for a personal recognizance bond], so no one else ask me."); *see* Dkt. 125-2, Pls.' Ex. 63 at 1 (Summary of Video Evidence).

[102] Dkt. 125-1, Pls.' Ex. 62 at 12:43:00 (Magistration Videos from July 6, 2018) ("You just go through your lawyer and . . . have [her] schedule some type of hearing); *see* Dkt. 125-2, Pls.' Ex. 63 at 2 (Summary of Video Evidence).

d. Stating that they would not consider anything other than secured money bail for any arrestee with a criminal history.[103] Requiring secured financial conditions of release, even when they result in detention and without making findings concerning the availability of less-restrictive conditions to serve the government's interests or the necessity of detention in light of any government interest.[104]

58. Bail hearings last mere seconds,[105] without any notice of the critical issues to be decided or the factors to be considered,[106] opportunity to be heard,[107] consideration of

[103] Dkt. 125-1, Pls.' Ex. 62 at 12:43:00 (Magistration Videos from July 6, 2018); Dkt. 125-2, Pls.' Ex. 63 at 2 (Summary of Video Evidence) (Magistrate Judge Turley (12:43:00): In response to an arrestee's request for an unsecured bond for misdemeanor trespass, Magistrate Wolff replies: "I only do PR bonds if there's absolutely nothing on the record.").

[104] Dkt. 125-1, Pls.' Ex. 62 at 01:15:55 (Magistration Videos from July 6, 2018) (Arrestee: "How much is [the bond]"? Magistrate Turley: "$5,000 or you can go to a bail bondsman but I cannot tell you exactly how much they are going to charge you." Arrestee: "Well I a'int got no money." Magistrates Turley: "okay."); *id.* at 20:29:36 (Arrestee: "If I can't pay the bond, do I sit [in jail]?" Magistrate Wolff: "You have to stay in jail until at least your first court date."); Dkt. 125-2, Pls.' Ex. 63 at 2 (Summary of Video Evidence).

[105] Dkt. 125-1, Pls.' Ex. 62 (Magistration Videos from July 6, 2018); Dkt. 125-2, Pls.' Ex. 63 at 2–5 (Summary of Video Evidence) (describing 64 bail hearings that were over in 30 seconds or less).

[106] Hr'g Tr. at 53:21–54:3 (Testimony of Magistrate Judge Terrie McVea) (TRIGILIO: Is it explained to arrestees that they have a federal right to pretrial liberty that they may be -- that they may be deprived of the proceeding? MCVEA: It's not explained in those terms. TRIGILIO: Is it standard practice for arrestees to receive notice that their danger to others is a critical issue determining their release? MCVEA: Sometimes.); *id.* at 54:15–18 (TRIGILIO: Okay. Is it standard practice for arrestees to receive notice that their likelihood of appearing in court is a critical issue determining their release? MCVEA: Not in those terms, no.); *id.* at 38:16–19 (Testimony of Defendant Misdemeanor Judge Roberto Cañas) (TRIGILIO: Is it standard practice that arrestees receive notice that their right against wealth-based detention is at issue in magistrations? CAÑAS: I don't think it's put in that [sic] terms, no.); *id.* at 39:15–18 (TRIGILIO: is there a written rule requiring magistrates to make such an advisory [to arrestees that their right to pretrial liberty is at stake]? CAÑAS: If there is I'm not aware of it.); *id.* at 39:25-40:4 (TRIGILIO: Is it standard practice that arrestees receive notice that their likelihood of appearing in court is a critical issue that determines their release? CAÑAS: That's also one of the aspects of pretrial release, but I don't know if it's put to them in that exact way.); *id.* at 40:9–40:12: (TRIGILIO: Are arrestees informed in any way that their likelihood of appearing in court determines the outcome of the magistration, or is that an issue in the magistration? CAÑAS: I don't think it's put to them in that way.).

[107] *Id.* at 54:19–25 (Testimony of Terrie McVea) (TRIGILIO: Is it standard practice for magistrates to grant arrestees an opportunity to present evidence at magistration? MCVEA: No. TRIGILIO: Is it standard practice for magistrates to grant arrestees an opportunity to confront the facts that are used against them at magistration? MCVEA: No.); *id.* at 56:19–24 (TRIGILIO: Is it standard practice for arrestees to be informed of all the facts magistrates rely on to set conditions of pretrial release? MCVEA: Not generally, no.); *id.* at 40:21–24 (Testimony of Roberto Cañas) (TRIGILIO: . . . It's standard practice for magistrates to give arrestees an opportunity to confront the facts used against them at magistration? CAÑAS: I know that does not happen in the jail magistrate court. . . . but they will—they do have that opportunity at some point."); *id.* at 41:17–24 (TRIGILIO: . . . [I]s it standard practice that magistrates grant arrestees an opportunity to confront the facts used against them at magistration? CAÑAS: It's not done at that time, no. TRIGILIO: Okay. And I'd like to reiterate an earlier question. Is it standard practice that magistrates grant arrestees an opportunity to present evidence at magistration? CAÑAS: It's not done at that time.).

alternatives,[108] or articulated findings.[109] The County continues to jail people who cannot afford secured bail set in these summary proceedings.[110]

59. Arrestees are not given an opportunity to speak or ask questions at the hearings.[111] Indeed, days before the preliminary injunction hearing, one person detained in the jail due to inability to pay secured money bail reported that he had been removed from magistration because he attempted to ask a question about his conditions of release.[112]

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[108] *Supra* nn. 94–95, 100–105.

[109] *Id.* at 42:8–11 (Testimony of Roberto Cañas) (TRIGILIO: Is it standard practice that magistrates make findings on the record about whether an arrestee has the ability to pay the money bail amount required for their release? CAÑAS: I don't know if that happens on the record.); *id.* at 56:19–24 (Testimony of Terrie McVea) (TRIGILIO: Is it standard practice for arrestees to be informed of all the facts magistrates rely on to set conditions of pretrial release? Is it standard practice for magistrates to grant arrestees an opportunity to present evidence at magistration? MCVEA: No. TRIGILIO: The question is whether the magistrate makes a finding in that system that says, I find the arrestee is able to pay this bond amount, or I find the arrestee is not able to pay this bond amount? MCVEA: No. TRIGILIO: Okay. And are the notes that are made in the AIS system available to arrestees? MCVEA: No.).

[110] Dkt. 125-1, Pls.' Ex. 62 at 20:29:36 (in response to an arrestee who asked, "[I]f I can't pay the bond, do I sit it [in jail]"?, Magistrate Wolff replied, "[Y]ou have to stay in jail until at least your first court date."); Dkt. 125-2, Pls.' Ex. 63 at 2 (Summary of Video Evidence); Dkt. 125-9, Pls.' Ex. 70 ¶ 4 (Decl. of Emily Gerrick) ("People are routinely kept in the Dallas County Jail for days after arrest because they cannot afford to purchase their release."); Dkt. 125-10, Pls.' Ex. 71 ¶ 3 (Decl. of Karly Jo Dixon) (stating that, of the seven detained individuals Ms. Dixon interviewed, "[a]ll of them reported to me that they were there because they could not afford to pay the secured financial condition required for the release, and that if they could afford to pay the money bail amount, they would pay it so they could go home. None of them wanted to be in the jail."); Dkt. 125-11, Pls.' Ex. 72 ¶¶ 5, 7 (Decl. of Abel Arce) ("I cannot afford to pay the $1,000 bond. . . . I do not know when I will get out. . . ."); Dkt. 125-12, Pls.' Ex. 73 ¶¶ 9–10 (Decl. of Jeremie Athens Grant) ("I cannot afford to pay the money bail required for my release. I do not know when I will go to court or get out of here."); Dkt. 125-13, Pls.' Ex. 74 ¶ 9 (Decl. of Hariet Ogendi) ("I have a bank account and I think I may have enough money to pay the bail amount, but I don't have my debit card with me. . . . I have to stay in jail because I don't have access to the money I need to get out."); Dkt. 125-14, Pls.' Ex. 75 ¶¶ 5–7 (Decl. of Dequaceion Demarcus Jones) ("I do not know when I will go to court or when I will get out of here. . . . I cannot afford to pay the money bail required for my release."); Dkt. 125-15, Pls.' Ex. 76 ¶ 5 (Decl. of Lawrence Calvin Durham) ("I cannot afford to pay the bond and so I am still in jail."); Dkt. 125-16, Pls.' Ex. 77 ¶¶ 7 (Decl. of Luis Miguel Westbrook) ("I am homeless and I struggle to afford the basic necessities of life. I am in jail because I am unable to pay the bond."); Dkt. 125-17, Pls.' Ex. 78 ¶¶ 6–7 (Decl. of Roderick Moore) ("I do not know when I will go to court or when I will get out of here. My family is trying to get the money to bond me out, but we have bills to pay and it is hard."); Dkt. 125-18, Pls.' Ex. 79 ¶¶ 7–8 (Decl. of Jesse James Ramirez) ("I plan to plead guilty when I go to court so that I can get out of jail. I struggle to meet the basic necessities of life. I cannot afford to pay the money bail required for my release."); Dkt. 125-19, Pls.' Ex. 80 ¶¶ 7–9 (Decl. of Fahad Shailsh) ("I plan to plead guilty when I go to court so that I can get out of jail. I struggle to meet the basic necessities of life. I cannot afford to pay the money bail required for my release."); Dkt. 125-7, Pls.' Ex. 68 ¶ 9 (Decl. of Kali Cohn) ("These sample cases from January, June, and July demonstrate the tremendous length of time individuals can languish in Dallas County Jail pretrial, solely because they cannot purchase their freedom. When individuals were not given access to a personal recognizance or pretrial release bond, they experienced 5 days of wealth-based detention at the least, and 201 days of wealth-based detention at the most.")

[111] Dkt. 125-1, Pls.' Ex. 62 at 05:15:16 (Magistration Videos from July 6, 2018) ("Nobody else ask me if you do [qualify for a personal recognizance bond], because you don't."); *id.* at 8:20:43 ("No one else did [qualify for a personal recognizance bond], so no one else ask me."); Dkt. 125-2, Pls.' Ex. 63 at 1 (Summary of Video Evidence).

[112] Dkt. 125-17, Pls.' Ex. 78 ¶ 5 (Decl. of Roderick Moore) ("I tried to ask her why she set someone else's money bail at $500 who had the same charge. I was removed from the courtroom before the end of the docket. I felt I was removed because I had asked questions.").

