IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARANDA LYNN ODONNELL, On behalf of herself and all others similarly situated, Plaintiffs, v. HARRIS COUNTY, TEXAS, SHERIFF RON HICKMAN, ERIC STEWART HAGSTETTE, JOSEPH LICATA III, RONALD NICHOLAS, BLANCA ESTELA VILLAGOMEZ, JILL WALLACE, Defendants.	Case No. 4:16-cv-1414 **Expedited Hearing Requested** (Class Action)

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The named Plaintiff, Maranda Lynn ODonnell, is an impoverished person arrested for a misdemeanor offense of driving with an invalid license. She is currently being held in a jail cell solely because she cannot pay what to other people is a small sum of money. Like many other presumptively innocent people arrested by Harris County and charged with the same offenses every day, she could walk out of the Harris County Jail immediately if only she could afford to pay the predetermined amount.

The Supreme Court has repeatedly articulated the fundamental principle that no person can be kept in a jail cell solely because of her poverty. Although that rule has been applied directly to the issue presented in this case by federal and state courts, the principle is so utterly ignored by local Harris County officials that the jailing of people because they cannot pay a predetermined sum of money to secure their release is a daily routine in Harris County.

The results are devastating. Presumptively innocent people languish in the Harris County Jail in deplorable conditions without any determination that they pose any risk to society. Every year, an average of nine human beings die in the Harris County Jail before they can pay their money bail or contest their case at trial.

Keeping the poor in jail cells because they cannot pay a predetermined sum of money without any inquiry into or findings concerning their ability to pay violates longstanding and fundamental principles of American law. As described in detail below, the scheme enforced by Harris County has been rejected by the courts and by every major panel of legal experts to study the issue over the past fifty years.

Because the named Plaintiff is — and because many others in her situation will continue to be — subjected to imminent jailing solely by virtue of the amount of money that they and their families have, Plaintiff respectfully requests that this Court hold an expedited hearing on this Motion. Following that hearing, this Court should issue a temporary restraining order to protect the rights of the named plaintiff and, after appropriate proceedings, a preliminary injunction preventing the continuation of Harris County's wealth-based post-arrest detention scheme. The Court should require an inquiry into and findings concerning an arrestee's ability to pay before imposing a financial condition on an arrestee's pretrial release. The practice of jailing

individuals unable to pay a monetary sum without inquiry into or findings concerning their ability to pay has no place in a legal system committed to equal justice.

STATEMENT OF FACTS

I. Background

The facts of this case are similar to the facts at issue nearly four decades ago, when the Fifth Circuit condemned the jailing of indigent arrestees solely because they could not make small cash payments. *See Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (*en banc*). They are materially identical to the schemes declared unconstitutional by numerous federal courts over the past year in Alabama, Mississippi, Louisiana, Missouri, Tennessee, Kansas, and Georgia. *Walker v. City of Calhoun*, --- F. Supp. 3d ---, 2016 WL 361612 (N.D. Ga. Jan. 28, 2016) (granting class-wide preliminary injunction to stop the use of money bond to detain new arrestees without an inquiry into the arrestee's ability to pay); *Rodriguez v. Providence Community Corrections, Inc.*, --- F. Supp. 3d ---, 2015 WL 9239821 (M.D. Tenn. 2015) (granting class-wide preliminary injunction to stop the use of money bond to detain misdemeanor probationers without an inquiry into the arrestee's ability to pay); *Cooper v. City of Dothan*, 2015 WL 10013003 (M.D. Ala. 2015) (issuing Temporary Restraining Order and holding that the practice of requiring secured money bond without an inquiry into ability to pay violates the Fourteenth Amendment); *Snow v. Lambert*, 2015 WL 5071981 (M.D. La. 2015) (issuing a Temporary Restraining Order and holding that the Plaintiff was likely to succeed on the merits of her claim that Ascension Parish's money bail schedule violated due process and equal protection); *Jones on behalf of Varden v. City of Clanton*, 2015 WL 5387219 (M.D. Ala. 2015) (declaring secured money bond unconstitutional without an inquiry into ability to pay); *Thompson v. City of Moss Point*, 2015 WL 10322003 (S.D. Miss. 2015) (same); *Pierce et al. v.*

City of Velda City, 2015 WL 10013006 (E.D. Mo. 2015) (issuing a declaratory judgment that the use of a secured bail schedule is unconstitutional as applied to the indigent and enjoining its operation). *See* Exhibits 1–5.

The Harris County approach to post-arrest procedures has also been condemned by the United States Department of Justice in a recent federal court case challenging the same practices. *See* Exhibit 6, United States Department of Justice, Statement of Interest, *Jones on behalf of Varden v. City of Clanton*, 15-cv-34 (M.D. Ala. 2015) (arguing on behalf of the United States government that the use of secured monetary bail schedules to keep indigent arrestees in jail "not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy."). As described below, the same illegalities rejected by these courts and the United States Government pervade Harris County's treatment of the poor every day.

A. The Named Plaintiff

Maranda Lynn ODonnell is a 22-year-old woman. Ms. ODonnell was arrested on May 18, 2016, and taken into the custody of Harris County for allegedly driving while her license was invalid. She was informed that, because of the Harris County bail schedule, she would be released immediately, but only if she paid a money bail of $2,500. She was told that she will be detained by Harris County if she does not pay. *See* Doc. 1-1, Declaration of Maranda Lynn ODonnell.

Ms. ODonnell appeared by video from the jail at a probable cause hearing, and a hearing officer found probable cause for her arrest. She was told by Harris County Sheriffs Deputies not to speak at the hearing. The hearing lasted approximately 60 seconds and, pursuant to the policies and practices described in this Complaint, no inquiry was made into her ability to pay.

Id. The predetermined money bail amount required by the Harris County bail schedule was confirmed to be $2,500. *Id*.

Ms. ODonnell is the mother of a 4-year-old child. She and her child struggle to meet the basic necessities of life. *Id.* She receives benefits from the federal government's Women, Infants, and Children (WIC) program to help meet the nutritional needs of her daughter. *Id.* Because she cannot afford shelter, she stays with a friend. She obtained a job as a waitress within the past few weeks, but she is unsure if her current jailing will cause her to lose that job. *Id*.

B. Harris County's Arrest and Detention Policies and Practices

The relevant Harris County policies and practices are simple. When police effect a warrantless arrest of a person for a misdemeanor offense in Harris County, they take the person into custody and place a call to a hotline that is staffed by assistant district attorneys. The police officer describes the basis of the arrest to the prosecutor on duty who decides whether to pursue charges. If no charges are to be filed, the arrestee is released. If the prosecutor decides to pursue charges, law enforcement imposes money bail pursuant to a schedule. *See* Doc. 1-2. If the arrestee can pay the money bail immediately, she is released, without ever being admitted into the jail. If she cannot pay, she is booked into the jail. *See generally* Exhibit 7, Declaration of Salil Dudani.

Individuals who are arrested pursuant to warrants are subjected to a similar practice. In these cases, the district attorney again makes a charging decision on the basis of allegations by a police officer or another complainant and imposes money bail according to the schedule. The money bail amount is written on the warrant. *Id.* A judicial officer makes a finding of probable cause based on the allegations in the warrant and then signs the warrant. As a matter of policy,

the judicial officer imposes the money bail required by the schedule. Thus, when a person is arrested for a misdemeanor offense, pursuant to a warrant or a warrantless arrest, that person can pay the amount of money determined by the bail schedule and be released immediately.[1] If the person cannot pay the amount of money required, she is booked into the Harris County Jail.[2]

Many of Harris County's arrestees are released almost immediately when they post these small amounts of money. The rest are left to languish in jail until their next court date, or until they or their families produce enough money at some point in the intervening period. Every day, hundreds of people are booked into the jail[3] and detained because they are unable to purchase their freedom.

