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

PLAINTIFFS' REPLY TO COUNTY DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This case is about enjoining Defendants' policy and practice of automatically requiring secured money bail from every arrestee, which results in the pretrial detention of thousands of people every day in Dallas County solely because of their poverty. Contrary to Defendants' arguments, Plaintiffs have not argued that there is a "right to affordable bail." Dkt. 32 at 7, 24. Nor do Plaintiffs ask this Court to order all arrestees—or any arrestee—released from jail. *See, e.g.*, Dkt. 32 at 6. Instead, Plaintiffs ask the Court to prohibit Defendants from making post-arrest release and detention decisions solely on the basis of access to money, and instead, to provide constitutionally required substantive findings and procedural safeguards before requiring de facto orders of pretrial detention. Their request is grounded in precedent, Dkt. 4-3, and is necessary to redress ongoing irreparable harm. This Court should grant preliminary injunctive relief.

I. The Relief Plaintiffs Seek

Plaintiffs argue that Defendants must justify, under heightened scrutiny, their use of a predetermined money bail schedule, which results in the automatic wealth-based detention of indigent arrestees for four days to three weeks, prior to any individualized hearing.[1] The relief Plaintiffs seek would not "end money bail."[2] *See e.g.*, Dkt. 32 at 14, 19. As Plaintiffs argue in their motion, Defendants are free to require money bail as a condition of release for those who can

[1] There are many ways to craft a constitutional post-arrest system prior to an individualized hearing. To take just two examples, Defendants could choose to authorize detention prior to a prompt individualized hearing for certain categories of arrestees based on appropriate non-discriminatory criteria (such as those arrested for failure to appear, those charged with certain offenses involving a victim, or those under the influence of drugs or alcohol at arrest). Defendants could also promulgate a new bail schedule that provides for equally expeditious release on standard non-financial conditions if an arrestee cannot afford to pay the predetermined monetary amount.

[2] Defendants conflate the term "bail"—the financial and *non-financial* conditions of release before trial—with *secured money* bail. Dkt. 32 at 18 n.3. Historically, secured money bail was not used to detain, but instead to release. *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1069 (S.D. Tex. 2017), *aff'd as modified by* 882 F.3d 528 (5th Cir. 2018) ("Early American constitutions codified a right to bail as a presumption that defendants should be released pending trial").

afford it and for those who cannot (after an individualized inquiry into ability to pay).[3] What Defendants may *not* do is order arrestees released, but automatically condition release on payment of a predetermined monetary amount, such that only those people who are too poor to pay are kept in jail. If a financial condition of release will function as an order of detention because the arrestee does not have enough money to pay it, Defendants must justify that de facto order of detention as they would a transparent order of pretrial detention: by (1) making a substantive finding that the condition is necessary to satisfy a government interest because no other less restrictive alternatives exist, and (2) providing the procedural safeguards necessary to ensure the accuracy of that substantive finding.

Defendants' claim that this simple relief is "drastic" is betrayed by Dallas County's current practices. *See* Dkt. 32 at 9. By promulgating and implementing a predetermined money bail schedule, the County has already determined that the vast majority of arrestees are eligible for immediate release. If the Plaintiff class could afford to pay the cash required by the predetermined schedule,[4] the County would immediately release them from jail. Plaintiffs' requested relief merely ensures that impoverished arrestees do not "sustain an absolute deprivation of their most basic

[3] This case does not present the question of whether, under *state* law, Defendants can use an unattainable amount of money bail to accomplish pretrial detention in cases where state law prohibits a transparent order of preventive detention. *See ODonnell*, 251 F. Supp. 2d at 1166 ("Jailing the indigent by setting secured money bail that they cannot pay makes an end run around a Texas-created liberty interest without providing due process."); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."). Nor does it concern (because Plaintiffs have not pled) an independent due process claim that *Salerno* only permits pretrial detention for "extremely serious offenses." *United States v. Salerno*, 481 U.S. 739, 750 (1987).

[4] In practice, it is for-profit bonding companies that determine how much money a person must pay to be released. *See, e.g.*, Payment Options, Southern Bail Bonds, http://southernbailbonds.com/our-services (offering "Low Interest and sometimes Interest Free financing," and stating, "If you don't have the full bail bond fee, we may still be able to work something out!!") (last visited Apr. 23, 2018); Absolute Bail Bonds, https://www.absolutebailbonds.com/no-money-down-0-interest-payment-plans-bail-bonds (offering "No Money Down & 0% Interest Payment Plans Bail Bonds") (last visited Apr. 23, 2018). Even when the bonding companies themselves refuse to provide a payment plan the person can afford, third-party lenders are available to provide the cash necessary. *See, e.g.*, Dallas Bail Bonds Loan, BailRep, https://bailrep.com/texas-dallas.php (offering "emergency loans for bail bonds" and "various financing plans") (last visited Apr. 23, 2018). As a result, bonding companies, because they choose which arrestees' bonds to finance, determine which arrestees will be released from jail in Dallas County's money-based system.

liberty interests—freedom from incarceration …. solely because [they] cannot afford to pay a secured bond," by requiring any deprivation of vital constitutional rights be narrowly tailored to a compelling government interest, *ODonnell*, 882 F.3d at 544; *id.* at 544-45.

II. The Factual and Legal Issues in Dispute

Defendants do not contest the most critical facts in this case, including: that Magistrates set bail in perfunctory proceedings at which arrestees are told not to speak, Dkt. 4-3 at 15-16; Dkt. 10 at ¶¶ 62-63, 65-66, 68-69, 84, 106; that they adhere to the County's bail schedules in virtually every case, Dkt. 4-3 at 16; Dkt. 10 at ¶¶ 87-89, 90-99;[5] that they do not inquire into or make findings concerning ability to pay, the availability of less restrictive alternative conditions, or the need for pretrial detention in light of any government interest, Dkt. 4-3 at 16-17; Dkt. 10 at ¶¶ 93, 98-99, 102-105; and that the first even conceivable opportunity for a person detained because of her indigence to seek pretrial release is at First Appearance, which occurs *four to ten days* after arrest for misdemeanor arrestees and *two to three weeks* after arrest for felony arrestees, Dkt. 4-3 at 19-20; Dkt. 10 at ¶¶ 3-4. Defendants also do not contest that this delayed proceeding (days or weeks after arrest) does not result in any substantive findings justifying detention and does not contain the procedural safeguards Plaintiffs argue are required. *See* Dkt. 4-3 at 35-40; *see also* Dkt. 10 at ¶¶ 153-172 (describing the proceedings at first appearances). Defendants also do not contest that most misdemeanor and low-level felony arrestees who are still detained at First Appearance plead guilty in exchange for release. *See* Dkt. 4-3 at 22; Dkt. 10 at ¶¶ 164, 166, 177.[6]

[5] Defendants instead argue that "[t]his practice [of adhering to the bail schedule] is constitutional." Dkt. 32 at 8.