60. Second, the financial affidavits the County purports to have begun providing to "all" arrestees are not actually uniformly provided.[113] Even when the affidavits are provided, many arrestees who complete them do not understand, or report that they were not informed of, the purpose of the affidavit.[114]

61. Defendants do not make any finding concerning whether an arrestee can pay the amount of secured money bail required.[115] Defendants do not make any determination that alternatives to detention do not serve the government's interests.[116] Defendants do not claim to consider alternatives or make findings; indeed, they argue that they no law requires them to do so.

62. There is no basis to conclude that the changes are permanent or consistently applied:

a. Magistrates' purported authority to consider personal bonds in misdemeanor cases was apparently conveyed through a verbal conversation and informal follow-up email.[117]

[113] Dkt. 125-17, Pls.' Ex. 78 ¶¶ 4,8 (Decl. of Roderick Moore) ("I don't remember filling out a financial form or being asked anything about my income."); Dkt. 125-19, Pls.' Ex. 80 ¶ 4 (Decl. of Fahad Shailsh) ("I did not fill out any paper work regarding my financial situation[.]"); Dkt. 125-18, Pls.' Ex. 79 ¶ 4 (Decl. of Jesse James Ramirez) ("When I got to the Dallas County Jail 2 days [after I was arrested] . . . I filled out financial paperwork to request an attorney.").

[114] Dkt. 125-13, Pls.' Ex. 74 ¶ 3 (Decl. of Hariet Ogendi) ("I was given paperwork at the jail. The paperwork asked questions about my finances. I don't remember anyone telling me what the paperwork was for."); Dkt. 125-14, Pls.' Ex. 75 ¶ 3 (Decl. of Dequaceion Demarcus Jones) ("I filled out paperwork that I believe was a request for a court appointed attorney."); Dkt. 125-15, Pls.' Ex. 76 ¶ 3 (Decl. of Lawrence Calvin Durham) ("When I got to the Dallas County Jail, they gave me a form. I didn't have glasses so a guard filled it out for me. I don't know what the form was for."); *see* Dkt. 125-9, Pls.' Ex. 70 ¶ 5 (Decl. of Emily Gerrick); Dkt. 125-10, Pls.' Ex. 71 ¶ 5 (Decl. of Karly Jo Dixon).

[115] *See* citation *supra* n. 109.

[116] Hr'g Tr. at 43:6–9 (Testimony of Roberto Cañas) (TRIGILIO: Do you make findings on the record when an arrestee can't afford the money bail amount that pretrial detention is necessary to serve a compelling government interest? CAÑAS: I don't make that specific finding on the record.); *id.* at 56:14-18 (Testimony of Terrie McVea) (TRIGILIO: Is it standard practice for magistrates to make findings on the record when an arrestee cannot afford their money bail that pretrial detention is necessary to serve a compelling government interest? MCVEA: That's not discussed at that time, no.); *see* Dkt. 125-9, Pls.' Ex. 70 ¶ 8 (Decl. of Emily Gerrick) ("Arrestees do not typically understand why they are being required to pay the secured financial conditions of release that the Magistrate tells them they have to pay to be released. Arrestees do not typically know how the money bail amounts are determined. Sometimes arrestees are informed simply that they do not qualify for release on anything other than a secured financial condition."); Dkt. 125-10, Pls.' Ex. 71 ¶ 8 (Decl. of Karly Jo Dixon) (same); Dkt. 125-12, Pls.' Ex. 73 ¶ 5 (Decl. of Jeremie Athens Grant) ("I don't know why she set my bond at $500."); Dkt. 125-14, Pls.' Ex. 75 ¶ 4 (Decl. of Dequaceion Demarcus Jones) ("I do not know why my money bail was set at $500."); Dkt. 125-15, Pls.' Ex. 76 ¶ 5 (Decl. of Lawrence Calvin Durham) ("I don't know why [my bond] is set at $25,000.").

[117] Dkt. 125-21, Pls.' Ex. 82 (March 6, 2018 Email from Misdemeanor Judge Lisa Green to Chief Magistrate Judge Terrie McVea) ("Judge McVea, per our earlier discussion the magistrate judges have the discretion of approving PR bonds on misdemeanor cases, only when appropriate.").

b. Magistrates' authority to consider personal bonds in felony cases appears to have been conveyed by the felony judges' copying magistrates on an email exchange, and then asking a magistrate judge to send a final confirmation email.[118]

c. The instruction to provide the financial affidavit was apparently given by a single felony judge to a representative of the Sheriff's office during an in-person meeting, but not pursuant to any written order or guidelines.[119] Chief Magistrate Terri McVea testified that she is not in possession of "any other policies that dictate the way this new financial affidavit is administered," including "the way that sheriff's deputies . . . present the form to arrestees," or "give arrestees any information about the purpose of the form."[120]

63. These emails are the only written "policy changes" in the Chief Magistrate's possession.[121]

64. There is no evidence that the judges have issued any standing order, amended the local administrative rules, or otherwise repealed the bail schedules.

65. Nor should such policy changes be expected: all Defendants argue that they are providing everything that the Constitution requires.[122]

66. Judge Cañas, a misdemeanor judge, testified that he orders secured bail without making specific findings about ability to pay or the adequacy of alternatives to detention,[123] and that he believes this practice is constitutional. He testified that he was not aware of any law

[118] Dkt. 125-20, Pls.' Ex. 81 (February 16, 2018 Email from Magistrate Judge Steven Autry to Dallas County Magistrate Judges) ("As you have read in the earlier correspondence, the district judges have given us authority to grant PR bonds."); *id.* ("Please review Section 17.03 for a list of charges where PR bonds are NOT ALLOWED to be granted by the magistrate judges.") (emphasis in original).

[119] Dkt. 125-22, Pls.' Ex. 83 (Judge Amber Givens-Davis Email) ("Today I had a follow-up meeting with the Sheriff's Office. On Sunday, February 11, 2018, the Dallas County Sheriff's Office will start providing the Financial Affidavit Form to all individuals arraigned at Lew Sterrett").

[120] Hr'g Tr. at 70:07–14, 71:14–18 (Testimony of Terrie McVea).

[121] The emails were produced in response to an expedited discovery request. While there may be other documents in the Chief Magistrate's possession that are responsive to the request but were overlooked during her search, there are almost certainly no other major written policy changes. If such changes were issued, the Chief Magistrate would have easily recalled and located them.

[122] Dkt. 32 at 8 (Dallas Cty. Defs.' Resp. to Pls' Mot. for Prelim. Inj.) ("Plaintiffs complain that the Magistrate Judges most often set bail at the arraignment hearing in accordance with the bail schedules, which are promulgated by both the misdemeanor and the felony judges. This practice is constitutional."); Dkt. 152 at 8 (Dallas Cty. Defs.' Resp. to Pls Amend. Prop. Ord.) ("The evidence in the record shows that the pretrial system in Dallas County currently provides just such a [legally required] hearing.").

[123] Hr'g Tr. at 43:02–09 (Testimony of Roberto Cañas) (TRIGILIO: When you issue a bail order, do you typically make findings on the record about whether an arrestee has the ability to pay the money bail amount required for the release? CAÑAS: I don't typically make that specific finding. TRIGILIO: Do you make findings on the record when an arrestee can't afford the money bail amount that pretrial detention is necessary to serve a compelling government interest? CAÑAS: I don't make that specific finding on the record.)

requiring magistrates to notify arrestees that their right to pretrial liberty is at stake at magistration, or notify them of the reasons the magistrate orders them detained.[124]

67. Chief Magistrate McVea echoed this sentiment with regard to the right against wealth-based detention.[125]

68. Recent orders issued by the Commissioners Court identify reforms that, if implemented, might improve the post-arrest system. However, they do not provide a timeline for implementation or any other information about implementation, and Defendants have provided no information about the reforms beyond what is written in the documents filed with this Court.[126]

VI. The Evidence on the Efficacy of Secured Bail

69. There is no evidence that secured money bail serves any government interest, let alone that it serves any government interest better than alternatives that do not result in the mass pretrial detention of indigent arrestees. Plaintiffs submitted overwhelming empirical evidence and expert testimony about the effects of secured money bail. Most of that evidence was entirely unrebutted.[127] That evidence, and Plaintiffs' experts, are credible.

70. Dr. Stephen Demuth, Dr. Michael Jones, John Clark, and the Honorable Truman Morrison testified as experts under Rule 702 of the Federal Rules of Evidence.[128]

71. Dr. Stephen Demuth is a professor of sociology who researches the influence of race/ethnicity, gender, and social class on decisions and outcomes at the pretrial and sentencing stages of the criminal case, and more recently, the collateral consequences of criminal system involvement on later-life outcomes. As Professor Demuth explained through his testimony, his opinions are based on studies of robust data sets, and an understanding of the reliability of principles and methods for drawing conclusions from that data.[129]

72. Dr. Michael R. Jones is the founder and president of a consulting company that provides technical assistance and advice to jurisdictions seeking to reform their pretrial practices to conform to the most up-to-date research on best practices. He has spent a seventeen-year career

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[124] *Id.* at 44:02–05 (Testimony of Roberto Cañas) (TRIGILIO: Are you aware of any law that requires you or the magistrates to notify an arrestee that their pretrial liberty is at stake, to use the words counsel was using? CAÑAS: No.); *id.* at 44:24–45:02 (TRIGILIO: Are you aware of any law that requires you to notify an arrestee of the factors that judges consider under code of criminal procedure in setting bail? CAÑAS: No.)

[125] *Id.* at 53:06–09 (Testimony of Terrie McVea) (TRIGILIO: Is it standard practice that arrestees receive notice that their federal right against wealth-based detention is at issue in magistration? MCVEA: I don't think that's required at magistration, so no.)

[126] *See* Dkt. 141-40, Defs.' Ex. 40 (2018 Commissioners' Ct. Order – Pretrial Plan).

[127] Defendants briefly cross-examined one of Plaintiffs' witnesses, Professor Demuth, but did not meaningfully question any of his specific opinions. Hr'g Tr. at 12:02-15:24.

[128] Dkt. 93-6, Pls.' Ex. 6 (Decl. of Stephen Demuth); Dkt. 93-15, Pls.' Ex. 15 (Decl. of Michael R. Jones); Dkt. 93-32, Pls.' Ex. 32 (Decl. of John Clark); Dkt. 93-47, Pls.' Ex. 47 (Decl. of Truman Morrison).

