Handout 1

Texas DWI Bond Condition Program

- The DWI Bond Condition Program is part of a state-wide plan to reduce the incidence of DWI offenses in Texas by assisting Texas counties in adopting a comprehensive plan for setting bond conditions in DWI cases. The Texas Justice Court Training Center (TJCTC) views this program as an important step in reducing the number of DWI drivers on Texas roads and highways, thereby improving public safety throughout the state.

- TJCTC will work with all criminal magistrates (including county judges, municipal court judges and justices of the peace), local prosecutors, and potential monitoring agencies in each county that elects to participate in the program in order to create or modify forms specific to that county to be used in administering the program.

The program:

•Provides county officials with an opportunity to develop a system for setting, monitoring, and enforcing DWI bond conditions to ensure community safety and protect victims;

•Increases consistency in setting bond conditions by a magistrate and a trial court;

•Promotes the use of bond conditions (such as ignition interlock devices) that reduce the incidence of DWI recidivism; and

•Ensures that bond conditions required by law are set, monitored, and enforced.

The program is administered by the Texas Justice Court Training Center Traffic Safety Initiative through funding provided by the Texas Department of Transportation.

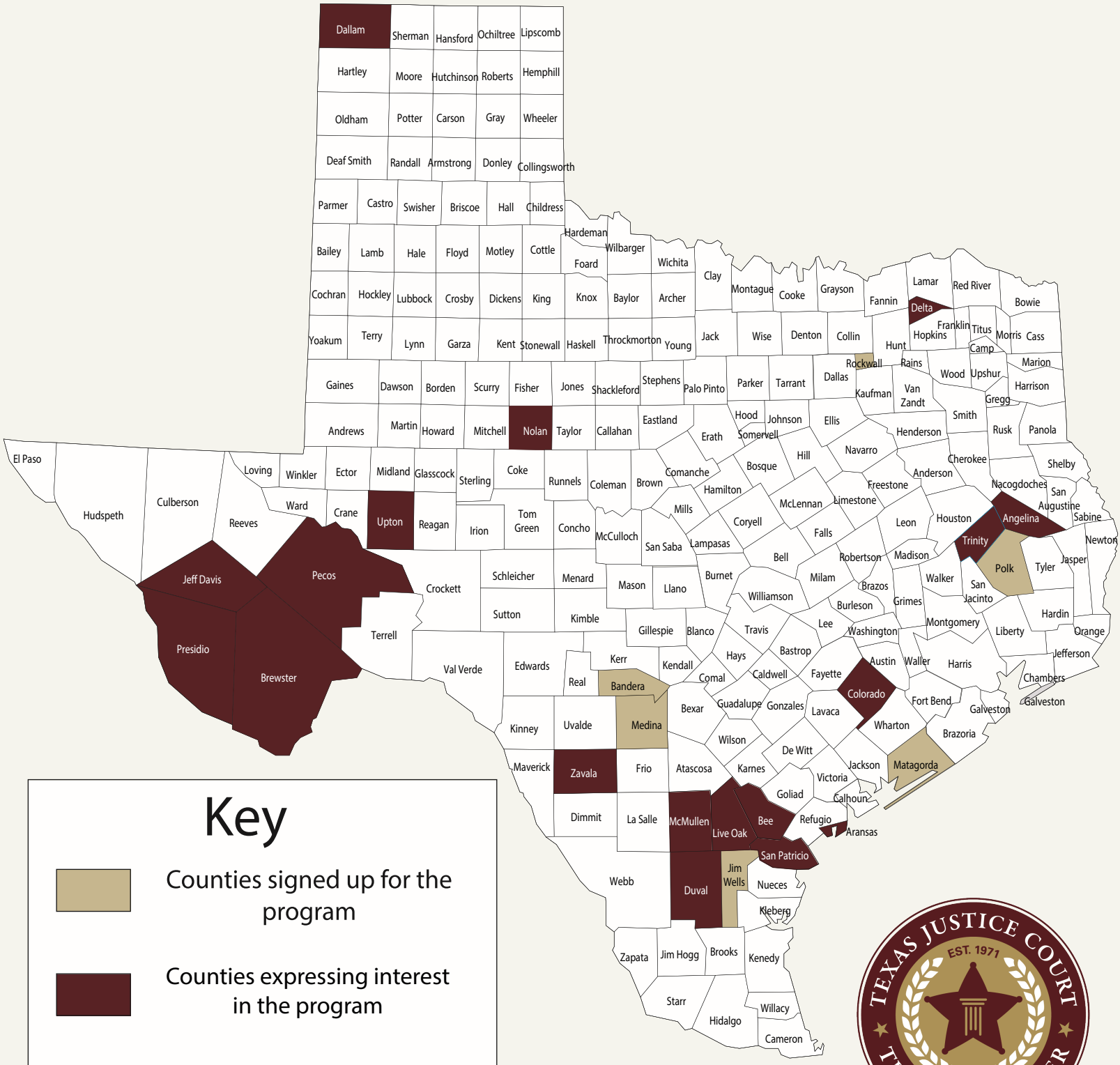
If you would like further information concerning the program, please feel free to contact Randall Sarosdy at rsarosdy@txstate.edu or Rebecca Glisan at rebecca.glisan@txstate.edu

TEXAS JUSTICE COURT TRAINING CENTER EST. 1971

Save a Life™
Texas Department of Transportation

DWI Bond Condition Program

Counties Signed Up For & Expressing Interest in the Program



Key

Counties signed up for the program

Counties expressing interest in the program

TEXAS JUSTICE COURT TRAINING CENTER
EST. 1971

Handout 2

BEFORE THE STATE COMMISSION ON JUDICIAL CONDUCT

CJC NO. 17-0350-AJ

PUBLIC ADMONITION AND ORDER OF ADDITIONAL EDUCATION

HONORABLE ERIC HAGSTETTE
CRIMINAL LAW HEARING OFFICER
HOUSTON, HARRIS COUNTY, TEXAS

During its meeting on December 6-8, 2017, the State Commission on Judicial Conduct concluded a review of the allegations against the Honorable Eric Hagstette, Criminal Law Hearing Officer, in Houston, Harris County. Judge Hagstette was advised by letter of the Commission's concerns and provided a written response. Judge Hagstette appeared with counsel before the Commission on December 7, 2017, and gave testimony. After considering the evidence before it, the Commission entered the following Findings and Conclusion:

FINDINGS OF FACT

1. At all times relevant hereto, the Honorable Eric Hagstette was a Criminal Law Hearing Officer, in Houston, Harris County. As part of his job duties, he conducts probable cause hearings and sets bond amounts.

Agreeing to Forego Personal Bonds and Adherence to Bond Schedule

2. Chief U.S. District Judge Lee Rosenthal issued an opinion in April of 2017 in a lawsuit against Harris County[1] for violating the rights of misdemeanor defendants. *ODonnell v. Harris County*, 2017 U.S. Dist. LEXIS 65445, *281 (S.D. Tex. April 28, 2017). *Inter alia,* the Court found Harris County's bail policy unconstitutional because the "policy is to detain indigent misdemeanor defendants before trial, violating equal protection rights

[1] Judge Hagstette was one of the defendants named in the lawsuit.

against wealth-based discrimination and violating due process protections against pretrial detention without proper procedures or an opportunity to be heard."[2]

3. The Court also issued an injunction requiring Harris County to promptly release indigent defendants within 24 hours of their arrest.[3]

4. The district court found "little to no credibility in the Hearing Officers' claims of careful case-by-case consideration under the *Roberson* order and the Article 17.15 factors" based on the high percentage of misdemeanor defendants subject to secured money bail who were detained rather than released, the infrequent deviations from the scheduled bail amount, and the video recordings of probable cause hearings "which consistently show an indifference as to whether pretrial detention will result from setting bail." *Id*. at *103.[4]

5. Judge Hagstette informed the Commission that he considers "the factors set out in article 17.15 of the Code of Criminal Procedure, all available facts and information, and the accused's demeanor," when determining bond amounts for individuals accused of a crime.

6. Judge Hagstette stated he also considers "any rules, preferences, and policies of the assigned trial court judge to whom the case is assigned." He noted that until March of 2017, several of the District Court Judges "did not permit Hearing Officers to grant personal bonds" and, until August 2016, "the County Criminal Court at Law Judges historically had similar rules."

7. Judge Hagstette stated that "a job description by the board of judges made clear the Hearing Officers are 'at will employees,' [and] that the Hearing Officers are the 'delegates' of the judges trying criminal cases." During his testimony before the Commission, Judge Hagstette testified that Hearing Officers could "be dismissed at any time by the same board that appoints us."

8. Judge Hagstette provided instructions from multiple District and County judges aiming to restrict the Hearing Officers' authority to set certain bonds. The following instructions were included in e-mails:

    a. A retired hearing officer: "You may never, never ever give a PR bond to a defendant in any of the District courts. This would probably get you fired."

    b. District Court Judge Joan Huffman: "No pre-trial bonds; no lowering of bonds."

    c. County Court Judge Diane Bull: "Please instruct the probable cause hearing officers to withhold their rulings on all pre-trial release applications for defendants."

9. Section 54.851 *et seq.* of the Texas Government Code establishes the Criminal Law Hearing Officer position.

---

[2] Harris County was sued on a related issue over thirty years ago. In *Roberson v. Richardson*, Civil No. 84-2974 (S.D. Texas Nov. 25, 1987), the parties reached a final agreed judgment which included language that hearing officers "shall have the authority to order the accused released on personal bond or released on other alternatives to prescheduled bail amounts."

[3] Before the effective date of the trial court's injunction, Harris County filed motions to stay in the Fifth Circuit and the Supreme Court, both of which were denied.

[4] Judge Rosenthal gathered evidence over an eight day hearing that included 300 written exhibits, 2,300 video recordings of bail-setting hearings, and the testimony of thirteen witnesses, including Judge Hagstette.

10. Section 54.856(a)(2) of the Texas Government Code outlines the magistration authority of Criminal Law Hearing Officers, and provides that the "jurisdiction of the criminal law hearing officer" includes: "Committing the defendant to jail, discharging the defendant from custody, or admitting the defendant to bail, as the law and facts of the case require."

11. Judge Hagstette provided the Commission with a copy of the Harris County local rules. Consistent with Section 54.856(a)(2) of the Texas Government Code, Local Rule 12.1 states "whether to approve or deny a personal bond is up to the reviewing magistrate's sound discretion."

12. The judge also stated the Hearing Officers "serve many masters" and they "exercise the discretion they can within the bounds set."

13. During his appearance before the Commission, Judge Hagstette testified that the hearing officers "didn't write the policies, but we had to follow them." Regarding the Hearing Officers making bond determinations on cases, he stated: "Could I do something? Probably by law, I could have. I don't know if it would have been good for my career."

RELEVANT STANDARDS

1. Canon 2A of the Texas Code of Judicial Conduct states: "A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

2. Canon 3B(2) of the Texas Code of Judicial Conduct states: "A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism."

3. The Texas Code of Criminal Procedure Art. 17.15 states:

> The amount of bail…is to be regulated by the court, judge or magistrate; they are to be governed in the exercise of this discretion by the Constitution and by the following rules:
>
> 1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
>
> 2. The power to require bail is not to be so used as to make it an instrument of oppression.
>
> 3. The nature of the offense and the circumstances under which it was committed are to be considered.
>
> 4. The ability to make bail is to be regarded, and proof may be taken upon this point.
>
> 5. The future safety of a victim of the alleged offense and the community shall be considered.

4. The Texas Code of Criminal Procedure Art. 17.03(a) states "A magistrate may, in the magistrate's discretion, release the defendant on his personal bond without sureties or other security."

CONCLUSION

After considering the facts and evidence before it, the Commission concludes that Judge Hagstette failed to comply with the law, and failed to maintain competence in the law, by strictly following directives not to issue personal bonds to defendants per the instructions of the judges in whose court the underlying cases were assigned. In so doing, Judge Hagstette violated his constitutional and statutory obligation to consider all legally available bonds, including personal recognizance bonds, for those individuals whose cases were assigned to courts who instructed him not to issue personal recognizance bonds.

In weighing the facts and circumstances of this case, the Commission gave weight to the fact that, at least in part, Judge Hagstette's conduct was motivated by direct instructions from individual judges who played a role in his continued employment. The Commission considered this a mitigating factor in reaching its determination in this case.

Based on this conduct, the Commission concludes that Judge Hagstette's actions constituted willful violations of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.

****

In condemnation of the conduct violative of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct recited above, it is the Commission's decision to issue a **PUBLIC ADMONITION WITH ORDER OF ADDITIONAL EDUCATION** to Eric Hagstette, Hearing Officer, Houston, Harris County, Texas.

Pursuant to the authority contained in Article V, §1-a(8) of the Texas Constitution, it is ordered that the actions described above be made the subject of a **PUBLIC ADMONITION WITH ORDER OF ADDITIONAL EDUCATION** by the Commission.

Pursuant to this Order, Judge Hagstette must obtain **four hours** of instruction with a mentor, in addition to his required judicial education for Fiscal Year 2018. In particular, the Commission desires that Judge Hagstette receive this additional education in the area of magistration and bond setting.

Pursuant to the authority contained in § 33.036 of the Texas Government Code, the Commission authorizes the disclosure of certain information relating to this matter to the Texas Justice Court Training Center to the extent necessary to enable that entity to assign the appropriate mentor for Judge Hagstette.

Judge Hagstette shall complete the additional **four hours** of instruction recited above within **60 days** from the date of written notification from the Commission of the assignment of a mentor. Upon receiving such notice, it is Judge Hagstette's responsibility to contact the assigned mentor and schedule the additional education.

Upon the completion of the **four hours** of instruction described herein, Judge Hagstette shall sign and return the Respondent Judge Survey indicating compliance with this Order. Failure to complete, or report the completion of, the required additional education in a timely manner may result in further Commission action.

Pursuant to the authority contained in Article V, §1-a (8) of the Texas Constitution, it is ordered that the actions described above be made the subject of a **PUBLIC ADMONITION WITH ORDER OF ADDITIONAL EDUCATION.**

The Commission has taken this action with the intent of assisting Judge Hagstette in his continued judicial service, as well as in a continuing effort to protect public confidence in the judicial system and to assist the state's judiciary in its efforts to embody the principles and values set forth in the Texas Constitution and the Texas Code of Judicial Conduct.

Issued this the 10th day of January, 2018.

Justice Douglas S. Lang, Chair
State Commission on Judicial Conduct

Handout 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20333

United States Court of Appeals
Fifth Circuit
FILED
February 14, 2018
Lyle W. Cayce
Clerk

MARANDA LYNN ODONNELL,

Plaintiff - Appellee

v.

HARRIS COUNTY, TEXAS; ERIC STEWART HAGSTETTE; JOSEPH LICATA, III; RONALD NICHOLAS; BLANCA ESTELA VILLAGOMEZ; JILL WALLACE; PAULA GOODHART; BILL HARMON; NATALIE C. FLEMNG; JOHN CLINTON; MARGARET HARRIS; LARRY STANDLEY; PAM DERBYSHIRE; JAY KARAHAN; JUDGE ANALIA WILKERSON; DAN SPJUT; JUDGE DIANE BULL; JUDGE ROBIN BROWN; DONALD SMYTH; JEAN HUGHES,

Defendants - Appellants

LOETHA SHANTA MCGRUDER; ROBERT RYAN FORD,

Plaintiffs - Appellees

v.

HARRIS COUNTY, TEXAS; JILL WALLACE; ERIC STEWART HAGSTETTE; JOSEPH LICATA, III; RONALD NICHOLAS; BLANCA ESTELA VILLAGOMEZ,

Defendants - Appellants

Appeals from the United States District Court
for the Southern District of Texas

Before CLEMENT, PRADO, and HAYNES, Circuit Judges.

No. 17-20333

EDITH BROWN CLEMENT, Circuit Judge:

Maranda ODonnell and other plaintiffs (collectively, "ODonnell") brought a class action suit against Harris County, Texas, and a number of its officials—including County Judges,[1] Hearing Officers, and the Sheriff (collectively, the "County")—under 42 U.S.C. § 1983. ODonnell alleged the County's system of setting bail for indigent misdemeanor arrestees violated Texas statutory and constitutional law, as well as the equal protection and due process clauses of the Fourteenth Amendment. ODonnell moved for a preliminary injunction, and the County moved for summary judgment. After eight days of hearings, at which the parties presented numerous fact and expert witnesses and voluminous written evidence, the district court denied the County's summary judgment motion and granted ODonnell's motion for a preliminary injunction. The County then applied to this court for a stay of the injunction pending appeal, but the motion was denied, and the injunction went into effect. Before this court now is the County's appeal, seeking vacatur of the injunction and raising numerous legal challenges.

For the reasons set forth, we affirm most of the district court's rulings, including its conclusion that ODonnell established a likelihood of success on the merits of its claims that the County's policies violate procedural due process and equal protection. We disagree, however, with the district court's analysis in three respects: First, its definition of ODonnell's liberty interest under due process was too broad, and the procedures it required to protect that interest were too onerous. Second, it erred by concluding that the County Sheriff can be sued under § 1983. Finally, the district court's injunction was overbroad. As a result, we will dismiss the Sheriff from the suit, vacate the

[1] The parties use the term "County Judges" to refer to the judges of the County Criminal Courts of Harris County, and we will use that same term. This term does not refer to the County Judge who is the head of the County Commissioners' Court of Harris County.

injunction, and order the district court to modify its terms in a manner consistent with this opinion.

I.

We need not conduct an exhaustive review of the facts. The district court's account is expansive: It comprised over 120 pages of factual findings, including not only the specific details of the County's bail-setting procedures, but also the history of bail and recent reform attempts nationwide.

Bail in Texas is either secured or unsecured. Secured bail requires the arrestee to post bond either out of the arrestee's pocket or from a third-party surety (often bail bondsmen, who generally require a 10% non-refundable premium in exchange for posting bond). Unsecured bail, by contrast, allows the arrestee to be released without posting bond, but if he fails to attend his court date and/or comply with any nonfinancial bail conditions, he becomes liable to the County for the bail amount. Both secured and unsecured bail may also include nonfinancial conditions to assure the detainee's attendance at future hearings.

The basic procedural framework governing the administration of bail in Harris County is set by the Texas Code of Criminal Procedure and local rules promulgated by County Judges. *See* Tex. Gov't Code § 75.403(f). When a misdemeanor defendant is arrested, the prosecutor submits a secured bail amount according to a bond schedule established by County Judges. *See* Harris County Criminal Courts at Law Rule 9 (*hereinafter*, "Local Rule"). Bonds are then formally set by Hearing Officers and County Judges. Tex. Code. Crim. Pro. art. 2.09, 17.15. Hearing Officers are generally responsible for setting bail amounts in the first instance. This often occurs during the arrestee's initial probable cause hearing, which must be held within 24 hours of arrest. Tex. Code Crim. Pro. art. 17.033; Local Rule 4.2.1.1. County Judges review the

Hearing Officers' determinations and can adjust bail amounts at a "Next Business Day" hearing. Local Rule 4.3.1.

The Hearing Officers and County Judges are legally proscribed from mechanically applying the bail schedule to a given arrestee. Instead, the Texas Code requires officials to conduct an individualized review based on five enumerated factors, which include the defendant's ability to pay, the charge, and community safety. Tex. Code of Crim. Pro. art. 17.15. The Local Rules explicitly state the schedule is not mandatory. They also authorize a similar, individualized assessment using factors which partially overlap with those listed in the Code. Local Rule 4.2.4. Hearing Officers and County Judges sometimes receive assessments by Pretrial Services, which interviews the detainees prior to hearings, calculates the detainees flight and safety risk based on a point system, and then makes specific recommendations regarding bail.[2]

Despite these formal requirements, the district court found that, in practice, County procedures were dictated by an unwritten custom and practice that was marred by gross inefficiencies, did not achieve any individualized assessment in setting bail, and was incompetent to do so. The district court noted that the statutorily-mandated probable cause hearing (where bail is usually set) frequently does not occur within 24 hours of arrest. The hearings often last seconds, and rarely more than a few minutes. Arrestees are instructed not to speak, and are not offered any opportunity to submit evidence of relative ability to post bond at the scheduled amount.

[2] Individualized assessment is also assured by a preexisting federal consent decree, which requires County officials to make individualized assessments of each misdemeanor defendant's case and adjust the scheduled bail amount accordingly, or else release the defendant on unsecured or nonfinancial conditions.

The court found that the results of this flawed procedural framework demonstrate the lack of individualized assessments when officials set bail. County officials "impose the scheduled bail amounts on a secured basis about 90 percent of the time. When [they] do change the bail amount, it is often to conform the amount to what is in the bail schedule." The court further found that, when Pretrial Services recommends release on personal bond, Hearing Officers reject the suggestion 66% of the time. Because less than 10% of misdemeanor arrestees are assigned an unsecured personal bond, some amount of upfront payment is required for release in the vast majority of cases.

The court also found that the "Next Business Day" hearing before a County Judge fails to provide a meaningful review of the Hearing Officer's bail determinations. Arrestees routinely must wait days for their hearings. County Judges adjust bail amounts or grant unsecured bonds in less than 1% of cases. Furthermore, prosecutors routinely offer time-served plea bargains at the hearing, and arrestees are under immense pressure to accept the plea deals or else remain incarcerated for days or weeks until they are appointed a lawyer.