[6] The district court in *ODonnell* concluded that Harris County's policy of automatically requiring secured money bail from all arrestees had the effect of coercing guilty pleas from impoverished people who could not afford the amounts, who were desperate to go home, and who were told that if they pled guilty they would be promptly released from custody, typically within the day. *See ODonnell*, 251 F. Supp. 3d at 1104-07; *id.* at 1107 ("[T]housands of misdemeanor defendants each year are voluntarily pleading guilty knowing that they are choosing a conviction with fast release over exercising their right to trial at the cost of prolonged detention. This Hobson's choice is, the evidence shows, the predictable effect of imposing secured money bail on indigent misdemeanor defendants.").

The remaining factual and legal issues on the merits are limited. The major legal issues that remain for the Court are: (1) whether Plaintiffs' substantive constitutional rights against wealth-based detention and to pretrial liberty require Defendants, before enforcing an unattainable financial condition, to make a finding that pretrial detention is necessary; (2) what procedural safeguards must be employed to ensure the accuracy of that substantive finding; and (3) regardless of the findings and procedures the Constitution requires *at* an individualized hearing, whether Defendants' policies, practices, and customs of automatically requiring secured money bail in every case for days or weeks *prior* to an individualized hearing can be justified under heightened scrutiny.

The answers to questions (1) and (2) are purely legal, and Defendants do not meaningfully contest the facts necessary to decide these issues. The answer to the third question will turn on whether Defendants can meet their burden to demonstrate that automatically requiring arrestees to pay predetermined monetary amounts to secure release prior to an individualized hearing—which results in wealth-based pretrial detention of indigent arrestees—is necessary to achieve compelling government interests. The parties' factual dispute about the efficacy of secured money bail in protecting the public and ensuring court appearance will therefore be the key factual dispute at an evidentiary hearing. If Plaintiffs are correct that Defendants will not be able to prove a need to use secured money bail, as compared to less-restrictive alternatives, to achieve any government interest, then Defendants' automatic use of a secured money bail schedule to determine whether an arrestee is released or detained is unconstitutional for *any* amount of time, let alone for the four days to three weeks that Defendants currently detain indigent arrestees prior to First Appearance.

At an evidentiary hearing on this Motion, Plaintiffs will show that there is no credible evidence that secured money bail is more effective than non-financial conditions or unsecured bail.

Instead, the available evidence suggests that other alternatives are more effective than secured money bail.[7] Defendants' rhetoric about the "disastrous consequences," Dkt. 32 at 18-20, that have supposedly befallen other jurisdictions that have stopped using blunt access to cash to make post-arrest detention decisions cannot withstand adversarial testing in open court. *See ODonnell*, 251 F. Supp. 3d at 1131-32 ("The reliable, credible evidence in the record . . . shows that release on secured financial conditions does not assure better rates of appearance or law-abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision.").

III. Plaintiffs' Legal Claims

A. Defendants' Bail Practices Violate Equal Protection and Due Process

Plaintiffs' claims are based on longstanding constitutional principles. *See generally* Dkt. 4-3 at 29-30. First, the government may not keep a person in a jail cell solely because she cannot afford a monetary payment. *Bearden v. Georgia*, 461 U.S. 600 (1983); *Tate v. Short*, 401 U.S. 395, 397–98 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970); *Pugh*, 572 F.2d 1053; *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972). Second, due process protects a right to pretrial liberty that is "fundamental." *United States v. Salerno*, 481 U.S. 739, 750 (1987); *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014) (*en banc*); *In re Humphrey*, 19 Cal. App. 5th 1006, 1049 (Cal. Ct. App. 2018); *Brangan v. Commonwealth*, 80 N.E.3 949 (Mass. 2017).

[7] Fifth Circuit precedent requires this Court, at the evidentiary hearing, to apply strict scrutiny to Defendants' wealth-based pretrial detention system. *See Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972). The Fifth Circuit's interlocutory decision in *ODonnell* held that "heightened scrutiny" applies to Harris County's wealth-based bail practices, but did not specify whether intermediate or strict scrutiny is required when evaluating government conduct infringing the right to wealth-based detention. *See ODonnell*, 882 F.3d at 544 (holding that "heightened scrutiny" applies); *Lauder, Inc. v. City of Houston*, 751 F. Supp. 2d 920, 933 (S.D. Tex. 2010) (explaining that both strict and intermediate scrutiny require the government to show that infringing a private right is narrowly tailored to a compelling interest.)

This Court need not resolve what form of heightened scrutiny—intermediate or strict—applies if it finds that the challenged practices flunk intermediate scrutiny, or if it rules on substantive due process grounds, where strict scrutiny unquestionably applies to government conduct infringing the fundamental right to pretrial liberty.

The central legal issue in this case is straightforward: If the government requires an unattainable financial condition of release, it must provide the constitutional protections and findings required for an order of pretrial detention. *See, e.g.*, *ODonnell v. Harris County*, 260 F. Supp. 3d 810, 814 (S.D. Tex. 2017) (holding that "using orders imposing secured money bail as de facto orders of pretrial preventive detention only for indigent defendants .... without the due process protections needed to detain .... violated equal protection and due process"); *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017) (finding that 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."); *see also* Dkt. 4-3 at 33-35 (explaining this principle).

Contrary to Defendants' mantra, this case is therefore not about a "right to affordable bail," Dkt. 32 at 7, 24, and Plaintiffs are not asking this Court to release all or any arrestees.[8] Rather, Plaintiffs argue that, before requiring an unattainable condition of release, the government must conclude that detention is necessary because it is the least restrictive option available to serve a compelling government interest. This substantive finding is necessary to ensure that detention prior to trial remains the "carefully limited exception" to the "norm" of pretrial liberty. *Salerno*, 481 U.S. at 755. In Dallas County, where about 50% of misdemeanor arrestees and 50% of felony arrestees are detained for the entire duration of their cases, Dkt. 10 at ¶ 177, pretrial detention is not "carefully limited," *Salerno*, 481 U.S. at 755.

[8] Defendants' assertion that "Plaintiffs' theory is . . . contrary to Texas law," Dkt. 32 at 19, is incorrect. Plaintiffs requested relief is consistent with Texas law. Defendants state that, with respect to people arrested for certain offenses, Texas law authorizes "'*only* the court before whom the case is pending'" to grant release on unsecured bail. Dkt. 32 at 19-20 (quoting Tex. Code Crim. Pro. art. 17.03(b) (emphasis added)). Even if Defendants are correct that no government official can release an arrestee who falls within those statutory categories other than "the court before whom the case is pending," Plaintiffs do not seek immediate release of any arrestee, and the relief Plaintiffs request is consistent with that interpretation of this provision of state law: it would allow Defendants to detain arrestees who fall within those statutory categories prior to a prompt individualized hearing at which the judge in whose court the case is pending can make an individualized determination of conditions of release.

The Constitution further requires the government to provide robust safeguards to protect against the erroneous deprivation of these substantive rights, *ODonnell*, 882 F.3d at 540 (quoting *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010)), and to ensure "that the individual's liberty interest actually is outweighed in a particular instance," *Washington v. Harper*, 494 U.S. 210, 228 (1990). The California Court of Appeals recently explained these principles at length in a landmark opinion overturning the State's wealth-based pretrial detention practices, holding that accomplishing pretrial detention using unaffordable bail is permissible only if "no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or that no less restrictive nonfinancial conditions of release would be sufficient to protect the victim and community." *In re Humphrey*, 19 Cal. App. 5th 1006, 1026 (2018). Defendants have attempted no meaningful legal response on these issues.