[129] Hr'g Tr. at 23:07–29:15 (Testimony of Stephen Demuth); Dkt. 93-6, Pls.' Ex. 6 (Decl. of Stephen Demuth).

studying pretrial release and helping jurisdictions implement pretrial reforms to reduce detention and improve rates of court appearance and public safety. As Dr. Jones's declaration explains, his opinion is based on his own and others' studies using large robust data sets, and an understanding of the reliability of principles and methods for drawing conclusions from that data.[130]

73. John Clark has spent his thirty-one-year career working for the nonprofit Pretrial Justice Institute. Mr. Clark has provided technical assistance to thousands of jurisdictions seeking to improve their pretrial release policies, monitored their progress, and written articles about successful reforms.[131]

74. The Honorable Truman Morrison is a Senior Judge on the Superior Court of the District of Columbia, where he has been a judge for more than thirty-seven years. Judge Morrison has specialized knowledge of the operation and efficacy of the District of Columbia's pretrial release system, which has virtually eliminated the use of secured money bail. He has first-hand knowledge of how a system that does not use access to money to make release and detention decisions operates.[132]

A. Secured Bail Results in Unnecessary Pretrial Detention

75. The use of secured bail increases rates of pretrial detention. Requiring a pre-release payment results in longer periods of pretrial detention and a lower likelihood of release before case disposition. Secured bail results in detention of people who are unable to pay the necessary pre-release payment toward a secured bond, and leads to disproportionate detention of people of color.[133]

B. Secured Bail Provides No Benefits in Court Appearance or Community Safety That Are Not Provided to the Same or Greater Extent by Less-Restrictive Conditions of Release

76. There is no evidence that secured money bail is more effective than unsecured bail, or non-financial conditions of release, at promoting appearance in court or public safety.[134]

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[130] Dkt. 93-15, Pls.' Ex. 15 (Decl. of Michael R. Jones).

[131] Dkt. 93-32, Pls.' Ex. 32 (Decl. of John Clark).

[132] Dkt. 93-47, Pls.' Ex. 47 (Decl. of Truman Morrison).

[133] Hr'g Tr. at 22:24–23:3 (Testimony of Stephen Demuth); Dkt. 93-6, Pls.' Ex. 6 ¶¶ 4, 11–13 (Decl. of Stephen Demuth); Dkt. 93-10, Pls.' Ex. 10 at 26 (Stevenson Study); Dkt. 93-15, Pls.' Ex. 15 ¶¶ 10–11, 13–16, 32(d), 36–37 (Decl. of Michael R. Jones); Dkt. 93-19, Pls.' Ex. 19 at 12–16 (Jones Study); Dkt. 93-20, Pls.' Ex. 20 at 9–12 (Brooker *et al.* Study); Dkt. 93-29, Pls.' Ex. 29 at 23–24 (Kimbrell & Wilson Study); Dkt. 93-30, Pls.' Ex. 30 at 7–8, 11, 16–17 (Brooker Study); Dkt. 93-32, Pls.' Ex. 32 ¶ 5 (Decl. of John Clark); Dkt. 93-35, Pls.' Ex. 35 at 1–2 (Pretrial Justice Institute Study). *See* Dkt. 93-8, Pls.' Ex. 8 at 23 (Gupta *et al.* Study) (discussing evidence suggesting racial disparities); Dkt. 93-36, Pls.' Ex. 36 at 25 (Lusardi *et al.* Study) (concluding that a "disturbingly high fraction" of Americans report being unable to come up with $2,000 in 30 days); Dkt. 93-37, Pls.' Ex. 37 at 29 (Report on Economic Well-Being of U.S. Households) (reporting 4 in 10 adults would have difficulty covering an unexpected $400 expense).

[134] Hr'g Tr. at 21:23–22:7 (Testimony of Stephen Demuth).

Rigorous recent empirical studies support this conclusion.[135] This is true across all "risk levels," as determined by an empirically derived risk assessment tool.[136] Studies purportedly reaching different conclusions referenced by Defendants are flawed for the unrebutted reasons discussed in declarations and other publications by Professor Stephen Demuth, Dr. Michael Jones, and John Clark, each of whom has considerable expertise in this area of research.[137]

77. Many arrestees who remain detained due to their inability to pay secured bail are released from jail as soon as the case is disposed, usually in a matter of days or weeks from arrest. For this set of arrestees, the record evidence shows that unaffordable secured bail functions to coerce a guilty plea that results in the arrestee's immediate release.[138]

78. Secured bail therefore results in unnecessary pretrial detention.[139]

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[135] Dkt. 93-19, Pls.' Ex. 19 at 4 (Jones Study) (finding that unsecured bonds are "as effective at achieving public safety as are secured bonds," "are as effective at achieving court appearance as are secured bonds," and "free up more jail beds than do secured bonds because: (a) more defendants with unsecured bonds post their bonds; and (b) defendants with unsecured bonds have faster release-from-jail times"; and that "[h]igher monetary amounts of secured bonds are associated with more pretrial jail bed use but not increased court appearance rates."); Dkt. 93-20, Pls.' Ex. 20 at 2 (Brooker *et al.* Study) (finding that, "Results showed that the increased use of secured financial conditions of bond did not enhance court appearance, public safety, or compliance with other conditions of supervision."); Dkt. 93-39, Pls.' Ex. 39 at 61–62 (Baradaran & McIntyre Study) (concluding that judges release and detain the wrong groups; judges could release approximately 25% more defendants while decreasing pretrial crime levels); *see* Dkt. 93-6, Pls.' Ex. 6 ¶¶ 22–24, 33–36 (Decl. of Stephen Demuth); Dkt. 93-8, Pls.' Ex. 8 at 22–23 (Gupta *et al.* Study); Dkt. 93-15, Pls.' Ex. 15 ¶¶ 10–12, 31–38 (Decl. of Michael R. Jones); Dkt. 93-19, Pls.' Ex. 19 at 10–11, 16–17 (Jones Study); Dkt. 93-20, Pls.' Ex. 20 at 7, 12 (Brooker *et al.* Study); Dkt. 93-30, Pls.' Ex. 30 at 6, 16–17 (Brooker Study); Dkt. 93-32, Pls.' Ex. 32 ¶ 5 (Decl. of John Clark).

[136] Dkt. 93-32, Pls.' Ex. 32 ¶ 5 (Decl. of John Clark).

[137] Dkt. 93-6, Pls.' Ex. 6. ¶¶ 2–6, 25–32 (Decl. of Stephen Demuth); Ex. 12 (Demuth expert reports from Harris County litigation); Dkt. 93-15, Pls.' Ex. 15 ¶¶ 1–8, 28–30 (Decl. of Michael R. Jones); Dkt. 93-21, Pls.' Ex. 21 at 13–15 (Bechtel *et al.* article); Dkt. 93-32, Pls.' Ex. 32 ¶¶ 1–4, 15–16 (Decl. of John Clark). Notably, no contrary study exists that compares secured money bail to alternative non-financial conditions of release, or compares secured and unsecured bond in a jurisdiction that actually uses and forfeits unsecured money bonds.

[138] Dkt. 93-9, Pls.' Ex. 9 at 2 (Heaton *et al.* Study) ("[P]retrial detention poses a particular problem because it may induce innocent defendants to plead guilty in order to exit jail, potentially creating widespread error in case adjudication."); Dkt. 93-10, Pls.' Ex. 10 at 1 (Stevenson Study) ("I find that pretrial detention leads to a 13% increase in the likelihood of being convicted, an effect largely explained by an increase in guilty pleas among defendants who otherwise would have been acquitted or had their charges dropped."); Dkt. 93-8, Pls.' Ex. 8 at 1 (Gupta *et al.* Study) ("Our estimates suggest that the assignment of money bail causes a 12% rise in the likelihood of conviction, and a 6-9% rise in recidivism."); *see* Dkt. 93-6, Pls.' Ex. 6 ¶¶ 14–18, 37–38 (Decl. of Stephen Demuth); Dkt. 93-15, Pls.' Ex. 15 ¶ 32(f) (Decl. of Michael R. Jones); Dkt. 93-19, Pls.' Ex. 19 at 17 (Jones Study); Dkt. 93-20, Pls.' Ex. 20 at 11–12 (Brooker *et al.* Study); Dkt. 125-3, Pls.' Ex. 64 ¶ 6(i) (Rebuttal Decl. of Clarissa Kimmey); Dkt. 125-4, Pls.' Ex. 65 ¶ 8(c) (Decl. of Arjun Malik).

[139] Dkt. 93-6, Pls.' Ex. 6 ¶ 13 (Decl. of Stephen Demuth) ("The unaffordability of secured bail for many arrestees translates into higher detention rates for arrestees and higher costs for taxpayers, but with no better court appearance or public safety outcomes than unsecured bail."); *see supra* n.133. As discussed in the accompanying conclusions of law, appearance in court and public safety are the only two government interests that can justify pretrial detention.

C. Secured Bail Decreases Court-Appearance Rates, Harms Public Safety, Increases the Number of People Who Are Detained, and Generates Other Harms to the General Public

79. Not only is the increased detention resulting from secured bail unnecessary, it is also harmful to court appearance, public safety, the person detained, and their loved ones.[140]

80. Pretrial detention of a low- or moderate-risk arrestee increases the likelihood that she will fail to appear in court after she is released. This effect manifests after just 24 hours of detention, and as the delay in release becomes longer, the chance of a person will miss a court appearance increases.[141]

81. Pretrial detention of a low- or moderate-risk arrestee increases the likelihood that a person will be rearrested after she is released, both during the pretrial period and after her case is resolved.[142] This effect is detectible after just 24 hours of detention, and as the delay in release becomes longer, the chance of re-arrest increases. Detaining a low- or moderate-risk arrestee for longer than 24 hours affects her likelihood of rearrest for up to two years.[143]

82. Pretrial detention increases the likelihood of a defendant receiving a greater punishment, including an increased likelihood of guilty pleas, convictions, and, when convicted, an increased likelihood of being sentenced to prison, given a longer sentence, and higher court fines and fees. Pretrial detention also increases the likelihood of a wrongful conviction.

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[140] Dkt. 93-6, Pls.' Ex. 6 ¶¶ 14–20 (Decl. of Stephen Demuth).