The district court further noted the various ways in which the imposition of secured bail specifically targets poor arrestees. For example, under the County's risk-assessment point system used by Pretrial Services, poverty indicators (such as not owning a car) receive the same point value as prior criminal violations or prior failures to appear in court. Thus, an arrestee's impoverishment increased the likelihood he or she would need to pay to be released.

The court also observed that Hearing Officers imposed secured bails upon arrestees after having been made aware of an arrestee's indigence by the risk-assessment reports or by the arrestee's own statements. And further, after extensive review of numerous bail hearings, the court concluded Hearing

Officers were aware that, by imposing a secured bail on indigent arrestees, they were ensuring that those arrestees would remain detained.

The court rejected the argument that imposing secured bonds served the County's interest in ensuring the arrestee appeared at the future court date and committed no further crime. The court's review of reams of empirical data suggested the opposite: 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." Instead, the County's true purpose was "to achieve pretrial detention of misdemeanor defendants who are too poor to pay, when those defendants would promptly be released if they could pay." In short, "secured money bail function[ed] as a pretrial detention order" against the indigent misdemeanor arrestees.

The district court also reviewed voluminous empirical data and academic literature to evaluate the impact of pretrial detention on an arrestee. The court found that the expected outcomes for an arrestee who cannot afford to post bond are significantly worse than for those arrestees who can. In general, indigent arrestees who remain incarcerated because they cannot make bail are significantly more likely to plead guilty and to be sentenced to imprisonment. They also receive sentences that are on average twice as long as their bonded counterparts. Furthermore, the district court found that pretrial detention can lead to loss of job, family stress, and even an increase in likeliness to commit crime.

The court concluded that ODonnell had established a likelihood of success on the merits of their claim that the County violated both the procedural due process rights and the equal protection rights of indigent misdemeanor detainees. It granted the motion for a preliminary injunction,

requiring the implementation of new safeguards and the release of numerous detainees subjected to the insufficient procedures.

II.

This court reviews a "district court's grant of a preliminary injunction . . . for abuse of discretion." *Women's Med. Cty. of Nw. Hous. v. Bell*, 248 F.3d 411, 418–19 (5th Cir. 2001). "Findings of fact are reviewed only for clear error; legal conclusions are subject to *de novo* review." *Id.* at 419. "Issuance of an injunction rests primarily in the informed discretion of the district court. Yet injunctive relief is a drastic remedy, not to be applied as a matter of course." *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 733 (5th Cir. 1977) (internal citations omitted). A district court abuses its discretion if it issues an injunction that "is not narrowly tailored to remedy the specific action which gives rise to the order as determined by the substantive law at issue." *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (internal quotation marks and alterations omitted).

III.

The County raises a number of arguments that do not implicate the merits of ODonnell's constitutional claims. We address these first.

A. Liability of County Judges and Sheriff under § 1983

The County appeals the district court's ruling that the County Judges and Sheriff could be sued under 42 U.S.C. § 1983. Liability under § 1983 attaches to local government officers "whose [unlawful] decisions represent the official policy of the local governmental unit." *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). Whether an officer has been given this authority is "a question of state law." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). "Official policy" includes unwritten widespread practices that are "so common and well settled as to constitute a custom that fairly represents municipal policy." *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992) (quoting

Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984) (en banc)). And unlawful decisions include "acquiescence in a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity." *Jett*, 491 U.S. at 737 (internal quotation marks omitted).

Though a judge is not liable when "acting in his or her judicial capacity to enforce state law," *Moore*, 958 F.2d at 94, we agree with the district court that the County Judges are appropriate parties in this suit. Texas law explicitly establishes that the Judges are "county officers," TEX. CONST. art. V § 24, imbued with broad authority to promulgate rules that will dictate post-arrest policies consistent with the provisions of state law, Tex. Gov't Code § 75.403(f). Here, ODonnell alleged that, despite having this authority, County Judges acquiesced in an unwritten, countywide process for setting bail that violated both state law and the Constitution. In other words, they sue the County Judges as municipal officers in their capacity as policymakers. Section 1983 affords them an appropriate basis to do so.

We agree with the County that its Sheriff is not an appropriate party, however. The Sheriff does not have the same policymaking authority as the County Judges. To the contrary, the Sheriff is legally obliged to execute all lawful process and cannot release prisoners committed to jail by a magistrate's warrant—even if prisoners are committed "for want of bail." *See* Tex. Code Crim. Pro. arts. 2.13, 2.16, 2.18; Tex. Loc. Gov't Code § 351.041(a) (noting the Sheriff's authority is "subject to an order of the proper court"). State statutes, in other words, do not authorize the County Sheriff to avoid executing judicial orders imposing secured bail by unilaterally declaring them unconstitutional. Accordingly, the County Sheriff cannot be sued under § 1983.

B. Younger *Abstention*

The County next argues that *Younger* abstention precludes our review of ODonnell's claims. We are not persuaded.

The Supreme Court held in *Younger v. Harris* that, when a party in federal court is simultaneously defending a state criminal prosecution, federal courts "should not act to restrain [the state] criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." 401 U.S. 37, 43–44 (1971). Its conclusion was motivated by the "basic doctrine of equity jurisprudence," "notion[s] of 'comity,'" and "Our Federalism." *Id.* Courts apply a three-part test when deciding whether to abstain under *Younger*. There must be (1) "an ongoing state judicial proceeding" (2) that "implicate[s] important state interests" and (3) offers "adequate opportunity" to "raise constitutional challenges." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

The third prong of this test is not met. As the Supreme Court has already concluded, the relief sought by ODonnell—i.e., improvement of pretrial procedures and practice—is not properly reviewed by criminal proceedings in state court. *See Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975) (noting that abstention did not apply because "[t]he injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution"); *see also Pugh v. Rainwater*, 483 F.2d 778, 781–82 (5th Cir. 1973) (noting that a federal question whose "resolution . . . would [only] affect state procedures for handling criminal cases . . . . is not 'against any pending or future court proceedings *as such*'" (quoting *Fuentes v. Shevin*, 407 U.S. 67, 71 n.3 (1971))), *rev'd on other grounds by Gerstein*, 420 U.S. 103. As the district court noted, the adequacy of the state court review of bail-setting procedures is essential to ODonnell's federal cause of action. In short, "[t]o find that the plaintiffs have an adequate hearing on their constitutional claim in state court would decide [its] merits."

We also note that the policy concerns underlying this doctrine are not applicable here. The injunction sought by ODonnell seeks to impose "nondiscretionary procedural safeguard[s]," which will not require federal intrusion into pre-trial decisions on a case-by-case basis. *Tarter v. Hurry*, 646 F.2d 1010, 1013–14 (5th Cir. Unit A June 1981); *compare O'Shea v. Littleton*, 414 U.S. 488, 499–502 (1974) (noting that the enforcement of the improper injunction in question required "continuous supervision by the federal court over the conduct of the petitioners in the course of future criminal trial proceedings involving any of the members of the respondents' broadly defined class"). Such relief does not implicate our concerns for comity and federalism.[3]

C. The County's Eighth Amendment Argument

The County contends that ODonnell's complaint "is an Eighth Amendment case wearing a Fourteenth Amendment costume." The Eighth Amendment states in relevant part that "[e]xcessive bail shall not be required." U.S. CONST. amend. VIII. It is certainly true that, when a constitutional provision specifically addresses a given claim for relief under 42 U.S.C. § 1983, a party should seek to apply that provision directly. *See Graham v. Connor*, 490 U.S. 386, 394 (1989); *cf. Manuel v. City of Joliet*, 137 S. Ct. 911, 917 (2017). But we have already concluded that "[t]he incarceration of those who cannot [pay money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."

[3] The County also argues that we are precluded from reviewing ODonnell's claims because they should have been raised as a petition for habeas corpus. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973). We agree with the district court that this argument has been waived. The County neither mentioned *Preiser* nor pressed the habeas argument until its motion for a stay of the injunction. The closest the County came to preserving this argument was one sentence in its response to ODonnell's motion for preliminary injunction. This passing reference is insufficient to preserve the argument, especially given that it is dispositive of the case at the threshold stage.

Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc). ODonnell's present claims do not run afoul of *Graham*.

IV.

We now address the merits of ODonnell's constitutional claims. For the reasons set forth below, we affirm the court's rulings that the County's bail system violates both due process and equal protection, though we modify the basis for its conclusion as to due process.

A. Due Process Claim

Procedural due process claims are subject to a two-step inquiry: "The first question asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010) (internal quotation marks omitted). Applying this framework, we disagree with the district court's formulation of the liberty interest created by state law, but agree that the procedural protections of bail-setting procedures are nevertheless constitutionally deficient.

Liberty interests protected by the due process clause can arise from two sources, "the Due Process Clause itself and the laws of the States." *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (internal citation omitted). Here, our focus is the law of Texas, which has acknowledged the two-fold, conflicting purpose of bail. This tension defines the protected liberty interest at issue here.

On the one hand, bail is meant "to secure the presence of the defendant in court at his trial." *Ex parte Vance*, 608 S.W.2d 681, 683 (Tex. Crim. App. 1980). Accordingly, "ability to make bail is a factor to be considered, [but] ability alone, even indigency, does not control the amount of bail." *Ex parte Charlesworth*, 600 S.W.2d 316, 317 (Tex. Crim. App. 1980). On the other hand, Texas courts have repeatedly emphasized the importance of bail as a means of

protecting an accused detainee's constitutional right "in remaining free before trial," which allows for the "unhampered preparation of a defense, and . . . prevent[s] the infliction of punishment prior to conviction." *Ex parte Anderer*, 61 S.W.3d 398, 404–05 (Tex. Crim. App. 2001) (en banc). Accordingly, the courts have sought to limit the imposition of "preventive [pretrial] detention" as "abhorrent to the American system of justice." *Ex parte Davis*, 574 S.W.2d 166, 169 (Tex. Crim. App. 1978). Notably, state courts have recognized that "the power to . . . *require* bail," not simply the denial of bail, can be an "instrument of [such] oppression." *Taylor v. State*, 667 S.W.2d 149, 151 (Tex. Crim. App. 1984) (en banc) (emphasis added).

These protections are also ensconced in the Texas Constitution. Specifically, Article 1 § 11 reads in relevant part, "[a]ll prisoners shall be bailable by sufficient sureties." TEX. CONST. art. 1, § 11. The provision is followed by a list of exceptions—i.e., circumstances in which an arrestee may be "denied release on bail." *Id.* §§ 11b, 11c. The only exception tied to misdemeanor charges pertains to family violence offenses. *See id.* § 11c. The scope of these exceptions has been carefully limited by state courts, which observe that they "include the seeds of preventive detention." *Davis*, 574 S.W.2d at 169.

The district court held that § 11 creates a state-made "liberty interest in misdemeanor defendants' release from custody before trial. Under Texas law, judicial officers . . . have no authority or discretion to order pretrial preventive detention in misdemeanor cases." This is too broad a reading of the law. The Constitution creates a right to bail on "sufficient sureties," which includes both a concern for the arrestee's interest in pretrial freedom and the court's interest in assurance. Since bail is not purely defined by what the detainee can afford, *see Charlesworth*, 600 S.W.2d at 317, the constitutional provision forbidding

denial of release on bail for misdemeanor arrestees does not create an automatic right to pretrial release.[4]

Instead, Texas state law creates a right to bail that appropriately weighs the detainees' interest in pretrial release and the court's interest in securing the detainee's attendance. Yet, as noted, state law forbids the setting of bail as an "instrument of oppression." Thus, magistrates may not impose a secured bail solely for the purpose of detaining the accused. And, when the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order. Accordingly, such decisions must reflect a careful weighing of the individualized factors set forth by both the state Code of Criminal Procedure and Local Rules.

Having found a state-created interest, we turn now to whether the procedures in place adequately protect that interest. As always, we are guided by a three-part balancing test that looks to "the private interest . . . affected by the official action"; "the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards"; and "the Government's interest, including the function involved and the fiscal and administrative burdens" that new procedures would impose. *Meza*, 607 F.3d at 402 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

As the district court found, the current procedures are inadequate—even when applied to our narrower understanding of the liberty interest at stake. The court's factual findings (which are not clearly erroneous) demonstrate that secured bail orders are imposed almost automatically on indigent arrestees.

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[4] We also note that Texas courts have never sought to eliminate the use of bail bonds. To the contrary, the use of secured bail was affirmed by the Texas Court of Criminal Appeals in *Anderer*, despite the opinion's strong language in support of an accused's pretrial freedom. *Anderer*, 61 S.W.3d at 403.

Far from demonstrating sensitivity to the indigent misdemeanor defendants' ability to pay, Hearing Officers and County Judges almost always set a bail amount that detains the indigent. In other words, the current procedure does not sufficiently protect detainees from magistrates imposing bail as an "instrument of oppression."

The district court laid out specific procedures necessary to satisfy constitutional due process when setting bail. Specifically, it found that,

> Due process requires: (1) notice that the financial and other resource information Pretrial Services officers collect is for the purpose of determining a misdemeanor arrestee's eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; (4) a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial; and (5) timely proceedings within 24 hours of arrest.[5]

The County challenges these requirements on appeal. We find some of their objections persuasive.

As this court has noted, the quality of procedural protections owed a defendant is evaluated on a "spectrum" based on a case-by-case evaluation of the liberty interests and governmental burdens at issue. *Meza*, 607 F.3d at 408–09. We note that the liberty interest of the arrestees here are particularly important: the right to pretrial liberty of those accused (that is, presumed innocent) of misdemeanor crimes upon the court's receipt of reasonable assurance of their return. *See id.* So too, however, is the government's interest

[5] The district court analyzed new efforts by both the County and State to improve their bail-setting procedures. We need not review its discussion here. We note, however, that we agree with its conclusions that the County's proposed remedies, which are beginning to be implemented, fail to address the constitutional violations at issue. We also agree that the changes proposed by the State would provide a more adequate remedy. Should these provisions become law, the need for the court's intervention must be revisited.

in efficiency. After all, the accused also stands to benefit from efficient processing because it "allow[s] [for his or her] expeditious release." *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983); *cf. Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991) (noting that defendants might be disserved by adding procedural complexity into an already complicated system). The sheer number of bail hearings in Harris County each year—according to the court, over 50,000 people were arrested on misdemeanor charges in 2015—is a significant factor militating against overcorrection.

With this in mind, we make two modifications to the district court's conclusions regarding the procedural floor. First, we do not require factfinders to issue a written statement of their reasons. While we acknowledge "the provision for a written record helps to insure that [such officials], faced with possible scrutiny by state officials . . . [and] the courts . . . will act fairly," *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974), such a drastic increase in the burden imposed upon Hearing Officers will do more harm than good. We decline to hold that the Constitution requires the County to produce 50,000 written opinions per year to satisfy due process. *Cf. United States v. McConnell*, 842 F.2d 105, 110 (5th Cir. 1988) (concluding that, under the Bail Reform Act of 1984, the "court must [merely] explain its reasons for concluding that the particular financial requirement is a necessary part of the conditions for release" when setting a bond that a detainee cannot pay). Moreover, since the constitutional defect in the process afforded was the *automatic* imposition of pretrial detention on indigent misdemeanor arrestees, requiring magistrates to specifically enunciate their individualized, case-specific reasons for so doing is a sufficient remedy.

Second, we find that the district court's 24-hour requirement is too strict under federal constitutional standards. The court's decision to impose a 24-hour limit relied not on an analysis of present Harris County procedures and

their current capacity; rather, it relied on the fact that a district court imposed this requirement thirty years ago (that is, prior to modern advancements in computer and communications technology). *See Sanders v. City of Hous.*, 543 F. Supp. 694 (S.D. Tex. 1982). But *Sanders*'s holding, which was not grounded in procedural due process but in the Fourth Amendment, relied on the Supreme Court opinion, *Gerstein*, 420 U.S. 103. *Id.* at 699. And *Gerstein* was later interpreted as establishing a right to a probable cause hearing within 48 hours. *McLaughlin*, 500 U.S. at 56–57. Further, *McLaughlin* explicitly included bail hearings within this deadline. *Id.* at 58.

We conclude that the federal due process right entitles detainees to a hearing within 48 hours. Our review of the due process right at issue here counsels against an expansion of the right already afforded detainees under the Fourth Amendment by *McLaughlin*. We note in particular that the heavy administrative burden of a 24-hour requirement on the County is evidenced by the district court's own finding: the fact that 20% of detainees do not receive a probable cause hearing within 24 hours despite the statutory requirement. Imposing the same requirement for bail would only exacerbate such issues.

The court's conclusion was also based on its interpretation of state law. But while state law may define liberty interests protected under the procedural due process clause, it does not define the procedure constitutionally required to protect that interest. *See Wansley v. Miss. Dep't of Corr.*, 769 F.3d 309, 313 (5th Cir. 2014) (noting that state law cannot serve as "the source of . . . process due"); *Giovanni v. Lynn*, 48 F.3d 908, 912 (5th Cir. 1995) ("[W]here a liberty . . . interest is infringed, the process which is due under the United States Constitution is that measured by the due process clause, not that called for by state regulations. Mere failure to accord the procedural protections called for by state law or regulation does not of itself amount to a denial of due process." (internal citation omitted)). Accordingly, although the parties contest whether

state law imposes a 24- or 48-hour requirement, we need not resolve this issue because state law procedural requirements do not impact our federal due process analysis.

The district court's definition of ODonnell's liberty interests is too broad, and the procedural protections it required are too strict. Nevertheless, even under our more forgiving framework, we agree that the County procedures violate ODonnell's due process rights.

B. Equal Protection

The district court held that the County's bail-setting procedures violated the equal protection clause of the Fourteenth Amendment because they treat otherwise similarly-situated misdemeanor arrestees differently based solely on their relative wealth. The County makes three separate arguments against this holding. It argues: (1) ODonnell's disparate impact theory is not cognizable under the equal protection clause, *see Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997); (2) rational basis review applies and is satisfied; (3) even if heightened scrutiny applies, it is satisfied. We disagree.

First, the district court did not conclude that the County policies and procedures violated the equal protection clause solely on the basis of their disparate impact. Instead, it found the County's custom and practice purposefully "detain[ed] misdemeanor defendants before trial who are otherwise eligible for release, but whose indigence makes them unable to pay secured financial conditions of release." The conclusion of a discriminatory purpose was evidenced by numerous, sufficiently supported factual findings, including direct evidence from bail hearings. This custom and practice resulted in detainment solely due to a person's indigency because the financial conditions for release are based on predetermined amounts beyond a person's ability to pay and without any "meaningful consideration of other possible alternatives." *Rainwater*, 572 F.2d at 1057. Under this circuit's binding

precedent, the district court was therefore correct to conclude that this discriminatory action was unconstitutional. *Id.* at 1056–57 (noting that pre-trial "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible" under both "due process and equal protection requirements"); *see also Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (noting that the indigent are protected by equal protection "at all stages of [criminal] proceedings"). Because this conclusion is sufficient to decide this case, we need not determine whether the equal protection clause requires a categorical bar on secured money bail for indigent misdemeanor arrestees who cannot pay it.

Second, the district court's application of intermediate scrutiny was not in error. It is true that, ordinarily, "[n]either prisoners nor indigents constitute a suspect class." *Carson v. Johnson*, 112 F.3d 818, 821–22 (5th Cir. 1997). But the Supreme Court has found that heightened scrutiny is required when criminal laws detain poor defendants *because of* their indigence. *See, e.g.*, *Tate v. Short*, 401 U.S. 395, 397–99 (1971) (invalidating a facially neutral statute that authorized imprisonment for failure to pay fines because it violated the equal protection rights of indigents); *Williams v. Illinois*, 399 U.S. 235, 241–42 (1970) (invalidating a facially neutral statute that required convicted defendants to remain in jail beyond the maximum sentence if they could not pay other fines associated with their sentences because it violated the equal protection rights of indigents). Reviewing this case law, the Supreme Court later noted that indigents receive a heightened scrutiny where two conditions are met: (1) "because of their impecunity they were completely unable to pay for some desired benefit," and (2) "as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973).

We conclude that this case falls into the exception created by the Court. Both aspects of the *Rodriguez* analysis apply here: indigent misdemeanor arrestees are unable to pay secured bail, and, as a result, sustain an absolute deprivation of their most basic liberty interests—freedom from incarceration. Moreover, this case presents the same basic injustice: poor arrestees in Harris County are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond. Heightened scrutiny of the County's policy is appropriate.[6]

Third, we discern no error in the court's conclusion that the County's policy failed to meet the tailoring requirements of intermediate scrutiny. In other words, we will not disturb the court's finding that, although the County had a compelling interest in the assurance of a misdemeanor detainee's future appearance and lawful behavior, its policy was not narrowly tailored to meet that interest.