Instead, Defendants do not contest that they evade the findings and procedures required for pretrial detention by detaining all arrestees eligible for release who are too poor to pay an amount of money listed in their predetermined schedules. This policy results in the pretrial detention of indigent arrestees without any finding that detention is necessary to meet a compelling government interest and without any consideration of less-restrictive alternative conditions of release.

Finally, in an attempt to justify wealth-based detention prior to an individualized hearing, Defendants misinterpret the Fifth Circuit Court of Appeals's holding in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978). They claim that, because *Rainwater* held that "an absolute presumption" against the use of money bail for indigent arrestees is not required, 48 hours of purely wealth-based detention is permissible. *See* Dkt. 32 at 13. Even if this case involved 48 hours of wealth-based detention instead of four days to three weeks, Defendants are wrong. *Rainwater* held that a Florida Rule of Criminal Procedure was facially constitutional, meaning it is *possible* to apply the

Rule in a constitutional way. *See Rainwater*, 572 F.2d at 1058 ("[O]n its face Rule 3.130(b)(4) does not suffer such infirmity that its constitutional application is precluded."). Nothing in the four corners of the rule even provided for a bail schedule, let alone an inflexible secured money bail schedule that results in pretrial detention due to inability to pay—it merely authorized secured money bail as an available condition of release. *Id.* at 1055 n.2. The Court explicitly invited a challenge to unconstitutional *application* of the Rule upon "presentation of a proper record reflecting application by the courts," as Plaintiffs have done here. *Id.* at 1058. *Rainwater* held that application of the Rule would be unconstitutional if there were not "meaningful consideration" of alternatives to secured money bail prior to wealth-based detention. *Id.* at 1057. Indeed, *Rainwater* even stated that the court would not assume that "the automatic setting of money bails will continue and that the unnecessary and therefore constitutionally interdicted pretrial detention of indigents" would continue after its ruling. *Id.* at 1058. This "automatic" detention of the indigent is exactly what is happening in Dallas County.

B. Defendants' Bail Practices Violate Procedural Due Process

Plaintiffs' motion identifies the specific procedures that are required to protect the substantive rights against wealth-based detention and to pretrial liberty. *See* Dkt. 4-3 at 35-39. Under the balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the government must provide: (1) notice of the critical issues to be decided; (2) an adversarial hearing at which the arrestee has an opportunity to present and confront evidence; (3) an impartial decision-maker; and (4) findings on the record explaining the decision.[9] *Id.* at 335; *see, e.g.*, *Salerno*, 481 U.S. at 746 (citing *Mathews*, 424 U.S. at 335); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *Morrissey v.*

[9] For purposes of preliminary relief, Plaintiffs have not yet pressed their claim that due process also requires the government to provide counsel at the individualized hearing or that the on-the-record findings must be made by clear and convincing evidence. *See* Dkt. 4-3 at 36 n.17.

Brewer, 408 U.S. 471, 48-89 (1972); *see generally* Dkt. 4-3 at 35-39. Defendants do not meaningfully contest that these safeguards are required to protect the federal rights at issue, and they explicitly agree, *see, e.g.*, Dkt. 32 at 7, 25, that the government must provide most of them: "notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision[10] by an impartial decision-maker," *ODonnell*, 882 F.3d at 546. (But they make these concessions only with respect to the procedures protecting a *state-created liberty interest*, a claim that Plaintiffs have not raised.)[11]

Defendants' main argument—that it is an "open question" whether an individualized hearing is required *at all* for felony arrestees—is baseless. Dkt. 32 at 7. A presumptively innocent person's federal constitutional rights do not hinge on a state's categorization of a crime as a misdemeanor or a felony, or the vicissitudes of initial police and prosecutor's arrest and charging decisions. Defendants provide no logical or doctrinal reason, let alone any case law, for their vague assertion that felony arrestees are entitled to a less rigorous determination or process than misdemeanor arrestees.[12]

C. *ODonnell* Confirms Plaintiffs' Likelihood of Success on the Merits

Defendants do not meaningfully respond to the legal arguments in Plaintiffs' Motion concerning Plaintiffs' likely success on the merits, including that Plaintiffs have a right against

[10] The Fifth Circuit's decision that "written" findings were not required presumed that such a requirement could mandate "50,000 written opinions per year." *ODonnell*, 882 F.3d at 542. But due process requires such findings only when a person is detained. And Plaintiffs do not argue that the finding must be "written" as opposed to otherwise on the record. Plaintiffs note, however, that written findings are optimal because the Sheriff cannot otherwise determine whether the orders to be enforced are lawful, as Texas and federal law require of him. *Id.* at 547.

[11] Defendants concede that they fail to provide a timely individualized hearing, even under *ODonnell*'s discussion of the state-created right, within 48 hours. They claim only to be "working to ensure that this first appearance is consistent with the new, *ODonnell* standard." Dkt. 32 at 9, 16.

[12] But if the substantive findings and procedural protections owed to presumptively innocent felony arrestees were different from (and somehow *less* than) those afforded to misdemeanor arrestees, that would be yet another reason to reject Defendants' request to stay this case pending rehearing in *ODonnell*. Dkt. 32 at 15-16.

wealth-based detention, that government conduct infringing that right is subject to heightened scrutiny, or that an order of unaffordable bail is the functional equivalent of a detention order. Nor do Defendants contest that, prior to issuing a detention order, procedural due process requires an inquiry and on-the-record findings concerning ability to pay and, if the amount exceeds what the person can afford, further safeguards: notice, an adversarial hearing at which the arrestee has an opportunity to be heard and to present and confront evidence, an impartial decision-maker, and on-the-record findings. Because Defendants have conceded these aspects of Plaintiffs' constitutional claims, Plaintiffs are likely to prevail on them.

Defendants instead rely on misstatements of the Fifth Circuit's decision in *ODonnell* to argue that detained arrestees are not entitled to substantive findings at all and that the Constitution permits up to 48 hours of wealth-based detention. Defendants claim the Fifth Circuit "rejected most of Plaintiffs' constitutional theories," Dkt. 32 at 13, 23. But the Fifth Circuit *affirmed* the District Court's equal-protection holding and did not reach at all Plaintiffs' other constitutional claim: that due process protects a "fundamental" right to pretrial liberty. The Fifth Circuit's decision (in a preliminary interlocutory appeal) to strike down Harris County's scheme on a *narrower* procedural due process ground—that Harris County failed even to provide the minimal procedures necessary to protect a *state-created* liberty interest, *ODonnell*, 882 F.3d at 541, 543—does not resolve Plaintiffs' other constitutional claims. Defendants' legal arguments are meritless.