[141] Dkt. 93-22, Pls.' Ex. 22 at 10 (Lowenkamp *et al.* Hidden Costs Study) ("Overall, when other relevant statistical controls are considered, defendants who are detained 2 to 3 days pretrial are slightly more likely to FTA than defendants who are detained 1 day (1.09 times more likely). . . . Specifically, low-risk defendants are more likely to FTA if they are detained 2 to 3 days (1.22 times more likely than low-risk defendants detained 1 day or less."), 4 to 7 days (1.22 times more likely), and 15 to 30 days (1.41 times more likely")); *see* Dkt. 93-6, Pls.' Ex. 6 ¶¶ 14, 19–20 (Decl. of Stephen Demuth); Dkt. 93-15, Pls.' Ex. 15 ¶¶ 17, 19–20 (Decl. of Michael R. Jones); Dkt. 93-25, Pls.' Ex. 25 at 11–13 (Holsinger Four Outcomes Study); Dkt. 93-32, Pls.' Ex. 32 ¶ 11 (Decl. of John Clark); Hr'g Tr. at 23:4–27:22 (Testimony of Stephen Demuth).

[142] Dkt. 93-9 at 9 (Heaton Study) ("Although detention reduces defendants' criminal activity in the short term through incapacitation, by eighteen months post-hearing, detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges, a finding consistent with other research suggesting that even short-term detention has criminogenic effects."); *id.* at 50–59; Dkt. 93-22, Pls.' Ex. 22 at 11 (Lowenkamp *et al.* Hidden Costs Study) ("The longer low-risk defendants are detained, the more likely they are to have new criminal activity pretrial (1.39 times more likely when held 2 to 3 days, increasing to 1.74 when held 31 days or more)" and "[f]or moderate-risk defendants, the lowest three categories of days spent in detention (2 to 3 days, 4 to 7 days, and 8 to 14 days) are associated with significant increases in the likelihood of [new criminal activity."); *see* Dkt. 93-6, Pls.' Ex. 6 ¶¶ 19–20 (Decl. of Stephen Demuth).

[143] Dkt. 93-22, Pls.' Ex. 22 at 19 (Lowenkamp *et al.* Hidden Costs Study) ("Generally, as the length of time in pretrial detention increases, so does the likelihood that 12-month NCA-PD [new criminal activity post-disposition] will occur for low-risk defendants (1.16 times more likely to recidivate if detained 2 to 3 days, increasing to 1.43 times if detained 15 to 30 days."); *see* Dkt. 93-6, Pls.' Ex. 6 ¶¶ 14, 19–20, 37 (Decl. of Stephen Demuth); Dkt. 93-8, Pls.' Ex. 8 at 22–23 (Gupta *et al.* Study); Dkt. 93-9, Pls.' Ex. 9 at 50–59 (Heaton *et al.* Study); Dkt. 93-15, Pls.' Ex. 15 ¶¶ 17–18, 20–21 (Decl. of Michael R. Jones); Dkt. 93-32, Pls.' Ex. 32 ¶¶ 11–12 (Decl. of John Clark).

Unsurprisingly, increased pretrial detention also leads to jail and prison overcrowding, and requires more money to be spent on jail operations.[144]

83. Pretrial detention has negative effects on employment, housing, education, and the well-being of the arrestee's dependent family members. These negative effects are evident after fewer than three days of detention, and worsen for arrestees who are detained for more than three days. A recent survey found that the majority of pretrial detainees reported that detention would cause a disruption in their housing or their children's living situation, and the vast majority reported that they may lose their jobs.[145]

D. Effective Alternatives to Secured Bail Are Readily Available

84. There are readily available, less-restrictive alternatives to secured bail that effectively improve rates of court appearance.[146]

85. It is a common misconception that people who fail to appear are willfully disobeying the court or fleeing the jurisdiction. In fact, the evidence shows that most people who miss court do so for reasons that can be solved with simple interventions: for example, they forgot the court date, were unable to secure transportation or child care, were unable to take time off work or forgot to ask in advance, were scared or confused about going to court, or did not understand

[144] Hr'g Tr. at 23:07–29:15 (Testimony of Stephen Demuth) (describing methodology of the "large body of sophisticated research using natural experiments that shows quite convincingly that pretrial detention causes worse case outcomes for defendants."); *see* Dkt. 93-6, Pls.' Ex. 6 ¶¶ 14–18, 37–38 (Decl. of Stephen Demuth); Dkt. 93-8, Pls.' Ex. 8 at 22–23 (Gupta *et al.* Study); Dkt. 93-9, Pls.' Ex. 9 at 77–78 (Heaton *et al.* Study); Dkt. 93-10, Pls.' Ex. 10 at 26–27 (Stevenson Study); Dkt. 93-13, Pls.' Ex. 13 at 26–27 (Leslie & Pope Study); Dkt. 93-14, Pls.' Ex. 14 at 4 (Lum & Baiocchi Study); Dkt. 93-15, Pls.' Ex. 15 ¶¶ 17, 22–25 (Decl. of Michael R. Jones); Dkt. 93-22, Pls.' Ex. 22 at 10–11 (Lowenkamp *et al.* Sentencing Outcomes Study); Dkt. 93-25, Pls.' Ex. 25 at 15–18 (Holsinger Four Outcomes Study); Dkt. 93-27, Pls.' Ex. 27 at 29–30 (Dobbie *et al.* Study); Dkt. 93-28, Pls.' Ex. 28 at 14 (Sacks & Ackerman Study); Dkt. 93-32, Pls.' Ex. 32 ¶ 13 (Decl. of John Clark); Dkt. 93-48, Pls.' Ex. 48 ¶¶ 11, 14–15 (Decl. of Insha Rahman)*; see also* citation *supra* n.17.

[145] Hr'g Tr. at 23:07–29:15 (Testimony of Stephen Demuth) (describing research methodology and concluding that "There's no debate about the negative consequences of incarceration; It dramatically leads to downward social mobility, and it's very hard to reverse that."); Dkt. 93-15, Pls.' Ex. 15 ¶¶ 17, 26 (Decl. of Michael R. Jones); Dkt. 93-26, Pls.' Ex. 26 at 12 (Holsinger Supervision Survey Study); Dkt. 93-27, Pls.' Ex. 27 at 29–30; Dkt. 93-29, Pls.' Ex. 29 at 23–24 (Kimbrell & Wilson Study); Dkt. 93-32, Pls.' Ex. 32 ¶ 14 (Decl. of John Clark); Dkt. 93-35, Pls.' Ex. 35 at 3–5 (Pretrial Justice Institute Study); Dkt. 93-56, Pls.' Ex. 56 ¶¶ 9–10, 14 (Decl. of Erriyah Banks) ("I live with my Mom who receives disability payments and food stamps. She relies on me to take care of her. Without me there, I'm worried about her health and safety."); Dkt. 93-58, Pls.' Ex. 58 ¶ 10 (Decl. of Patroba Michieka) ("I was working a few days a week before my arrest, but I may no longer have that job."). *See, e.g.*, Dkt. 125-13, Pls.' Ex. 74 ¶ 8 (Decl. of Hariet Ogendi) ("I do not know when I will get out of jail. I have class today and am worried about missing school. I have assignments due and I am missing finals."); Dkt. 125-17, Pls.' Ex. 78 ¶ 11 (Decl. of Roderick Moore) ("Being in jail means I am not working or taking care of my family . . . I am worried I will lose my job.").

[146] Dkt. 93-6, Pls.' Ex. 6 ¶ 21 (Decl. of Stephen Demuth) ("There is considerable evidence that court date reminders are effective at increasing appearance rates among people released pretrial.").

the consequences of failing to appear. Most failures to appear can be avoided by providing people with the assistance they need to get to court.[147]

86. Court date reminders are the single most effective pretrial risk management intervention for reducing and preventing failure to appear. Reminders delivered through in-person meetings, letters, postcards, live callers, robocalls, text messages, and email have all demonstrably and considerably improved rates of court appearance. This type of intervention is most effective with people who already have a low level of trust in the court system. Helping people know when and where to appear for court, how to plan for transportation to court, what to expect when they arrive, and the consequence of failure to appear is a relatively easy, less-biased, and cost-effective strategy to improve rates of court appearance. It is certainly less restrictive than pretrial detention.[148]

87. Pretrial monitoring is another less-restrictive, cheaper, and cost-effective means of increasing rates of court appearance and mitigating the risk new arrests. Multiple jurisdictions have implemented risk-informed pretrial monitoring in appropriate cases, resulting in both improvements in pretrial outcomes and significant cost savings.[149]

88. Other jurisdictions have implemented these less-restrictive alternatives and have seen considerable success. For example, New York City's policy decisions favoring pretrial release over detention and non-custodial sentences reduced its jail population by 55% without compromising public safety. Over 98% of people charged with misdemeanors and violations are released, and 85% of them appear in court.[150]

89. In the District of Columbia, which largely stopped using secured money bail twenty-five years ago, over 94% of arrestees are released pretrial. Of those released last year, 88%

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[147] Hr'g Tr. at 18:21–20:07 (Testimony of Stephen Demuth) ("[T]he main reasons why people fail to appear are practical . . . [A] very small fraction, maybe single digits, are really willful."); Dkt. 93-53, Pls.' Ex. 53 ¶¶ 4–5 (Decl. of Jacob Sills).

[148] Dkt. 93-53, Pls.' Ex. 53 ¶ 13 (Decl. of Jacob Sills) ("In Contra Costa County, CA (population: 1,049,025), the FTA rate of Public Defender clients receiving text messages decreased from approximately 20% to below 5%. A 95% court appearance rate is a stellar accomplishment given my examination of typical appearance rates in American jurisdictions."); *id.* at 14 ("In Luzerne County, Pennsylvania (population: 320,918), the FTA rate of low-income defendants (clients of the public defender) dropped from an estimated 15% to less than 6%. Put another way, people showing up for court increased from approximately 85% to 94%."); *see* Dkt. 93-6, Pls.' Ex. 6 ¶ 21 (Decl. of Stephen Demuth); Dkt. 93-15, Pls.' Ex. 15 ¶¶ 39–40 (Decl. of Michael R. Jones); Dkt. 93-47, Pls.' Ex. 47 ¶ 14 (Decl. of Truman Morrison); Dkt. 93-48, Pls.' Ex. 48 ¶¶ 10, 13–15 (Decl. of Insha Rahman); Dkt. 93-54, Pls.' Ex. 54 at 15–16 (Cooke *et al*. Study); Dkt. 93-55, Pls.' Ex. 55 (Pretrial Justice Center Brief).