The court's thorough review of empirical data and studies found that the County had failed to establish any "link between financial conditions of release and appearance at trial or law-abiding behavior before trial." For example, both parties' experts agreed that the County lacked adequate data to demonstrate whether secured bail was more effective than personal bonds in securing a detainee's future appearance. Notably, even after analyzing the

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[6] We acknowledge that the cited Supreme Court cases applied to indigents who were already found guilty. But this court in *Rainwater* concluded that the distinction between post-conviction detention targeting indigents and pretrial detention targeting indigents is one without a difference. We found that, regardless of its timing, "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Rainwater*, 572 F.2d at 1056 (citing *Williams* and *Tate*). Our conclusion was based on the "punitive and heavily burdensome nature of pretrial confinement" and the fact that it deprives someone who has only been "accused but not convicted of crime" of their basic liberty. *Id.*; *see also Anderson v. Nosser*, 438 F.2d 183, 190 (5th Cir. 1971) (noting that the pre-trial detainment of "unconvicted misdemeanants" was a "[p]unitive measure[ ] . . . out of harmony with the presumption of innocence"). We are bound by this analysis.

incomplete data that were available, neither expert discerned more than a negligible comparative impact on detainees' attendance. Additionally, the court considered a comprehensive study of the impact of Harris County's bail system on the behavior of misdemeanor detainees between 2008 and 2013. The study found that the imposition of secured bail might *increase* the likelihood of unlawful behavior. *See* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 786–87 (2017) (estimating that the release on personal bond of the lowest-risk detainees would have resulted in 1,600 fewer felonies and 2,400 fewer misdemeanors within the following eighteen months). These findings mirrored those of various empirical studies from other jurisdictions.

The County, of course, challenges these assertions with empirical studies of its own. But its studies at best cast some doubt on the court's conclusions. They do not establish clear error. We are satisfied that the court had sufficient evidence to conclude that Harris County's use of secured bail violated equal protection.

In sum, the essence of the district court's equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because

he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

V.

Having largely affirmed the district court's determinations that constitutional violations occurred, we turn to the court's remedy. When crafting an injunction, district courts are guided by the Supreme Court's instruction that "the scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). A district court abuses its discretion if it does not "narrowly tailor an injunction to remedy the specific action which gives rise to the order." *John Doe # 1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004). Thus, an injunction must be vacated if it "fails to meet these standards" and "is overbroad." *Id.* "The broadness of an injunction refers to the range of proscribed activity . . . . [and] is a matter of substantive law." *U.S. Steel Corp. v. United Mine Workers of Am.*, 519 F.2d 1236, 1246 n.19 (5th Cir. 1975).

The County argues that, even if the panel credits every one of the district court's factual findings and conclusions of law, the injunction it ultimately crafted is *still* overbroad. We agree. There is a significant mismatch between the district court's procedure-focused legal analysis and the sweeping injunction it implemented.

The fundamental source of constitutional deficiency in the due process and equal protection analyses is the same: the County's mechanical application of the secured bail schedule without regard for the individual arrestee's personal circumstances. Thus, the equitable remedy necessary to cure the constitutional infirmities arising under both clauses is the same: the County must implement the constitutionally-necessary procedures to engage in a case-by-case evaluation of a given arrestee's circumstances, taking into account the various factors required by Texas state law (only one of which is ability to pay).

These procedures are: notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decision-maker.

That is not what the preliminary injunction does, however. Rather, it amounts to the outright elimination of secured bail for indigent misdemeanor arrestees. That remedy makes some sense if one assumes a fundamental substantive due process right to be free from any form of wealth-based detention. But, as the foregoing analysis establishes, no such right is in view. The sweeping injunction is overbroad.

We therefore conclude that the district court abused its discretion in crafting an injunction that was not "narrowly tailor[ed] . . . to remedy the specific action which gives rise to the order." *Veneman*, 380 F.3d at 818. We will vacate the injunction and remand to allow the court to craft a remedy more finely tuned to address the harm.

The following represents the sort of modification that would be appropriate here, although we leave the details to the district court's discretion:

> With these principles in mind, the court will order the following relief, to take effect within 30 days, unless those enjoined move for and show good cause for a reasonable, brief extension. Any motions for extension will be set for prompt hearing and resolution.
>
> - Harris County is enjoined from imposing prescheduled bail amounts as a condition of release on arrestees who attest that they cannot afford such amounts without providing an adequate process for ensuring that there is individual consideration for each arrestee of whether another amount or condition provides sufficient sureties.
>
> - Pretrial Services officers, as County employees and subject to its policies, must verify an arrestee's ability to pay a prescheduled financial condition of release by an affidavit, and must explain to arrestees the nature and significance of the verification process.

- The purpose of the explanation is to provide the notice due process requires that a misdemeanor defendant's state constitutional right to be bailable by sufficient sureties is at stake in the proceedings. Pretrial Services may administer either the form of the affidavit currently used to determine eligibility for appointed counsel or the adapted form that Dr. VanNostrand testified was prepared for Pretrial Services to be administered by July 1, 2017, if they comply with the below guidelines. Pretrial Services must deliver completed affidavits to the Harris County Sheriff's Office before a declarant's probable cause hearing.

- The affidavit must give the misdemeanor arrestee sufficient opportunity to declare under penalty of perjury, after the significance of the information has been explained, the maximum amount of financial security the arrestee would be able to post or pay up front within 24 hours of arrest. The affidavit should ask the arrestee to provide details about their financial situation sufficient to help the County make reliable determinations regarding the amount of bail that would provide sufficient sureties, including: 1) arrestee and spouse's income from employment, real property, interest and dividends, gifts, alimony, child support, retirement, disability, unemployment payments, public-assistance, and other sources; 2) arrestee and spouse's employment history for the prior two years and gross monthly pay; 3) arrestee and spouse's present cash available and any financial institutions where cash is held; 4) assets owned, e.g., real estate and motor vehicles; 5) money owed to arrestee and spouse; 6) dependents of arrestee and spouse, and their ages; 7) estimation of itemized monthly expenses; 8) taxes and legal costs; 9) expected major changes in income or expenses; 10) additional information the arrestee wishes to provide to help explain the inability to pay. The question is neither the arrestee's immediate ability to pay with cash on hand, nor what assets the arrestee could eventually produce after a period of pretrial detention. The question is what amount the arrestee could reasonably pay within 24 hours of his or her arrest, from any source, including the contributions of family and friends.

- The purpose of this requirement is to provide a better, easier, and faster way to get the information needed to determine a misdemeanor defendant's ability to pay. The Hearing Officers and County Judges testified that they presently do not know who has the ability to pay.

The affidavit can be completed within 24 hours after arrest; the current process of verifying references by phone extends for days after arrest.

- The court does not order relief against the Hearing Officers or against the County Judges in their judicial or legislative capacities.

- Misdemeanor defendants who are not subject to: (1) formal holds preventing their release from detention; (2) pending mental-health evaluations to determine competency; or (3) pretrial preventive detention orders for violating a condition of release for a crime of family violence, have a constitutionally protected state-created liberty interest in being bailable by sufficient sureties before trial. If a misdemeanor defendant has executed an affidavit showing an inability to pay prescheduled money bail and has not been released either: (1) on an unsecured personal bond with nonfinancial conditions of release; or (2) on a secured money bond for which the defendant could pay a commercial surety's premium, as indicated on the affidavit, then the defendant is entitled to a hearing within 48 hours of arrest in which an impartial decision-maker conducts an individual assessment of whether another amount of bail or other condition provides sufficient sureties. At the hearing, the arrestee must have an opportunity to describe evidence in his or her favor, and to respond to evidence described or presented by law enforcement. If the decision-maker declines to lower bail from the prescheduled amount to an amount the arrestee is able to pay, then the decision-maker must provide written factual findings or factual findings on the record explaining the reason for the decision, and the County must provide the arrestee with a formal adversarial bail review hearing before a County Judge. The Harris County Sheriff is therefore authorized to decline to enforce orders requiring payment of prescheduled bail amounts as a condition of release for said defendants if the orders are not accompanied by a record showing that the required individual assessment was made and an opportunity for formal review was provided. All nonfinancial conditions of release ordered by the Hearing Officers, including protective orders, drug testing, alcohol intake ignition locks, or GPS monitoring, will remain in effect.

- The purpose of this requirement is to provide timely protection for the state-created liberty interest in being bailable by sufficient sureties

and to prevent the automatic imposition of prescheduled bail amounts without an adequate process for ensuring that there is individualized consideration of whether another amount or condition provides sufficient sureties.

- To enforce the 48-hour timeline, the County must make a weekly report to the district court of misdemeanor defendants identified above for whom a timely individual assessment has not been held. The County must also notify the defendant's counsel and/or next of kin of the delay. A pattern of delays might warrant further relief from the district court. Because the court recognizes that the County might need additional time to comply with this requirement, the County may propose a reasonable timeline for doing so.

- The purpose of this requirement is to give timely protection to the state-created liberty interest in being bailable by sufficient sureties by enforcing federal standards indicating that 48 hours is a reasonable timeframe for completing the administrative incidents to arrest. The 48-hour requirement is intended to address the endemic problem of misdemeanor arrestees being detained until case disposition and pleading guilty to secure faster release from pretrial detention.

- For misdemeanor defendants who are subject to formal holds and who have executed an affidavit showing an inability to pay the prescheduled financial condition of release, the Sheriff must treat the limitations period on their holds as beginning to run the earliest of: (1) after the probable cause hearing; or (2) 24 hours after arrest. The purpose of this requirement is to ensure that misdemeanor defendants are not prevented from or delayed in addressing their holds because they are indigent and therefore cannot pay a prescheduled financial condition of release.

- Misdemeanor defendants who do not appear competent to execute an affidavit may be evaluated under the procedures set out in the Texas Code of Criminal Procedure Article 16.22. If competence is found, the misdemeanor defendant is covered by the relief the court orders, with the exception that the 48-hour period begins to run from the finding of competence rather than from the time of arrest. As under Article 16.22, nothing in this order prevents the misdemeanor arrestee from

being released on secured bail or unsecured personal bond pending the evaluation.

VI.

For the forgoing reasons, we AFFIRM the district court's findings of fact. We AFFIRM its conclusions of law except its conclusion that the County Sheriff may be sued under § 1983 and its determination of the specific procedural protections owed under procedural due process. On those issues, we REVERSE the district court's conclusions. Accordingly, we DISMISS the Sheriff. We VACATE the preliminary injunction as overbroad and REMAND to the district court to craft a revised injunction—one that is narrowly tailored to cure the constitutional deficiencies the district court properly identified. But we also STAY the vacatur pending implementation of the revised injunction, so as to maintain a stable status quo.

Handout 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20466

United States Court of Appeals
Fifth Circuit
FILED
August 14, 2018
Lyle W. Cayce
Clerk

MARANDA LYNN ODONNELL,

Plaintiff–Appellee,

versus

PAULA GOODHART; BILL HARMON; NATALIE C. FLEMING; JOHN CLINTON; MARGARET HARRIS; LARRY STANDLEY; PAM DERBYSHIRE; JAY KARAHAN; JUDGE ANALIA WILKERSON; DAN SPJUT; JUDGE DIANE BULL; JUDGE ROBIN BROWN; DONALD SMYTH; JEAN HUGHES,

Defendants–Appellants.

* * * * *

LOETHA SHANTA MCGRUDER; ROBERT RYAN FORD,

Plaintiffs–Appellees,

versus

HARRIS COUNTY, TEXAS, ET AL.,

Defendant.

PAULA GOODHART; BILL HARMON; NATALIE C. FLEMING; JOHN CLINTON; MARGARET HARRIS; LARRY STANDLEY; PAM DERBYSHIRE; JAY KARAHAN; JUDGE ANALIA WILKERSON; DAN SPJUT; JUDGE DIANE BULL; JUDGE ROBIN BROWN; DONALD SMYTH; JEAN HUGHES,

Defendants–Appellants.

No. 18-20466

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH, GRAVES, and DUNCAN, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This is a motion for stay pending appeal. We grant the stay.

I.

Plaintiffs brought a class action against Harris County, Texas, and a number of its officials—including County Judges,[1] Hearing Officers, and the Sheriff (collectively, the "County")[2]—under 42 U.S.C. § 1983, alleging the County's system of setting bail for indigent misdemeanor arrestees violates Texas statutory and constitutional law and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[3]

[1] The parties use the term "County Judges" to refer to the judges of the County Criminal Courts of Law of Harris County, so we do likewise. That term does not refer to the County Judge, who is the head of the County Commissioners' Court.

[2] Only fourteen of the sixteen County Judges join in the instant appeal. The Sheriff and two County Judges chose not to join. We use "Fourteen Judges" or "the Judges" when referring to the defendants.

[3] For a full review of Texas's bail system and the challenges to it, *see ODonnell v. Harris Cty.* (*ODonnell I*), 892 F.3d 147, 152–55 (5th Cir. 2018) (opinion on petition for rehearing). For misdemeanors in 2016 when suit was filed, bail ranged from $500 to $5,000, depending on the crime and the arrestee's criminal history. Under the 2017 schedule, however, arrestees are classified based on their crime and risk score (determined using the Laura and John Arnold Foundation Public Safety Assessment). The 2017 schedule utilizes twenty categories. For seven of those, bail ranges from $500 to $2,000. If an arrestee in one of those seven cannot post bail, he is presumptively eligible for an unsecured bond once he appears before the magistrate. Alternatively, to facilitate earlier release, some of those arrestees can be brought before a Hearing Officer for a determination of probable cause. The Hearing Officer can then grant a personal bond and release the arrestee. The arrestees in the other

After a hearing, the district court granted Plaintiffs' motion for a preliminary injunction, finding that they were likely to succeed on their procedural due process and equal protection claims. We affirmed in part and reversed in part. *ODonnell I*, 892 F.3d at 152–55.[4] We remanded for a revised injunction "consistent with this opinion." *Id.* at 152. That revised injunction was to be "narrowly tailored to cure the constitutional deficiencies the district court properly identified." *Id.* at 166–67. We provided a model injunction but left "the details to the district court's discretion." *Id.* at 164.

On remand, the district court adopted the model injunction but added four provisions of its own—Sections 7, 8, 9, and 16. Section 7 applies to all misdemeanor arrestees who (a) are not subject to a formal hold,[5] (b) have executed an affidavit of financial condition showing inability to pay, and (c) have not been granted release on unsecured bond. The injunction directs the County to release them if they would have been released had they posted bond. These arrestees must be released within "the same time frame of release" as an arrestee who posted bond, and "[v]erification of references must not delay release." Revised PI § 7, App. 4–5.

In other words, the County cannot hold indigent arrestees for the 48 hours preceding their bail hearing if the same individual would have been released had he been able to post bond. The district court explained that that

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thirteen categories (arrestees deemed a sufficiently serious risk) do not have bail set at the time of arrest but, instead, are detained until they are brought before the magistrate, who then determines the amount of bail.

[4] On petition for rehearing, an initial opinion, 882 F.3d 528 (5th Cir. 2018), was withdrawn and replaced by *ODonnell I*.

[5] Formal holds include a federal immigration detainer or an outstanding warrant from another county or municipal authority, a pending finding of mental illness or intellectual disability, family-violence detention procedures, and a medical condition that prevents participation in the pretrial bail system.

provision is to prevent those unable to afford bail "from being detained longer than those able to pay secured money bail before receiving a hearing and individual assessment." *Id.*

Except for formal holds, Section 8 requires the County to release, on unsecured personal bond, all misdemeanor arrestees who have not had a hearing and individual assessment within 48 hours. The County may require their return for a hearing but cannot hold arrestees "after the 48th hour after their arrest." Revised PI § 8, App. 6.

The district court justified Section 8 as addressing the concern of "arrestees being detained until case disposition and pleading guilty to secure faster release from pretrial detention." Revised PI Op. at 12, App. 21 (quoting *Odonnell I*, 892 F.3d at 166). Again, such arrestees could be required to return for an individualized hearing but could not be held beyond 48 hours. *Id.* at 13, App. 22.

Section 9 requires the County to implement procedures to comply with Section 8. Upon release, the arrestee will be subject to the bail amount previously set until his new hearing, but that amount will be imposed on an unsecured basis. *In absentia* hearings do not satisfy the 48-hour rule.

Section 16 applies the relief to "misdemeanor arrestees who are re-arrested on misdemeanor charges only or on warrants for failing to appear while released before trial on bond (either secured or unsecured)." Revised PI § 16, App. 8. The decisionmaker is free to consider these facts at the individual assessment hearing but must provide repeat offenders the same protections, in advance of that hearing, as any other first-time arrestee. Revised PI Op. at 16–17. App. 25–26.

On July 10, 2018, the Fourteen Judges filed this appeal of the

preliminary injunction and moved, in the district court, for a stay, pending appeal, of Sections 7, 8, 9, and 16. The district court denied their motion. On July 27, 2018, Fourteen County Judges filed an emergency motion with this court, requesting a stay only of those four sections set to go into effect at 12:01 a.m. on July 30, 2018. We issued an emergency stay to allow time for full consideration of the motion, and we heard oral argument on the motion on August 7, 2018. We now grant the motion and enter a stay of Sections 7, 8, 9, and 16 pending plenary resolution of this appeal by a merits panel.

II.

A stay pending appeal "is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation marks omitted). We consider

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Veasey v. Abbott, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (quoting *Nken*, 556 U.S. at 426). The first two factors are the most critical. *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016).

A.

The Fourteen Judges offer seven reasons why they are likely to succeed on the merits: (1) The revised injunction violates the mandate rule; (2) the revised injunction is overbroad such that it exceeds the limits of a federal court's power; (3) the revised injunction violates *Younger v. Harris*, 401 U.S. 37 (1971); (4) the revised injunction violates *Preiser v. Rodriguez*, 411 U.S. 475 (1973); (5) the revised injunction violates the Eighth Amendment; (6) the Constitution does not require mandatory release of those who cannot afford bail; and (7) the Constitution does not require mandatory release of those detained

more than 48 hours without a hearing. Because the Fourteen Judges are likely to succeed on the merits as to the first two and the last two grounds, we need not—and do not—reach the *Younger*, *Preiser*, or Eighth Amendment theories.

1.

"[T]he mandate rule compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." *Gene & Gene, L.L.C. v. BioPay, L.L.C.*, 624 F.3d 698, 702 (5th Cir. 2010). The district court "must implement both the letter and the spirit of the appellate court's mandate."[6] "[D]istrict courts are guided by the Supreme Court's instruction that 'the scope of injunctive relief is dictated by the extent of the violation established.'" *ODonnell I*, 892 F.3d at 163 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). "The district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order." *John Doe # 1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004).

The *ODonnell I* panel clarified that under both the Due Process and Equal Protection Clauses, the precise "constitutional defect in the process afforded was the *automatic* imposition of pretrial detention on indigent misdemeanor arrestees."[7] Thus, individualized hearings after which magistrates

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[6] *United States v. McCrimmon*, 443 F.3d 454, 460 (5th Cir. 2006) (quotation marks omitted). The mandate rule is subject to three exceptions—(1) Evidence at a later trial is substantially different; (2) there is an intervening change of law; (3) the prior decision is clearly erroneous and works a manifest injustice. *See Ball v. LeBlanc*, 881 F.3d 346, 351 (5th Cir. 2018), *petition for cert. filed* (Aug. 3, 2018) (No. 18-162). Neither side contends that any of those exceptions applies here.

[7] *ODonnell I*, 892 F.3d at 160, 163 ("The fundamental source of constitutional deficiency in the due process and equal protection analyses is the same: the County's mechanical application of the secured bail schedule without regard for the individual arrestee's personal circumstances.").

had to "specifically enunciate their individualized, case-specific reasons for [imposing bail] is a sufficient remedy." *Id.* at 160.[8] The procedures required for such hearings were "notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decision-maker." *Id.* at 163. The panel then provided detailed guidance on how a properly crafted injunction should look, cautioning that it should not "amount[] to the outright elimination of secured bail for indigent misdemeanor arrestees."[9]

Despite the district court's diligent and well-intentioned effort to comply with *ODonnell I*, Section 7 easily violates the mandate, which explicitly found that individualized hearings would remedy the identified procedural violations. The requirement that such a hearing be held within 48 hours is applied to those who cannot afford the prescheduled bond. In other words, the panel saw the 48-hour limit as sufficient to protect indigent arrestees from being detained for too long pending their hearings. *See id.* at 165; Revised PI § 6, App. 4.

The identified violation was the *automatic* imposition of bail. Individualized hearings fix that problem, so immediate release is more relief than required and thus violates the mandate rule and is not required by the Constitution. Further, though the *ODonnell I* panel refused to find clear error in the district court's ruling that the County Judges had not shown a "link between financial conditions of release and appearance at trial or law-abiding

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[8] *Id.* at 163 ("Thus, the equitable remedy necessary to cure the constitutional infirmities arising under both clauses is the same: the County must implement the constitutionally-necessary procedures to engage in a case-by-case evaluation of a given arrestee's circumstances.").

[9] *Id.* ("That remedy makes some sense if one assumes a fundamental substantive due process right to be free from any form of wealth-based detention. But . . . no such right is in view.").

behavior before trial,"[10] the panel recognized that the primary purpose of bail is "to secure the presence of the defendant in court."[11] Hence, the panel cautioned that an "outright elimination of secured bail for indigent misdemeanor arrestees" was an inappropriate remedy. *ODonnell I*, 892 F.3d at 163. Because the new injunction again orders release of an indigent arrestee with no strings attached and before an opportunity for the County to provide the strings, the injunction circumvents the purpose of bail and ultimately eliminates secured bail, all in violation of *ODonnell I*.