1. The Fifth Circuit Did Not Address the Findings Required to Justify a De Facto Order of Pretrial Detention

Defendants assert that the Fifth Circuit held that "an individualized assessment of bail within 48 hours of arrest," Dkt. 35 at 25, is "all" that is required to remedy the constitutional violations in *ODonnell* and in this case. That is not correct. The Fifth Circuit's equal protection holding, consistent with decades of precedent, recognized a *substantive* right against wealth-based

detention that cannot be infringed unless the government satisfies heightened scrutiny.[13] Consequently, any wealth-based detention must be predicated on a finding that it is "narrowly tailored" to "compelling interests." *ODonnell*, 882 F.3d at 544-45.

Defendants' assertion to the contrary seeks to exploit an ambiguity in the Fifth Circuit's opinion: specifically, that the court's suggested injunction, proposed in dicta, does not fully account for its equal-protection holding. The panel held that an unaffordable condition must be "narrowly tailored" to a "compelling government interest." *Id.* at 544, but in its sample order, it did not specify the finding required to satisfy heightened scrutiny, i.e. that pretrial detention is necessary because no adequate alternative exists. However, the panel explicitly left untouched the district court's holding that, before requiring a person to pay secured bail she cannot afford, the government must make a substantive finding that "'a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial.'" *Id.* at 541-42 (quoting *ODonnell*, 251 F. Supp. 3d at 1153).[14]

Thus, *ODonnell* plainly authorizes this Court to mandate *both* an individualized hearing *and*, before detaining someone by requiring an unattainable financial condition, a finding that

[13] The panel made the following rulings on equal-protection: (1) It violates equal protection to require an arrestee to pay a secured financial condition of release "without meaningful consideration of other possible alternatives," *ODonnell*, 882 F.3d at 543 . (quoting *Rainwater*, 572 F.2d at 1057); (2) "Heightened scrutiny" applies when the government infringes the right against wealth-based detention, and the deprivation must be "narrowly tailored" to serve a "compelling interest," *id.* at 544-45; and (3) the County's policy of automatically requiring secured money bail was not narrowly tailored to a compelling interest because the County did not establish "any 'link between financial conditions of release and appearance at trial or law-abiding behavior before trial,'" *id.* at 545 (quoting *ODonnell*, 251 F. Supp. 3d at 1152).

[14] After quoting Judge Rosenthal's holding as to what due process requires, including substantive findings, *ODonnell*, 882 F.3d at 541, the panel made just "two modifications" to the "procedural floor," *id.* at 542, neither of which pertained to the *content* of the findings the district court held were required. The panel also cited specific language from *McConnell* regarding the need to make findings about the necessity of detention prior to requiring unaffordable bail. *See id.* at 542 (a court must explain why "the particular financial requirement is a *necessary* part of the conditions of release" (quoting *United States v. McConnell*, 842 F.2d 105, 110 (5th Cir. 1988)). Notwithstanding this analysis, the relief proposed in dicta focuses almost exclusively on procedures. These and other issues related to the nature of the findings required by due process and equal protection must be resolved on remand to the district court in *ODonnell*.

detention is necessary because no less-restrictive alternatives are adequate. Additional binding equal protection precedent requires it. *Bearden*, 461 U.S. at 666–67 (requiring a "careful inquiry" into the state's asserted interests and invalidating detention if there are "alternative means for effectuating" those interests); *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (invalidating a practice requiring an indigent person to either pay a fine or be jailed because the alternative jail term was not "necessary to promote a compelling government interest" in light of "far less onerous alternatives"); *Rainwater*, 572 F.2d at 1057 (explaining that the same principles apply prior to trial and that the Constitution requires a finding that secured money bail "is necessary to reasonably assure defendant's presence at trial."). Nothing in *ODonnell*'s favorable equal-protection holding alters this longstanding Circuit and Supreme Court precedent. Moreover, such a substantive finding is separately required by due-process case law that *ODonnell* did not address and that Defendants do not challenge here. Dkt. 4-3 at 31-35. Nothing in the Fifth Circuit's decision rejected, or even addressed, the "fundamental" right to pretrial liberty. *See Salerno*, 480 U.S. at 750.

Given that both the right against wealth-based detention and the fundamental right to pretrial liberty require a determination of necessity prior to detention, Defendants are wrong to assert that this case is only about procedures. Dkt. 32 at 25-26. Other than misapprehending *ODonnell*, Defendants do not respond to Plaintiffs arguments on what substantive standard the government must meet. Plaintiffs are likely to succeed on the merits that pretrial detention violates the Constitution absent the *substantive finding* required by two lines of Supreme Court cases.

2. This Court Must Further Determine, Under Heightened Scrutiny, Whether Any Period of Wealth-Based Detention Can Be Justified

Separately, because wealth-based detention triggers "heightened scrutiny," as *ODonnell* held, this Court must apply that standard to determine what, if any, period of wealth-based

detention is permissible *prior to* an individualized hearing to determine conditions of release. Defendants must prove that secured financial conditions provide a narrowly tailored way of achieving a compelling governmental purpose. *ODonnell*, 882 F.3d at 544-45. If Defendants fail, automatic wealth-based detention of all indigent arrestees for any amount of time will be extraordinarily hard to justify. The Fifth Circuit's opinion, which requires the government to justify detention due to inability to pay under heightened scrutiny, does not authorize detention due to indigence (for two days, much less for three weeks) *if the government's interest can be equally or better met* by an alternative that does not require such automatic wealth-based detention. That is the factual question that Dallas County spends much of its brief disputing and that the parties must litigate at an evidentiary hearing.

Even if Defendants meet their burden at the hearing to justify some *de minimis* period of wealth-based detention, injunctive relief would still be warranted. Arrestees in Dallas County are regularly detained for weeks before any opportunity to contest conditions of release. *See* Dkt. 403 at 11-14; Dkt. 10 at ¶ 1 & n.1 (noting, for example, that Named Plaintiffs Shannon Daves was kept in jail for five days, and Shakena Walston for six days, due to their inability to pay money bail; Ms. Daves was released when local organizers paid her money bail, and Ms. Walston was released when the prosecutor decided not to file charges); Dkt. 10 ¶ 153 ("As of January 21, 2018, there were at least two individuals, arrested on January 9, 2018 [for misdemeanor offenses] who were being kept in the Dallas County Jail due to their inability to pay a $500 money bail amount," neither of whom had been taken to court). These examples are the norm; Dallas County imposes extended wealth-based detention prior to any opportunity to address conditions of release, and Defendants have not contested that their standard procedures contemplate four days to three weeks of detention prior to a First Appearance hearing. Dkt. 4-3 at 21-22. Nor do they contest that

arrestees are not brought into the courtroom at First Appearance unless pleading guilty. Dkt. 4-3 at 22.

To be sure, the Fifth Circuit held that the scope of the *ODonnell* court's initial relief was based on too broad a conception of what *state* law protects because it required the release of any misdemeanor arrestee who could not afford a secured bail amount, regardless of the procedures and findings provided. Indeed, the relief the district court ordered in *ODonnell* was broader than Plaintiffs' claims under the federal Constitution because Harris County defendants stated that they could not comply with the Constitution.[15] In this case, an injunction consistent with Plaintiffs' theories and binding Fifth Circuit and Supreme Court precedent need not go so far. The Court could allow Defendants to use unattainable money bail to accomplish pretrial detention, but only after the government makes a finding that detention is required in an individual case[16] because no other alternative exists to serve a compelling interest.