The Harris County Sheriff's Department, through its jail personnel, assembles groups of roughly 20 to 45 people, many of whom were arrested for minor misdemeanors, throughout the day. Generally within 24 hours of arrest, those arrestees appear via videolink before one of five hearing officers. The hearing officer determines probable cause and ensures that the bail amount

[1] Those able to pay that amount of money can avoid arrest on the warrant altogether by paying in advance.

[2] The vast majority of arrestees use a bail bond agent to secure their release from jail. Typically, if accepted by a for-profit bail agent, an arrestee will have to pay the for-profit agent a non-refundable fee of 10 percent of the value of the bond to be released, though the industry standard for a $500 money bail is $150. In 2012, the for-profit bail bond industry in Harris County collected at least $34.4 million dollars in fees. *See* Gerald R. Wheeler & Gerald Fry, Project Orange Jumpsuit Report #2, *Harris County's Two-Tier Justice System: Longitudinal Study of Effects of Harris County Felony and Misdemeanor Defendants' Legal & Extralegal Attributes on Pretrial Status and Case Outcome* (Apr. 23, 2014) at 4, available at http://www.pretrial.org/download/research/Harris%20County's%20Two-tier%20Justice%20System%20(Project%20Orange%20Jumpsuit)%20-%20Wheeler%20and%20Fry%202014.pdf [Wheeler & Fry, Report #2]; Michael Barajas, *Will Lawmakers Reform the System That Keeps Poor, Legally Innocent People in Lockup?* (Sept. 25, 2015), available at http://www.houstonpress.com/news/will-lawmakers-reform-the-system-that-keeps-poor-legally-innocent-people-in-lockup-7788583 (quoting bondsman saying that being poor raises a red flag).

[3] Sarah R. Guidry, et al., *A Blueprint for Criminal Justice Policy Solutions in Harris County* at 9, http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2015/ls_sclaid_summit_03_tcjc_2015_harris_county_blueprint.authcheckdam.pdf [ABA Report]; Harris County Pretrial Services, 2014 Annual Report (2014) at 3, available at http://www.harriscountytx.gov/CmpDocuments/59/Annual%20Reports/2014%20Annual%20Report.pdf (stating that 52,506 people whose most serious charge was a misdemeanor were admitted to the jail in 2013). [Pretrial Services 2014 Report].

imposed by the district attorney conforms to the bail schedule. These hearings are referred to locally as "magistrations," "Article 15.17. hearings," or "probable cause hearings." *See* Ex. 7.

The County strives to hold these hearings within 24 hours of arrest. However, the length of time between arrest and probable cause hearing depends on how long the Sheriff's booking process takes and the number of arrestees. On occasion, the hearings do not take place within 24 hours of arrest. At any point in the booking process, the arrestee can pay his or her predetermined money bail and be released. If a person pays before a probable cause determination, that determination in her case will be made at a subsequent court appearance.

An assistant district attorney participates in the probable cause hearings by arguing for the hearing officer to make a finding of probable cause and sometimes asking the hearing officer to impose bail in an amount higher than the amount on the schedule or on the warrant. One prosecutor stated recently at a probable cause hearing that, pursuant to Harris County's bail schedule scheme, if an arrestee "can't pay, they sit in jail." The County does not provide defense attorneys at the probable cause hearing.

When the videolink is turned on, arrestees appear on a television screen, sitting in rows of chairs in a room at the jail. The hearing officer, who is in a courtroom in the courthouse, calls an individual's name and reads the charge. That individual gets up and stands in the middle of a red square on the floor of the room in the jail. An assistant district attorney then reads from the complaint. The hearing officer decides whether there is probable cause, finding probable cause in almost every case, and, almost always, sets bail according to the schedule. Sometimes the hearing officer increases the money bail. The hearings last approximately one minute as a matter of routine. *See generally* Exhibit 7; *see also* Doc. 1-1.

Hearing officers make no attempt to determine an arrestee's financial situation, and they make no inquiry into or findings concerning an arrestee's ability to pay the money bail amount they impose pursuant to the bail schedule. In no case is a money bail set with reference to an arrestee's ability to pay. *See* Exhibit 7.

In addition to making no affirmative inquiry into or findings concerning ability to pay, hearing officers affirmatively refuse as a matter of policy and practice to hear any argument that an arrestee raises about her ability to pay. If an arrestee tells the hearing officer that she cannot pay the money bail, the hearing officer tells the arrestee that the reduction of money bail from the schedule is not the purpose of that hearing and that the arrestee should have her attorney raise the issue with the County Judge handling her case at her first court date after an attorney is assigned. As one hearing officer explained, probable cause hearings are "not the forum" for discussing a person's ability to pay money bail or raising any related issues, and hearing officers believe such questions must be addressed in an adversarial setting after appointment of counsel.

Pursuant to policy and practice, it is not possible for arrestees to challenge the constitutionality of their money bail before the hearing officer. Hearing officers determining the question of probable cause refuse to consider deviation from the bail schedule based on indigence and refuse to hear evidence concerning ability to pay. In almost all cases, the hearing officer affirms the money bail that the district attorney set pursuant to the bail schedule.[4] If, however, the district attorney erred in setting the money bail (i.e. the monetary amount did not conform to the bail schedule), the hearing officer will alter the money bail — by raising or lowering the bail — so that it meets the schedule and satisfies individual court judges' instructions.

[4] Meagan Flynn, *Bail Hearings: Where Prosecutors and Magistrates Ensure Defenseless People Stay In Jail* (Jan. 11, 2016), available at http://www.houstonpress.com/news/bail-hearings-where-prosecutors-and-magistrates-ensure-defenseless-people-stay-in-jail-8058308

In Harris County, money bail is imposed based solely on the alleged offense and the person's criminal history and without reference to a person's ability to pay, resulting in the detention of arrestees based on their poverty. Doc. 1-2. These practices have resulted in the confinement of named Plaintiff Maranda Lynn ODonnell without any inquiry into or findings concerning her ability to pay.

In contrast to Harris County, many American jurisdictions do not keep people in jail on minor offenses because of their poverty. Instead, many other jurisdictions release arrestees with an unsecured bond, on their own recognizance, or with tailored non-financial conditions of release. In jurisdictions where arrestees are released on unsecured bond, the person promises to pay the scheduled amount of money if the person fails to appear in court. When a person is released on her own recognizance, she promises to appear for court, usually on penalty of an additional criminal charge for Failure to Appear. In many places, each of these options is supplemented by the person's agreement to other reasonable conditions of release. In none of these situations, however, is a person kept in a jail cell solely because she cannot afford a sum of money.

ARGUMENT

A preliminary injunction is warranted if the movant demonstrates: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011); *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). The named Plaintiff easily satisfies each of these requirements.

I. Plaintiff Is Highly Likely to Succeed on the Merits Because the Defendants' Conduct Violates Basic Equal Protection and Due Process Law

The constitutional principles at issue in this case are well-established. The Fifth Circuit long ago identified the basic equal protection violation when reviewing Florida's post-arrest detention procedures: "At the outset we accept the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (*en banc*). *See Walker*, 2016 WL 361612 (granting class-wide preliminary injunction to stop the use of money bond to detain new arrestees without an inquiry into the arrestee's ability to pay); *Rodriguez*, 2015 WL 9239821 (granting class-wide preliminary injunction to stop the use of money bond to detain misdemeanor probationers without an inquiry into the arrestee's ability to pay).