Release might be warranted were "one [to] assume[] a fundamental substantive due process right to be free from any form of wealth-based detention. But . . . no such right is in view." *Id.* Narrowing the applicability of the relief does not make it any more permissible. Secured bail was not to be eliminated for any category of indigent arrestees, no matter how narrow.

But Section 7 does just that. Preserving the magistrates' discretion post-hearing does not correct the violation of the explicit mandate not to eliminate secured bail. Some wealth-based detention is permissible and was contemplated by the panel. *See id.* at 163.

Additionally, *ODonnell I* remanded so the district court could "craft a revised injunction—one that is narrowly tailored to cure the constitutional deficiencies the district court properly identified." *Id.* at 166–67. The problem that the district court claims to address via Section 7 is not a deficiency that was originally identified, so it falls outside the confines of our narrow remand.

The district court frames the problem of what to do with arrestees during

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[10] *Id.* at 162 (quotation marks omitted).

[11] *Id.* at 158 (quotation marks omitted) ("Texas state law creates a right to bail that appropriately weighs the detainees' interest in pretrial release and the court's interest in securing the detainee's attendance.").

the 48-hour prehearing window as one arising after the panel issued its ruling that included a sample injunction. Revised PI Op. at 9, App.18. With all due respect, that is not so. The original injunction contained the requirement that a hearing be held within 24 hours. Thus, the same issue of what to do with arrestees during the gap between arrest and hearing—be it 24 or 48 hours—was always at issue and could have been addressed during the initial proceedings.

Remand is not the time to bring new issues that could have been raised initially.[12] Thus, Section 7 plainly violates the mandate rule, and the Fourteen Judges are likely to succeed on the merits as to that section.

Sections 8 and 9 order the *immediate* release of any indigent detainee who is not provided an individualized hearing within 48 hours of detainment. *ODonnell I*, 892 F.3d at 160, addressed whether a hearing must occur within 24 hours, and it determined that 48 hours was sufficient under the Constitution. It did not, however, directly announce the remedy if a hearing does not occur within that timeframe. But in the model injunction, the proposed remedy for failure to comply with that requirement was for the County to make weekly reports to the district court identifying any delays and to inform the detainees' counsel or next of kin about the delays. *Id.* at 166. And, only "[a] pattern of delays *might* warrant further relief." *Id.* (emphasis added).

As explained, *ODonnell I* did not require the district court to adopt the model injunction word for word but instead left "the details to the district court's discretion." *Id.* at 164. Despite that latitude, the mandate that the

[12] *McCrimmon*, 443 F.3d at 459 ("All other issues not arising out of this court's ruling and not raised before the appeals court, which could have been brought in the original appeal, are not proper for reconsideration by the district court below."); *see also Henderson v. Stalder*, 407 F.3d 351, 354 (5th Cir. 2005).

district court craft a narrowly tailored injunction is binding. The proposed relief of weekly progress reports and notification of counsel/kin was deemed sufficient to fix the constitutional deficiency. The district court was to monitor the situation for a pattern of violations and only then take possible corrective action.

Anything broader than that remedy violates any reasonable reading of the mandate. And at the very least, the injunction provides broader relief than necessary, as the model injunction illustrates. Sections 8 and 9 are definitively overbroad and arguably violative of the mandate rule, so the Fourteen Judges are likely to succeed on the merits as to those sections as well.[13]

2.

The Due Process and Equal Protection Clauses do not require the release required in Section 7. The relief would be warranted under due process only were a substantive right to release at issue. But the *ODonnell I* panel already found that the substantive right to release on "sufficient sureties" is "not purely defined by what the detainee can afford" and "does not create an automatic right to pretrial release." *ODonnell I*, 892 F.3d at 158.

Nor does the Equal Protection Clause require the release imposed by Section 7. The threshold question is the proper standard of review. The *Odonnell I* panel found the exception in *San Antonio Independent School District v. Rodriguez*,[14] to be applicable such that heightened scrutiny applied to the bail

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[13] Because Section 16 grants the relief ordered in Sections 7, 8, and 9 to a particular category of arrestees, it rises and falls on the merits with those sections and does not require independent consideration.

[14] 411 U.S. 1, 20 (1973) (concluding that indigents receive heightened scrutiny where (1) "because of their impecunity they were completely unable to pay for some desired benefit," and (2) "as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit").

schedule. The release under Section 7, however, presents a narrower concern that is subject only to rational basis review because it is premised solely on inability to afford bail, as distinguished from inability to afford bail *plus* the absence of meaningful consideration of other possible alternatives. *See id.* at 161.

Caselaw bears out that distinction. An Equal Protection Claim that an indigent "person spends more time incarcerated than a wealthier person" is reviewed for a rational basis.[15] The 48-hour detention claim is based solely on the premise of inability to afford, as the detention itself is part of the remedy the panel created to afford arrestees more process.

The parties' contentions highlight that both the standard of review and the underlying merits of this issue are a challenge because of the level of generality. Looking at the detention alone, Plaintiffs assert the same constitutional deficiency the court found in the County's bail system: Identical arrestees are invidiously discriminated against on account of wealth. The Judges, however, frame the issue as one of disparate impact: The remedy to the automatic detention of the indigent is more process to allow them alternatives. Those who cannot afford the set bail are entitled to an individualized hearing within 48 hours to determine whether lowering that bail would be release on sufficient sureties.

The latter view is by far the better one. Plaintiffs artificially isolate a part of the remedy that, on its own, appears to be the same violation found in

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[15] *Doyle v. Elsea*, 658 F.2d 512, 518 (7th Cir. 1981) (cited favorably by *Smith v. U.S. Parole Comm'n*, 752 F.2d 1056, 1059 (5th Cir. 1985) (applying rational basis review and finding that "unconstitutional wealth discrimination simply is not involved by this allegedly disparate treatment that results from Parole Commission policies that serve rationally legitimate, articulated governmental policies in the administration of parole violations [that result in increased jail time for those unable to afford bail]")); *see also McGinnis v. Royster*, 410 U.S. 263, 270 (1973).

the first instance. Asking what the proper remedy would be reveals the weakness of that position. Were we to find the 48-hour detention improper, we would have to affirm the district court's elimination of secured bail for the category of arrestees addressed in Section 7. That is expressly what *ODonnell I* forbids. That panel found that a procedural violation is subject to procedural relief. That some arrestees would continue to afford and pay bail while others would avail themselves of the new hearing within 48 hours is an inherent part of this calculus.

Now that the requirement of a hearing is in place, the only remaining contention about the 48-hour window concerns only the inability to afford bail. And that is an equal protection claim consistently rejected on rational-basis review.[16] That does not call into question *ODonnell I*'s application of intermediate scrutiny or finding of a violation.

In *ODonnell I*, the inability to afford bail was coupled with the lack of meaningful considerations of alternatives. Here, however, the alternative is the 48-hour detention and hearing. In its original conclusion that the imposition of automatic bail violated due process, the panel "boiled down" the violation to this situation:

> [T]ake two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. . . . One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less

[16] *See, e.g.*, *McGinnis*, 410 U.S. at 270; *Smith*, 752 F.2d at 1059. For example, a state scheme allowing good-time credit "resulted in longer incarceration for those unable to afford bail. Yet the Supreme Court, applying a rational-basis analysis, upheld the scheme." *Doyle*, 658 F.2d at 518 (discussing *McGinnis*).

> money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

ODonnell I, 892 F.3d at 163.

That last piece is critical. Detention of indigent arrestees and release of wealthier ones is not constitutionally infirm purely because of the length of detention. Instead, the court considered the consequences of such detention: the likelihood of pleading guilty, the ultimate sentence given, and the social cost of a potentially lengthy pretrial incarceration.

None of these concerns comes to bear on the alleged problem Section 7 aims to cure. The prehearing detention is capped at 48 hours. Measures are in place to address violations of that procedural safeguard. Misdemeanor arrestees awaiting their individualized bail hearing do not face the same dire prospects of "bear[ing] the brunt" of a lengthy pretrial incarceration caused by an unconstitutional bail system. The individualized hearing imposed by the district court as modeled on the panel's suggestions is sufficient to cure the automatic imposition of bail. It does so in a way that is rationally related to the state's interest in securing the appearance of arrestees. *See id.* at 164–66.

3.

Sections 8, 9, and 16 are likewise not constitutionally required. The district court described those sections as consistent with *ODonnell I*, concluding that the production of a report of those awaiting a hearing does not preclude the remedy of release. *Id.* That well-meant reasoning does not hold water. *ODonnell I* expressly provided only procedural relief.[17] The grant of automatic

[17] *ODonnell I*, 892 F.3d at 160, 163 ("There is a significant mismatch between the district court's procedure-focused legal analysis and the sweeping injunction it implemented. . . . [T]he equitable remedy necessary to cure the constitutional infirmities arising under both clauses is the same: the County must implement the constitutionally-necessary

release smuggles in a substantive remedy via a procedural harm. That goes too far. The due process and equal protection relief found sufficient in *Odonnell I* did not contemplate release, and it follows that such relief is improper.

B.

The Judges have made an adequate showing to satisfy the remaining three factors. They and the public are harmed by enjoining the County's bail system. And given their likelihood of success on the merits, any harm to Plaintiffs, standing alone, does not outweigh the other factors. *See Planned Parenthood of Greater Tex. Surgical Health Servs v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013).

III.

In sum, the expansive injunction entered on remand repeats the mistake of the original injunction: It "amounts to the outright elimination of secured bail for indigent misdemeanor arrestees." *ODonnell*, 892 F.3d at 163. But there is "no such . . . fundamental substantive due process right to be free from any form of wealth-based detention." *Id.* "The sweeping injunction is overbroad." *Id.*

The motion for stay, pending appeal, of Sections 7, 8, 9, and 16 is GRANTED.

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procedures to engage in a case-by-case evaluation of a given arrestee's circumstances, taking into account the various factors required by Texas state law (only one of which is ability to pay).").

JAMES E. GRAVES, JR., Circuit Judge, dissenting:

Harris County's unconstitutional bail practices will continue to deny equal protection and due process to indigent misdemeanor arrestees unless the amended preliminary injunction is fully and immediately implemented. "Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

The judges of Harris County Criminal Courts at Law Nos. 1 through 13 and 15 move for a partial stay, pending appeal, of the district court's amended order of preliminary injunction. The decision whether to grant a motion for stay pending appeal is governed by four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "The first two factors . . . are the most critical." *Id.* As the parties seeking a stay, the judges bear the burden of satisfying these four factors. *Id.* at 433–34; *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982). They have satisfied none. I would therefore deny their motion.

1. The judges are unlikely to succeed on the merits of their appeal.

"[T]he mandate rule compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004) (citing *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993)). The judges argue that Sections 7 and 8 of the amended injunction violate this court's mandate in *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018) (*ODonnell I*), because they require the release, on personal bond, of certain

misdemeanor arrestees in specified circumstances.[1] *ODonnell I* does not contain an "explicit directive[]" against the remedies provided by Sections 7 and 8. *See Lee*, 358 F.3d at 321 (quoting *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002)). Thus, to prevail on their mandate-rule argument, the judges must demonstrate that such a proscription is a "necessary implication" of this court's opinion. *See id.* at 320 (citing *Crowe v. Smith*, 261 F.3d 558, 562 (5th Cir. 2001)). When construing an appellate court's mandate, a district court must "tak[e] into account the circumstances that [the appellate court's] opinion embraces." *Sobley v. S. Nat. Gas Co.*, 302 F.3d 325, 333 (5th Cir. 2002).

This court's opinion in *ODonnell I* was directed, not to every conceivable remedy the district court might have entered, but to the district court's original preliminary injunction and must therefore be read in light of that order's particular provisions. Like Sections 7 and 8 of the amended injunction, Sections 2 and 3 of the original injunction required misdemeanor defendants who satisfied certain criteria to be released on unsecured personal bond in specified circumstances. But unlike Sections 7 and 8 of the amended injunction—both of which expressly state that the county "may require misdemeanor arrestees who are released on unsecured personal bonds under this Section to return for a hearing and individual assessment"—nothing permitted county officials to require defendants released under the original injunction to return for a hearing at which secured money bail could be imposed if necessary to provide "sufficient sureties." This is a crucial distinction. By failing to account for the county's "interest in assurance," *ODonnell I*, 892 F.3d at 158, the original injunction's open-ended release

[1] The judges also challenge Sections 9 and 16 of the amended injunction, but since those provisions largely depend on Sections 7 and 8, they do not warrant separate discussion here.

provisions "amount[ed] to the outright elimination of secured bail for indigent misdemeanor arrestees," *id.* at 163. Because Sections 7 and 8 of the amended injunction preserve the county's ability to impose secured bail on all misdemeanor arrestees, they do not "create an automatic right to pretrial release," *id.* at 158, and thus fully comport with *ODonnell I*'s mandate.

The amended preliminary injunction is also narrowly tailored to the equal protection and due process violations affirmed by this court in *ODonnell I*. *See id.* at 157–63.

Section 7 of the amended injunction requires, with various exceptions, that misdemeanor arrestees who "would otherwise be released after arrest and before a hearing and individual assessment . . . if not for their inability to pay the prescheduled or other secured financial conditions of release" must be released "on the same time frame" as "a misdemeanor arrestee who is able to pay secured money bail." By ensuring that misdemeanor arrestees are not detained before they receive an individualized hearing solely because of their inability to afford a preset amount of secured money bail, Section 7 aims to prevent county officials from violating the Equal Protection Clause. It is narrowly tailored to that purpose. Because it requires release only to the extent that county officials choose to engage in wealth-based detention through the use of secured money bail, Section 7 itself does not create any entitlement to release. Furthermore, Section 7 in no way eliminates secured money bail, which may still be imposed at an individualized hearing.

However thorough and fair it may be, an individualized hearing 48 hours *after* arrest cannot "fix" the deprivation of liberty and equal protection suffered by an indigent misdemeanor arrestee who is automatically detained *prior to* that hearing "solely because [she is] too poor to pay" a preset amount of secured money bail. *See Bearden v. Georgia*, 461 U.S. 660, 664 (1983). The majority contends that detention before the individualized hearing "is subject only to

rational basis review because it is premised solely on inability to afford bail, as distinguished from inability to afford bail *plus* the absence of meaningful consideration of other possible alternatives." In addition to being foreclosed by *ODonnell I*'s holding that heightened scrutiny—not rational basis review—applies here, 892 F.3d at 161–62 & n.6, the majority's argument squarely contravenes Supreme Court precedent. Indigent misdemeanor arrestees who are detained prior to their individualized hearings solely because they cannot afford secured money bail do not receive any "meaningful consideration of other possible alternatives" that would enable their pre-hearing release. Rather, they "share[] two distinguishing characteristics" that trigger heightened scrutiny: (1) "because of their impecunity they [are] completely unable to pay for some desired benefit"; and (2) "as a consequence, they sustain[] an absolute deprivation of a meaningful opportunity to enjoy that benefit." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973); *accord ODonnell I*, 892 F.3d at 161–62. Accordingly, *Williams v. Illinois*, 399 U.S. 235 (1970), *Tate v. Short*, 401 U.S. 395 (1971), and *Bearden* control this case, and the majority's suggestion that this is an issue of "disparate impact" is unavailing. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996) ("Sanctions of the *Williams* genre . . . are not merely *disproportionate* in impact. Rather, they are wholly contingent on one's ability to pay, and thus 'visi[t] different consequences on two categories of persons'; they apply to all indigents and do not reach anyone outside that class." (quoting *Williams*, 399 U.S. at 242)).[2]

[2] The sole Supreme Court decision that the majority cites to support its application of rational basis review is *McGinnis v. Royster*, 410 U.S. 263 (1973). The equal protection claim in *McGinnis*, however, involved a distinction that a state statute drew between time served in state prisons and time served in county jails. *Id.* at 268–72. While the Court indicated that this distinction adversely affected "those state prisoners *unable to afford or otherwise qualify for* bail prior to trial," *id.* at 268 (emphasis added), it did not analyze the claim in terms of invidious discrimination against the indigent. The majority also cites *Doyle v. Elsea*, 658 F.2d 512 (7th Cir. 1981), and *Smith v. United States Parole Commission*, 752

Section 8 of the amended injunction is also an appropriate remedy. Subject to certain exceptions, Section 8 requires the prompt release on unsecured personal bond of misdemeanor arrestees who "have not appeared at a hearing and individual assessment within 48 hours of arrest." Thus, Section 8 requires release only when county officials fail to comply with their duty under the Fourteenth Amendment to provide misdemeanor arrestees with a bail hearing within 48 hours of arrest. *See ODonnell I*, 892 F.3d at 160 ("We conclude that the federal due process right entitles detainees to a hearing within 48 hours."). Even then, the county retains the authority to impose secured money bail at a later hearing. Section 8 is therefore narrowly tailored to ensuring that misdemeanor arrestees are not detained without an individualized hearing for longer than the Due Process Clause permits.

The judges contend that Section 8 is overbroad because "the Fourteenth Amendment does not require the automatic release of arrestees who are detained more than 48 hours before they are afforded an individualized hearing regardless of the justification for the delay." They cite the Supreme Court's opinion in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), but *McLaughlin* says nothing about whether an order of release would be an appropriate remedy for an unduly delayed probable cause determination (the proceeding at issue in *McLaughlin*) or any other type of pretrial hearing.

The majority relies heavily on the following provision in *ODonnell I*'s model injunction:

> To enforce the 48-hour timeline, the County must make a weekly report to the district court of misdemeanor defendants

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F.2d 1056 (5th Cir. 1985). Because it predated *Bearden*, *Doyle*'s basis for applying *McGinnis* instead of *Williams* rested on a faulty distinction. *Doyle*, 658 F.2d at 518 (finding *Williams* inapplicable because the prisoner "will not spend more time incarcerated than the maximum period set by statute for the offenses of which he was found guilty"). Consequently, *Smith*, which adopted *Doyle*'s reasoning and did not even mention *Bearden*, has little persuasive value.

> identified above for whom a timely individual assessment has not been held. The County must also notify the defendant's counsel and/or next of kin of the delay. A pattern of delays might warrant further relief from the district court. Because the court recognizes that the County might need additional time to comply with this requirement, the County may propose a reasonable timeline for doing so.

ODonnell I, 892 F.3d at 166. The district court, however, was not required to confine its remedy to this or any other portion of the model injunction. *See id.* at 164. Moreover, nothing in the *ODonnell I* opinion indicates that this court considered the possibility of a limited release remedy like Section 8, which accommodates the constitutional rights of arrestees and the interest of county officials in being able to impose secured bail after a hearing and individualized assessment.

The judges recycle various arguments based on *Younger v. Harris*, 401 U.S. 37 (1971), *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and the Eighth Amendment. This court, having previously rejected those arguments, *ODonnell I*, 892 F.3d at 156–57 & n.3, is unlikely to find them persuasive in their repackaged forms.

2. The judges have not shown that they will suffer irreparably injury without a stay.

Citing questionable bond-forfeiture statistics, the judges assert that the amended injunction will undermine the county's criminal justice system and endanger public safety. Assuming that the judges could overcome the myriad deficiencies in that data identified by the district court and the plaintiffs, their statistics show, at most, "some 'possibility of irreparable injury'" and therefore fall short of satisfying the second stay factor. *Nken*, 556 U.S. at 434–35 (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The judges also claim that they will suffer irreparable harm because the amended injunction enjoins them from

enforcing state law, but nothing in Texas law requires the unconstitutional practices that the amended injunction seeks to remedy.

3. A stay will cause the plaintiff class to suffer substantial injury.

The district court found that "[p]retrial detention of misdemeanor defendants, for even a few days, increases the chance of conviction and of nonappearance or new criminal activity during release," and that "[c]umulative disadvantages mount for already impoverished misdemeanor defendants who cannot show up to work, maintain their housing arrangements, or help their families because they are detained." *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1158 (S.D. Tex. 2017); *see also id.* at 1121 (noting that "[r]ecent studies of bail systems in the United States have concluded that even brief pretrial detention because of inability to pay a financial condition of release increases the likelihood that misdemeanor defendants will commit future crimes or fail to appear at future court hearings," and that one study "found that for misdemeanor defendants, even two to three days of pretrial detention correlated at statistically significant levels with recidivism"). Without full and immediate implementation of the amended preliminary injunction, members of the plaintiff class will continue to suffer substantial harm as a result of Harris County's unconstitutional bail practices.

4. The public interest favors denying the motion for stay.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012)); *see also Williams*, 399 U.S. at 245 ("[T]he constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo."). If a stay is granted, the "tens of thousands of constitutional violations" already found by the district court, 251 F. Supp. 3d

at 1150 n.99, will only increase in number. The public interest strongly favors denying the motion for stay.

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I would deny the judges' motion for stay pending appeal. Because the majority decides otherwise, I respectfully dissent.