D. This Case Does Not Implicate the Eighth Amendment

Defendants' argument that Plaintiffs make a "direct assault" on the Eighth Amendment, Dkt. 32 at 14; *see also id.* at 25-26 (citing *Graham v. Connor*, 490 U.S. 386 (1989)), is foreclosed by circuit precedent. *See Rainwater*, 572 F.2d at1057 ("The incarceration of those who cannot [pay money bail], without meaningful consideration of other possible alternatives, infringes on both

[15] Although broader than Plaintiffs' constitutional theories, the order Chief Judge Rosenthal crafted is consistent with the court's factual findings and Harris County's representations to the trial court. The defendants stated that they believe that the Hearing Officers lack the power to provide the findings and procedures that the Constitution would require for a valid detention order. *ODonnell*, 251 F. Supp. 3d at 1093. In light of these findings, the court ordered release on the assumption that the required findings could not be made. The Fifth Circuit reversed that part of the order, which had presumed that Harris County officials would not be able to comply with the federal Constitution.

[16] Defendants' assertion that heightened scrutiny does not apply to a "bail setting itself," Dkt. 32 at 10, is frivolous. Government conduct that infringes substantive rights—including policies that infringe many individuals' rights, and conduct that infringes only one individual's rights—must be subjected to heightened scrutiny.

due process and equal protection requirements."); *ODonnell*, 882 F.3d at 539 (rejecting Defendants' argument that Plaintiffs' claims must be considered under the Eighth Amendment).

Defendants' authority is not to the contrary. The Court has made clear that *Graham* reflects only a "'reluctan[ce] to expand the concept of substantive due process.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)). Plaintiffs' claims involve no such expansion; they rely on an established "converge[nce]" of equal protection and due process principles, *Bearden*, 461 U.S. at 665, as well as the established principle that substantive due process protects the "fundamental" interest in pretrial liberty, *Salerno*, 481 U.S. at 750; *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

IV. Plaintiffs Do Not Challenge Judicial Conduct in this Motion

Plaintiffs are not, as Defendants claim, seeking to enjoin judicial conduct. *See* Dkt. 32 at 6, 16-17. As explained more fully in Plaintiffs' concurrently filed Reply to the Felony Judges' Response in Opposition to Plaintiffs' Motion to Dismiss (at p.2-8), Plaintiffs are seeking an injunction prohibiting the Judges, whether acting on behalf of the County or the State of Texas,[17] from enforcing jurisdiction-wide policies—whether written or unwritten—that require arrestees to

[17] Harris County has petitioned for rehearing on the issue of whether the misdemeanor judges in *ODonnell* act on behalf of the County or the State of Texas when promulgating blanket, generally applicable bail policies, making the same arguments that were previously rejected by the Fifth Circuit and the district court. *See ODonnell*, 882 F.3d at 538 ("Though a judge is not liable when acting in his or her judicial capacity to enforce state law, we agree with the district court that the County Judges are appropriate parties in this suit …. [Plaintiffs] sue the County Judges as municipal officers in their capacity as policymakers. Section 1983 affords them an appropriate basis to do so." (quotations and citations omitted)); *ODonnell v. Harris County*, No. H-16-1414, 2017 WL 784899, at *3 (S.D. Tex. Mar. 1, 2017) (affirming that the judges are county policymakers "when they choose among alternatives in their discretion to promulgate the written Rules of Court or administratively oversee unwritten customs and practices that apply countywide to the regulation of bail and pretrial detention of misdemeanor arrestees"). And even if the Dallas County Judges are policymakers for the state, they can be enjoined under § 1983. Plaintiffs address this argument in their concurrently filed Response in Opposition to the Felony Judges' Motion to Dismiss (at p.17-20).

pay predetermined amounts without an individualized inquiry into ability to pay or consideration of less restrictive alternative conditions; an injunction prohibiting enforcement of the Dallas County Commissioners Court resolution, promulgated in 1999, Dkt. 10-9, that results in the categorical exclusion of the vast majority of arrestees, including all people who are homeless (like many of the named Plaintiffs), from consideration for release on unsecured or non-financial conditions; and an injunction prohibiting the Sheriff, whether she is acting on behalf of the County or the State of Texas,[18] from enforcing orders to pay money bail unless the orders are accompanied by a record showing that the required findings and procedures were provided. None of the conduct Plaintiffs seek to enjoin in this motion is judicial.[19]

V. Balance of Harms

Defendants' assertions that Plaintiffs are "insensitive" to certain "practical realities," Dkt. 32 at 9; that "there is something fundamentally unfair" to Defendants about enjoining them from systemically violating constitutional rights, Dkt. 32 at 23; and that it is in impoverished arrestees' best interests to be detained because releasing them without a better-functioning pretrial services agency will "set [them]. . . up for failure," Dkt. 32 at 16 reflect a profound lack of appreciation for the misery inflicted every day by the current practices. The felony judges go further in their response to Plaintiffs' Motion for Class Certification, claiming that some impoverished arrestees

[18] The Fifth Circuit in *ODonnell* dismissed the Harris County Sheriff as a Defendant. Plaintiffs have sought rehearing on that issue. But even if the Fifth Circuit were correct to dismiss the Sheriff under § 1983, *ODonnell* says nothing about this Court's power to exercise its equitable authority to enjoin the Dallas County Sheriff from violating the Constitution. *See Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015); *see also Terrace v. Thompson*, 263 U.S. 197, 214 (1923); *Ex Parte Young*, 209 U.S. 123 (1908); *Air Evac EMS, Inc. v. Texas Department of Insurance, Division of Workers' Compensation*, 851 F.3d 507, 519 (5th Cir. 2017). Indeed, the County seems to concede that the Sheriff might be enjoined as a state actor. Dkt. 32 at 15. Plaintiffs will address this issue (which the County gestures at in its response brief, Dkt. 32 at 7) more fully in their forthcoming response in opposition to the Sheriff's Motion to Dismiss.

[19] Plaintiffs do challenge judicial conduct in this case, including when seeking declaratory relief concerning the Magistrates' conduct at the jailhouse hearings, *see* Dkt. 10 ¶¶ 69, 84, 95, 98-106, and the Judges' conduct at First Appearance, *see* Dkt. 10 ¶¶ 169-70. But judicial conduct is not at issue in this motion. *See ODonnell*, 882 F.3d at 538.

are in the Dallas County jail because they "choose" to be, Dkt. 37 at 9, not because they are too poor to purchase their release, and that they "prefer" to be in jail where they will be "fed" and "sheltered,"[20] Dkt. 37 at 9. These claims are unsubstantiated, deeply misleading, and do not address the irreparable harm the Plaintiff class suffers every day.