A. The Constitution Prohibits Keeping a Person in Jail Solely Because the Person's Poverty Renders Him Unable to Afford a Monetary Payment

The rule that poverty and wealth status have no place in deciding whether a human being should be kept in a jail cell embodies some of the most fundamental principles in American law. *See Williams v. Illinois*, 399 U.S. 235, 241 (1970) ("[T]he Court has had frequent occasion to reaffirm allegiance to the basic command that justice be applied equally to all persons."). In *Griffin v. Illinois*, 351 U.S. 12, 19 (1956), the Court stated this principle in its simplest form: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." In *Douglas v. California*, 372 U.S. 353, 355 (1963), the Court applied this principle to an indigent person's appeal: "For there can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has."

These principles have been applied in a variety of contexts where the government has sought to keep a person in jail solely because of the person's inability to make a monetary payment. *See, e.g., Tate v. Short*, 401 U.S. 395, 398 (1971) ("[T]he Constitution prohibits the

State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."). In *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983), the Supreme Court explained that to "deprive [a] probationer of his conditional freedom simply because, through no fault of his own he cannot pay [a] fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment." For this reason, the Court held that a necessary pre-condition for a state to jail an individual for non-payment is an inquiry into that person's ability to pay. *Id*. at 672.

In *Williams*, 399 U.S. 235, the Supreme Court explained:

> But, as we said in Griffin, a law nondiscriminatory on its face may be grossly discriminatory in its operation. Here the Illinois statute[] as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds. Since only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment . . . . By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.

Id. at 242 (citation and quotation omitted). The holdings of *Bearden*, *Tate*, and *Williams* establish a maxim at the core of the American justice system: an individual cannot be jailed solely because she cannot make a monetary payment.

Relying on this Supreme Court precedent, it has long been the law of this Circuit that any kind of pay-or-jail scheme is unconstitutional when it operates to jail the poor. In *Frazier v. Jordan*, 457 F.2d 726, 728–29 (5th Cir. 1972), the court found that an alternative sentencing scheme of $17 dollars or 13 days in jail was unconstitutional as applied to those who could not immediately afford the fine. Because those people would be sent to jail if they could not pay the

$17 fine, the local court's order of imprisonment was unconstitutional. *Id*. at 728. Put simply, *Frazier* condemned the municipal court scheme because it created a system in which "[t]hose with means avoid imprisonment [but] the indigent cannot escape imprisonment." *Id.*; *see also Barnett v. Hopper*, 548 F.2d 550, 554 (5th Cir. 1977) ("To imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws."), vacated as moot, 439 U.S. 1041 (1978); *United States v. Hines*, 88 F.3d 661, 664 (8th Cir. 1996) ("A defendant may not constitutionally be incarcerated solely because he cannot pay a fine through no fault of his own."); *United States v. Estrada de Castillo*, 549 F.2d 583, 586 (9th Cir. 1976) ("[I]f a defendant, because of his financial inability to pay a fine, will be imprisoned longer than someone who has the ability to pay the fine, then the sentence is invalid.").

The court in *United States v. Flowers*, 946 F. Supp. 2d 1295 (M.D. Ala. 2013), was confronted with an analogous situation: a criminal defendant faced imprisonment because she could not afford the cost of release on home confinement monitoring. The court found — as the U.S. government conceded, *id*. at 1301 — that keeping a person in jail solely because she could not afford to pay for home confinement monitoring would be "wrong" and that "the Constitution's guarantee of equal protection is inhospitable to the Probation Department's policy of making monitored home confinement available to only those who can pay for it." *Id*. at 1302.

In *Flowers*, the court began by acknowledging that "the principle that wealth and poverty have no place in sentencing decisions is nothing new." *Id.* The court held that it could not put a person in jail simply because the person could not afford the cost of electronic monitoring services. *Id.* at 1301. The court recounted the fundamental federal precedent from a variety of contexts, explaining that, just as "it violates the Constitution's guarantee of equal protection

under the laws to convert a fine-only sentence into a prison term based on inability to pay," it would also violate the Constitution to turn a sentence of electronic monitoring into a jail sentence simply because the defendant could not afford to pay for the service. *Id*. at 1300.[5]

If poverty status has no place in determining sentencing outcomes, it has no place in pretrial release decisions. Just as it is unlawful to put a convicted person in jail because of his inability to make a monetary payment, it is unlawful to put a presumptively innocent person in jail for the same reason. *Rainwater*, 572 F.2d at 1057; *see generally* Exhibit 6, DOJ Statement of Interest. The fundamental principles in *Bearden*, *Williams*, and *Flowers* thus apply equally to pretrial and post-trial confinement. In other words, the analysis in *Flowers* would have been the same if the question was whether to jail an *innocent* defendant *prior to trial* simply because he could not afford the U.S. Probation Department's *pretrial* electronic monitoring services.[6]

In the context of pretrial arrestees, the rights at stake are even more significant because their liberty is not diminished by criminal conviction — they are presumed innocent. Justice Douglas, writing at the onset of the successful movement to rid the federal courts of the use of the kind of poverty jailing now prevalent in Harris County, famously set forth the fundamental

[5] As *Flowers* described the basic violation: "[A] defendant identical to Flowers but with a thicker billfold would receive home confinement, while Flowers would receive prison." *Id*. at 1301. Other federal district courts have consistently enforced these fundamental principles. *See, e.g.*, *United States v. Waldron*, 306 F. Supp. 2d 623, 629 (M.D. La. 2004) ("It is well established that our law does not permit the revocation of probation for a defendant's failure to pay the amount of fines if that defendant is indigent or otherwise unable to pay. In other words, the government may not imprison a person solely because he lacked the resources to pay a fine."); *De Luna v. Hidalgo County*, 853 F. Supp. 2d 623, 647-48 (S.D. Tex. 2012) ("[T]he Court finds that … before a person charged with a … fine-only offense may be incarcerated by Hidalgo County for the failure to pay assessed fines and costs, this deprivation of liberty must be preceded by some form of process that allows for a determination as to whether the person is indigent and has made a good faith effort to discharge the fines, and whether alternatives to incarceration are available."); *Brown v. McNeil*, 591 F. Supp. 2d 1245, 1260 (M.D. Fla. 2008) (granting federal habeas petition because "Petitioner did not have the ability to remain current with his supervision payments given his other financial obligations at the time," which meant that state's revocation of his conditional release constituted "an unreasonable application of clearly established federal law.").

[6] For example, if a federal magistrate judge began telling all destitute defendants at initial misdemeanor appearances in the Southern District of Texas that they would be jailed unless they could pay $100 cash, this Court would reverse such an order immediately.

question: "To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. . . . Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?" *Bandy v. United States*, 81 S. Ct. 197, 197-98 (1960).

This is the question that the former Fifth Circuit answered in *Rainwater*. The panel opinion, *Pugh v. Rainwater*, 557 F.2d 1189, 1190 (5th Cir. 1977), had struck down the Florida Rule of Criminal Procedure dealing with money bail because it is unconstitutional to keep an indigent person in jail prior to trial solely because of the person's inability to make a monetary payment. The *en banc* court agreed with the constitutional holding of the panel opinion but reversed the panel's facial invalidation of the *entire* Florida Rule. *Rainwater*, 572 F.2d at 1057.

Rainwater's reasoning is easy to understand and dispositive of this case. The *en banc* court held that the Florida Rule itself did not require on its face the setting of monetary bail for arrestees and explained that, if such a thing were to happen to an indigent person, it would be unconstitutional. In other words, the court held that the Florida courts could not be expected to enforce the new Rule — which had been amended during the litigation in that case — in a manner that violated the Constitution by requiring monetary payments to secure the release of an indigent person. The Fifth Circuit explained the binding constitutional principles at stake:

> We have no doubt that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint. We do not read the State of Florida's new rule to require such a result.