Handout 5

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[341 F.Supp.3d 691]
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[341 F.Supp.3d 697]
[341 F.Supp.3d 698]

MEMORANDUM OPINION AND ORDER

David C. Godbey, *United States District Judge.*

This Order addresses Plaintiffs Shannon Daves, Shakena Walston, Erriyah Banks, Destinee Tovar, Petroba Michieko, and James Thompson's motion for preliminary injunction [3]. For the reasons set forth below, the Court grants Plaintiffs' motion and issues the Preliminary Injunction filed contemporaneously with this Order. The Court has also granted Plaintiffs' motion for class certification [2] in a separate order. The preliminary injunction shall apply to the class the Court certified in that Order.

I. ORIGINS OF THE DISPUTE

This case is about Dallas County's pretrial detention system. Plaintiffs are recent arrestees in custody at the Dallas County Jail. Plaintiffs allege that the County, the Sheriff, the Magistrates, the Felony Judges, and the Misdemeanor Judges employ an unconstitutional "system of wealth-based detention by imposing and enforcing secured money bail without an inquiry into and findings concerning the arrestee's present ability to pay." Compl. ¶ 8 [1]. Plaintiffs seek both injunctive and declaratory relief against the County's procedures.

[341 F.Supp.3d 691]

Now before the Court is Plaintiffs' motion for preliminary injunction.

The disposition of this case is greatly simplified by the Fifth Circuit's recent decision in *ODonnell v. Harris Cty*, 892 F.3d 147 (5th Cir. 2018) (on rehearing) (*ODonnell I*). *See also ODonnell v. Goodhart*, 900 F.3d 220 (5th Cir. 2018) (*ODonnell II*) (reversing aspects of the injunction entered on remand from *ODonnell I*). This case differs from *ODonnell* in two respects: (1) it includes felony arrestees; and (2) Plaintiffs raise a substantive due process argument not raised in *ODonnell*. The Court holds that neither of those differences is material and issues a preliminary injunction in the form suggested in *ODonnell I*.

II. FACTUAL FINDINGS

The Court makes the following findings.

1.0. The post-arrest system in Dallas County has four main actors.

1.1. First are the Dallas County Criminal Court at Law Judges (Misdemeanor Judges) 1

1.2. Second are the Dallas County Criminal District Court Judges (Felony Judges).2 The Felony Judges hire and fire Magistrate Judges.

1.3. Third are the Magistrate Judges.3 Magistrate Judges report to the Felony Judges, and are subject to the policies and guidance the Felony Judges promulgate. Magistrate Judges also routinely follow the guidance and policies Misdemeanor Judges distribute, but they do not report to Misdemeanor Judges. Magistrate Judges are responsible for determining the conditions of release for arrestees in Dallas County.

1.4. Fourth is the Dallas County Sheriff, Defendant Marian Brown. The Sheriff is responsible for enforcing the Magistrate Judges' bail determinations.

2.0. The court finds that the County's post-arrest system operates in the following way.

2.1. The process begins with an arrest. This arrest can be made by a number of agencies, including the Dallas County Sheriff's Office, and the City of Dallas Police Department.

2.2. If either of these two agencies make the arrest, the arrestee will be taken directly to the Dallas County Jail. If another agency makes the arrest, the arrestee is taken to the jail the arresting authority operates.

2.3. The arrestee is then scheduled for a hearing that is locally referred to as an arraignment. Arraignments are held in front of Magistrate Judges, either in person or by video-link.

2.4. At arraignments, Magistrate Judges inform the arrestee of the offense charged and set the condition required for release.

2.5. In Texas, release is generally contingent on one of two types of bonds. The first is an unsecured, or personal release bond. These require an arrestee to make an up-front payment in order to avoid detention.

2.6. In February 2018, the Felony Judges granted Magistrate Judges the authority to grant personal release, or unsecured bonds.

2.7. Video evidence taken in July 2018, however, reveals that Magistrate Judges routinely deny personal release bonds. The vast majority of arrestees are instead given secured financial conditions of release.

2.8. The Misdemeanor Judges have given Magistrate Judges a generally applicable schedule of secured financial conditions that apply to every misdemeanor arrestee in the County.

2.9. The Felony Judges have given Magistrate Judges a similar schedule for felony arrestees.

2.10. These schedules operate like a menu, associating various prices for release with different types of crimes and arrestees.

2.11. Magistrate Judges routinely treat these schedules as binding when determining bail. The schedules are the policy of Dallas County.

2.12. Video evidence taken in July 2018 reveals that arraignments typically last under 30 seconds, and consist of the Magistrate Judge: (1) calling the arrestee by name, (2) informing the arrestee of the crime he or she is accused of and the bail associated with that crime, and (3) asking the arrestee if he or she is a United States citizen.

2.13. Prior to February 2018, Magistrate Judges did not take an arrestee's ability to pay into consideration when setting bail. In February 2018, Magistrate Judges were instructed to consider a financial affidavit that arrestees have the opportunity to fill out prior to arraignment. The form asks arrestees to indicate the maximum amount of secured bail they could afford.

2.14. Yet, Magistrate Judges still routinely treat the schedules as binding, and make no adjustment in light of an arrestee's inability to pay. The post-February 2018 affidavits have made no material difference in the Magistrate Judges' practices. Routine reliance on the schedules is still the policy of Dallas County.

2.15. Once an arrestee knows the amount required for release, he or she can pay the sum and obtain release.

2.16. An arrestee who cannot access money through a bank account can call a family member or friend, or contact a commercial bonding company. If he or she still cannot access the required funds, he or she is kept in jail, assigned to a housing unit, and confined in a cell until his or her first appearance.

2.17. Misdemeanor arrestees typically wait between four and ten days for their first appearance before a misdemeanor judge. Felony arrestees who waive indictment typically wait two weeks for their first appearance before a felony judge. Felony arrestees who do not waive indictment typically wait two to three months.

2.18. Most misdemeanor and low level felony arrestees who are detained at the time of their first appearance elect to plead guilty. Doing so most often results in sentences of time served and immediate release.

2.19. If arrestees do not plead guilty, they will be detained until their next appearance.

2.20. Judges decline to hold an on-the-record hearing regarding bond reduction or pretrial release at the first appearance. In order to obtain such a hearing, a defense attorney must file a written motion for bond reduction. The hearing is usually scheduled for a week or more after the motion is filed.

3.0. The Court thus finds that the County's post-arrest system automatically detains those who cannot afford the secured bond amounts recommended by the schedules. This detention can last for days, weeks, and, in some cases, even months. This detention results solely because an individual cannot afford the secured condition of release.

4.0. The County's policy of routinely relying on the schedules thus causes the pretrial detention of indigent arrestees. The February 2018 changes that the County implemented had minimal effect; the policy is still firmly in place, and the resulting harms are ongoing.

5.0. Pretrial detention has severe consequences beyond deprivation of liberty. Some examples include: loss of employment, loss of education, loss of housing and shelter, deprivation of medical treatment, inability to care for children and dependents, and exposure to violent conditions and infectious diseases in overcrowded jails.

III. THE FELONY AND MISDEMEANOR JUDGES ARE PROPER DEFENDANTS UNDER SECTION 1983; THE SHERIFF IS NOT

Plaintiffs sue Dallas County under 42 U.S.C. § 1983. To succeed, Plaintiffs must first "'show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right.'" *ODonnell v. Harris Cty.*, 251 F.Supp.3d. 1052, 1148 (S.D. Tex. 2017) (quoting *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009)). [4]

These requirements are met as to the Felony and Misdemeanor Judges. When the Felony and Misdemeanor Judges promulgated the bail schedules, they were not acting in their judicial capacity, but rather in "their capacity as county policymakers." *ODonnell I*, 892 F.3d at 156. While the schedules may not appear to be "official policy" in the traditional sense of the term, the Magistrate Judges' routine reliance on the schedules was clearly a practice "so common and well settled as to constitute a custom that fairly represents municipal policy." *ODonnell I*, 892 F.3d at 155 (finding "official policy" to "include ... practices that are `so common and well settled as to constitute a custom that fairly represents municipal policy'") (quoting *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992)). That reliance, furthermore, is the factual foundation upon which the Plaintiffs' constitutional theories rest. The administration of the schedules was thus, in other words, an official policy promulgated by a municipal policymaker that became the driving force behind an alleged constitutional violation. As such, the Court finds the judges are proper defendants under section 1983.

Because the Felony and Misdemeanor Judges are acting as policymakers for the County, in these circumstances, their actions can subject the County to liability under section 1983. Thus, the County is also a proper defendant. Because the County is a proper defendant, any injunction against the County would reach the Magistrate Judges, who are acting on behalf of the County. The Court, therefore, need not consider whether the Magistrate Judges are themselves proper defendants. [5]

The Sheriff, however, is not a proper defendant under section 1983. The Sheriff does not have policy making authority, but rather "is legally obliged to execute all lawful process" and follow the instructions of the magistrate. *ODonnell I*, 892 F.3d at 156. She, thus, cannot act as a policymaker like the Felony and Misdemeanor Judges. Accordingly, the Court holds that the Sheriff is not a proper defendant under section 1983.

IV. THE COURT GRANTS PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION

To obtain a preliminary injunction, Plaintiffs must establish:

> (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). The Court holds that Plaintiffs have satisfied each of these elements.

A. Plaintiffs Have Shown a Likelihood of Success on the Merits

1. Equal Protection Claim.[6] — First, Plaintiffs have shown it is substantially likely that Dallas County's current post-arrest procedures violate their equal protection rights. The Fifth Circuit in *ODonnell I* concluded that the equal protection issue essentially amounted to the following:

> [T]ake two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart.

ODonnell I, 892 F.3d at 163. That Plaintiffs' case involves felony and misdemeanor arrestees does not change the analysis.[7] The fact remains that two arrestees similar in every way except their ability to pay will have vastly different pretrial outcomes as a result of the Magistrate Judges' mechanical application of the bond schedules. Wealthy arrestees — regardless of the crime they are accused of — who are offered secured bail can pay the requested amount and leave. Indigent arrestees in the same position cannot. Indeed, the equal protection issue that plagued *ODonnell I* is not cured by adding more arrestees to the mix. The Court thus finds that

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Plaintiffs have a substantial likelihood of succeeding on their equal protection claim.

2. Procedural Due Process Claim. — The Court reaches a similar conclusion with respect to Plaintiffs' procedural due process arguments. To succeed on a procedural due process theory, Plaintiffs must show: (1) that there exists a liberty or property right that has been infringed by the State, and (2) that the procedures protecting that right were constitutionally deficient." *ODonnell I*, 892 F.3d at 157 (citing *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010)).

Plaintiffs first identify a fundamental right against wealth based detention. Pls.' Br. in Supp. of the Named Pls.' Mot. for Class-Wide Prelim. Inj., 20–24 [4-3] ("Pls.' Br."). Presented with an almost identical slate of facts, the Fifth Circuit in *ODonnell* found this right to be too broad, and instead chose to recognize only the right to be "bailable upon sufficient sureties." *ODonnell I*, 892 F.3d at 158. The Court finds the same reasoning applies here, and thus recognizes only the right to be bailable upon sufficient sureties.

The County's existing procedures surrounding this right are constitutionally deficient. As stated above, the decision to impose secured bail is essentially automatic. Even after the financial affidavit was introduced, decisions are still made in an overtly mechanical way that routinely detains indigent arrestees because they cannot afford bail. That this case involves felony arrestees, again, does not change the analysis.[8] The Fifth Circuit's balancing exercise further reveals that there are procedures the County can implement that would better protect the right, without causing an untenable administrative burden. *ODonnell I*, 892 F.3d at 160–1. The Plaintiffs have thus shown there is a substantial likelihood that the County's post-arrest procedures violate procedural due process.

3. Substantive Due Process Claim. — Some words are owed, however, to Plaintiffs' alleged pretrial liberty right. Pls.' Br., 24–6 [4-3]. Plaintiffs contend that there is a substantive due process right to pretrial liberty that requires more relief than the right to be bailable upon sufficient sureties. *Id.* Specifically, they seek to require a substantive finding by the Magistrate Judges that no other alternative to secured release would serve the State's interest before detaining an individual before trial. The Court disagrees for two reasons.

First, while the plaintiffs in *ODonnell* did not raise this argument, the broader right to pretrial liberty was still a factor in *ODonnell I's* balancing exercise. *ODonnell I*, 892 F.3d at 159 (noting that the "the right to pretrial liberty of those accused" was "particularly important"). With this right in full view, the Fifth Circuit nonetheless found that the procedures required in the model injunction struck the proper constitutional balance. This Court will follow their guidance.

Even if *ODonnell I* lacked this guidance, however, the Court would reach the same result. Plaintiffs chief support for their argument is *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). There, the Supreme Court upheld procedures in the Bail Reform Act that required detention of individuals "charged with certain serious felonies [only] if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably

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assure ... the safety of any other person and the community.'" *Salerno*, 481 U.S. at 739, 107 S.Ct. 2095 (quoting 18 U.S.C. § 3142(e))

There is no denying that *Salerno* firmly emphasizes the importance of the right to pretrial liberty. *Id.* at 750, 107 S.Ct. 2095. But that alone does not establish that the right to pretrial liberty can be stretched by substantive due process to require the finding Plaintiffs seek. There is a difference between requiring that arrestees be granted *some* condition of release absent a showing that they are a flight risk, and requiring that arrestees be granted a condition of release they can afford absent a showing that no other condition of release is feasible. The Court accepts that due process requires the former, but declines to extend it to cover the latter.

This is in large part because the law requires "that if a constitutional claim is covered by a specific constitutional provision, such as the ... Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Walker v. City of Calhoun, GA*, 901 F.3d 1245, 1258-59 (11th Cir. 2018) (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.9, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)). The Eighth Amendment states that "[e]xcessive bail shall not be required." U.S. CONST. Amend. VIII. Plaintiffs do not raise an Eighth Amendment claim and do not contend they can show a violation under Eighth Amendment jurisprudence. *See, e.g. Stack v. Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 S.Ct. 3 (1951) (holding that "excessive" bail under the Eighth Amendment is bail set at a higher figure than the amount reasonably calculated to assure the accused will stand trial).

The moment that Plaintiffs transition from advocating for reformed procedures to advocating for the abolition of or lessening of monetary bail, they must traverse through the Eighth Amendment. Requiring courts to use detention only as a last resort does just that. The Court declines to use substantive due process as an end-around of the Eighth Amendment. Plaintiffs have thus not shown a likelihood of success on their substantive due process arguments.

B. Plaintiffs Have Shown a Risk of Irreparable Harm

Failure to grant an injunction would risk irreparable harm. The status quo deprives the Plaintiff class of an established liberty interest without procedural due process and in violation of their equal protection rights. The record clearly indicates that this constitutional deprivation is ongoing and routine. The injury also extends well beyond the initial deprivation of liberty. Those detained lose their jobs, their homes, and much more. Without an injunction, these injuries will linger unchecked and untreated. Indeed, these were the exact facts that led the district court in *ODonnell* to find a risk of irreparable harm. 251 F.Supp.3d at 1157-58. This Court agrees.

C. The Balance of Harms and the Public Interest Favor an Injunction

The balance of harms also tilts heavily in favor of an injunction. Defendants fail to produce credible evidence of harm that competes with the severity of the harm to the Plaintiff class's liberty interest at stake. Much of the evidence they lean on to support their allegations of increased failed appearances, heightened risks to the public, and exorbitant costs is the same that was presented to the district court in *ODonnell*. *See* Dallas County Defs.' Resp. to Pls. Mot. for Prelim. Inj., 14-17 [32] ("Defs.' Resp."). The court there found that "the reliable, credible evidence

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in the record" showed that secured financial conditions fare no better than unsecured or non-financial conditions at assuring appearance or law-abiding behavior, and that community supervision was actually more cost effective than pretrial detention.[9] *ODonnell*, 251 F.Supp.3d at 1131-32, 1145. This Court agrees, and none of the additional evidence Defendants produce compels a different finding.

As to the public interest, "it is always in the public interest to prevent the violation of a party's constitutional rights." *ODonnell*, 251 F.Supp.3d at 1159 (quoting *Simms v. District of Columbia*, 872 F.Supp.2d 90, 105 (D.D.C. 2012)). The County's post-arrest system routinely violates indigent arrestees' constitutional rights. As such, the Court finds an injunction to be in line with the public interest.

V. RELIEF

Both parties request the Court to stray from the Fifth Circuit's model injunction in one way or another. Plaintiffs urge the Court to require a substantive finding that detention is strictly necessary before imposing it on an indigent arrestee, and to prohibit any amount of wealth based detention. *See* Pls. Reply to County Defs.' Resp. in Opp'n. to Pls.' Mot. For Prelim. Inj., 10-14 [58]. Defendants argue less relief — if any — should be granted because this case includes felony arrestees. Defs.' Resp., 16, 22 [32]. The Court respectfully declines to do either.

This case shares the same roots as *ODonnell*. Much like *ODonnell*, there is a clear showing of routine wealth based detention. There is also a clear showing this detention violates procedural due process and equal protection rights. That some of those impacted are accused of felonies, as examined above, does not meaningfully change the analysis.

The apple ought not to fall far from the tree. The Fifth Circuit has designed appropriate relief for an almost identical case. Doing anything different here would put the Court in direct conflict with binding precedent. The Court thus finds that the procedures required to protect the rights currently in jeopardy are those articulated by the Fifth Circuit in *ODonnell I*.[10]

Broadly, those procedures include "notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decision-maker." *ODonnell I*, 892 F.3d at 163. Specifically, the Court is by separate order requiring the relief set forth in the Fifth Circuit's model injunction, slightly modified to fit the facts of this case.

CONCLUSION

For the reasons stated above, the Court grants Plaintiffs' motion for preliminary injunction. Following *ODonnell*, the Court exercises its discretion under Federal Rule of Civil Procedure 65(c) to waive the bond

requirement. *ODonnell*, 251 F.Supp.3d at 1160 (citing *City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority*, 636 F.2d 1084 (5th Cir. 1981)). Plaintiffs are indigent and "have brought this suit to enforce their constitutional rights." *Id.* The relief shall apply to the class the Court certified in a separate order, and shall take effect within thirty (30) days.

FootNotes

1. These are Defendants Dan Patterson, Julia Hayes, Doug Skemp, Nancy C. Mulder, Lisa Green, Angela King, Elizabeth Crowder, Tina Yoo Clinton, Peggy Hoffman, Roberto Canas, Jr., and Shequitta Kelly.

2. These are Defendants Ernest White, Hector Garza, Teresa Hawthorne, Tammy Kemp, Jennifer Bennett, Amber Givens-Davis, Livia Liu Francis, Stephanie Mitchell, Brandon Birmingham, Tracy Holmes, Robert Burns, Nancy Kennedy, Gracie Lewis, Dominique Collins, Carter Thompson, Jeanine Howard, and Stephanie Fargo.

3. These are Defendants Terrie McVea, Lisa Bronchetti, Steven Autry, Anthony Randall, Janet Lusk, and Hal Turley.

4. The governmental entity here is a county, of course, rather than a municipality.

5. The Magistrate Judges here are analogous to the Hearing Officers in *ODonnell I*. The Fifth Circuit affirmed the injunction against the Hearing Officers, *ODonnell I*, 892 F.3d at 165, but did not specifically address whether they were proper defendants.

6. The Court is aware that in the intersection of indigency and the criminal justice system, the Supreme Court has observed that "[d]ue process and equal protection principles converge in the Court's analysis...." *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). This Memorandum follows *ODonnell I* in discussing the two theories separately.

7. Although Dallas County argues that this Court should afford lesser relief than *ODonnell I* allowed because of the presence of felony defendants, this Court sees no reason the procedural due process or equal protection analysis would differ if a defendant were charged with a felony.

8. As noted above, this is in large part because the procedures for setting bail are the same regardless of the crime of which the arrestee is accused. The Court acknowledges, however, that the type of crime may impact the risk analysis when deciding the amount of bail or other security required.

9. In spite of the evidence presented on costs, nothing in the injunction the Court is granting today *requires* community supervision. Today's injunction follows the guidance of the Fifth Circuit, mandating only additional procedures at the moment bail is set. This is examined in more detail in the next section.

10. It is worth noting that the injunction is not absent an instruction to consider alternatives to secured release. In reaching its conclusion, *ODonnell I* cited case law requiring "meaningful consideration of other possible alternatives" before imposing secured conditions of release an arrestee could not afford. *ODonnell I*, 892 F.3d at 161 (citing *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978)). This instruction was further reflected in the model injunction: twice it states the need for consideration of whether "other condition[s]" will provide "sufficient sureties." *Id.* at 164, 165. The Court adopts this language, but declines to speculate as to whether the Fifth Circuit intended this instruction to further require the precise substantive finding Plaintiffs seek.