Defendants also rely on discredited assertions regarding the pretrial systems in Harris County and other jurisdictions, arguing that jurisdictions that have moved away from wealth-based pretrial systems have experienced exorbitant failure-to-appear rates, fiscal costs, and threats to public safety.[21] The *ODonnell* district court correctly rejected these alarmist contentions after reviewing the evidence. *See, e.g.*, *ODonnell*, 251 F. Supp. 3d at 1131-32 ("The reliable, credible evidence in the record from other jurisdictions shows 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."); *id.* at 1145 ("The credible evidence shows that, while Pretrial Services might incur some additional costs in supervising those who are now detained on a secured money bail they cannot pay, those costs are far less than the

[20] Defendants in *ODonnell* made similar arguments, which the district court rejected. *See ODonnell*, 251 F. Supp. 3d at 1109, n.57 ("The record provides no support for defense counsel's argument that some defendants choose to remain detained. . . . The credible testimony from every witness and declarant with experience representing criminal misdemeanor defendants is that no one remains in the Harris County Jail out of desire to be there."); *ODonnell*, No. H-16-1414, Dkt. 186 at 20, Hr'g Tr., February 8, 2017 (rejecting argument as "uncomfortably reminiscent of a historical argument that used to be made that people enjoyed slavery, because they were afraid of the alternative. . . . You don't see a lot of people volunteering for jail in order to get warm.").

[21] Defendants' assertion that the preliminary injunctions issued in Harris County and Calhoun, Georgia did not "survive[] appellate scrutiny," Dkt. 32 at 9, is misleading. The Fifth Circuit in *ODonnell* upheld most of the district court's legal rulings, 882 F.3d at 543-45, and although it required "two modifications" to the district court's order, *id.* at 542, and the Fifth Circuit stayed vacatur while the district court crafts a new preliminary injunction, *id.* at 549. In *Walker v. City of Calhoun*, the Eleventh Circuit Court of Appeals held that the district court's initial injunction was not sufficiently specific to satisfy Rule 65. *See* 682 Fed. Appx. 721, 724-25 (11th Cir. Mar. 9, 2017). The court remanded the case to the district court, which entered a revised, more detailed preliminary injunction order. *Walker v. City of Calhoun*, No. 4:15-cv-170, 2017 WL 2794064 (N.D. Ga. June 16, 2017) Defendants in *Walker* have challenged the new injunction in another appeal not yet argued, Case No. 17-1319, but the district court's preliminary injunction remains in effect.

costs of detention. The issue is not added costs, but, more precisely, shifted costs."). At an evidentiary hearing, Plaintiffs will show that Defendants' factual assertions are incorrect.

A. Failures to Appear

Defendants' claim that "failure to appear rates [have] skyrocketed" in Harris County is based entirely on untested assertions[22] made by fourteen of the defendant judges in Harris County, who have made inaccurate claims throughout that case[23] (some of them under oath).[24] Those assertions are unreliable for a variety of reasons,[25] including that people released pursuant to the injunction have been misinformed of their court dates, that officials have funneled arrestees most likely to not appear into the group released pursuant to the federal court's order, and that Harris County has refused to provide pretrial supervision to arrestees released pursuant to the federal order, even though these arrestees are the ones most in need of assistance getting to court (based on the County's pretrial assessment tool).[26] Several Harris County defendants have used these

[22] The *ODonnell* plaintiffs will be able to test these assertions during proceedings on remand in the district court.

[23] To take one example, the Harris County judges hired Robert Morris (on whose work Defendants in this case also rely, *see* Dkt. 32 at 19) to support their claim that no one was in the jail because of their poverty. He produced an "expert opinion" that "[i]n the Harris County Jail, people are rarely held if indigent." *See* Expert Report of Robert G. Morris, Ph.D. at 70, *ODonnell v. Harris Cnty*., No. 16-CV-1414 (S.D. Tex. Jun. 1, 2017), Dkt. 336-2. Judge Rosenthal found his conclusion "not entitled to any weight." *ODonnell*, 251 F. Supp. 3d at 1117 ("In sum, Dr. Morris excluded indigent defendants from his survey to conclude that, of the misdemeanor defendants surveyed, none was detained because of indigence.").

[24] Chief Judge Rosenthal recently ordered discovery concerning whether the Fourteen Judges deliberately misled the federal trial and appellate courts under oath and misled the Plaintiffs in discovery responses on key issues throughout the case. Dkt. 376.

[25] *See, e.g.*, Meagan Flynn, *Harris County Bail System Offers Little Help to Defendants Who Most Need It, Cases Reveal*, Hous. Chron. (Jan. 22, 2018), https://www.chron.com/news/houston-texas/article/Dozens-of-jail-inmates-miss-out-on-pretrial-help-11281893.php.

[26] *See* Gabrielle Banks & Mihir Zaveri, *Dozens of Jail Inmates Miss Out on Pretrial Help as County Struggles with Bail Order*, Hous. Chron. (July 12, 2017), https://www.chron.com/news/houston-texas/article/Dozens-of-jail-inmates-miss-out-on-pretrial-help-11281893.php.

maneuvers to concoct a narrative that the order is causing a public-safety crisis, an effort the Harris County District Attorney has called an attempt to "deliberately undermine" the federal order.[27]

Defendants also claim that the preliminary injunction in Calhoun, Georgia—which challenged money bail practices in a small municipal court handling traffic and ordinance violations—has led to "disastrous consequences." Dkt. 32 at 18. But the City of Calhoun has no meaningful data on failures to appear, from either before or after the injunction. And the City has not provided the information necessary to determine whether failure-to-appear *rates* went up at all. Chad Silvers's affidavit cites only the *total number of cases*, Dkt. 32-3 ¶¶ 13-14. Without knowing the number of failures to appear relative to the number of people released, it is impossible to know whether own-recognizance release was, as Defendants suggest, less effective than secured bond, or whether it was more effective. In other words, an increase in the total number of failures to appear by a few dozen may reflect a *decrease* in the failure to appear rate because a far greater total number of people were released from jail without money bail.

Next, Defendants cite a 2013 study by Robert Morris (who is affiliated with the for-profit bail industry)[28] on the Dallas County pretrial system. That study purports to show a higher failure-to-appear rate for people released on unsecured bonds than for people released on surety bonds. Dkt. 32 at 19. Dr. Morris himself, and this particular study, were discredited during the Harris County hearing. *ODonnell*, 251 F. Supp. 3d at 1121 (finding Dr. Morris's 2013 study of Dallas

[27] *Id.* In the same article, District Attorney Kim Ogg commented, "Clearly the hope is that the reformed bail process fails." *Id.*

[28] *See generally ODonnell v. Harris County*, 4:16-cv-1414 (S.D. Tex. 2016), Dkt. 282 at 157-63 (transcript of Day Four, PM Session) (cross-examination of Dr. Robert Morris on his affiliation with the bail industry); *id.* at 158 (Q [Plaintiffs' Counsel]: "So just so the record is clear, you were hired by the American Bail Coalition [a lobbying group for the bail industry] to testify by a state legislative body in New Jersey, right ...?" A [Dr. Morris]: "Right."); *id.* at 163 (Plaintiffs' counsel, explaining the relevance of an exhibit, noted that Dr. Morris "testified that he has received thousands of dollars in compensated testimony and travel, and . . . it is clear on the American Bail Coalition's website that he is closely affiliated with that organization to the point that they are speaking for him.").