Id. at 1058.[7] Summing up its reasoning, the *en banc* court held: "The incarceration of those who cannot [afford a cash payment], without meaningful consideration of other possible alternatives,

[7] *Rainwater* further explained that it refused to require that priority be given in all cases — including those of the non-indigent — to non-monetary conditions of release. The court noted that, at least for wealthier people, some

infringes on both due process and equal protection requirements."[8] *Id*. at 1057; *see also, e.g.*, *Williams v. Farrior*, 626 F. Supp. 983, 985 (S.D. Miss. 1986) ("For the purposes of the Fourteenth Amendment's Equal Protection Clause, it is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainee infringes on both equal protection and due process requirements.").

Harris County's scheme does exactly what *Rainwater* and the entire line of precedent on which it relied rejects: it prescribes jail for those who cannot afford to pay the County and reserves freedom for those who can. In no case is an indigent arrestee offered an alternative to posting an immediate payment. The County (and the State of Texas) has determined that people accused of minor misdemeanor offenses (like the Plaintiff and other Class members) are eligible for immediate release after arrest. The County cannot make exercising the right to freedom contingent solely on the ability to pay. *Cf. Bearden*, 461 U.S. at 667-68 (holding that "if [a] State determines a fine or restitution to be the appropriate and adequate penalty for [a] crime, it may not thereafter imprison a person solely because he lacked the resources to pay it")*; see also Walker*, 2016 WL 361612 (granting class-wide preliminary injunction to stop the use of money bond to detain new arrestees without an inquiry into the arrestee's ability to pay); *Rodriguez*, 2015 WL 9239821 (granting class-wide preliminary injunction to stop the use of money bond to detain misdemeanor probationers without an inquiry into the arrestee's ability to pay); *Cooper*, 2015 WL 10013003 (issuing Temporary Restraining Order and holding that the practice of

might actually prefer monetary bail over release with certain other conditions, and that the court would not invalidate a state Rule that allowed for those other conditions in appropriate cases. *Id*. at 1057.

[8] Four circuit judges wrote a powerful dissent in *Rainwater*. Although they agreed with the constitutional principles announced by the majority that the Constitution forbids jailing the poor when they cannot afford monetary bail, they were concerned about the majority's faith in the Florida courts not to apply the new state Rule in unconstitutional ways to detain the indigent. *Id*. at 1067 ("I cannot escape the conclusion that the majority has chosen too frail a vessel for such a ponderous cargo of human rights.") (Simpson, J., Dissenting).

requiring secured money bond without an inquiry into ability to pay violates the Fourteenth Amendment); *Jones on behalf of Varden*, 2015 WL 5387219 (declaring secured money bond unconstitutional without an inquiry into ability to pay); *Thompson*, 2015 WL 10322003 (same); *Piece*, 2015 WL 10013006 (issuing a declaratory judgment that the use of a secured bail schedule is unconstitutional as applied to the indigent and enjoining its operation; "If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond."); *Snow*, 2015 WL 5071981 (issuing a Temporary Restraining Order and holding that the Plaintiff was likely to succeed on the merits of her claim that Ascension Parish's money bail schedule violated due process and equal protection); Exhibit 6, DOJ Statement of Interest (arguing that the use of secured monetary bail schedules to keep indigent arrestees in jail "not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy.").

Harris County's money-based detention scheme has also been rejected by state courts. In *State v. Blake*, 642 So. 2d 959, 968 (Ala. 1994), the Alabama Supreme Court struck down a state statute that allowed for indigent arrestees to be held for 72 hours solely because they could not afford monetary payments to secure their release prior to their first appearance. The Court held:

> [A]n indigent defendant charged with a relatively minor misdemeanor who cannot obtain release by cash bail, a bail bond, or property bail, must remain incarcerated for a minimum of three days, and perhaps longer, before being able to obtain [recognizance release]. *We conclude that, as written, article VII of the Act violates an indigent defendant's equal protection rights guaranteed by the United States Constitution, because the classification system it imposes is not rationally related to a legitimate governmental objective.*

Id (emphasis added) (quotations removed).[9] In *Blake*, the lower court had expressed outrage at the system of detention based on poverty that prevailed in Alabama at the time:

> The pretrial detention of this defendant accused of a misdemeanor for possibly five or six days because of defendant's lack of resources interferes with the right of liberty, the premise of innocent until proven guilty, and *shocks the conscience of this court*. If this defendant has $60 cash to pay a bondsman, he walks out of the jail as soon as he is printed and photographed …. Absent property or money, the defendant must wait 72 hours…. *Putting liberty on a cash basis was never intended by the founding fathers as the basis for release pending trial.*

Id. at 966 (emphases added). The Mississippi Supreme Court long ago condemned the jailing of the poor based on inability to pay secured monetary bail. *See, e.g., Lee v. Lawson*, 375 So. 2d 1019, 1023 (Miss. 1979) ("A consideration of the equal protection and due process rights of indigent pretrial detainees leads us to the inescapable conclusion that a bail system based on monetary bail alone would be unconstitutional."). In *Lawson*, the court explained that Mississippi law provided for release without payment of money and that, following the American Bar Association Standards, Mississippi courts should adopt a presumption of release on recognizance (at least in cases not involving "violent or heinous crimes"). *Id.* ("There is incorporated in these standards a presumption that a defendant is entitled to be released on order

[9] *Blake* struck down the scheme holding indigent defendants on small cash bonds for at least 72 hours under even rational basis review. *Blake* inappropriately applied rational basis review even after correctly stating the legal rule that strict scrutiny must be applied to any government action that deprives a person of a fundamental right. The panel decision in *Rainwater*, therefore, was correct in its determination that jailing a person — and depriving her of the *most fundamental* right to liberty, requires that strict scrutiny be applied. *See United States v. Salerno*, 481 U.S. 739, 750 (1987) (recognizing "fundamental nature of this right" to pretrial liberty and applying heightened scrutiny to pretrial detention scheme); *United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990) (holding that release prior to trial is a "vital liberty interest"); *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) ("[A] statutory classification based upon suspect criteria or affecting 'fundamental rights' will encounter equal protection difficulties unless justified by a compelling governmental interest."); *see also, e.g., Williams v. Farrior*, 626 F. Supp. 983, 986 (S.D. Miss. 1986) (holding that a state's pretrial detention scheme must meet "strict judicial scrutiny" because of the fundamental rights at issue); *Carlisile v. Desoto County., Mississippi*, 2010 WL 3894114, at *5 (N.D. Miss. Sept. 30, 2010) (holding that because a "compelling interest" was required for pretrial detention, the plaintiff's rights were violated if he was jailed without a consideration of non-financial alternatives); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) (*en banc*) (applying strict scrutiny to strike down Arizona law that required detention after arrest without individualized consideration of an arrestee's circumstances).

The difference is immaterial here, though, because the Alabama courts correctly held that jailing indigent people who are otherwise deemed eligible for release solely because they cannot make small payments is not even rationally related to a legitimate government objective, let alone necessary to achieve a compelling one.

to appear or on his own recognizance."). The court declared that this presumption of non-monetary release "will go far toward the goal of equal justice under law." *Id*. at 1024.[10]

The Supreme Court's most recent case on wealth-based detention emphasizes the importance of a rigorous inquiry into ability to pay before jailing a person for failing to meet a financial condition. In *Turner v. Rogers*, 131 S. Ct. 2507, 2519–20 (2011), the Court described the procedural requirements that must be followed if a government attempts to jail a person who has not made a required payment. *Turner* held that South Carolina's incarceration of a man for not paying child support was unconstitutional because the court had imprisoned him without an inquiry into his ability to pay. *Id*. at 2520. Whether in the context of the final revocation proceeding in *Bearden*, the contempt proceedings in *Turner*, or the post-arrest, pre-trial detention in this case, the Court explained the basic protections that a government must provide before jailing a person for non-payment:

> Those safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the . . . proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.