Handout 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

AARON BOOTH	§	
	§	
Plaintiff.	§	
	§	
VS.	§	CIVIL ACTION NO. 3:18–CV–00104
	§	
GALVESTON COUNTY, ET AL.[1]	§	
	§	
Defendants.	§	

MEMORANDUM AND RECOMMENDATION

Pending before the Court are two separate motions for preliminary injunction filed by Plaintiff Aaron Booth ("Booth"). The first motion, Plaintiff's Motion for Preliminary Injunction, contends that Galveston County's bail system violates the United States Constitution and asks this Court to issue an order requiring certain procedural changes in how Galveston County's secured money bail system operates. *See* Dkt. 3-1. The second motion, Plaintiff's Motion for Preliminary Inunction [sic] Requiring Counsel at Initial Bail Hearings, seeks an order requiring Galveston County to provide counsel at initial bail hearings for those felony arrestees who cannot afford representation. *See* Dkt. 205. The parties have submitted extensive briefing on the legal issues involved, provided voluminous exhibits, and presented live testimony from 11 witnesses at a day-long

[1] On March 19, 2019, Counsel for the Galveston County District Court Judges provided the Court with notice that: (1) Defendant Michelle M. Slaughter, former Judge of the 405th District Court, has assumed a seat on the Texas Court of Criminal Appeals; (2) Jared Robinson has been appointed and confirmed as the new Judge of the 405th District Court; and (3) pursuant to Federal Rule of Civil Procedure 25(d), Judge Jared Robinson is automatically substituted as a party. *See* Dkt. 215.

preliminary injunction hearing. After thoroughly reviewing the briefing, analyzing the applicable law, considering the evidentiary submissions, entertaining live testimony, and hearing argument from counsel, the Court **RECOMMENDS** that the Motion for Preliminary Injunction (Dkt. 3-1) be **DENIED** and the Motion for Preliminary Inunction [sic] Requiring Counsel at Initial Bail Hearings (Dkt. 205) be **GRANTED**. This Memorandum and Recommendation constitutes the Court's findings of facts and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

INTRODUCTION

In recent years, a number of lawsuits have been filed all across this great nation challenging long-established bail practices. This case is one of those lawsuits. It focuses on Galveston County's pretrial detention system for felony arrestees and requires this Court to assess the constitutionality of that pretrial detention system.

Booth was arrested in April 2018 for an alleged felony. A prosecutor recommended Booth's bail be set at $20,000.00. After being booked into Galveston County Jail, Booth appeared before a magistrate. The magistrate informed Booth of the charges against him, advised him of his rights, and set bail. More specifically, the magistrate signed an order requiring Booth to post a $20,000.00 bond to be released from jail pending the resolution of his criminal case. Booth did not have an attorney at the time bail was set. Only after the hearing at which bail was determined did Booth have the opportunity to complete the paperwork demonstrating his financial inability to hire counsel. Booth received a court-appointed counsel the day after his bail hearing. Booth claims that he could not afford the

amount required for his release and, as a result, spent 54 days in custody before a bail reduction hearing was held.

Booth brings this lawsuit on behalf of himself and all others similarly situated, alleging that Galveston County, a group of Galveston County District Court Judges (the "District Court Judges"), several Galveston County Magistrate Judges, and Galveston County District Attorney Jack Roady (the "District Attorney") all act together to employ an unconstitutional bail policy that results in the routine detention of Galveston County felony arrestees before trial solely due to their inability to pay bail. Booth also alleges that the same policy denies arrestees their constitutional right to counsel at a "critical stage" of the prosecution: the initial bail hearing.

Booth seeks both injunctive and declaratory relief.

HISTORY OF BAIL

Black's Law Dictionary defines "bail" as "[a] security such as cash, a bond, or property; esp., security required by a court for the release of a criminal defendant who must appear in court at a future time." *Bail*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See also* TEX. CODE CRIM. PRO. ART. 17.01 (defining "bail" as "the security given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a bail bond or a personal bond").

Given that this case concerns the use of bail in Galveston County, a brief history of bail is appropriate to set the stage for the analysis to come.

> Bail originated in medieval England as a device to free untried prisoners. The penalty for most crimes was a fine paid as compensation to the victim. When capital and corporal punishment replaced fines, abuses in the delay

> between arrest and trial began to emerge. In response, the common law right to bail was codified into English law, and the principles that an accused is presumed innocent and entitled to personal liberty pending trial were incorporated into the Magna Carta.

Buffin v. City and Cty. of San Francisco, No. 15-CV-04959-YGR, 2019 WL 1017537, at *11 (N.D. Cal. Mar. 4, 2019) (internal quotation marks, footnote, and citations omitted).

"American history makes clear that the settlers brought this practice with them to America." *Jennings v. Rodriguez*, 138 S. Ct. 830, 863 (2018) (Breyer, J., dissenting). Colonial constitutions, the Northwest Ordinance of 1787, the Judiciary Act of 1789, and the vast majority of state constitutions throughout history have protected a right to bail by sufficient sureties. *See id.* at 863–64. The United States Constitution also addresses the use of bail. The Eighth Amendment, which prohibits "excessive bail," recognizes both the obvious liberty interest of pretrial detainees (those accused, but not yet convicted) and the government's legitimate interest in ensuring the accused's appearance at trial. U.S. CONST. AMEND. VIII. It does so by ensuring that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Stack v. Boyle*, 342 U.S. 1, 5 (1951). Accordingly, the amount of bail cannot be "excessive"—that is, "higher than . . . reasonably calculated to" ensure the accused's appearance. *Id.* (citation omitted).

The presumption of innocence is a bedrock principle of the American criminal justice system. As the Supreme Court has explained: "Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Id.* at 4. Thus, in our system, monetary bail is the mechanism that

protects the well-established "right to freedom before conviction," while also protecting society's interest in ensuring that defendants answer the charges against them. *Id.* Accordingly, "liberty is the norm, and detention . . . is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).

THE *ODONNELL* OPINION

Just last year, the Fifth Circuit issued a landmark opinion in a case challenging Harris County's[2] system of setting bail for poor misdemeanor arrestees. *See ODonnell v. Harris Cty. (ODonnell II)*, 892 F.3d 147 (5th Cir. 2018).[3] As a result, *ODonnell II* provides the framework by which the constitutionality of any pretrial detention system within the Fifth Circuit must be measured. In *ODonnell II*, the plaintiffs brought a class action lawsuit against Harris County and several of its officials alleging that Harris County's system of setting bail for indigent misdemeanor arrestees violated Texas statutory and constitutional law, as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment. After an eight-day preliminary injunction hearing, the District Court granted the request for a preliminary injunction, finding that the plaintiffs were likely to prevail on their Equal Protection and Due Process claims. *See id.* at 152. The District Court's injunction required the implementation of safeguards to prevent the automatic imposition

[2] Harris County, which is contiguous with Galveston County, is the third largest county in the United States.

[3] *ODonnell II* largely affirmed Chief Judge Lee Rosenthal's underlying decision in *ODonnell v. Harris Cty. (ODonnell I)*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017). After issuing *ODonnell II*, the Fifth Circuit released a subsequent related opinion in which it examined the terms of a proposed preliminary injunction issued in the wake of *ODonnell II*. *See ODonnell v. Goodhart (ODonnell III)*, 900 F.3d 220 (5th Cir. 2018).

of pretrial detention on indigent misdemeanor arrestees and the release of numerous detainees subjected to Harris County's constitutionally deficient bail system. *See id.* at 155.

The Fifth Circuit largely upheld the injunction, concluding that it is constitutionally impermissible to automatically impose pretrial detention on indigent misdemeanor arrestees. On the due process front, the Fifth Circuit held that procedures must be in place that "sufficiently protect detainees from magistrates imposing bail as an 'instrument of oppression.'" *Id.* at 159. Because bail for indigent arrestees in Harris County was almost always set at an amount that detained the defendant, the Fifth Circuit found a violation of the Due Process Clause. *See id.* In terms of the Equal Protection Clause, the Fifth Circuit affirmed the District Court's holding that Harris County's bail-setting procedures violated the Equal Protection Clause because "they treat otherwise similarly-situated misdemeanor arrestees differently based solely on their relative wealth." *Id.* at 161. As the Fifth Circuit explained:

> In sum, the essence of the district court's equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

Id. at 163.

In addressing the appropriate scope of the injunction, the Fifth Circuit held that individualized hearings after which magistrates had to "specifically enunciate their individualized, case-specific reasons for [imposing bail] is a sufficient remedy." *Id.* at 160. The procedures required for such hearings include "notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decisionmaker." *Id.* at 163. The Fifth Circuit then provided detailed guidance on how a properly crafted injunction should look, cautioning that it should not "amount[] to the outright elimination of secured bail for indigent misdemeanor arrestees." *Id.*

THE BAIL SYSTEM FOR FELONY ARRESTEES IN GALVESTON COUNTY

The procedures governing how the Galveston County bail system functions for felony arrestees have changed dramatically since this lawsuit was initially filed. As a result, the facts described below are arranged in two categories: Past Bail Schedule Policy and Current Bail Schedule Policy. Past Bail Schedule Policy refers to the system in place at the time of Booth's arrest in April 2018. Current Bail Schedule Policy refers to the procedures utilized today.

Past Bail Schedule Policy. At the time of Booth's arrest, Galveston County's bail system for felony arrestees functioned in the following manner:

- After a felony arrestee was taken into custody, the arresting officer would prepare a preprinted bail order form identifying the charges levied against the arrestee, as well as a bail amount for each charge.

- In setting the bail amounts for felony charges, the arresting officer would call the intake district attorney, who would then recommend a bond amount based on amounts reflected in a schedule prepared by

the District Attorney for use by attorneys in his office. If the arrestee had multiple charges, the recommended bail amounts for each charge were added together.

- After the arresting officer completed the bail order form, the felony arrestee could be booked into the Galveston County jail.

- Usually within 24 hours of incarceration, an arrestee appeared before a magistrate for a proceeding referred to as "magistration."[4] This was the first time an arrestee would appear before a judicial officer. At magistration, the magistrate would briefly explain the charges levied against the arrestee, inform the arrestee of his basic rights, including the right to remain silent, and ask the arrestee a few questions (Are you a United States citizen? Have you served in the armed forces? Are you out on bail for another offense?). The magistrate also set bail at this proceeding. However, the magistrate did not possess any financial information indicating an arrestee's ability or inability to make bail, nor did the magistrate inquire into the arrestee's financial status. As a practical matter, the magistrate routinely adopted the bail amounts contained on the bail order form, which had been completed by the arresting officer in conjunction with the intake district attorney.

- Arrestees were not represented by counsel during magistration.

- After magistration, an arrestee would finally have an opportunity to complete a pauper's oath, declaring his indigency and requesting a court appointed attorney.

- The next hearing, which would be the first hearing the arrestee would have court appointed counsel, would occur anywhere from a few days to a few weeks after magistration. Accordingly, if an arrestee was unable to pay the bail set at magistration, the arrestee might be held for weeks solely based on his inability to pay.

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[4] "Magistration" is a term not found in the Texas Code of Criminal Procedure or elsewhere in the law. In Texas, the terms "magistration," "initial appearance," "probable cause hearing," and "Article 15.17 hearing" are often used interchangeably to describe the first time an arrestee is brought before a magistrate. Article 15.17(a) of the Texas Code of Criminal Procedure requires an officer making an arrest to "without unnecessary delay . . . take the person arrested . . . before some magistrate of the county where the accused was arrested." Article 15.17 also sets forth the basic responsibilities and duties of a magistrate at this initial appearance.

Current Bail Schedule Policy. Sometime after Booth's arrest and during the pendency of this lawsuit, significant changes were made to Galveston County's magistration system with the express goal to bring it into compliance with *ODonnell II*. The new system functions as follows:

- After a felony arrestee is taken into custody, the arresting officer prepares a bail order form identifying the charges levied against the arrestee, as well as a bail amount for each charge.

- In setting the bail amounts for felony charges, the arresting officer calls the intake district attorney, who recommends a bond amount based on amounts reflected in a schedule prepared by the District Attorney for use by attorneys in his office. If the arrestee has multiple charges, the recommended bail amounts for each charge are added together.

- After the arresting officer completes the bail order form, the felony arrestee is booked into the Galveston County jail.

- The first time an arrestee appears before a judicial officer is at magistration. Galveston County magistrations occur twice a day at 7:00 a.m. and 7:00 p.m. Given this daily schedule, an arrestee usually appears for magistration within 12 hours of incarceration. Sometime prior to magistration, the arrestee is interviewed by an individual from the Personal Bond Office. Created in July 2018, the Personal Bond Office is responsible for interviewing individuals about their financial condition as they are booked into jail. During this interview, the arrestee completes a detailed financial affidavit. This detailed financial affidavit is included in the packet presented to the magistrate before magistration.

- At magistration, the magistrate still explains the charges levied against the arrestee, provides statutory warnings such as the right to remain silent, asks a few questions, and sets bail. However, under the new system, at the time bail is set the magistrate now possesses the detailed financial affidavit the arrestee completed.

- At the initial bail hearing held at magistration, Galveston County does not provide defense counsel to those arrestees who are financially

unable to afford representation. There is a written policy officially adopted by the District Court Judges, effective October 1, 2018, that makes clear that indigent arrestees do not receive appointed representation during the initial bail hearing.

- Galveston County's written policy provides that within 48 hours of magistration, arrestees whose financial affidavits indicate that they would not be able to post the amount set as bail are brought before a magistrate for a bail review hearing. As a practical matter, this bail review hearing typically occurs 12 hours after magistration, either at 7:00 a.m. or 7:00 p.m. The bail review hearings take place right before the initial magistrations.

- At the bail review hearing, Galveston County provides an indigent arrestee with counsel. More specifically, the District Court Judges appoint a single defense lawyer to appear at every bail review docket, and that attorney is available to advise and represent arrestees at the bail review hearing. Prior to the bail review hearing, arrestees can meet privately with the lawyer to discuss their financial situation in preparation for the bail review hearing. The defense lawyer is appointed for the limited purpose of handling the bail review hearing.

- At the bail review hearing, defense counsel and a prosecutor make arguments and present evidence to either reduce or maintain the previously set bail amount. The magistrate is supposed to explain the reason for his or her decision either in writing or verbally for the record.

PRELIMINARY ISSUES TO CONSIDER

Before addressing the substantive legal issues, which will determine whether injunctive relief is appropriate in this case, the Court must rule on some preliminary matters.

A. EVIDENTIARY ISSUES

The District Court Judges have filed lengthy objections to the declarations submitted in support of Plaintiff's Motion for Preliminary Inunction [sic] Requiring Counsel at Initial Bail Hearings. *See* Dkt. 235. Among other things, the District Court Judges complain that

the declarations lack proper foundation, contain irrelevant information, and advance improper legal opinion testimony. In considering these objections, the Court is mindful that the procedures governing a preliminary injunction are more relaxed than those utilized at trial. As the United States Supreme Court has noted: "[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The Fifth Circuit has followed suit, stating "at the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence." *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993) (citation omitted). Districts courts across the State of Texas have uniformly followed the guidance provided by the Fifth Circuit and considered evidence at the temporary injunction phase that would not be admissible at trial. *See, e.g., Compass Bank v. Dixon*, No. H-17-1576, 2018 WL 6733018, at *1 n.2 (S.D. Tex. Nov. 16, 2018) ("Both the rules of evidence, as well as the procedural predicates for the admission of evidence, can be relaxed in the injunction context.") (citation omitted); *Tujague v. Adkins*, No. 4:18-CV-631, 2018 WL 4816094, at *1 n.2 (E.D. Tex. Oct. 4, 2018); *Bar J-B Co., Inc. v. Tex. Dep't of Transp.*, No. 3:18-CV-0576, 2018 WL 2971157, at *11 (N.D. Tex. May 15, 2018). Guided by the lenient evidentiary standard in place at this early stage of the proceedings, the Court is reluctant to exclude the declarations provided by Booth. The Court, therefore, overrules the District Court Judges' evidentiary objections.

B. APPROPRIATENESS OF INJUNCTIVE RELIEF AGAINST THE DISTRICT ATTORNEY

Prior to, and during the preliminary injunction hearing, the District Attorney strenuously argued that Booth should not be permitted to pursue injunctive relief against him since Booth had previously represented that he would not be seeking a preliminary injunction against the District Attorney. In making this argument, the District Attorney presented clear and unmistakable evidence of such representations. *See* Dkt. 170-1 at 1 (email from Booth's counsel confirming that Booth "does not move for relief against [the District Attorney]"); 170-2 at 1 (email from Booth's counsel noting that "nothing about the preliminary injunction hearing concerns the District Attorney. . . . As for your questions about injunctive relief against the District Attorney, I can confirm that we are not seeking *preliminary* injunctive relief from the DA."). The first time the District Attorney learned that Booth intended to seek injunctive relief against him in this case was roughly 10 days before the temporary injunction hearing when Booth submitted a proposed order for injunctive relief asking to restrain the District Attorney, as well as other parties. In light of the clear representations made by Booth's counsel, on which the District Attorney relied by not submitting a brief opposing the original preliminary injunction motion, it would be patently unfair to allow Booth to change course at the last minute and actively seek injunctive relief against the District Attorney. Accordingly, the Court refuses to consider Booth's eleventh hour request for injunctive relief against the District Attorney.

INJUNCTION STANDARD

To obtain preliminary injunctive relief, Booth has the burden of demonstrating: (1) a substantial likelihood that he will prevail on the merits; (2) a substantial threat that he

will suffer irreparable injury if the injunction is not granted; (3) that his threatened injury outweighs the threatened harm to those he seeks to enjoin; and (4) that granting the preliminary injunction is in the public's interest. *See PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005). If Booth fails to carry the burden "on any one of [these] four prerequisites, a preliminary injunction may not issue, and if issued, will be vacated." *Anderson v. Douglas & Lomason Co.*, 835 F.2d 128, 133 (5th Cir. 1988) (internal quotation marks and citation omitted).

The United States Supreme Court and the Fifth Circuit have cautioned repeatedly that a preliminary injunction is a powerful remedy to be used sparingly in cases with a set of extraordinary circumstances. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.") (citation omitted); *ODonnell II*, 892 F.3d at 155 ("injunctive relief is a drastic remedy, not to be applied as a matter of course") (internal quotation marks and citation omitted); *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985) ("Injunctive relief is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion.") (citation omitted). Even if Booth establishes all four prerequisites to a preliminary injunction, the decision to grant or deny a preliminary injunction remains discretionary with the district court. *See Miss. Power & Light Co. v. United Gas Pipeline Co.*, 760 F.2d 618, 621 (5th Cir. 1985). In short, "[t]he decision to grant a preliminary injunction is to be treated as the exception rather than the rule." *Id.* (citation omitted).

LEGAL ANALYSIS

In his request for a preliminary injunction, Booth seeks to vindicate three substantive federal rights: (1) the right against wealth-based detention, arising out of a convergence of the Fourteenth Amendment's Equal Protection and Due Process Clauses; (2) the right against the deprivation of the fundamental interest in pretrial liberty, arising under the Due Process Clause alone; and (3) the right to counsel, arising under the Sixth Amendment.

A. WEALTH-BASED IMPRISONMENT: DUE PROCESS AND EQUAL PROTECTION

In this case, Booth claims that Galveston County's Current Bail Schedule Policy violates the Equal Protection and Due Process Clauses because its "practice is to order bail under a predetermined minimum bail schedule without a hearing, and without any meaningful consideration of other possible alternatives." Dkt. 3-1 at 21 (internal quotation marks and citation omitted). This is substantially similar to the argument considered in *ODonnell II*, where the Fifth Circuit explained that "[t]he fundamental source of constitutional deficiency in the due process and equal protection analyses is the same: [T]he County's mechanical application of the secured bail schedule without regard for the individual arrestee's personal circumstances." 892 F.3d at 163.

Were the facts in this case substantially similar to the facts considered in *ODonnell II*, the Court would have no problem finding that Booth has shown a substantial likelihood of succeeding on the merits. *See, e.g., Daves v. Dallas Cty.*, 341 F. Supp. 3d 688, 694–95 (N.D. Tex. 2018) (applying *ODonnell II* based on substantially similar facts). However, this is not the case here.

Galveston County specifically modeled its Current Bail Schedule Policy after the suggested preliminary injunction the Fifth Circuit provided in *ODonnell II*. *See* 892 F.3d at 164–66. Prior to magistration, arrestees in Galveston County are now interviewed by the Personal Bond Office and a financial affidavit is completed and presented to the magistrate. Further, Galveston County now provides an individualized bail review hearing within 48 hours of magistration, where the arrestee is represented by counsel and can present evidence and make arguments concerning the reduction of bail. And at the conclusion of the bail review hearing, the magistrate is supposed to explain the reason for his or her decision either in writing or verbally for the record. This new process seemingly satisfies the requirements laid out in *ODonnell II*, i.e., Galveston County provides individualized hearings after which magistrates have to "specifically enunciate their individualized, case-specific reasons for [imposing bail]," and the procedures required for such hearings include "notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decisionmaker." *Id.* at 160, 163.

At the preliminary injunction hearing, Booth presented arguments and some evidence contesting (1) the extent to which this new process has been implemented; (2) the extent to which the magistrates and other Galveston County personnel adhere to the new process; and (3) whether the new process has changed bail determination outcomes in any meaningful way since its alleged implementation. Based on the evidence presented thus far, the Court cannot conclude that Booth has a substantial likelihood of success on this

claim. Booth has not carried the burden of persuasion sufficient to justify the extraordinary and drastic remedy he seeks.[5]

B. PRETRIAL LIBERTY: PROCEDURAL DUE PROCESS

The Court reaches a similar conclusion with respect to Booth's Due Process argument seeking to vindicate his right to pretrial liberty.