[149] Dkt. 93-15, Pls.' Ex. 15 ¶¶ 41–43 (Decl. of Michael R. Jones); Dkt. 93-24, Pls.' Ex. 24 at 17 (Lowenkamp & VanNostrand Study); Dkt. 93-30, Pls.' Ex. 30 at 6, 12, 16–17 (Brooker Study); Dkt. 93-38, Pls.' Ex. 38 at 5 (Arnold Foundation Report); Dkt. 93-40, Pls.' Ex. 40 at 5–6 (VanNostrand *et al.* Study); Dkt. 93-34, Pls.' Ex. 34 at 5–6 (Pretrial Justice Inst. Brief on Costs); Dkt. 93-43, Pls.' Ex. 43 at 1–2 (Keenan Article); Dkt. 93-44, Pls.' Ex. 44 (U.S. Courts on Supervision Costs); Dkt. 93-47, Pls.' Ex. 47 ¶ 11, 14 (Decl. of Truman Morrison); Dkt. 93-48, Pls.' Ex. 48 ¶ 12 (Decl. of Insha Rahman); Dkt. 93-50, Pls.' Ex. 50 at 4 (New York City Criminal Court 2016 Report). *See* Dkt. 93-11, Pls.' Ex. 11 at 29–30 (Baughman Study) (describing cost savings of risk-informed pretrial release).

[150] Dkt. 93-48, Pls.' Ex. 48 ¶¶ 3, 10 (Decl. of Insha Rahman); Dkt. 93-49, Pls.' Ex. 49 at 30–31 (Greene & Schiraldi Article).

made *all* of their court appearances, 86% were not rearrested while their cases were pending, and 88% remained on release at the time their cases were disposed. Only 2% of those released were rearrested for a violent offense.[151]

90. Other jurisdictions that have taken steps away from using access to cash to make release and detention decisions have achieved increases in pretrial release without any negative effect on court appearances or public safety.[152]

E. Defendants Know That Secured Bail is Unnecessary and Harmful

91. Defendants acknowledge the reality that unaffordable secured bail is unnecessary and harmful. They have repeatedly made public statements acknowledging that secured bail is both ineffective and detrimental to public safety, appearance rates, case outcomes, individual arrestees, their families, and their communities.[153]

Conclusions of Law

I. Standard of Review

92. This Court must weigh four factors when deciding whether to grant a motion for preliminary injunction: (1) has the movant shown a reasonable probability of success on the merits; (2) will the movant be irreparably harmed by denial of the relief; (3) will granting preliminary relief result in even greater harm to the non-moving party; and (4) is granting preliminary relief in the public interest. *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011).

II. Plaintiffs Are Likely to Succeed on the Merits

93. There are two federal substantive rights at issue in this case: one against wealth-based detention, and one against the deprivation of the fundamental interest in pretrial liberty. *See*

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[151] Dkt. 93-32, Pls.' Ex. 32 ¶ 7 (Decl. of John Clark); Dkt. 93-42, Pls.' Ex. 42 (Washington, D.C. Pretrial Release Rates); Dkt. 93-43, Pls.' Ex. 43 at 1–2 (Keenan Article); Dkt. 93-47, Pls.' Ex. 47 ¶¶ 7–8, 12–15 (Decl. of Truman Morrison); Dkt. 93-46, Pls.' Ex. 46 at 16 (Washington, D.C. Pretrial Services Budget Justification).

[152] Dkt. 93-41, Pls.' Ex. 41 at 16–18 (Kentucky Pretrial Services Report) ("Statistically, about 70% of pretrial defendants are released in Kentucky; 90% of those make all future court appearances and 92% do not get re-arrested while on pretrial release"); *see* Dkt. 93-30, Pls.' Ex. 30 at 16 (Brooker Study); Dkt. 93-32, Pls.' Ex. 32 ¶ 8 (Decl. of John Clark) ("In 2016, Yakima County, Washington established a pretrial services program and started using an actuarial pretrial risk assessment tool on all those booked into the county jail on new charges. A study that looked at outcomes before and after these changes were made found that the pretrial release rate rose from 46% to 64%, with no changes in rates of new criminal activity or failure to appear."); *id.* ¶ 9 ("Santa Clara County has taken concrete steps in recent years to reduce its use of money bail and increase pretrial release . . . By 2014, the number of defendants released on their own recognizance had risen to about 1,600 per month, up from 900 per month in 2010. Released defendants are making court dates and are not being arrested. Between 2013 and 2016, people released pretrial appeared in court 95% of the time and avoided re-arrest 99% of the time."); Dkt. 93-38, Pls.' Ex. 38 at 2 (Arnold Foundation Report); Dkt. 93-53, Pls.' Ex. 53 ¶¶ 13–14 (Decl. of Jacob Sills).

[153] Dkt. 93-2, Pls.' Ex. 2 ¶ 15-19 (Defendants' Admissions) (County Judge Clay Jenkins: "Not only is it costing you a lot of money for nonviolent offenders to sit in jail, but it doesn't make us any safer… It actually erodes public safety because it puts them in such a hole financially when they finally do get out of jail."); *see* citation *supra* n. 144.

Bearden v. Georgia, 461 U.S. 660, 666–67 (1983); *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc); *United States v. Salerno*, 481 U.S. 739, 750 (1987).

A. Plaintiffs Have a Constitutional Right to be Free from Wealth-based Detention

94. Individuals have a constitutional right to be free from wealth-based detention. *See Bearden*, 461 U.S. at 668–69 (holding that it is fundamentally unfair for the state to jail a person solely because the person cannot afford to pay a sum of money); *Tate v. Short*, 401 U.S. 395, 398 (1971) (holding that a person may not be "subjected to imprisonment solely because of his indigency"); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that the state may not impose different consequences on persons simply because one can pay a monetary sum and another cannot); *see also ODonnell v. Harris County*, 892 F.3d 147, 161 (5th Cir. 2018) (opinion on petition for rehearing) (holding that a "custom and practice result[ing] in detainment solely due to a person's indigency because the financial conditions for release are based on predetermined amounts beyond a person's ability to pay and without any 'meaningful consideration of other possible alternatives' . . . . [is] unconstitutional") (quoting *Pugh*, 572 F.2d at 1056-57), *injunction revised by* No. H-16-1414, 2018 WL 3913456 (S.D. Tex., June 29, 2018); *Barnett v. Hopper*, 548 F.2d 550, 553 (5th Cir. 1977) (holding that when "[t]he sole distinction is one of wealth … the procedure is invalid."); *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (holding that the government cannot satisfy strict scrutiny where "those with means avoid imprisonment" and the "indigent cannot escape imprisonment"); *Pugh*, 572 F.2d at 1057 (applying the wealth-based detention cases to detention for inability to pay money bail prior to trial).[154]

95. Infringement of this right, which is protected by the Equal Protection and Due Process clauses, is subject to strict scrutiny review.[155] *See Frazier*, 457 F.2d at 728 (evaluating a

[154] Brief of Conference of Chief Justices as Amicus Curiae at 35, *ODonnell*, 892 F.3d 147 (5th Cir. 2017) (No. 17-20333), 2017 WL 3536467, at *24 ("[A]ll the concerns that attend post-conviction deprivations based on indigence apply with even greater force where a defendant has not been convicted of a crime. . . . If a state may not imprison convicted indigent defendants solely 'on account of their poverty,' how can a state constitutionally detain presumably innocent persons for the same reason?").

[155] The Fifth Circuit held that "heightened" scrutiny applies to policies infringing the right against wealth-based detention. *See ODonnell*, 892 F.3d at 161-162; *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19–21 (1973) (exempting wealth-based detention from rational basis review because wealth-based detention involves an "absolute deprivation" of liberty solely due to indigence). Strict scrutiny and intermediate scrutiny are both forms of "heightened" scrutiny. *ODonnell*, 251 F. Supp. 3d at 1138 (citing *Lauder, Inc. v. City of Houston*, 751 F. Supp. 2d 920, 933 (S.D. Tex. Dkt. 93-20, Pls.' Ex. 2010), *aff'd.*, 670 F.3d 664 (5th Cir. 2012)). Both require the government to show that its policy is narrowly tailored to a compelling interest. *Id.* Under strict scrutiny, the policy must be necessary to achieve that interest. *Id.* Under intermediate scrutiny, the policy is constitutional only if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* (quoting *Lauder*, 751 F. Supp. 2d at 933).

Rainwater did not explicitly specify whether strict or intermediate scrutiny applies in the context of wealth-based detention, but it prohibited detention absent a finding that secured money bail "is *necessary* to reasonably assure defendant's presence at trial." 572 F.2d at 1057. And *Frazier*, which is binding, explicitly applied strict scrutiny, 457 F.2d at 728, consistent with *Bearden*'s later rejection of wealth-based detention because the government's interest could "be served fully by alternative means," 461 U.S. at 671-72. This Court need not resolve which form of heightened scrutiny applies if it finds that the practices flunk intermediate scrutiny, or if it concludes that Defendants' policies infringe Plaintiffs' fundamental right to pretrial liberty, because strict scrutiny unquestionably applies when a fundamental right is at issue. *See infra* ¶¶ 98–101 & accompanying footnotes.

system in which "the difference in treatment is one defined by wealth" under strict scrutiny) (citation omitted); *Buffin v. City & Cty. of San Francisco*, No. 15-cv-04959, 2018 WL 424362, at *8 (N.D. Cal. Jan. 16, 2018) ("[A]n examination of the *Bearden-Tate-Williams* line of cases persuades the Court that strict scrutiny applies to plaintiffs' Due Process and Equal Protection [bail] claims."); *see also Pugh*, 572 F.2d at 1057 (requiring "meaningful consideration of . . . alternatives" to "incarceration of those who cannot" pay a financial condition of release, and a finding that secured money bail "is *necessary* to reasonably assure defendant's presence at trial." (emphasis added)).