Id. at 2519. The Court held that Turner's imprisonment was unconstitutional because the South Carolina court did not comply with the procedures that were essential to "fundamental fairness." *Id*. at 2520. In the same way, if the court in Harris County orders an arrestee's release but conditions that release on a monetary payment, the judge must make an inquiry and "an express finding" that "the defendant has the ability to pay." *Id*. at 2519. Otherwise, the order of release

[10] *See also, e.g.*, *Robertson v. Goldman*, 369 S.E.2d 888, 891 (W.Va. 1988) ("[W]e have previously observed in a case involving a "peace bond," which we said was analogous to a bail bond, that if the appellant was placed in jail because he was an indigent and could not furnish [bond] while a person who is not an indigent can avoid being placed in jail by merely furnishing the bond required, he has been denied equal protection of the law.") (internal quotes removed).

would be converted into an order of detention for an indigent person.

The County's only conceivable interest in requiring a person to post money bail is to achieve the societal benefits of pre-trial release while also giving the arrestee incentive to return to court. But if the monetary amount is more than the person can pay and results in detention, how can it further this governmental interest? A person stuck in detention will never be in a position in which that incentive could operate. Setting a condition of release that is a physical impossibility for the arrestee to meet therefore furthers no governmental interest, let alone a compelling one.

In *Bearden*, the Supreme Court explained that it would be difficult ever to find a legitimate state reason for jailing a person when she could not pay. In the post-conviction context, the Court explained that the state's interest in "ensuring that restitution be paid to the victims" is insufficient, because "[r]evoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming." *Bearden*, 461 U.S. at 670. Similarly, the State's interest in removing the defendant "from the temptation of committing other crimes" in order to protect society and rehabilitate him is also insufficient, as this would amount to "little more than punishing a person for his poverty." *Id*. at 671. Finally, although the state's interest in punishment and deterrence of others is a valid interest, it can be "served fully by alternative means." *Id*. at 671–72. Indeed, if a person is unable to pay through no fault of her own, she is not deserving of punishment for not paying, and punishing her has no deterrent effect because the non-payment was not intentional. In the pre-trial context, the only valid interest in a money bond is assuring future appearance after release. By definition, that interest cannot be served through a sum greater than the person can afford.

There is nothing wrong, of course, with the concept of giving an already released person

an additional financial incentive to appear. As the federal Bail Reform Act contemplates, when a person can afford to pay a sum, the thought of later losing that money for nonappearance might create an additional incentive for a released person to appear. But when the amount is set without a finding that the person can pay — and it operates to detain a person simply because the person cannot afford to make the payment through which that incentive to return would have been created — then it fails to serve any legitimate interest. Without that finding, a court cannot be sure that it has not imposed "a financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(2).

Nearly forty years after *Rainwater*, these basic principles are being ignored by Harris County every day. While some arrestees in Harris County hand money to County employees and are released immediately, poor arrestees charged with the same offenses languish in a crowded jail. No one has even bothered to inquire into their ability to pay, let alone made the required findings on that issue. A county-wide system that jails the poor and frees the rich for no reason other than their wealth is not a system consistent with the "fundamental fairness," *Bearden*, 461 U.S. at 673, enshrined in the Fourteenth Amendment.

B. Harris County Has Simple, Constitutional Alternatives to Jailing the Poor

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).[11] All over

[11] In evaluating the federal Bail Reform Act, which authorized pretrial detention only for people charged with "serious felonies," under its heightened scrutiny test for fundamental rights, the Supreme Court found that the federal statute survived because it addressed a "compelling" and "overwhelming" interest of preventing additional pretrial criminal activity by operating "only on individuals who have been arrested for a specific category of extremely serious offenses" and who "Congress specifically found" to be especially dangerous and to pose a "particularly acute problem." *Salerno*, 481 U.S. at 750; *id.* at 747 ("The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes."). Moreover, the Court relied on the numerous aspects of the federal law that made it narrowly tailored, such as that, even as applied only to the most serious federal offenses, it required "a full-blown adversarial hearing," the representation of counsel, and a heightened evidentiary burden of proof, *id.* at 742, 750, before a person could be held in custody prior to trial. The

the country, in the area of post-arrest procedure, jurisdictions have taken this constitutional obligation seriously and instituted simple alternatives to the odious system of jailing the poor and freeing the rich. For example, in Washington, D.C., arrestees are released on recognizance with appropriate non-financial conditions. *See* D.C. Code § 23-1321. In Clanton, Alabama, after being confronted with a similar federal suit in January 2015, the city adopted a new policy of releasing all arrestees on a $500 unsecured recognizance bond, allowing every new arrestee to be released on the promise to pay that amount should the person later fail to appear. *See Jones on behalf of Varden*, 2015 WL 5387219. Similarly, in April 2015, after being confronted with a federal suit, Velda City, Missouri, ended its use of secured bail and implemented a system of recognizance release for all new arrestees. *Pierce*, 2015 WL 10013006. In so doing, Clanton and Velda City joined many other cities and counties in following the advice of the *en banc* Fifth Circuit court in *Rainwater*: "Systems which incorporate a presumption favoring personal recognizance avoid much of the difficulty inherent in the entire subject area." *Rainwater*, 572 F.2d at 1057.[12] *See Walker*, 2016 WL 361612; *Rodriguez*, 2015 WL 9239821; *Cooper*, 2015 WL 10013003; *Thompson*, 2015 WL 10322003; *Snow*, 2015 WL 5071981. Harris County could cure the illegality at the core of this case simply by allowing misdemeanor arrestees to sign unsecured bonds in the same monetary amounts that it currently uses or by releasing them on their own recognizance under penalty of a new charge for failure to appear.

Court ultimately upheld the law because "Congress' careful delineation" required an individualized finding that a particular "arrestee presents an identified and articulable threat to an individual or the community." *Id*. at 751.

[12] The *en banc* court in *Rainwater* also cited favorably to overwhelming academic authority outlining the unconstitutionality of generic bail schedules, calling the academic consensus "convincing." *Rainwater*, 572 F.2d at 1056 ("The punitive and heavily burdensome nature of pretrial confinement has been the subject of convincing commentary.").

In Washington, D.C. and many other cities around the United States,[13] chaos has not ensued by following *Rainwater*'s guidance and relying on recognizance or unsecured bond. Some areas have chosen to supplement release on recognizance or unsecured bond with standard conditions of release that place additional non-financial obligations on arrestees. Harris County is free to choose reasonable measures among these options without offending the Fourteenth Amendment, but Harris County's poverty-based post-arrest detention scheme makes a mockery of the "carefully limited" circumstances, *Salerno*, 481 U.S. at 755, in which continued detention of a presumptively innocent arrestee is allowed.

Like the courts of this Circuit, other federal courts, and the Department of Justice, the American Bar Association's seminal Standards for Criminal Justice condemn Harris County's policies as having no place in American law. *American Bar Association Standards for Criminal Justice – Pretrial Release* (3rd ed. 2007) ("ABA Standards").[14] The ABA recently reaffirmed its opposition to secured money bail schedules, stating that, "Under our system of justice, the right of any individual to liberty, as well as the right to mount an effective defense to criminal charges, should not depend on that person's ability to pay."[15] The ABA Standards, which have been

[13] The federal government and the District of Columbia both removed money bail virtually entirely from their court systems after the Department of Justice, Congress, and an overwhelming consensus of legal experts concluded that the old system of post-arrest detention based on money bail was fundamentally unfair and unconstitutional. For example, federal law explicitly forbids obtaining post-arrest detention through the use of money bail that a person cannot meet. *See* 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.").