To succeed on a procedural due process theory,[6] Booth must show: (1) that there exists a liberty or property right that has been infringed by the State; and (2) that the procedures protecting that right were constitutionally deficient. *See ODonnell II*, 892 F.3d at 157.

By now, an arrestee's (an accused who has not been convicted of a crime) pretrial liberty interest is a well-recognized legal right. Thus, in evaluating Booth's likelihood of success, the salient issue is whether the procedures in place adequately protect that right.

Although *ODonnell II* was not confronted with a direct argument based on the arrestee's pretrial liberty interest, as is the case here, *ODonnell II* nonetheless indicated that the procedural safeguards it announced should apply with equal force to such an argument. *See id.* at 159 (describing the procedural safeguards discussed above, after noting "that the liberty interest of the arrestees here are particularly important: the right to

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[5] This determination should not be construed as a comment on the ultimate merits of Booth's claim. At this time, the Court only considers Booth's likelihood of success based on the evidence now before the Court.

[6] Booth is sufficiently clear that his argument is procedural in nature: "Plaintiff here *seeks procedural protection*, not from the deprivation of that state liberty interest, but from deprivation of their federal substantive due process right to pretrial liberty and right against wealth-based detention." Dkt. 3-1 at 29 n.22 (emphasis added).

pretrial liberty of those accused (that is, presumed innocent) of misdemeanor crimes upon the court's receipt of reasonable assurance of their return") (citation omitted). Booth seeks procedural safeguards that would go a little bit further than those announced in *ODonnell II*, but the Court is not convinced that the Constitution mandates such an extension. To be clear, the Fifth Circuit in *ODonnell II* clearly explained that its analysis of the procedures required to meet constitutional muster was guided by the Constitution, as opposed to state law. *See id.* Those same procedures seem to have been implemented by Galveston County in this case. Given that *ODonnell II* recognized an arrestee's pretrial liberty right before delineating the procedures as adequate to satisfy procedural due process, the Court is not convinced that the Constitution requires more. Thus, as to this claim, the Court cannot conclude that Booth has a substantial likelihood of success.

C. RIGHT TO COUNSEL AT AN INITIAL BAIL HEARING: SIXTH AMENDMENT

Booth next contends that the absence of court-appointed counsel at the time of an initial bail hearing (an alleged critical stage of the prosecution) violates an arrestee's right to counsel under the Sixth Amendment. In response, the District Court Judges and the District Attorney argue that the Sixth Amendment does not require court-appointed counsel to be present at the initial bail-setting hearing.[7]

1. Booth Has Shown a Likelihood of Success on the Merits

Booth brings a claim under 28 U.S.C. § 1983. "Section 1983 provides a remedy against 'any person' who, under color of state law, deprives another of rights protected by

[7] Curiously, Galveston County did not file an opposition to Plaintiff's Motion for Preliminary Inunction [sic] Requiring Counsel at Initial Bail Hearings.

the Constitution." *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992). Section 1983 is not an independent source of constitutional or statutory rights. Instead, Section 1983 simply provides a cause of action for governmental violations of rights protected by the Constitution or other federal statutes. *See Albright v. Oliver*, 510 U.S. 266, 271 (1994). To succeed on a Section 1983 claim, Booth "must show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right." *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) (citation omitted).

The first element—an official policy—is easily met. There is a written policy, effective October 1, 2018, promulgated by the County Court at Law Judges and the District Court Judges for Galveston County, creating "county wide procedures, rules and orders" for the appointment of counsel for indigent accused persons in Galveston County. Dkt. 185-43 at 4. That written policy, referred to by Booth as the Galveston County Indigent Defense Plan, expressly instructs Galveston County officials to provide defense counsel *after* the initial bail hearing and before the bail review hearing. *See id.* at 19.

The second element—a municipal policymaker—is also satisfied. When the District Court Judges adopted the Galveston County Indigent Defense Plan, they were not acting in their judicial capacity, but rather "in their capacity as county policymakers." *ODonnell II*, 892 F.3d at 156. *See also Booth v. Galveston Cty.*, 352 F. Supp. 3d 718, 744 (S.D. Tex. 2019) (holding that the District Court Judges are policymakers for post-arrest practices). In short, the Galveston County Indigent Defense Plan is an official policy promulgated by a County policymaker that became the driving force behind an alleged

constitutional violation. Because the District Court Judges were acting as policymakers for Galveston County in determining when indigent defendants receive counsel, their actions can subject Galveston County to liability under Section 1983.

That leaves the third element—violation of a constitutional right—for the Court to address. Booth asserts that his Sixth Amendment right to counsel has been violated because Galveston County refuses to provide indigent defendants with appointed counsel until after an initial bail hearing. To analyze the likelihood of Booth prevailing on the merits of his Sixth Amendment claim, it is necessary to start with the text of the United States Constitution. The Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. AMEND. VI. Although the Sixth Amendment contains just 19 words concerning the right to counsel, the importance of that text cannot be minimized. To this end, the Supreme Court has expressly recognized the right to the assistance of counsel guaranteed by the Sixth Amendment "is indispensable to the fair administration of our adversarial system of criminal justice." *Maine v. Moulton*, 474 U.S. 159, 168 (1985). "Embodying 'a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself,' the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." *Id.* at 169 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938)).

The Supreme Court's recognition of the Sixth Amendment's right to counsel dates back to 1932, when the high court eloquently and emphatically stated:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at *every step* in the proceedings against him.

Powell v. Alabama, 287 U.S. 45, 68–69 (1932) (emphasis added). *See also Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (recognizing the "obvious truth" that "in our adversary system of criminal justice, any person haled into court who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."); *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (explaining that in cases involving the rights of indigent criminal defendants, such as *Gideon*, "[m]eaningful access to justice has been the consistent theme" of the court's jurisprudence because the court "recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense").

It is indubitable that the right to counsel is critical during an actual trial, when evidence must be submitted in admissible form, witnesses must be examined and argument persuasively presented to the factfinder, whether it be a judge or jury. But, as the Supreme Court recognized in *Powell* and a litany of other cases throughout the years, counsel is also required "at every stage of a criminal proceeding where substantial rights of a criminal

accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). *See also Missouri v. Frye*, 566 U.S. 134, 140 (2012) ("It is well settled that the right to the effective assistance of counsel applies to certain steps before trial."); *Moulton*, 474 U.S. at 170 ("to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself").

The Supreme Court has clearly stated that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger the attachment of the Sixth Amendment right to counsel." *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 213 (2008). That does not, however, mean that a criminal defendant is entitled to counsel as soon as the Sixth Amendment right attaches. *See id.* at 213–14 (Alito, J., concurring) ("[T]he term 'attachment' signifies nothing more than the beginning of the defendant's prosecution. It does not mark the beginning of a substantive entitlement to the assistance of counsel."). Rather, the Supreme Court has held that "[o]nce attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings." *Id.* at 212. *See also Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) ("the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical stages' of the criminal proceedings") (citing *United States v. Wade,* 388 U.S. 218, 227–28 (1967) and *Powell*, 287 U.S. at 57).

Thus, the central question in this case is whether an initial bail hearing constitutes a "critical stage" of a criminal proceeding. If a bail hearing is a "critical stage," Galveston County must provide an indigent defendant with counsel at a bail hearing. If, on the other

hand, a bail hearing is not a "critical stage," Galveston County is under no obligation to appoint counsel to an indigent defendant facing a bail hearing.

So what exactly is a "critical stage"? In simple terms, a "critical stage" is "a step of a criminal proceeding . . . that h[olds] significant consequences for the accused." *Bell v. Cone*, 535 U.S. 685, 696 (2002) (citations omitted). As the Supreme Court explained in *Rothgery*, "the cases have defined critical stages as proceedings between an individual and agents of the State (whether formal or informal, in court or out) that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or meeting his adversary." 554 U.S. at 212 n.16 (internal quotation marks and citations omitted). *See also Wade,* 388 U.S. at 227 (explaining that the "critical stage" analysis requires a court to determine "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."); *McAfee v. Thaler*, 630 F.3d 383, 391 (5th Cir. 2011) ("Critical stage[s]" occur "where 'the accused required aid in coping with legal problems or assistance in meeting his adversary,' and the 'substantial rights of the accused may be affected.'") (quoting *United States v. Ash*, 413 U.S. 300, 311 (1973)). Put another way, "what makes a stage critical is what shows the need for counsel's presence." *Rothgery*, 554 U.S. at 212.

Among the stages of a criminal proceeding that have been deemed "critical" for Sixth Amendment purposes include preliminary hearings (*see Coleman v. Alabama*, 399 U.S. 1, 10 (1970)); arraignments (*see Hamilton v. Alabama*, 368 U.S. 52, 54 (1961)); plea negotiations (*see Frye*, 566 U.S. at 139); postindictment identification lineups (*see Wade*, 388 U.S. at 237); guilty pleas (*see Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972)); and

postindictment interrogations (*see Massiah v. United States*, 377 U.S. 201, 205 (1964)). There are common themes running through these cases. For starters, competent counsel is necessary to help a defendant navigate the complicated, treacherous and, oftentimes, confusing landscape of the criminal justice system. A defendant cannot be reasonably presumed to make critical decisions concerning his case without the advice of counsel. In addition, it is imperative in all these cases that counsel be present "at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *Wade*, 388 U.S. at 224. As the Supreme Court noted in *Wade*: "[T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id.* at 226 (citations omitted).

To assess whether a bail hearing is a "critical stage" of a criminal prosecution, the Court must first inquire as to whether counsel would be needed to help a defendant cope with complex legal problems raised during such a hearing. The answer is a no-brainer. Unrepresented defendants, especially those that have had no experience in the criminal justice system, are in no position at an initial bail hearing to present the best, most persuasive case on why they should be released pending trial. A lawyer would unquestionably provide invaluable guidance to a criminal defendant facing a bail determination.

Two district courts in the Fifth Circuit—more than 40 years apart—have perfectly captured how important it is to have counsel present at a bail hearing. Back in 1975, a district court in the Southern District of Texas commented:

> [I]f counsel can review and cogently represent his incarcerated client, a court might reduce or eliminate a money bond, permitting the client to be released from incarceration pending trial. . . . The accused are frequently ignorant of their legal rights and unaware of the steps which must be taken to trigger prompt processing of the case pending against them. It must also be recognized that courts are more readily able to communicate with attorneys than prisoners and are more likely to rely upon the representations of an attorney in deciding whether to release a defendant pending trial or to dismiss the charges against him.

Albertiv. Sheriff of Harris Cty., 406 F. Supp. 649, 660 (S.D. Tex. 1975). Similarly, a district court in the Eastern District of Louisiana noted just last year:

> [W]ithout representative counsel the risk of erroneous pretrial detention is high. Preliminary hearings can be complex and difficult to navigate for lay individuals and many, following arrest, lack access to other resources that would allow them to present their best case. Considering the already established vital importance of pretrial liberty, assistance of counsel is of the utmost value at a bail hearing.

Caliste v. Cantrell, 329 F. Supp. 3d 296, 314 (E.D. La. 2018).

Although these legal authorities are helpful in framing the issue, the testimony in this case unmistakably demonstrates the stark reality that arrestees are hesitant to advocate for themselves without counsel present. As Booth, himself, testified when asked if he posed any questions to the magistrate at his bail hearing: "I was—I was kind of under informed. I didn't—overwhelmed, and I wasn't represented by any—an attorney or anything like that. I didn't know which direction to go." Dkt. 184 at 218. Making matters worse, the magistrates who make the bail determinations in Galveston County readily acknowledge that they are reluctant to engage a defendant in conversation at the initial bail hearing, given the repeated admonitions to arrestee of his right to remain silent. *See* Dkt. 184 at 207 ("I'm not going to force a defendant into a conversation with me, especially

after I just told him he's got the right not to talk to anybody."). It is hard to imagine how a defendant can possibly be expected to champion for his release at an initial bail hearing when he is, understandably, disinclined to speak without an attorney present and, at the same time, the magistrates are hesitant to ask the defendant any questions that might elicit information favoring release.

It should shock absolutely nobody that the failure to have counsel during an initial bail hearing, when a critical decision is made concerning pretrial release, leads to concrete harm in the form of outcomes that are far worse than if counsel were provided. *See, e.g.,* Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1516 (2013) ("Appointing counsel at bail hearings . . . will substantially reduce the amount of time a substantial number of indigent defendants spend in jail awaiting their trials."). This harm is not just anecdotal or theoretical. Ample empirical research indicates that "delaying representation until after the pretrial release determination [is] the single most important reason for lengthy pretrial incarceration of people charged with nonviolent crimes. Without counsel present, judicial officers ma[k]e less than informed decisions and [a]re more likely to set or maintain a pretrial release financial condition that [are] beyond that individual's ability to play." Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1720 (2002) (study in Baltimore, Maryland concluding that having adequately prepared and resourced defense counsel at the initial bail hearing results in defendants being released on their own recognizance twice as often than if they were unrepresented, and bail being reduced four times as often for the remaining defendants).

See also Ernest J. Fazio, et al., Nat'l Institute of Justice, *Early Representation by Defense Counsel Field Test: Final Evaluation Report* at i (1985) (study on the effect lawyers had on pretrial release decisions in Passaic, New Jersey, Shelby County, Tennessee, and Palm Beach, Florida; concluding that representation at an initial bail hearing "had an interesting and important impact upon pretrial detention" in that "test defendants obtained pretrial release much sooner"); Dkt. 205-5 (noting in Bexar County, Texas that 77 percent of those represented by the public defender's office at the initial bail hearing were released on personal bond compared to a 57 percent rate for those not represented at the initial bond hearing).

In addition to an indigent defendant's obvious need to have counsel at an initial bail hearing to provide general advice and advocate for release, there are tangible adverse consequences as to the ultimate disposition of the criminal case that can result if an individual is not represented at an initial bail hearing. If a criminal defendant does decide to speak up at an initial bail hearing without the presence of counsel, it is often in an effort to explain the situation in the hopes of obtaining release. This increases the likelihood of the individual making an incriminating statement that can be used against him at a later date. And if an individual makes an incriminating statement at a bail hearing, the appointment of a lawyer to represent the individual later in the criminal case would, in effect, be meaningless. *See, e.g., United States v. Dohm*, 618 F.2d 1169, 1174 (5th Cir. 1980) (permitting uncounseled admission of guilt at initial bail hearing); *Cowards v. State*, 465 S.E.2d 677, 679 (Ga. 1996) (same). Indeed, "the right to use counsel at the formal trial (would be) a very hollow thing (if), for all practical purposes, the conviction is already

assured by the pretrial examination." *Wade*, 388 U.S. at 226 (quotation and citation omitted). That is why "[o]ur Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination." *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964) (citation omitted). Representation at an initial bail hearing unquestionably lessens the risk that a defendant makes a statement that can be used against him later. To safeguard the privilege against self-incrimination from being jeopardized, counsel must be provided to indigent defendants at those stages of the proceedings—like the initial bail hearing—that involve a substantial risk that the indigent defendant might incriminate himself. An indigent defendant should, therefore, be permitted to discuss with appointed counsel the pros and cons associated with waiving the right against self-incrimination *before* determining whether to speak his mind at an initial bail hearing. *See Wade*, 388 U.S. at 225–26 (discussing the importance "of counsel's presence if the accused [is] to have a fair opportunity to present a defense at the trial itself").

In trying to determine whether a bail hearing should be categorized as a "critical stage" of a criminal prosecution, the Supreme Court's *Coleman* decision is quite instructive. 399 U.S. 1. The issue presented in that case was whether an Alabama preliminary hearing represented a "critical stage" for which the Sixth Amendment required the assistance of counsel. *See id.* at 9–10. At an Alabama preliminary hearing, the trial court "determine[s] whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury and, if so, to fix bail if the offense is bailable." *Id.* at

8 (citation omitted). In explaining how the guiding hand of counsel can protect an indigent defendant at a preliminary hearing, the high court noted:

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

Id. at 9. Because a defendant cannot realize these advantages on his own, the Supreme Court held that a defendant was as much entitled to the aid of counsel at the Alabama preliminary hearing as at the trial itself. *See id.* Make no mistake: The Supreme Court reached this conclusion because, in part, a criminal defense attorney can make effective arguments about the "necessity for . . . bail" that a defendant would be unlikely to advance. *Id.*

Following this same logic, courts across the country have held that a bail proceeding is a "critical stage" requiring the appointment of counsel for indigent defendants. *See, e.g., Higazy v. Templeton*, 505 F.3d 161, 172 (2d Cir. 2007) ("a bail hearing is a critical stage of the State's criminal process") (internal quotation marks and citation omitted); *Ditch v. Grace*, 479 F.3d 249, 252–53 (3rd Cir. 2007) (a preliminary hearing, which includes a determination as to whether a defendant will be discharged or bound over to the court, is a "critical stage"); *Smith v. Lockhart*, 923 F.2d 1314, 1319 (8th Cir. 1991) (holding that

hearing on bail reduction motion was a "critical stage" of proceeding requiring representation by counsel); *Caliste*, 329 F. Supp. 3d at 314 (holding that an initial bail hearing is a "critical stage" of the proceedings because "[t]here is no question that the issue of pretrial detention is an issue of significant consequence for the accused"). *Gonzalez v. Comm'r of Corr.*, 68 A.3d 624, 631–37 (Conn. 2013) (criminal defendant has a Sixth Amendment right to counsel in proceedings pertaining to the setting of bond); *Hurrell-Harring v. New York*, 930 N.E.2d 217, 223 (N.Y. 2010) ("There is no question that a bail hearing is a critical stage of the State's criminal process") (internal quotation marks and citation omitted); *State v. Fann*, 571 A.2d 1023, 1030 (N.J. Super. Ct. 1990) ("The setting of bail certainly is a 'critical stage' in the criminal proceedings").

Applying the reasoning used in these cases, it should come as no surprise that the Court concludes that a hearing at which bail is set is a "critical stage," requiring the appointment of counsel for indigent defendants. Not only is a bail hearing *a* "critical stage" in the criminal process, but it is arguably the *most* "critical stage." As one court noted:

> The setting of bail certainly is a "critical stage" in the criminal proceedings. It is an action that occurs after adversary criminal proceedings have been commenced. Its importance to defendant in terms of life and livelihood cannot be overstated. The effect on family relationships and reputation is extremely damaging. Failure of pretrial release causes serious financial hardship in most cases. Jobs and therefore income are lost. The immediate consequence of the absence of bail or the inability to make bail-deprivation of freedom-standing alone, is critically consequential. Being jailed, for however short a time, is a significantly unpleasant experience. There are other consequential results. . . . [T]he prospect of conviction is greatly increased when an accused is jailed between the time of arrest and final adjudication; so is the severity of sentence. The opportunity to consult with counsel, to find witnesses, to obtain evidence and, in general, to prepare a defense is clearly restricted when a defendant is kept in jail.

Fann, 571 A.2d at 1030. If Galveston County does not provide counsel to a defendant at an initial bail hearing, the Sixth Amendment's right to counsel is nothing more than an empty right.

In opposing the issuance of a preliminary injunction, the District Attorney and the District Court Judges cite the Supreme Court's opinion in *Rothgery* for the proposition that there is no Sixth Amendment right to counsel at an initial bail hearing. This argument greatly overstates the holding of *Rothgery*. In *Rothgery*, the plaintiff brought a civil rights lawsuit alleging that Gillespie County refused to appoint him a lawyer until six months after his initial appearance in court. 554 U.S. at 196. In an admittedly "narrow" ruling, the Supreme Court held that the plaintiff's right to counsel "attached" at the initial appearance in court. *See id.* at 213. In accordance with a long list of Supreme Court cases, *Rothgery* held that once the right to counsel has attached, the Sixth Amendment requires that defendants be represented by counsel at any "critical stage before trial." *Id.* The sole question at issue in *Rothgery* ultimately was "whether attachment of the right [to counsel] also requires that a public prosecutor (as distinct from a police officer) be aware of that initial proceeding or involved in its conduct." *Id.* at 194–95. The Supreme Court answered that question in the negative. *See id.* The issuance of bail was not an issue in the case since Rothgery had waived the right to have appointed counsel present at the initial bail hearing. *See id.* at 196 n.5. Because bail was not contested in *Rothgery*, the high court never addressed whether an initial bail hearing is a "critical stage" of trial. That question was left for another day.

The District Attorney also argues that for there to be a "critical stage" proceeding, it must involve a "trial-like confrontation." Dkt. 236 at 20. This assertion is misguided. In no uncertain terms, the Supreme Court has explained that "critical stages" do not require the presence of a prosecutor or any legal proceeding remotely resembling a trial. *See, e.g., Frye*, 566 U.S. at 140. There are numerous examples of "critical stages" of criminal proceedings that arise outside courtroom or any trial-like setting. For instance, the Supreme Court has held that the Sixth Amendment right to effective assistance of counsel extends to a post-indictment lineup (*see Wade*, 388 U.S. at 237), and the consideration of plea offers (*see Lafler v. Cooper*, 566 U.S. 156, 162 (2012))—two activities that often take place far from the courtroom. The important question to ask is whether the pretrial proceeding has the potential to ultimately impact the fairness at the trial itself if the defendant is not represented by counsel.[8] All that being said, the fact remains that "[b]ail hearings fit comfortably within the sphere of adversarial proceedings closely related to trial." *United States v. Abuhamra*, 389 F.3d 309, 323 (2d Cir. 2004).