County to be "entitled to substantially less weight than the published, peer-reviewed[29] articles in the record that rigorously compare pretrial failure rates among misdemeanor arrestees released on different categories of bonds."); *id.* at 1117 (finding Dr. Morris's testimony that no one was detained in the Harris County Jail due to indigence to be "not entitled to any weight"); [30] *see also* Second Rebuttal Report of Dr. Stephen Demuth at 13-14, *ODonnell v. Harris Cnty.*, No. 16-CV-1414 (S.D. Tex. Mar. 17, 2017), Dkt. 242 (explaining the weaknesses of Dr. Morris's 2013 study). Plaintiffs will demonstrate that, because of the facts on the ground in Dallas, experimental design, internal flaws with proxies for failures to appear, and the study's failure to compare secured money bail to non-financial alternatives or even unsecured bond (i.e. the only putative point of the study in the first place; Dr. Morris compared pretrial services bonds, which he described as "a type of personal recognizance bond" that involves no financial condition, Dkt. 32-5 at 28). Dr. Morris's Dallas study is useless to any disputed issue in this case.

Defendants make similarly specious claims about other jurisdictions, including assertions about the entire State of New Jersey that parrot the for-profit bail industry's lobbying in that State but that contradict the statements of former Governor Christie and the New Jersey judiciary. *See* Dkt. 32 at 18-19. At an evidentiary hearing on this motion, Plaintiffs will demonstrate that these assertions are meritless.

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[29] After the hearing, Dr. Morris submitted his paper to an online peer-reviewed journal, which accepted it for publication. The journal has a 50% acceptance rate, https://retractionwatch.com/2017/03/15/plos-one-faced-decline-submissions-new-editor-speaks (as compared to a 5-10% acceptance rate for publication in the top journals), and requires authors whose papers are accepted for publication to pay $1,495 to be published. *See* Richard Knox, *Some Online Journals Will Publish Fake Science, For A Fee* (Oct. 3, 2013), *available at* https://www.npr.org/sections/health-shots/2013/10/03/228859954/some-online-journals-will-publish-fake-science-for-a-fee.

[30] After Plaintiffs' expert, Dr. Stephen Demuth, unraveled Dr. Morris's math, Judge Rosenthal concluded that the "critical flaws" in Dr. Morris's analysis "undermine his credibility and diminish[] the court's confidence in the reliability of the opinions he expressed, whether deriving from his own research or criticizing the analytic methods and conclusions of others." *ODonnell*, 251 F. Supp. 3d at 1117. The fact that the Dallas County Defendants are offering Dr. Morris's discredited research as evidence in this case shows just how little available support there is for their empirical positions.

B. Public Safety

Defendants next make the same "public safety" arguments that were discredited by adversarial testing in Harris County.[31] Although Defendants refer to these factual statements as the "raw truth," they have been debunked by every rigorous empirical study to examine the question. *See ODonnell*, 251 F. Supp. 3d at 1121 (discussing various studies which found that "even two to three days of pretrial detention correlated at statistically significant levels with recidivism."). In fact, automatically requiring money bail from every arrestee *damages* public safety.

Most starkly, for those who can afford to pay and are released, financial conditions cannot provide any incentive to follow the law because money bail cannot be forfeited if someone commits a new crime while on pretrial release. *See* Tex. C.C.P. art. 22.01-22.02; *ODonnell*, 251 F. Supp. 3d at 1110 ("[I]t is the fact of detention, not the secured money amount, that addresses [public safety] concerns, and only for those too poor to pay."); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 1029 ("Money bail, however, has no logical connection to protection of the public. . . ."); *Reem v. Hennessey*, No. 17-CV-06628-CRB, 2017 WL 6539760 (N.D. Cal. Dec. 21, 2017), at *3 (there is "no rational relationship between the setting of bail" and the government's interest in mitigating the risk a defendant poses to public safety because "[b]y statute, defendants do not forfeit the bail money" if they commit a new offense while released pretrial). Moreover, automatically requiring money as a condition of release results in the pretrial detention of those who cannot pay, pretrial detention due to inability to pay makes people *more likely* to commit crimes in the future. *ODonnell*, 251 F. Supp. 3d at 1122 (crediting a landmark study which found

[31] Defendants also claim that "for the first time" Plaintiffs seek "to extend their constitutional theories to felony arrestees." Dkt. 32 at 19. That is untrue. Numerous lawsuits have been filed challenging the use of secured money bail to detain felony arrestees and raising the same equal protection and due process claims. *See, e.g., Caliste v. Cantrell*, No. 17-6197, 2018 WL 1365809 (E.D. La. Mar. 16, 2018) (certifying a class of misdemeanor and felony arrestees); *Buffin v. San Francisco*, No. 15-cv-04959, 2018 WL 1070892, at *2 (N.D. Cal. Feb. 26, 2018) (same).

that releasing the lowest-risk misdemeanor defendants in Harris County over a period of five years would have avoided 1,600 felony offenses and 2,400 misdemeanor offenses in the eighteen months following pretrial release); Brief for Amicus Curiae Law-Enforcement and Corrections Officials at 18, 20-23, *ODonnell v. Harris County*, No. 17-20333 (5th Cir. Aug. 8, 2017) ("[U]nnecessary pretrial detention leads to more crime, not less."). At least one of the Defendants has stated publicly that even he does not believe this claim: County Judge Clay Jenkins told the Dallas Morning News, "Not only is it costing you a lot of money for nonviolent offenders to sit in jail, but it doesn't actually make us any safer. … It actually erodes public safety…."[32]

C. Financial Costs

Defendants' arguments about the financial costs of implementing the injunction Plaintiffs seek are also meritless. *See, e.g.*, *ODonnell*, 251 F. Supp. 3d at 1145 (finding that it costs less to supervise people in the community than to jail them prior to trial). Research consistently demonstrates that it is less costly to supervise people than to detain them prior to trial.[33] Plaintiffs will show at a hearing that the costs of alternatives to pretrial detention are cheaper than jailing thousands of people every day because they cannot afford release. *See id.* at 1145, 1144.

VI. Public Interest

Defendants' wealth-based post-arrest system violates the Constitution, and "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Simms v. District*

[32] Naomi Martin, *Dallas County officials pledge reforms after News' investigation into high bonds for nonviolent offenders* (Jan. 2017), *available at* https://www.dallasnews.com/news/dallas-county/2017/01/03/dallas-county-officials-pledge-reforms-news-investigation-high-bonds-nonviolent-defendants.

[33] In particular, the claim that "Plaintiffs are demanding that all arrestees be supervised," Dkt. 32 at 21, is false. Over-supervision of arrestees, especially arrestees who pose a low risk of non-appearance, "by, for example, subjecting them to frequent check-ins and drug tests, increases nonappearance." *ODonnell*, 251 F. Supp. 3d at 1144 (citing credible empirical research that most arrestees "require little to no supervision"). Plaintiffs have never asked that all arrestees be supervised, nor would such a system reflect best practices among expert pretrial services providers.

of Columbia, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (collecting cases); *ODonnell*, 251 F. Supp. 3d at 1159 (quoting *Simms*).