B. Plaintiffs Have a Fundamental Constitutional Interest in Pretrial Liberty

96. The Supreme Court has recognized a "fundamental" interest in pretrial liberty and expressed a "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial." *Salerno*, 481 U.S. at 749-50;*see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.") (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (same); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014) (en banc) (applying strict scrutiny to Arizona pretrial detention law because it infringed on the "fundamental" right to pretrial liberty); *Schultz v. State*, No. 17-CV-00270, 2018 WL 4219541, at *9 (N.D. Ala. Sept. 4, 2018) (holding that "[c]riminal defendants have a constitutional right to pretrial liberty . . . . [and] the 'interest in liberty' is 'fundamental.'"); *Caliste v. Cantrell*, No. 17-CV-6197, 2018 WL 3727768, at *8 (E.D. La. Aug. 6, 2018) ("Plaintiffs have been deprived of their fundamental right to pretrial liberty"); *Reem v. Hennessy*, No. 17-CV-6628, 2017 WL 6765247, at *1 (N.D. Cal. Nov. 29, 2017) ("The due process clauses of the Fifth and Fourteenth Amendments bar pretrial detention unless detention is necessary to serve a compelling government interest."); *Buffin v. City & Cty. of San Francisco*, No. 15-cv-04959 2018 WL 424362, at *6 (N.D. Cal. Jan. 16, 2018) (holding that pretrial detention due to inability to pay "implicates plaintiffs' fundamental right to liberty"); *In re Humphrey*, 19 Cal. App. 5th 1006, 1049 (Ct. App. 2018) (recognizing the "fundamental constitutional right to pretrial liberty"), *review pending* 417 P.3d 769 (Cal. 2018); *Brangan v. Commonwealth*, 80 N.E.3d 949, 961 (Mass. 2017) (holding that the right to pretrial liberty is "fundamental"). This fundamental right dictates that "[i]n our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception." *Salerno*, 481 U.S. at 755**.**

In a non-dispositive opinion that contradicts binding Fifth Circuit and Supreme Court precedent, an emergency motions panel of the Fifth Circuit stayed certain provisions of Judge Rosenthal's revised preliminary injunction order, stating that rational basis review applies to government conduct that discriminates based on wealth unless there is wealth-based detention that results from "inability to afford bail *plus* the absence of meaningful consideration of other possible alternatives." *ODonnell v. Goodhart*, 900 F.3d 220, 226 (5th Cir. 2018). Such wealth-based detention "plus the absence of meaningful consideration of possible alternatives" is, of course, exactly what happens in Dallas County during the days and weeks after arrest on the uncontested factual record in this case. Moreover, as a matter of law, the stay panel in *ODonnell II* did not consider the scrutiny required when the government infringes the fundamental right to pretrial liberty because that question was not before it. *Frazier*, *Bearden*, and *Salerno* remain binding on this Court and require application of heightened scrutiny. Finally, *ODonnell II*'s rational-basis ruling was limited to the first 48 hours of wealth-based detention prior to a bail hearing, not the lengthy wealth-based detention challenged in this case. *See also* Dkt. 162 (Plaintiffs' Response to Notice of New Authority).

C. Requiring an Unattainable Financial Condition of Release Is a De Facto Order of Pretrial Detention.

97. An order to pay unattainable money bail is the functional equivalent of an order of pretrial detention. *See ODonnell*, 892 F.3d 147, 162 (5th Cir. 2018) (holding that Defendants' practices result in the "absolute deprivation of [indigent misdemeanor arrestees'] most basic liberty interests—freedom from incarceration"); *ODonnell*, 251 F. Supp. 3d at 1131, 1156, 1161 (holding that secured money bail set in an amount that an arrestee cannot afford is constitutionally equivalent to an order of detention); *see also, e.g.*, *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) ("[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all."); *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) ("[O]nce a court finds itself in this situation—insisting on terms in a "release" order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid *detention* order . . . ."); *State v. Brown*, 338 P.3d 1276, 1291 (N.M. 2014) ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."); *Brangan*, 80 N.E.3d at 963 (unattainable money bail "is the functional equivalent of an order for pretrial detention, and the judge's decision must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty."). As a result, an unattainable financial condition of pretrial release is an absolute deprivation of arrestees' rights to pretrial liberty and against wealth-based detention.

D. Pretrial Detention Requires a Finding that Detention Is Necessary Because Alternatives Are Inadequate to Serve the Government's Compelling Interests.

98. The fundamental interest in pretrial liberty is not absolute. *See Washington v. Harper*, 494 U.S. 210, 220 (1990) (quoting *Mills v. Rogers*, 457 U.S. 291, 299 (1982)); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (explaining that even "fundamental liberty interests" can be infringed if the deprivation is "narrowly tailored to serve a compelling state interest" (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))). The individual's strong interest in pretrial liberty may therefore be subordinated under narrow circumstances in individual cases in which "the government's interest is sufficiently weighty." *Salerno*, 481 U.S. at 750-51.

99. The government must justify an order to pay unattainable money bail in the same way it would be required to justify a transparent order of pretrial detention. *Salerno*, 481 U.S. at 749, 751 (describing the government interest in preventing serious pretrial crime as "compelling" and the statute as "careful[ly] delineat[ing] . . . the circumstances under which detention will be permitted"); *id.* at 750–51 (holding that the "fundamental" interest in pretrial liberty "may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society.")

100. The total deprivation of pretrial liberty (on the basis of wealth or otherwise) must be justified by a determination that detention is necessary to serve a compelling government interest. *See Lopez-Valenzuela*, 770 F.3d at 780 (holding that the government must demonstrate that its "infringement [of pretrial liberty] is narrowly tailored to serve a compelling state interest."); *see also Schultz*, 2018 WL 4219541, at *9 ("Liberty is prohibitively expensive for indigent criminal defendants in a jurisdiction where secured bond is a condition of liberty, and judges set

unattainable bond amounts that serve as *de facto* detention orders for the indigent. Pretrial imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible."(citation and quotations omitted)); *Caliste*, No. 17-6197, 2018 WL 3727768, at * 10 (holding that the "deprivation of liberty requires a heightened standard" and explaining that "the Court is convinced of the vital importance of the individual's interest in pretrial liberty recognized by the Supreme Court"); *Reem*, No. 17-cv-6628, 2017 WL 6765247, at *1 ("The due process clauses of the Fifth and Fourteenth Amendments bar pretrial detention unless detention is necessary to serve a compelling government interest."); *ODonnell*, 251 F. Supp. 3d at 1156–57 (holding that government action infringing pretrial liberty must be the least restrictive means necessary to serve court appearance and community safety); *Humphrey*, 19 Cal. App. 5th at 1028, 1037 (holding that a person may be detained only if "no less restrictive alternative will satisfy" the government's interests because pretrial detention is permissible "only to the degree necessary to serve a compelling governmental interest"); *Brangan*, 80 N.E.3d at 962 (holding that pretrial detention is permissible if "such detention is demonstrably necessary" to meet a compelling interest).[156]

101. The pretrial detention at issue at an individualized bail proceeding is therefore unconstitutional unless the government demonstrates that less-restrictive alternatives to incapacitation are inadequate to serve a compelling government interest in court appearance or community safety.

E. To Ensure the Accuracy of any Determination that Pretrial Detention Is Necessary, Procedural Due Process Requires an Inquiry and Findings Concerning Ability to Pay and Additional Procedural Safeguards if the Monetary Amount Will Result in Detention

102. Procedural due process determines the minimum procedural safeguards that are required to protect against the erroneous deprivation of these two substantive rights. *Harper*, 494 U.S. at 228; *ODonnell*, 892 F.3d at 157 ("The first question [in a procedural-due-process analysis] asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.") (quoting *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010)). Plaintiff's fundamental right to pretrial liberty may not be infringed without "constitutionally adequate procedures" that ensure the accuracy of any substantive determination that pretrial detention is necessary. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

103. At an individualized bail proceeding, an order resulting in pretrial detention may not be imposed without the following procedural safeguards:

a. Arrestees must be given constitutionally sufficient notice. Defendants must inform the arrestee that a proceeding at which pretrial liberty is at stake will take place, and must also inform the arrestee of the rights that are at issue at the hearing, and

[156] Any deprivation of that liberty interest must withstand heightened constitutional scrutiny, which requires that the deprivation be narrowly tailored to advance a compelling government interest. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (noting that when the government's action infringes a fundamental right, "it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests").

the "critical issues" relevant to the detention decision. *See Turner v. Rogers*; *see also, e.g.*, *Vitek v. Jones*, 445 U.S. 480, 496 (1980) ("[N]otice is essential to afford [an arrestee] an opportunity to challenge the contemplated action and to understand the nature of what is happening to him."); *Caliste*, No. 17-6197, 2018 WL 3727768, at * 9 ("holding that "the inquiry into the ability to pay must involve . . . notice" (citation omitted)); *ODonnell*, 251 F. Supp. 3d at 1153 (holding that due process requires "notice that the financial and other resource information Pretrial Services officers collect is for the purpose of determining a misdemeanor arrestee's eligibility for release or detention"). Arrestees cannot adequately prepare for a hearing if they are not informed about it or if they are not told what decisions are being made at that hearing and what critical issues will be before the decisionmaker.

b. Arrestees must be afforded a full opportunity to speak and to confront or present evidence before a neutral decisionmaker. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his" rights.); *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969) ("The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause."); *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 617 (1993) ("[D]ue process requires a 'neutral and detached judge in the first instance.'"); *Caliste*, No. 17-CV-6197, 2018 WL 3727768, at * 10 ("holding that "the inquiry into the ability to pay must involve . . . [an] opportunity to be heard" (citation omitted)); *ODonnell*, 251 F. Supp. 3d at 1153 (holding that due process requires "a hearing at which the arrestee has an opportunity to be heard and to present evidence [and] an impartial decisionmaker").

c. Defendants must make findings on the record that are accessible to the arrestee, either orally or in writing, explaining the detention decision. Indeed, a statement explaining the deprivation of liberty on the record has been required for nearly half a century, even for convicted parole violators. *See United States v. Kindred*, 918 F.2d 485, 488 (5th Cir. 1990); *Caliste*, No. 17-CV-6197, 2018 WL 3727768, at * 9 (holding that an ability-to-pay inquiry must include "express findings in the record as suggested by *Turner*; an ability-to-pay inquiry without these basic procedural protections would likely be ineffective" (citation omitted)); *ODonnell*, 251 F. Supp. 3d at 1153 (holding that due process requires "a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial");[157] *McCall v. Montgomery Hous. Auth.*, 809 F. Supp. 2d 1314, 1324 (M.D. Ala. 2011) ("Due process generally requires the decision-maker

[157] The statement of reasons on the record may be made orally or in writing. The Fifth Circuit in *ODonnell* held that "we do not require factfinders to issue a written statement of their reasons." *ODonnell*, 892 F.3d at 160. This holding was based on a mistaken assertion that a statement of reasons would be required for each of the 50,000 misdemeanor arrestees in Harris County ever year. *Id.* (explaining that a requirement of "50,000 written opinions per year" would be burdensome). In fact, a statement of reasons and findings on the record are required only when a person will be detained prior to trial. In any event, a statement would not be required in writing unless the jurisdiction does not have a mechanism for making and preserving oral statements of reasons on the record.

to state the reasons for his determination and indicate the evidence upon which he relied."); *Brangan*, 80 N.E.3d at 954 & n.4 (requiring "written or orally recorded findings of fact and a statement of reasons for the bail decision,"); *In re Humphrey*, 228 Cal. Rptr. 3d at 536 (explaining that explicit findings "guard[] against careless decision making …; preserve public confidence in the fairness of the judicial process," and provide a review mechanism).[158]

F. Requiring Secured Money Bail Prior to an Individualized Adversarial Hearing is Not Narrowly Tailored to a Compelling Government Interest

104. Because Defendants' policy and practice of requiring particular amounts of secured money bail results in automatic pretrial detention of the indigent, it triggers heightened scrutiny.