[14] Available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

[15] Amicus Brief, submitted by the ABA in *Rodriguez, et al. v. Providence Community Corrections, et al.*, No. 16-5058, Doc. 32 (Apr. 26, 2016), available at https://www.americanbar.org/content/dam/aba/images/abanews/rodriguez_v_pcc_042616.pdf; *id.* at 13–14 (reaffirming support for the Standards and stating that "inflexible money-bail systems that rely on preset bail schedules — instead of individualized determinations of the appropriate conditions of release — violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment"); *id.* at 22 ("Monetary conditions of release . . . should never prevent the defendant's release solely because the defendant is unable to pay."); *id.* at 32 n.9 (citing support for the ABA standards from a wide variety of actors in the legal system, including the National Association of Counties, the Conference of Chief Justices, the Association of Prosecuting Attorneys, the National Sheriffs'

relied on in more than 100 Supreme Court decisions for decades, first began addressing pretrial release procedures in 1968. The latest revision of the ABA Standards constitutes one of the most comprehensive statements available on the issue of post-arrest release, and they set forth clear, reasonable, and simple alternatives to the unconstitutional scheme used by Harris County.

For example, the ABA Standards call for the presumption of release on recognizance, followed by release pursuant to the least restrictive non-financial conditions; most importantly, they condemn the use of generic money schedules like the one used by Harris County:

> Consistent with these Standards, each jurisdiction should adopt procedures designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond. Additional conditions should be imposed on release only when the need is demonstrated by the facts of the individual case….

ABA Standards § 10-1.4(a).[16]

> The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay.

ABA Standards at § 10-1.4(e).

> Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court. The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.

ABA Standards at § 10-5.3(a). According to the ABA Standards, money bail is only to be used as a last resort, and should never be used in a generic fashion, as they are in Harris County:

> Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to

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Association among others; stating, "There is no serious dispute among criminal justice stakeholders that inflexible money-bail schemes have no place in the American justice system."). Attached as Exhibit 5.

[16] Moreover, when financial conditions are used, "the least restrictive conditions principle requires that unsecured bond be considered first." *Id*. § 10-1.4(c) (commentary) at 43–44. The ABA commentary goes on: "If the court finds that unsecured bond is not sufficient, it may require the defendant to post bail; however, the bail amount must be within the financial reach of the defendant and should not be at an amount greater than necessary to assure the defendant's appearance in court." *Id*. at 44.

> meet the financial conditions and the defendant's flight risk, and *should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge*.

ABA Standards at § 10-5.3(e) (emphasis added). The National Association of Pretrial Services Agencies (NAPSA) has also issued definitive Standards that condemn the use of generic monetary schedules. *See* NAPSA, Standards on Pretrial Release (3rd Ed. 2004) at § 2.5(f).[17]

The ABA Standards are widely viewed as authoritative in a variety of contexts,[18] and they are seen as the seminal text reflecting best practices by the leading commentators on post-arrest procedures. *See* Department of Justice, National Institute of Corrections, *Fundamentals of Bail* (2014) at 75 (discussing the importance of the ABA Standards and its rejection of standardized financial conditions of release after arrest). These Standards, which include detailed treatment of all relevant policies and procedures necessary for creating a lawful and effective post-arrest release system, have been a model for numerous jurisdictions around the country to eliminate the antiquated and unlawful practice of detention based on small amounts of money.

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[17] Available at, http://www.napsa.org/publications/2004napsastandards.pdf. The NAPSA Standards provide:

> Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the risk of the defendant's failure to appear for court proceedings, and should *never be set by reference to a predetermined schedule of amounts based solely on the nature of the charge*.

Id. at § 2.5 (f). The Commentary to the NAPSA Standards further explains:

> Some jurisdictions have historically used a "bail schedule" that establishes set bond amounts for various charge categories and excludes consideration of other factors that may be far more relevant to the risk of nonappearance. The practice of using a bail schedule easily leads to detention for those too poor to post the bail amount and to the release of others for whom the amount is relatively nominal and thus creates no incentive to return to court.

[18] *See, e.g., Strickland v. Washington*, 466 U.S. 668, 688 (1984) (relying on the ABA Standards to ascertain "prevailing norms of practice"). As Chief Justice Burger explained when discussing an earlier version of the ABA Standards, the ABA Standards constitute "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." Warren E. Burger, *The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974).

The Constitution guarantees that the poor will not face a different criminal legal system than the system faced by wealthier people. Because the Plaintiff and the similarly situated impoverished arrestees that she represents are being held, or will be held, based solely on their inability to pay the generic amount of money set by Harris County's bail schedule, they are highly likely to prevail on the merits of their constitutional claim.

II. Plaintiff and Class Members Will Suffer Irreparable Constitutional Harm If This Court Does Not Issue an Injunction

Without intervention from this Court, the Plaintiff and the class of similarly situated people that she represents will continue to suffer the serious and irreparable harm of being jailed. Imprisoning a human being in a jail cell in violation of her constitutional rights is undoubtedly an irreparable harm to her body and her mind. "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." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *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.").

Even one additional night in jail is a harm to a person that cannot be later undone. *See, e.g.*, *United States v. Bogle*, 855 F.2d 707, 710–711 (11th Cir. 1988) (holding that the "unnecessary deprivation of liberty clearly constitutes irreparable harm"); *Rodriguez*, 2015 WL 923982 (finding irreparable harm because plaintiffs were unconstitutionally deprived of their liberty when the defendants "jail[ed] [them] on secured money bonds without an indigency inquiry"); *Walker*, 2016 WL 361612, at *14 (holding that "an improper loss of liberty" resulting

from the plaintiffs' "being jailed simply because [they] could not afford to post money bail" "constitutes irreparable harm");[19]

Moreover, even a few days in jail can have devastating consequences in a person's life, such as the loss of a job or the inability to arrange safe alternate care for minor children. It also exposes arrestees to the risk of unsanitary conditions, infection, and other medical and safety emergencies prevalent in Texas jails.[20] The Harris County Jail — the largest jail in Texas and the third largest in the nation — is notorious for its overcrowding, inhumane, and life-threatening conditions. Every year since 2009, an average of nine people being held pretrial have died in the Harris County Jail, including three at the hands of guards. Indeed, physical abuse by guards against inmates is endemic in the jail. The Houston Chronicle recently uncovered stories of a guard choking an inmate so hard that handprints were left on the inmate's neck, six guards beating an inmate for flashing a mirror at a guard station, and guards who permit and encourage

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[19] *Wanatee v. Ault*, 120 F.Supp.2d 784, 789 (N.D. Iowa 2000) ("[U]nconstitutional incarceration generally constitutes irreparable harm to the person in such custody."); *SEC v. Bankers Alliance Corp*., 1995 WL 317586, *3 (D.D.C.1995) ("As for the question of irreparable harm in the absence of a stay, clearly Mr. Lee will be harmed by being incarcerated."); *Lake v. Speziale*, 580 F. Supp. 1318, 1335 (D. Conn. 1984) (granting preliminary injunction requiring court to inform child support debtors of their right to counsel because unlawful incarceration would be irreparable harm); *Cobb v. Green*, 574 F.Supp. 256, 262 (W.D. Mich. 1983) ("There is no adequate remedy at law for a deprivation of one's physical liberty. Thus the Court finds the harm asserted by plaintiff is substantial and irreparable."). Each jailing also carries with it numerous other indignities for each Class member, including intrusive body searches and cramped, crowded, and unsanitary living conditions.