Defendants' arguments regarding the public interest amount to a request for more "time to comply with new requirements," Dkt. 32 at 23; claims that "multiple" injunctions would disrupt the system in Dallas County, Dkt. 32 at 22; and an assertion that pretrial detention is in the best of interests of impoverished arrestees, Dkt. 32 at 16. They ask this Court to delay proceedings for a "few months" because the constitutional violations in this case are "not new," Dkt. 32 at 16, and complain that "there is something fundamentally unfair" about enjoining them from violating the Constitution, without giving them "a chance to comply," Dkt. 32 at 23.

Defendants' attempts at delay should be rejected. First, there is nothing "unfair" about ordering government officials to comply with the Constitution through injunctive relief. Forcing prompt compliance is particularly necessary precisely *because* these violations are "not new": Dallas County has failed to remedy the obvious violations at the heart of this case for years.[34] Second, Defendants argue that, because the Plaintiffs in *ODonnell* sought a stay pending resolution of the parties' rehearing petitions in that case, these proceedings, too, should be stayed pending rehearing in *ODonnell*. Dkt. 32 at 6. This argument ignores the critical fact that, in Harris County, a preliminary injunction remedying the irreparable harm in that case *is already in effect*. To the extent the County argues that "repeatedly," Dkt. 32 at 15, disturbing the status quo would be "disruptive," Dkt. 32 at 15, any inconvenience resulting from a potential need to tweak this Court's order does not outweigh the ongoing harm inflicted on the Plaintiffs class every day in the Dallas

[34] *See, e.g.*, Naomi Martin, *Dallas County officials pledge reforms after News' investigation into high bonds for nonviolent offenders* (Jan. 2017), *available at* https://www.dallasnews.com/news/dallas-county/2017/01/03/dallas-county-officials-pledge-reforms-news-investigation-high-bonds-nonviolent-defendants (observing, in an article published almost a year and a half ago, that the County "has been talking about this problem for years").

County jail. *See* Dkt. 4-3 at 41-45.[35] Third, and most importantly, it is highly unlikely that anything that happens in *ODonnell* would require this Court to re-write a preliminary injunction. None of the parties in that case have sought rehearing on the merits, and neither the opinion nor any of the rehearing petitions would preclude injunctive relief against the Sheriff as a state actor (even if the Sheriff's enforcement of bail directives does not give rise to County liability). Moreover, Harris County's argument that the case involves merely judicial conduct was already rejected by the Fifth Circuit, and it is unlikely that the Fifth Circuit panel will reverse its decision given the legal standards that provide for panel rehearing in very limited circumstances.

Finally, various Defendants in this case have publicly acknowledged the human and civil rights crisis in the Dallas County Jail and stated that jailing the poor is not in the public interest. For example, Dallas County Commissioner John Wiley Price expressed embarrassment at the County's money bail system, referencing a highly publicized case involving a woman who was accused of stealing $105 in clothing and was kept in jail for two months because she could not afford a $150,000 financial condition, stating, "We're jailing this person for more money than they stole. . . . What sense does that make? That's just embarrassing."[36] Dallas County Judge Clay Jenkins stated, "I support bail reform because some low-risk suspects that don't need to be there

[35] *See also* National Association of Counties, *Medicaid Coverage and County Jails* (Feb. 2017) at 14-15, *available at* http://www.naco.org/sites/default/files/documents/Medicaid%20and%20County%20Jails%20Report_02.20.2018.pdf?utm_source=In+Justice+Today+Newsletter&utm_campaign=509e7633c9-&utm_medium=email&utm_term=0_0331e33901-509e7633c9-52945119 (explaining that arrestees' Medicaid benefits are cut off as soon as they are booked into a county jail, often leading to months-long gaps in coverage after the person is released)

[36] Naomi Martin, *Dallas County officials pledge reforms after News' investigation into high bonds for nonviolent offenders* (Jan. 2017), *available at* https://www.dallasnews.com/news/dallas-county/2017/01/03/dallas-county-officials-pledge-reforms-news-investigation-high-bonds-nonviolent-defendants. Commissioner Price also acknowledged that Dallas County would be legally "on the hook" for its illegal conduct. *Id.* "Judges sometimes feel pressure to 'cover their backsides' and set higher bonds because they don't want to be responsible for letting someone free who goes on to commit a horrible crime, Price said. But, he added, 'ain't no backside on a nonviolent offense.'"

are held in Texas jails at taxpayer expense simply because they can't afford to bond out,"[37] and almost a year ago he told a reporter that a solution is needed "for our indigent to be able to be let out of jail and be with their families."[38] Presiding Judge of the felony courts, defendant judge Brandon Birmingham, recently proposed an amendment to the Texas constitution that would ensure that people are not "in jail awaiting trial simply because they are poor."[39] And Ron Stretcher, the County's Criminal Justice Director, has stated that detaining arrestees who cannot afford money bail amounts imposed automatically is "a really bad use of our resources."[40] These public comments reflect a consensus that what is happening to poor people in the Dallas County jail is intolerable. There is no serious dispute that a preliminary injunction is in the public interest.

VII. Conclusion

A preliminary injunction is necessary in this case. The legal standard for deciding Plaintiffs' motion is not whether, eventually (*i.e.* after the "dust" "settle[s]," Dkt. 32 at 16), Defendants might stop violating the rights of thousands of impoverished arrestees every day. The legal standard asks whether the moving party is likely to succeed on the merits, whether the balance of harms favors relief, and where the public interest lies. Plaintiffs are overwhelmingly likely to succeed on the merits, as most of the merits are not contested. And Defendants' unsupported rhetoric concerning the balance of the harms cannot justify keeping thousands of people in the

[37] Jolie McCullough, *Poor Inmates Sue Dallas County Over Bail System Following Harris County Ruling*, Tex. Trib. (Jan. 22, 2018), https://www.texastribune.org/2018/01/22/following-harris-county-ruling-poor-inmates-sue-dallas-county-over-bai.

[38] *Dallas County Calling For Changes to Bail Bond System*, Fox4 News (May 16, 2017), http://www.fox4news.com/news/dallas-county-calling-for-changes-to-bail-bond-system.

[39] Brandon Birmingham, *Guest Op-ed: It is Time to Fix the Texas Bail System*, North Dallas Gazette (Feb. 15, 2018), https://northdallasgazette.com/2018/02/15/guest-op-ed-time-fix-texas-bail-system.

[40] Naomi Martin, *Dallas County officials pledge reforms after News' investigation into high bonds for nonviolent offenders* (Jan. 2017), Dallas News, https://www.dallasnews.com/news/dallas-county/2017/01/03/dallas-county-officials-pledge-reforms-news-investigation-high-bonds-nonviolent-defendants.

Dallas County jail solely because they cannot make a payment. At an evidentiary hearing on this motion, Plaintiffs will demonstrate that Defendants' wealth-based post-arrest system does nothing to advance any government interest, and that it devastates the lives of many human beings and their families on a daily basis.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April, 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. The Clerk of Court will transmit a Notice of Electronic Filing to all ECF registrants in this lawsuit.

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