105. Defendants' policy and practice of requiring particular amounts of secured money bail predetermined by a schedule without an inquiry into ability to pay, consideration of alternatives, meaningful opportunity to be heard, or findings concerning ability to pay and alternatives to detention is not narrowly tailored to a compelling interest.

106. Defendants have three compelling pretrial interests. First, they have an interest in protecting the constitutional rights of arrestees and maximizing pretrial release. Second, they have an interest in court appearance. *Rainwater*, 572 F.2d at 1056. Third, they have an interest in community safety. *Salerno*, 481 U.S. at 751.

107. Defendants' post-arrest practices, including requiring the use of a secured money bail schedule prior to any adversarial bail determination, infringe arrestees' constitutional rights to be free from wealth-based detention and to pretrial liberty because they result in the pretrial detention of any person unable to pay the amount of money required for release without consideration of alternatives or a finding of necessity.

1. The Government's Interest in Protecting Arrestees' Rights and Maximizing Pretrial Release

[158] The Court does not address the proper evidentiary standard required by due process at detention hearings because Plaintiffs have not raised the issue in these preliminary proceedings. Plaintiffs have explained that they will argue at a later time that the Constitution requires an evidentiary standard of "clear and convincing evidence" for the findings on which pretrial detention is based. *See, e.g.*, *Addington v. Texas*, 441 U.S. 418, 425 (1979) (requiring the "clear and convincing" standard in civil commitment proceedings); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (same). Multiple lower courts have found that clear and convincing evidence is necessary prior to an order of pretrial detention. *See, e.g.*, *Schultz*, 2018 WL 4219541, at *20 ("The level of certainty that the clear and convincing evidence standard provides is necessary to ensure fundamental fairness in bail proceedings."); *Caliste*, No. 17-CV-6197, 2018 WL 3727768, at * 10; *In re Humphrey*, 228 Cal. Rptr. 3d at 535 ("We believe the clear and convincing standard of proof is the appropriate standard because an arrestee's pretrial liberty interest, protected under the due process clause, is 'a fundamental interest second only to life itself in terms of constitutional importance.'"); *Kleinbart v. United States*, 604 A.2d 861, 872 (D.C. 1992) (due process requires clear and convincing evidence prior to detention).

Similarly, the Court does not address Plaintiffs' claim, which they have not pressed at the preliminary stage, that arrestees are entitled to counsel at pretrial detention hearings. *See Caliste*, No. 17-CV-6197, 2018 WL 3727768, at * 11; *In re Humphrey*, 228 Cal. Rptr. 3d at 533–34.

108. Defendants' procedures and practices are not necessary to serve the government interest in effectuating pretrial release; in fact, they undermine that goal.

109. Defendants have not put forth any evidence to suggest that their use of secured money bail is more effective at facilitating pretrial release than unsecured bail or other non-financial alternatives. *See supra* ¶¶ 75–78 & accompanying footnotes. By contrast, Plaintiffs have presented voluminous empirical evidence that secured money bail increases pretrial detention and that alternatives to money bail, such as unsecured bail and pretrial supervision services, are more effective at achieving the government's interest in maximizing pretrial release. *Id.*

2. The Government's Interest in Reasonably Assuring Court Appearance

110. Defendants' practices are not necessary to serve the government's interest in reasonably assuring court appearance, and in fact increase the likelihood that a person will miss court later in the pretrial period. *See supra* ¶ 80 & n.141. Unaffordable secured money bail is not the least restrictive means to reduce risk of flight. *See id.*; *id.* at ¶¶ 85–90 & accompanying footnotes. Defendants have not put forth any evidence that their exclusive use of secured money bail serves any government interest. *See supra* ¶ 69.

111. By contrast, Plaintiffs have submitted voluminous empirical evidence that secured money bail is no more effective than unsecured bail or non-financial alternatives at reasonably assuring court appearance. *See supra* ¶ 69. Moreover, Plaintiffs have submitted overwhelming evidence that Defendants' reliance on secured money bail results in higher pretrial failure-to-appear rates for those who are eventually released pretrial. *See supra* ¶¶ 79–80.

112. The evidence in the record is overwhelming and unrebutted that Defendants do not get any benefit in court appearance from requiring predetermined financial conditions of release prior to individualized bail hearings. *See supra* ¶¶ 76–90.

113. This evidence is consistent with the findings of other courts. *See ODonnell*, 882 F.3d at 537 ("[R]eams of empirical data" suggest that "'release on secured financial conditions does not assure better rates of appearance or of law-abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision."); *see also ODonnell*, 251 F. Supp. 3d at 1132 (finding "no meaningful difference in pretrial failures to appear or arrests on new criminal activity between misdemeanor defendants released on secured bond and on unsecured financial conditions.").[159]

3. The Government's Interest in Community Safety

114. Defendants' practices are not necessary to serve the government interest in community safety, because less-restrictive alternatives are at least as effective at reasonably ensuring public safety. Defendants have not put forth any evidence to suggest that their use of

[159] For the indigent, secured money bail can have no incentivizing effect on court appearance: because the person cannot pay for release, and remains in jail, she will never be in a position for the incentive to operate, *see, e.g.*, *Pugh v. Rainwater*, 557 F.2d 1189, 1200 (5th Cir. 1977) ("[I]n the case of indigents, money bail is irrelevant in promoting the state's interest in assuring appearance"), *opinion vacated on reh'g en banc*, 572 F.2d 1053 (5th Cir. 1978).

secured money bail is more effective at reducing risk of danger to the community than unsecured bail or other non-financial alternatives. *See supra* ¶ 69; *see also* ¶ 76 & n.134.

115. Most obviously, because Texas state law does not permit forfeiture of money bail for the commission of a new offense, money bail can have no rational incentive effect to prevent new criminal activity. *See, e.g.*, *ODonnell*, 251 F. Supp. 3d at 1109 ("The evidence is that neither a secured nor unsecured bond is subject to forfeiture for new criminal activity [under Texas law]. The record establishes that requiring secured money bail provides no incentive to law-abiding behavior during pretrial release that is not equally provided by unsecured personal bonds. . . ." (citations omitted)); *see also Reem*, No. 17-cv-6628, 2017 WL 6765247, at *4 ("[I]t is pointless for a court to consider whether someone who has the means to make bail represents a threat to public safety. A person who can afford money bail is released, notwithstanding that he may pose an appreciable risk to public safety. The court may impose additional, nonmonetary conditions of release to address that risk. But the bail the person posts does nothing to incentivize him not to commit crimes . . . ."); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 528–29 (Cal. Ct. App. 2018) ("Money bail . . . has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes. Money bail will protect the public only as an incidental effect of the defendant being detained due to his or her inability to pay, and this effect will not consistently serve a protective purpose, as a wealthy defendant will be released despite his or her dangerousness while an indigent defendant who poses minimal risk of harm to others will be jailed.").

116. By contrast, Plaintiffs have presented overwhelming and unrebutted empirical evidence that secured money bail is no more effective than reasonable and less intrusive alternatives, and that secured money bail actually *increases* new criminal activity. *See supra* ¶¶ 81 & accompanying footnotes.[160]

4. Defendants' Policies Cause Serious Economic and Human Costs

117. At the same time, the record evidence shows that pretrial detention harms the arrestee and the community by increasing the likelihood of conviction, increasing the likelihood of wrongful conviction, increasing the likelihood an arrestee will receive a sentence of incarceration, increasing the likelihood an arrestee will receive a longer sentence of incarceration, increasing the likelihood an arrestee will be charged higher court costs and fees, increasing the likelihood the person will miss court, increasing the likelihood the person will commit new crimes post-conviction, increasing the cost to the community of jailing individuals due to longer jail sentences, and destabilizing the arrestee and their family in both the short- and long-term. *See supra* ¶¶ 79–83.

118. In sum, the record evidence shows that Defendants' automatic imposition of secured money bail prior to individualized determinations of appropriate conditions of pretrial release is unnecessary because such automatic requirement of secured money bail results in more pretrial detention that serves no government interest but instead actively causes harm to the

[160] *E.g.*, Dkt. 93-9, Pls.' Ex. 9 at 9 (Heaton Study) ("Although detention reduces defendants' criminal activity in the short term through incapacitation, by eighteen months post-hearing, detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges, a finding consistent with other research suggesting that even short-term detention has criminogenic effects.").

arrestee, the community, and the criminal legal system, without providing any benefit to the government and, in fact, while detracting from the government's interest in court appearance and community safety.