[20] *See, e.g.*, Bureau of Justice Statistics, Sexual Victimization In Prisons And Jails Reported By Inmates, 2011-12-Update, *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4654 (finding that 3.2% of jail inmates reported being sexually abused during their current stay in jail); *see also, e.g.*, Conor Friedersdorf, *Harris County Jails Prove Impervious to Reform* (Dec. 30, 2015), available at http://www.theatlantic.com/politics/archive/2015/12/harris-county-jails/422202/ (discussing the prevalence of abuse by Harris County guards against inmates, killings and suicides among inmates held pretrial, and "jail administrators abject[] fail[ure] to bring the system up to acceptable standards" even after a federal Department of Justice investigation); James Pinkerton, et al., *Harris County Jail considered 'unsafe and unhealthy' for inmates, public* (Nov. 21, 2015), available at http://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-Jail-is-unsafe-and-unhealthy-for-6649163.php (discussing the prevalence of tuberculosis and inadequate medical and mental health care in the Harris County Jail; stating that since the DOJ's investigation in 2009, at least 19 inmates died of treatable or preventable illnesses); Marcia Johnson and Luckett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW J. L. & Soc. Pol'y 42 (2012) (discussing overcrowding and inhumane conditions in the Harris County Jail).

inmates to attack other inmates.[21] Between 2010 and 2015, there were 120 disciplinary actions against Harris County guards who had beaten, kicked, and choked inmates, including 15 inmates who were handcuffed at the time of the assault.[22] In only six cases were criminal charges filed.[23] Dozens of jail employees have been disciplined for having sex with inmates or bringing in contraband.[24] Violence among inmates is also rampant.[25] An average of 11 fights break out every day.[26]

The jail is ridden with disease. Tuberculosis is prevalent and spreads easily among the inmate population.[27] A college student, who was struggling with a heroin addiction but was otherwise healthy, contracted bacterial meningitis while in jail and died. At least 19 inmates died of preventable or treatable illnesses between 2009 and 2015.[28] In those cases, the jail's inability or unwillingness to provide proper and timely care may have contributed to the deaths.[29] Even when medical neglect does not result in death, inmates suffer. In one case, a guard denied food to an inmate with diabetes as punishment for a fight.[30] In another, guards withheld insulin from an individual with diabetes, causing him to become violently ill, almost slipping into a life-

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[21] James Pinkerton and Anita Hassan, *Jailhouse jeopardy: Guards often brutalize and neglect inmates in Harris County Jail, records show* (Oct. 3, 2015), available at http://www.houstonchronicle.com/news/special-reports/article/Violence-neglect-by-jailers-common-in-county-6548623.php.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] James Pinkerton, Anita Hassan, and Lauren Caruba, *Harris County Jail considered 'unsafe and unhealthy' for inmates, public* (Nov. 21, 2015), available at http://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-Jail-is-unsafe-and-unhealthy-for-6649163.php.

[28] *Id.*

[29] *Id.*

[30] *Id.*

threatening coma.[31] Inmates wait in line for health care at the jail's clinic, but those needing routine help are regularly displaced when there is an emergency.[32]

The County also has proven incapable of keeping pace with the needs of inmates suffering from mental illnesses. One inmate committed suicide almost an hour after guards were required, and failed, to conduct a state-mandated check on the inmate's well-being.[33] The guards later attempted to cover up their breach of protocol by faking cell check logs.[34] Thousands of people in the jail take psychiatric medication, but there are only about 400 beds for inmates with mental health problems. Former Sheriff Adrian Garcia recently acknowledged that the jail needs 3,000.[35]

Forcing people to risk all of these additional harms because they cannot raise several hundred dollars to avoid them would only further contribute to the unnecessary and irreparable harm visited on the Plaintiff and other Class members in this case. The Plaintiff asks this Court to enjoin the County, pending a final resolution of this case on the merits, from keeping them in jail because they cannot afford to pay cash up front to secure their release.

III. An Injunction Will Serve the Public Interest and Will Not Harm Defendants.

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). Overwhelming federal precedent treats the amelioration of constitutional violations to be in the public interest. *See Giovani Carandola v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("The final prerequisite to the grant of a preliminary

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

injunction is that it serve the public interest. Again, we agree with the district court that upholding constitutional rights surely serves the public interest."); *G & V Lounge v. Michigan 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."). It is hard to imagine anything more in the public interest than remedying clear constitutional violations. *Freedberg v. United States Dept. of Justice*, 703 F. Supp. 107, 111 (D.D.C. 1988) ("And insofar as the public interest is concerned, it was perhaps put best by another judge of this district court, in another case … who said, simply, it is in the public interest to uphold a constitutionally guaranteed right." (quotations and citation omitted)); *see also, e.g., Wiley Mission v. New Jersey, Dep't of Cmty. Affairs*, 2011 U.S. Dist. LEXIS 96473, at * 59 (D.N.J. Aug. 25, 2011) (granting permanent injunction against state agency in part because "requiring the Department to abide by the Constitution serves the public interest"). As the Court explained in *Glatts v. Superintendent Lockett*, 2011 U.S. Dist. LEXIS 1910, at *18-19 (W.D. Pa. 2011), "one must consider the other side of the scale of public interest, which is, having a State's employees follow the Federal Constitution is also in the public interest." *See also Walker*, 2016 WL 361612; *Rodriguez*, 2015 WL 9239821; *Cooper*, 2015 WL 10013003.

Nor would an injunction harm the Defendants. The County already offers release to every misdemeanor arrestee — but only if they can pay for it. At worst, the County would be required to do what other cities and counties throughout the country do every day: release both rich and poor after arrest without requiring the poor to remain in jail just because they cannot afford to purchase their release.

Indeed, continuing to keep impoverished arrestees in jail cells because of their poverty has significant negative consequences for the public interest. The overwhelming consensus of

experts is that the Harris County community will be safer by ceasing needlessly to detain the poor. Since the original ABA Standards and *Rainwater* condemned post-arrest poverty jailing, law enforcement officials and researchers have learned even more about the negative effects of post-arrest poverty custody. The National Institute of Corrections at the Department of Justice has led the way in highlighting both the unequal nature of generic bail schedules and their negative impacts on community safety. *See* United States Department of Justice, National Institute of Corrections, *Fundamentals of Bail*, at 28-29 (2014).[36] Although *Rainwater*, *Lawson*, and *Blake* did not consider the devastating effects of the 72-hour detention of indigent people when they struck that system down decades ago, there is now overwhelming evidence that keeping indigent people in jail — even for a few days after an arrest — has tremendous deleterious consequences. First, it is enormously expensive to house people in jail.[37] Second, jailing the poor can devastate lives by disrupting stable employment and child custody arrangements. Third, even just 72 hours in jail after an arrest leads to worse outcomes for all involved by increasing poverty, hurting an arrestee's family, and making it more likely that an arrestee will recidivate.[38] *See* DOJ, National Institute of Corrections, at 24-29;[39] *see also, e.g.*,

[36] *See also, e.g.*, Arnold Foundation, *The Hidden Costs of Pretrial Detention* (2013) at 3, *available at*: http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_hidden-costs_FNL.pdf (studying 153,407 defendants and finding that "when held 2-3 days, low risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours"); Arnold Foundation, *Pretrial Criminal Justice Research Summary* (2013) at 5, *available at*: http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf (finding that "low-risk defendants held 2-3 days were 17 percent more likely to commit another crime within two years" and that those detained "4-7 days yielded a 35 percent increase in re-offense rates.").

[37] *See* Vera Institute of Justice, *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration* (May 2015), available at http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/05/The-Price-of-Jails-report.pdf (explaining that even the reported costs of approximately $50 to $570 per inmate per day in custody at local jails around the country was a significant underestimate of the cost to local jurisdictions of incarceration in local jails); Texas Criminal Justice Coalition, *A Blueprint for Criminal Justice Policy Solutions in Harris County* (Jan. 2015) at 2 (noting that in fiscal year 2013, Harris County spent almost $500,000 per day to run the jail).