> Bail litigation arises only after a defendant is formally charged with crimes that the prosecution must be prepared to prove within a specified time at trial. The statutory presumptions and burdens applicable to bail determinations are all defined in terms of a defendant's trial status. Further, bail hearings, like probable cause and suppression hearings, are frequently hotly contested and require a court's careful consideration of a host of facts about the defendant

[8] In *United States v. Mendoza-Cecelia*, 963 F.2d 1467 (11th Cir. 1992), a case relied upon by the District Attorney, an arrestee offered an admission of guilt at his initial bail hearing. The 11th Circuit rejected a defendant's Sixth Amendment claim, holding that an "initial appearance is largely administrative" and "the bail hearing is not a trial on the merits." *Id.* at 1473 (citation omitted). The Court declines to follow *Mendoza-Cecelia*, believing that the 11th Circuit erroneously focused on the similarities between an initial appearance and an actual trial without properly analyzing whether the denial of counsel at a bail hearing can irreparably prejudice the outcome of the case.

> and the crimes charged. Thus, there is an interest in conducting such hearings in open courtrooms so that persons with relevant information can come forward. . . . While the presentation of evidence at bail hearings may be more informal than at probable cause and suppression hearings, the matter in dispute is of no less public concern. Bail hearings do not determine simply whether certain evidence may be used against a defendant at trial or whether certain persons will serve as trial jurors; bail hearings determine whether a defendant will be allowed to retain, or forced to surrender, his liberty during the pendency of his criminal case.

Id. at 323–24.

In *ODonnell II*, the Fifth Circuit explained that an initial bail-setting hearing must take place within 48 hours of an individual's arrest to pass constitutional muster. *See ODonnell II*, 892 F.3d at 168. A governmental entity may, of course, accelerate this schedule and provide an initial bail hearing on a more expedited basis. That is exactly what Galveston County has tried to do by holding initial bail hearings within roughly 12 hours of booking an individual into the Galveston County Jail. Given that every minute in custody can have a dramatic effect on an individual's life, Galveston County's efforts to speed up the bail process should be applauded. But, at the same time, Galveston County cannot conveniently ignore the constitutional requirement to provide counsel at these initial bail hearings. This Court has concluded that the Sixth Amendment mandates a right to an appointed lawyer at bail hearings for those financially unable to hire counsel. That right must be respected whether the initial bail hearing takes place 12, 24, 36 or 48 hours after the initial arrest.

To be clear, the Court is not suggesting that radical changes need to be made to Galveston County's pretrial detention system to ensure that it is in compliance with the Sixth Amendment's right to counsel guarantee. Galveston County currently schedules

initial bail hearings and bail review hearings every day at 7:00 a.m. and 7:00 p.m. Under the current system, counsel is not provided to indigent defendants at the initial bail hearing, but counsel is provided at the bail review hearing, which is usually held within 12 hours of the initial bail hearing and within 24 hours of the arrest. At the bail review hearing, an appointed lawyer is on-call to assist any indigent defendant who requests assistance. To satisfy the Constitution's basic requirements under the Sixth Amendment, all Galveston County needs to do is provide counsel to indigent defendants at the initial bail hearing, just 12 hours earlier than it currently does. It is hard to fathom how this could be problematic, given that Galveston County has apparently been able to effectively make counsel available at the bail review hearings held twice daily.

In arguing that an Article 15.17 hearing is not a "critical stage" that requires the appointment of defense counsel for indigent arrestees, the District Attorney and the District Court Judges rely on a number of cases. The Court has carefully reviewed each one of these cases and finds that they are unpersuasive or readily distinguishable from the instant case. Many of the cases cited by the District Attorney and the District Court Judges, for example, do not discuss the right to counsel at hearings were bail was set, but rather generally discuss the propriety of having a lawyer appointed at an initial appearance. *See, e.g., Gilley v. State*, 418 S.W.3d 114 (Tex. Crim. App. 2014); *O'Kelley v. State*, 604 S.E.2d 509 (Ga. 2004); *Green v. State*, 872 S.W.2d 717 (Tex. Crim. App. 1994).[9] Two of the

[9] In *Green*, the Texas Court of Criminal Appeals held that a criminal defendant's Sixth Amendment right to counsel was not violated when he appeared without counsel before a magistrate for his "preliminary initial appearance" after arrest. *See* 872 S.W.2d at 720. The record in *Green* did not indicate whether bail had been set at the initial appearance. But, even more importantly, the *Green*

opinions dismiss pro se prisoners' claim that *Rothgery* requires counsel at magistration. *See, e.g., Kennedy v. Bexar Cty.*, No. 16-ca-262, 2016 WL 1715200 (W.D. Tex. Apr. 27, 2016); *Mortland v. Hays Cty. Cmty. Supervision & Corrs. Dep't*, No. 12-ca-488, 2013 WL 1455657 (W.D. Tex. Apr. 8, 2013). But those cases do not indicate whether bail was set at magistration and the arguments presented by counsel in this case are, as Booth correctly notes, "more developed and depend on interpretation of other Supreme Court cases." Dkt. 238 at 7.

It is important to clarify that the Court is not suggesting that an Article 15.17 hearing is, in all cases, a "critical stage" proceeding that automatically requires the appointment of counsel for indigent defendants. After *Rothgery*, an Article 15.17 hearing "plainly signals attachment," but the Court must dig a little deeper to determine if the initial appearance rises to the level of a "critical stage." *Rothgery*, 554 U.S. at 212. Remember, it is only at the point in which the proceedings rise to a "critical stage" that appointed counsel is constitutionally mandated. If there is no bail setting determination at the initial appearance, it is likely not a "critical stage" of the proceedings requiring representation. On the other hand, when an Article 15.17 hearing includes an initial bail determination, it is a "critical stage" in the criminal proceedings, requiring the appointment of counsel for indigent defendants. This is because an accused's right to counsel extends to those "critical" pretrial proceedings in which "the accused is confronted, just as at trial, by the procedural system,

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opinion came out four years before *Rothgery*. After *Rothgery*, it is black-letter law that an Article 15.17 hearing is an initial appearance at which the constitutional right to counsel attaches. *See Rothgery*, 554 U.S. at 199.

or by his expert adversary, or by both . . . in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality." *United States v. Gouveia*, 467 U.S. 180, 189 (1984).

The District Attorney and the District Court Judges next argue that by conducting a bail review hearing so quickly after an initial bail determination (roughly 12 hours in practice), Galveston County is able to cure any potential damage or prejudice that may arise from the lack of counsel at an initial bail hearing. The premise is that even if individuals are unnecessarily jailed after the initial bail hearing, they only remain jailed for a short period of time before the bail review hearing remedies the situation. Although a defendant in Galveston County can urge reconsideration of an initial bail determination at a bail review hearing (which must be held, according to the Galveston County Indigent Plan, within 48 hours of the initial bail determination), that does not obviate the harm. A bail review hearing does not remedy the harm caused by uncounseled statements at magistration. A bail review hearing also does not remove the possibility, no matter how slight, that an initial bail determination has an "anchoring effect" that may make it more difficult to persuade the reviewing judge to modify what has already been ordered. In short, a bail review hearing is an admirable step, but such a hearing does not magically eliminate all the harm incurred as a result of a lawyer-less initial bail hearing.

There are two New Jersey cases the District Attorney points to which suggest that a bail review hearing is sufficient to ameliorate any harm caused by not having counsel represent indigent defendants at an initial bail hearing. *See Rojas v. City of New Brunswick*, No. 04-3195, 2008 WL 2355535 (D.N.J. June 4, 2008); *Fann*, 571 A.2d 1023.

Interestingly, in both cases, the courts concluded, with apparently no hesitation, that the "setting of bail certainly is a 'critical stage' in the criminal proceedings." *Rojas*, 2008 WL 2344435, at *16 (quoting *Fann*, 571 A.2d at 1030). Nonetheless, the New Jersey courts—one state and one federal—both declined to order counsel at initial bail hearings based on the "practical consideration[]" that doing so would delay bail setting. *Id.* This Court strongly disagrees with these holdings. There is absolutely no precedent supporting the courts' "practical considerations" analysis. Indeed, the Supreme Court in *Rothgery* indicated that once a determination is made that a proceeding is a "critical stage," an attorney's presence is mandatory. *See* 554 U.S. at 212. In this case, there is no evidence whatsoever that providing counsel at the initial bail setting would delay magistration. To the contrary, there is ample historical evidence that Galveston County is fully capable of having appointed defense counsel attend bail review hearings within approximately 24 hours of an arrest. There is no rational reason to believe that Galveston County or the District Attorney's office will be substantially harmed if counsel must be provided at the initial bail setting, which currently takes place 12 hours after arrest.[10]

To conclude, the Court finds that Booth has adequately established a likelihood to prevail under the Sixth Amendment since the Constitution requires representation by counsel at an initial bail-setting hearing.

[10] As an aside, in the federal system, counsel is appointed to indigent defendants at their initial appearance before a magistrate judge, and the lawyers represent the defendants at all bail and detention hearings. *See* 18 U.S.C. §§ 3006A (c), (d)(4)(B)(ii)(II).

2. Booth has Established a Risk of Irreparable Harm

It is time to turn to the next part of the preliminary injunction test: irreparable harm. The Supreme Court has held that, as a matter of law, the deprivation of a constitutional right "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). This concept that a violation of a constitutional right in and of itself constitutes irreparable injury has been universally recognized and is not open to debate. *See Deerfield Med. Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (the denial of constitutional rights "for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction") (collecting cases); *ODonnell I*, 251 F. Supp. 3d at 1157 ("When an alleged deprivation of a constitutional right is involved . . . most courts hold that no further showing of irreparable injury is necessary.") (citation omitted). Since the Court has determined that an indigent defendant is entitled under the Sixth Amendment to counsel at an initial bail hearing, the irreparable injury requirement is automatically satisfied.

Even if a further showing of irreparable harm is required, that hurdle is easily overcome in this case. As noted above, there is a significant potential for inculpatory statements to be made at magistration if counsel is unable to advise arrestees of their right to remain silent at an initial bail hearing. Furthermore, numerous studies indicate that Defendants represented by counsel at an initial bail hearing are less likely to have high bail set, and consequently, less likely to be detained pending trial. *See e.g.* Colbert, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1720 (2002). The lack of counsel at initial bail hearings,

therefore, leads to unwarranted pretrial detention. Having representation at the initial bail hearing means that fewer defendants will be held in custody unnecessarily. This is undoubtedly a good thing since, as the American Bar Association ("ABA") has observed, "[t]he consequences of pretrial detention are grave." American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release–Approved Draft, 1968* (New York: American Bar Association, 1968) at 2–3. The ABA further noted:

> [As a result of pretrial detention,] Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defense. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family. Moreover, there is strong evidence that a defendant's failure to secure pretrial release has an adverse effect on the outcome of his case. Studies in Philadelphia, the District of Columbia and New York all indicate that the conviction rate for jailed defendants materially exceeds that of bailed defendants. For example, of defendants charged with grand larceny forty-three percent of those on bail pending trial were convicted while seventy-two percent of those in jail were convicted. In terms of the sentence imposed on convicted persons, the bailed defendant is far more likely to receive probation; his jailed counterpart, having been unable to demonstrate his reliability under supervision, more frequently goes to prison. Of course some of the factors, such as strong evidence of guilt or a long criminal record, that lead to high bail and hence detention, will also cause a court to find the defendant guilty and to sentence him to prison rather than to give him probation. But a recent study which attempted to hold other causative factors constant indicates that there is a strong relationship between detention and unfavorable disposition.

Id. *See also Booth*, 352 F. Supp. at 739 ("The importance of providing counsel at the initial detention hearing is underscored by empirical research which indicates that case outcomes for pretrial detainees are much worse—in terms of an increased likelihood of conviction and harsher sentences—than for those who are released pending trial.") (citation omitted).

Even if, hypothetically, the bail review hearings are able to cure all those cases of unnecessary pretrial detention, the fact remains that some individuals will remain in custody for a minimum of 12 hours from the time of the initial bail hearing to the bail review hearing. "Even temporary unconstitutional deprivations of liberty" suffice to establish irreparable harm. *Pugh v. Rainwater*, 483 F.2d 778, 782–83 (5th Cir. 1973), *rev'd in part on other grounds sub nom. Gerstein v. Pugh*, 420 U.S. 103 (1975).

In short, Booth meets his burden to establish irreparable harm.

3. Balancing the Harms Weighs in Favor of an Injunction

The third preliminary injunction factor requires Booth to show that, absent an injunction, the threatened injury outweighs any harm the defendants will suffer as a result of the injunction. *See Winter*, 555 U.S. at 24 ("courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief."). "If a court has made a finding of irreparable harm, a party opposing injunctive relief 'would need to present powerful evidence of harm to its interests' to prevent the scales from weighing in the movant's favor." *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 950 (S.D. Miss. 2014) (quoting *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 297 (5th Cir. 2012)). "[W]hen plaintiff is claiming the loss of a constitutional right, courts commonly rule that even a temporary loss outweighs any harm to defendant and that a preliminary injunction should issue." 11A Charles Alan Wright & Arthur R. Miller, FED. PRAC. & PROC. CIV. § 2948.2 (3d ed. 2019).

According to the District Attorney and the District Court Judges, there is a heavy administrative burden that will be placed on Galveston County and the District Attorney's

office in the event an injunction is issued. Specifically, there is a concern that requiring the appointment of counsel at initial bail hearings will necessitate the District Attorney to furnish prosecutors to attend the hearings, and "do nothing but add complexity and more time." Dkt. 234 at 25. The Court is not convinced. There might end up being some additional costs incurred if defense counsel has to be provided to indigent defendants twice—at an initial bail hearing and, later, at a bail review hearing as well. But, at the same time, it is very possible that by providing counsel at an initial bail hearing, more individuals will be released from pretrial detention and there will be quantifiable cost savings in terms of costs of incarceration. The financial cost, if any, on the District Attorney and Galveston County is far from clear. By contrast, indigent defendants are unquestionably more likely to remain in custody—even if only for a short time—if they do not receive appointed counsel early in the process, leading to time away from their friends, family, school, and employment.

By any metric, the hardship class members suffer from being denied counsel far outweighs any harm to the Defendants. As such, the Court finds that the balance of equities weighs heavily in favor of an injunction.

4. The Public Interest Favors an Injunction

The fourth factor a court must consider when deciding whether to grant a preliminary injunction is the impact an injunction may have on the public interest. It is axiomatic that the public interest is not served by allowing constitutional violations to continue. As the Fifth Circuit has explained, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*,

760 F.3d 448, 458 n.9 (5th Cir. 2014) (citation omitted). *See also Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 595 (5th Cir. 2006) (the public interest is established if a plaintiff can show a substantial likelihood of success on the merits of a constitutional claim); *Nobby Lobby, Inc. v. Dallas*, 970 F.2d 82, 93 (5th Cir. 1992) ("[T]he public interest always is served when public officials act within the bounds of the law and respect the rights of the citizens they serve.") (citation omitted); *Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 424 (S.D. Miss. 2013) ("[T]he grant of an injunction will not disserve the public interest, an element that is generally met when an injunction is designed to avoid constitutional deprivations."), *aff'd in part*, 760 F.3d 448. In this case, given the real harms that befall an indigent arrestee who does not receive appointed counsel at an initial bail hearing, the public interest is served by issuing a preliminary injunction.

THE PRELIMINARY INJUNCTION

Now that the Court has concluded that indigent arrestees in Galveston County are constitutionally entitled to representation at initial bail hearings, the Court must determine how to fashion an appropriate remedy. Booth has submitted a proposed preliminary injunction order, but that proposed preliminary injunction order is incredibly overbroad.

To begin with, Booth suggests that Galveston County be ordered to provide defense counsel to "*any* felony arrestee is who unable to retain counsel"—regardless of whether they can afford their own attorney. Dkt. 205-1 at 1 (emphasis added). There is no legal basis for this request. The Constitution requires the appointment of counsel to those who cannot afford to hire an attorney at "critical stages" of the criminal proceedings. The Constitution does not mandate that the government provide counsel to every criminal

defendant, rich or poor. While a governmental body could, conceivably, decide to provide counsel to all criminal defendants irrespective of their indigent status, that is not a decision for a district court to make. The undersigned will refrain from stepping in and playing policymaker. A district court is only permitted to devise an injunctive remedy that meets Constitutional minimums. As a result, the injunction issued in this case will be limited to requiring that indigent felony arrestees in Galveston County be provided with counsel at the initial bail hearing.

Booth's proposed injunction would also require Galveston County to provide defense counsel with at least three hours of lead time to meet with a criminal defendant before a bail hearing. How Booth came up with the three-hour period is unclear. There is certainly no evidentiary support for this request anywhere in the record. The only testimony on this issue indicates that a three-hour preparation period is completely unnecessary. Dkt. 239-2 at 64–65 (Harris County Chief Public Defender explaining that "[t]here doesn't need to be a rule" that an attorney must meet his client a certain number of hours before a detention hearing, and noting that he often meets with clients for the first time "within minutes, half hour" of a bail hearing). As a result, the Court will not, at this time, set a minimum number of minutes or hours of lead time that have to be provided so that a defense lawyer can consult with his client before an initial bail hearing. Once the injunction goes into effect, Booth is certainly entitled to ask the Court to revise the preliminary injunction in the unlikely event he believes that Galveston County is taking affirmative steps to frustrate a meaningful attorney-client relationship at the initial bail hearings.

The proposed injunction advanced by Booth also requests that Galveston County provide a weekly report to the Court with detailed information including, but not limited to, the name of each "arrestee's counsel, [the] time that counsel was provided to the arrestee, . . . the time of the arrestee's initial bail hearing . . . [and] any outstanding conditions of release applicable to the arrestee." Dkt. 205-1 at 2. The Court fully agrees with the District Court Judges that these requests "are time consuming, unnecessary, and only serve to add a burden on the County." Dkt. 234 at 28. There is no need to place this added administrative burden on Galveston County.

In accordance with these findings, the Court recommends that the injunction bind Galveston County and its officers, agents, servants, employees, and attorneys, as well as other persons who are in active concert or participation with them. The specific terms of the injunction should be as follows:

(1) Galveston County must provide any indigent felony arrestee with counsel to represent the arrestee at the initial hearing concerning conditions of pretrial release.

(2) The Court does not order injunctive relief against the magistrates or the District Attorney. The Court does not order injunctive relief against the District Court Judges in their judicial capacities, but rather does so in their policymaking capacities.

(3) The recommended injunction should expire on the entry of a final judgment in this case, unless the Court orders otherwise. Any party may seek modification of the injunction by a written motion served on all counsel and on a showing of good cause.

CONCLUSION AND RECOMMENDATION

In finding that a preliminary injunction was warranted in *ODonnell I*, Chief Judge Rosenthal made the following observation, which this Court wholeheartedly adopts as equally applicable to the case at hand:

> This case is not easy. Institutions charged with safeguarding the public have an extraordinary trust and a difficult task. The difficulty and importance of the task cannot defeat an equally important public trust, which the court and the defendants share—to enforce the Constitution. The court has done its best to recognize and work toward both. [Galveston County] is changing its bail procedures. That is commendable. The relief ordered here is intended to fit into that work, to discharge the responsibilities the court and the parties share.

ODonnell I, 251 F. Supp. 3d at 1168.

Accordingly, for the reasons stated above, the Court **RECOMMENDS** that:

- The Motion for Preliminary Injunction (Dkt. 3-1) be **DENIED**; and
- The Motion for Preliminary Inunction [sic] Requiring Counsel at Initial Bail Hearings (Dkt. 205) be **GRANTED** to the extent described in this Memorandum and Recommendation.

The Clerk shall provide copies of this Memorandum and Recommendation to the respective parties who have fourteen days from the receipt thereof to file written objections pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002–13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

SIGNED at Galveston, Texas, this 7th day of August, 2019.

ANDREW M. EDISON
UNITED STATES MAGISTRATE JUDGE

Handout 7

Handout 7: Sources and Reference Material

Amicus Brief of the Cato Institute in *O'Donnell v. Harris County:*
https://www.cato.org/publications/legal-briefs/odonnell-v-harris-county

HB 1323 and SB 628:
https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=SB628

Texas Office of Court Administration, Pretrial Risk Assessment Information System:
http://www.txcourts.gov/praistx/

Pretrial Justice Institute, State of the Science of Pretrial Release Recommendations and Supervision:
http://www.ajc.state.ak.us/acjc/bail%20pretrial%20release/sciencepretrial.pdf

Lowenkamp, Understanding the Risk Principle:
https://www.correctiveservices.justice.nsw.gov.au/Documents/Risk-principal--accessible-442577.pdf

Jones, Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option:
https://www.nmcourts.gov/uploads/FileLinks/251c46be89664ada8ab0d99c3c426956/Unsecured_Bonds_The_As_Effective_and_Most_Efficient_Pretrial_Release_Option_Jones_2013.pdf