119. Even if rational basis review applied to the first 48 hours of post-arrest wealth-based detention prior to an adequate bail hearing, Defendants' system would violate the Constitution. First, there is no connection between money bail and any government interest, and therefore no rational basis for using access to cash to make the initial release and detention decision. *See, e.g.*, *Schultz*, 2018 WL 4219541, at *12 (holding that "Cullman County's discriminatory bail practices deprive indigent criminal defendants . . . of equal protection of the law because the challenged distinction does not rationally further a legitimate state purpose."). Second, the evidence is uncontested that indigent arrestees in Dallas County are detained for days or weeks beyond 48 hours, and sometimes longer, if they cannot pay financial conditions of release before they have an opportunity to address conditions of pretrial release at an adequate bail hearing and before any findings concerning the necessity of detention could even conceivably be made. Third, Defendants admit they do not make those required findings at any bail proceeding at any point in the case because they do not believe the Constitution requires them. *See supra* ¶ 58 & n.109; ¶ 61 & accompanying footnotes; ¶ 65 & n. 122. Under Defendants' system, people are detained for the entire duration of their case prior to trial without any judicial finding that alternatives short of detention are insufficient to serve the government's interests, and that is unconstitutional. *See supra* ¶ 58 & n.110.

120. People who are eventually released on unsecured bonds are detained for days or weeks because of their inability to pay. *See supra* ¶ 58 & n.110; ¶ 47 & accompanying footnotes. Therefore, even if 48 hours of wealth-based detention were "rational," and it is not in light of the unrebutted evidence that detaining people due to inability to pay causes new crime and causes failures to appear, Dallas County cannot—indeed, has not even tried to—justify the widespread wealth-based pretrial detention of indigent arrestees beyond 48 hours.

5. Defendants' Post-Lawsuit Modifications Do Not Cure the Violations

121. Defendants contend that they have modified their practices and no longer automatically require predetermined amounts of secured money bail at magistration hearings.

122. At the outset, it is important to note a difference of opinion among Defendants on the issue of whether the Magistrates have discretion to deviate from the secured monetary amounts on the bail schedule. The County argues that, after this lawsuit was filed, the Misdemeanor Judges gave the Magistrates full discretion to determine conditions of pretrial release, including granting release on personal bonds, albeit "only when appropriate."[161] Similarly, the Felony Judges also apparently authorized the magistrates to grant personal bonds, but excluded a significant number of offenses.[162] Videos of bail hearings from July 6, 2018 show one of the Magistrates asserting

[161] Dkt. 125-21, Pls.' Ex. 82 (March 6, 2018 Email from Misdemeanor Judge Lisa Green to Chief Magistrate Judge Terrie McVea) ("Judge McVea, per our earlier discussion the magistrate judges have the discretion of approving PR bonds on misdemeanor cases, only when appropriate.").

[162] Dkt. 125-20, Pls.' Ex. 81 (February 16, 2018 Email from Magistrate Judge Steven Autry to Dallas County Magistrate Judges) ("Judge McVea has asked that I communicate with all of you so that everyone is clear on the new

that certain arrestees "do not qualify" for release on a personal bond until the arrestee appears before a judge.[163] The Felony Judges further argue that they do not have jurisdiction to address bail until weeks or months after arrest, when formal charges have been filed.[164] Thus, it is unclear whether and to what extent the Magistrates have discretion to consider alternatives to the secured monetary amounts listed in the bail schedule. It is further unclear the extent to which the Magistrates exercise whatever discretion they have, and the videos show Magistrates refusing release on unsecured bonds and instructing arrestees not to ask for release on alternative conditions.

123. Regardless of this dispute among Defendants as to the authority Magistrates have to deviate from the bail schedule and to authorize release on unsecured bond, the County's post-lawsuit modifications do not cure the constitutional violations in this case for several reasons.

124. As a threshold matter, the unrebutted direct witness testimony, court records, and video evidence submitted by Plaintiffs demonstrates that the County's practices have *not* changed in any way relevant to Plaintiffs' claims. Defendants still do not provide a meaningful opportunity to be heard; Defendants themselves still inform arrestees that they will not consider anything other than secured financial conditions of release; and bail hearings are still perfunctory proceedings without adequate notice of the critical issues to be decided, the evidence relied on, an opportunity to present and confront evidence, or findings made available to the arrestee explaining the decision. *See supra* ¶¶ 50–61 & accompanying footnotes. The videos demonstrate that the hearings last a matter of seconds, and that arrestees are not informed of the information being relied on by the decision maker in determining conditions of release, let alone afforded an opportunity to make factual or legal arguments about that information and alternatives to detention. While the County Defendants contend that notes are made concerning why a particular money bail amount is required *in cases where the Magistrate denies a personal bond or sets a bail amount the Magistrate thinks the person cannot afford*, the County concedes that the arrestee is not told the reason and that the notes are not permitted to be shared publicly.[165] Defendants did not offer any examples of the notes that the Magistrates purport to make, or any information about how frequently those notes are made or how they are used.

125. Moreover, even if Defendants were consistently applying their own asserted policy changes, they are still violating the Constitution. Specifically, Defendants' post-lawsuit modifications do not even purport to include a requirement that, before requiring unattainable

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updates. As you have read in the earlier correspondence, the district judges have given us authority to grant PR bonds. . . . Please review Section 17.03 for a list of charges where PR bonds are NOT ALLOWED to be granted by the magistrate judges.").

[163] Dkt. 125-1, Pls.' Ex. 62 at 05:15:16 ("Nobody else ask me if you do [qualify for a personal recognizance bond], because you don't."); *id.* at 8:20:43 ("No one else did [qualify for a personal recognizance bond], so no one else ask me."); Dkt. 125-2, Pls.' Ex. 63 at 1, 2 (Summary of Video Evidence).

[164] Hr'g Tr. at 103:12–20 (Attorney Eric Hudson Closing Argument) (Felony judges have "no jurisdiction until there's a criminal instrument filed that allows the felony judges to take the case.").

[165] Hr'g Tr. at 56:6–13 (Testimony of Terry McVea) (TRIGILIO: The question is whether the magistrate makes a finding in that system that says, I find the arrestee is able to pay this bond amount, or I find the arrestee is not able to pay this bond amount? MCVAE: No. TRIGILIO: And are the notes that are made in the AIS system available to arrestees? MCVAE: No. They're judicial notes.).

money bail, a decision maker will make the substantive findings required to justify a presumptively innocent person's pretrial detention. *First*, when an individualized hearing is held, Defendants fail to make any determination as to whether the arrestee has the present ability to pay secured money bail and, if so, in what amount. *See supra* ¶ 58 & nn. 109–10. This finding is necessary because money is the mechanism by which Defendants enter *de facto* detention orders. *See Turner v. Rogers*, 564 U.S. 431, 445 (2011) ("Given the importance of the interest at stake, it is obviously important to assure accurate decisionmaking in respect to the key 'ability to pay' question. . . . That is because an incorrect decision . . . can increase the risk of wrongful incarceration[.]"); *see also In re Humphrey*, 228 Cal. Rptr. 3d at 535 (concluding that without findings concerning ability to pay it is not possible "to guard against improper detention based only on financial resources"). *Second*, because Defendants do not determine whether they are in fact detaining an arrestee, Defendants do not make a finding that detention is necessary because other alternatives are inadequate to serve the government's interests.

126. Finally, Defendants concede that people are still detained pursuant to scheduled money bail amounts for lengthy periods of time prior to any conceivable opportunity to challenge it. *See supra* ¶ 58 & n.110. The Felony Judges contend that they lack jurisdiction to address the bail issue until after formal charges are filed, which can take weeks or months.[166] Even in misdemeanor cases, the evidence is undisputed that it still takes significantly longer than 48 hours for such an opportunity. The record shows that at the time this case was filed, people released on personal bonds spent an average of sixteen days in the jail prior to release.[167] And in April 2018, the most recent month for which data is available, the average time spent in jail prior to release on a personal bond was five days.[168]

127. Defendants have not met their "heavy burden" to prove that their voluntary cessation has eliminated the controversy between the parties such that it is "absolutely clear" that the challenged conduct could not reasonably recur. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 190 (2000); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007).

128. Defendants' purported changes were made informally and vaguely, either orally or by email, in direct response to this litigation. Moreover, the evidence is unrebutted that those changes are not occurring consistently and uniformly, and that, even if they were, they would not cure the constitutional violations.

III. Plaintiffs Are Suffering Ongoing Irreparable Harm, and Both the Public Interest and Balance of Harms Favor a Preliminary Injunction

129. Arrestees subjected to unconstitutional detention as a result of the Defendants' post-arrest procedures are suffering, and will continue to suffer, irreparable harm in the absence of an injunction.

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[166] Hr'g Tr. 103:12–20 (Attorney Eric Hudson Closing Argument) (Felony judges have "no jurisdiction until there's a criminal instrument filed that allows the felony judges to take the case.").

[167] Dkt. 125-4, Pls.' Ex. 65 ¶ 7(c) (Decl. of Arjun Malik).

[168] *Id.*

130. Without immediate injunctive relief, Plaintiffs will continue to be jailed solely because of their poverty. In addition to the loss of physical liberty, which has a special status in the American constitutional order, the related consequences of detention prior to trial are devastating. People detained prior to trial lose their jobs, lose their housing and shelter, are cut off from their children and families, are deprived of vital mental health and medical treatment, and are exposed to violent conditions and infectious disease in overcrowded jails. *See Barker v. Wingo*, 407 U.S. 514, 532–33 (1972) ("The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time.").

131. Moreover, there is overwhelming evidence that pretrial detention has adverse effects on case outcomes, *see supra* ¶¶ 77, 82 & accompanying footnotes, failure-to-appear rates, *see supra* 80 & n.141, and public safety, *see supra* ¶ 81 & accompanying footnotes. Empirical evidence suggests that Defendants could safely release many arrestees on unsecured bond or other non-financial conditions without any impact on the administration of justice. In fact, empirical evidence suggests that pretrial detention increases the likelihood that a defendant will fail to appear and commit new crimes both during and after the pretrial period. *See supra* ¶¶ 79–83.

132. The threat of injury to Plaintiffs considerably outweighs any threat of harm to Defendants.

133. The injunction serves the public interest because it will require adherence to basic constitutional principles, which all parties hope will occur as soon as possible. As numerous courts have emphasized, "It is always in the public interest to prevent the violation of a party's constitutional rights." *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (quoting and citing cases); *Giovani Carandola v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("[U]pholding constitutional rights surely serves the public interest."); *G & V Lounge v. Mich. Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *ODonnell*, 251 F. Supp. 3d at 1159 (quoting *Simms*, 872 F. Supp. 2d at 105, for this principle). *See also supra* nn. 49, 92, 153.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September, 2018, I electronically filed the foregoing with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court.

/s/ Elizabeth Rossi
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