[38] For all of these reasons, as well as the issues of fundamental fairness that render pretrial poverty-based custody unconstitutional, opposition to the routine use of generic bail schedules has been incorporated into the policy positions of the major American law enforcement stakeholders. *See, e.g.*, National Sheriffs' Association, Resolution

International Association of Chiefs of Police, Resolution (October 2014), 121st Annual Congress at 15-16 ("[D]efendants rated low risk and detained pretrial for longer than one day before their pretrial release are more likely to commit a new crime once they are released, demonstrating that length of time until pretrial release has a direct impact on public safety.").[40]

IV. The Court Should Use Its Discretion Not to Require the Posting of Security

Federal Rule of Civil Procedure 65(c) normally requires the moving party to post security to protect the other party from any financial harm likely to be caused by a temporary injunction if that party is later found to have been wrongfully enjoined. Rule 65(c), however, "vest[s] broad discretion in the district court to determine the appropriate amount of an injunction bond," *DSE v. United States*, 169 F.3d 21, 33 (D.C. Cir. 1999), *including the discretion to require no bond at all*. *Steward v. West*, 449 F.2d 324, 325 (5th Cir. 1971) (finding that no injunction bond need be posted when "it is very unlikely that the defendant will suffer any harm"); *RoDa Drilling v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) ("[T]rial courts have wide discretion under Rule 65(c) in determining whether to require security…."); *Donohue v. Mangano*, 886 F. Supp. 2d 126, 163 (E.D.N.Y. 2012) ("[A] district court has wide discretion to dispense with the bond requirement of Fed.R.Civ.P. 65(c) where there has been no proof of likelihood of harm…."); *Council on American-Islamic Rels. v. Gaubatz*, 667 F. Supp. 2d 67, 81 (D.D.C. 2009) (same).

2012-6 ("[A] justice system relying heavily on financial conditions of release at the pretrial stage is inconsistent with a fair and efficient justice system.").

[39] A*vailable at*, http://static.nicic.gov/UserShared/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf. Summarizing the current state of research, the DOJ report, *id.* at 29, concluded:

> [R]esearchers found that low- and moderate-risk defendants held only 2 to 3 days were more likely to commit crimes and fail to appear for court before trial than similar defendants held 24 hours or less. As the time in jail increased, the researchers found, the likelihood of defendant misbehavior also increased. The study also found similar correlations between pretrial detention and long-term recidivism, especially for lower risk defendants. In a field of paradoxes, the idea that a judge setting a condition of bail intending to protect public safety might be unwittingly increasing the danger to the public—both short and long-term—is cause for radically rethinking the way we administer bail.

[40] *Available at* http://www.theiacp.org/Portals/0/documents/pdfs/2014Resolutions.pdf.

The Court should use its considerable discretion to find that no security (or a nominal security of $1) is required in this case for several important reasons.

First, the likelihood of Defendants suffering any harm from an improperly issued injunction requiring the County to comply with federal law is almost non-existent. *See, e.g.*, *Gaubatz*, 667 F. Supp. 2d at 81 (requiring no bond where the defendant would not be substantially injured by the issuance of an injunction); 11A Charles A. Wright, Arthur R. Miller, et al., Federal Practice and Procedure § 2954 (2d ed.) ("[T]he court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant."). Indeed, the limited injunction sought in this Motion would not eliminate the County's ability to release the named Plaintiff or other future arrestees on a signature bond. The County may issue the same bond to the named Plaintiff and other arrestees and charge them the same amount of money should they fail to appear in court. Thus, no financial harm would result from this preliminary injunction.

Second, the named Plaintiff and other Class members are all living in poverty, and the very reason for bringing this case is their lack of financial resources. *See, e.g.*, *Mitchell et al. v. City of Montgomery*, 14-cv-186-MEF, Doc. 18 at 3, (May 1, 2014) (issuing preliminary injunction without requiring a bond for indigent plaintiffs because they were likely to succeed on the merits and because the City was unlikely to suffer significant financial harm); *Swanson v. Univ. of Hawaii Prof. Assembly*, 269 F. Supp. 2d 1252, 1261 (D. Hawai'i 2003) (waiving the security requirement for public employees based on ability to pay and also because the injunction sought enforcement of constitutional rights); *Johnson v. Bd. of Police Comm'rs*, 351 F. Supp. 2d 929, 952 (E.D. Mo. 2004) (requiring no bond for homeless plaintiffs); *Wayne Chem. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977) (requiring no bond for indigent

person); *Bass v. Richardson*, 338 F. Supp. 478, 490 (S.D.N.Y.1971) ("It is clear to us that indigents, suing individually or as class plaintiffs, ordinarily should not be required to post a bond under Rule 65(c)."); *see also* 11A Wright & Miller § 2954 (courts can waive the bond requirement in cases involving poor plaintiffs); *Walker*, 2016 WL 361612; *Rodriguez*, 2015 WL 9239821; *Cooper*, 2015 WL 10013003.

Finally, Plaintiff is overwhelmingly likely to succeed on the merits. The outcome of any future trial, if necessary, is likely to reaffirm the basic principles that have been repeatedly reaffirmed by the Supreme Court, the Fifth Circuit, and federal and state courts across the country.[41]

CONCLUSION

For the reasons stated above, the Court should grant Plaintiff's motion for emergency equitable relief for the named Plaintiff and, after appropriate proceedings, grant preliminary injunctive relief enjoining Harris County from using post-arrest procedures that keep people in

[41] Although this case is a prototypical situation for which the class action vehicle was created, and the class action certification motion was contemporaneously filed with this preliminary injunction motion, this Court need not rule on the Plaintiff's class certification motion or formally certify a class in order to issue preliminary injunctive relief. *See, e.g.*, Newberg on Class Actions § 24:83 (4th ed. 2002) ("The absence of formal certification is no barrier to classwide preliminary injunctive relief."); Moore's Federal Practice § 23.50, at 23-396, 23-397 (2d ed.1990) ("Prior to the Court's determination whether plaintiffs can maintain a class action, the Court should treat the action as a class suit."); *see also, e.g.*, *Lee v. Orr*, 2013 WL 6490577 at *2 (N.D. Ill. 2013) ("The court may conditionally certify the class or otherwise order a broad preliminary injunction, without a formal class ruling, under its general equity powers. The lack of formal class certification does not create an obstacle to classwide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons."); *N.Y. State Nat. Org. For Women v. Terry*, 697 F. Supp. 1324, 1336 (S.D.N.Y.1988) (holding that "the Court acted in the only reasonable manner it could under the circumstances, ruling on the continuation of [the] temporary restraining order and leaving the question of class certification for another day."); *Leisner v. New York Tel. Co.*, 358 F. Supp. 359, 371 (S.D.N.Y.1973) ("[R]elief as to the class is appropriate at this time even though when the preliminary injunction motion was heard, the class action had not yet been certified."); *Illinois League of Advocates for the Developmentally, Disabled v. Illinois Dep't of Human Servs.*, 2013 WL 3287145 at *4 (N.D. Ill. 2013) ("At this early stage in the proceedings, the class allegations in the Second Amended Complaint are sufficient to establish Plaintiffs' standing to seek immediate injunctive relief on behalf of the proposed class. At a later stage, we may revisit whether that classwide representation is inappropriate, but until that time, we will preserve the status quo (within the limits set forth in the TRO) with respect to all potential class members."); *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 433 (6th Cir. 2012) ("Simply put, there is nothing improper about a preliminary injunction preceding a ruling on class certification.").

its jail solely because they cannot pay a predetermined money bail without any inquiry into or findings concerning their ability to pay.

Respectfully submitted,

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