IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVONTAE ROSS, et al.,

Plaintiffs,

Case No. 19-cv-11076

vs.

Hon. Laurie J. Michelson

NANCY M. BLOUNT, et al.,

Defendants.
_____/

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

For the reasons that will be set forth in Plaintiffs' Brief in Support of Motion for Class Certification, attached below, Plaintiffs request that this Court certify a class, pursuant to Fed. R. Civ. P. 23(b)(2), composed of all pre-trial detainees whose bail is set at arraignments in the 36th District Court and who, as a result of the policies and practices followed by Defendants when setting bail, face detention because they are unable to pay imposed secured cash bail conditions. Plaintiffs further request that their undersigned attorneys be appointed as class counsel, pursuant to Fed. R. Civ. P. 23(g).

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Dated: April 14, 2019

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PLAINTIFFS' BRIEF IN SUPPORT
OF MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

This is a class action lawsuit challenging Michigan's 36th District Court's unconstitutional policy and practice of setting unaffordable cash bail for persons accused of crimes in Detroit. Bail is set by magistrates during video arraignments that typically last only a few minutes and do not include *any* of the following: (1) the opportunity to be heard, such as the ability to present or rebut evidence, on bail; (2) an assessment or findings of the arrestees' ability to pay; (3) the assistance of counsel; (4) individualized findings, by clear and convincing evidence, whether the arrestees present an unmanageable flight risk or an identified and articulable danger to the public; or (5) any finding that non-financial conditions of release would not sufficiently reduce any risk of flight or danger to the public. The result is that the 36th District Court routinely locks pre-trial arrestees in jail simply because they cannot afford to buy their release while similarly situated arrestees with the means to pay are able to go free until trial.

Plaintiffs, who are pre-trial detainees seeking injunctive and declaratory relief only, move for certification of a class of all pre-trial detainees whose bail is set at arraignments in the 36th District Court and who, as a result of the policies

and practices followed by Defendants when setting bail, face detention because they are unable to pay imposed secured cash bail conditions.[1]

Class certification is warranted because Plaintiffs seek declaratory and injunctive relief from the unconstitutional bail-setting policies and practices at the 36th District Court's arraignments ("the Arraignment Policies and Practices"). These policies and practices cause the same injury to Plaintiffs and all putative class members, i.e., pre-trial confinement in jail because an individual cannot afford to pay for her release. Such orders are, for all intents and purposes, pre-trial detention orders. Resolving Plaintiffs' claims requires answering the same common questions of law and fact by finding that the 36th District Court enters such orders in uncounseled hearings as a matter of course and without adequate procedures, including the right to counsel, and without constitutionally required findings that detention is necessary to protect against an unmanageable flight risk[2] or an articulable and identifiable danger to a third party that cannot be abated

[1] "Secured cash bail" means bail conditions that can be satisfied only by the arrestee paying money (or causing it to be paid by someone else) either directly to the government or to a bail bondsman who, in turn, provides a surety to the government. By contrast, "unsecured bail" or "personal bond" is a promise to pay bail later, if one fails to appear in court.

[2] A flight risk is not unmanageable when the "risk" is nothing more than the ever-present possibility that *any* individual could flee prior to trial. Similarly, a risk is not "unmanageable" simply because an individual has missed a hearing in a prior case, particularly when the court has not examined the reasons for the prior missed hearing.

through non-financial release conditions. A single declaratory judgment and injunction will address the constitutional defects of the 36th District Court's bail practices for all class members. And there are far too many class members and the class is far too fluid to efficiently resolve these questions individually. The named Plaintiffs and their counsel are dedicated to vindicating the constitutional rights of the proposed class members, even once the named Plaintiffs' cases have been resolved. Counsel will provide quality representation for the interests of proposed class members—just as they have for other similar classes of arrestees around the nation and for numerous civil rights classes in the state of Michigan and beyond.

BACKGROUND AND FACTS

I. Plaintiffs Are Being Detained Because They Cannot Afford Bail.

Named Plaintiffs Davontae Ross, Timothy Lucas, Starmanie Jackson, Kushawn Moore, Jr., Asia Dixon, Keith Wilson, and Katrina Gardner were all arrested between Monday, April 8, 2019, and Thursday, April 11. Exs. A–G. Each was arraigned at the 36th District Court, sometimes as much as three days after his or her arrest. *Id.* The arraignments were very fast, lasting between approximately one-and-one-half to three minutes. *Id.*; *see, e.g.*, Exs. B ¶ 5 (2–3 minutes); D ¶ 9 (~90 seconds).

The magistrates at each arraignment spoke very quickly and few of the named Plaintiffs could fully understand what was said. Exs. A–G. For example, Mr. Moore understood nothing more than the amount of his bail, Ex. D ¶ 7; all Ms. Gardner could make out "was numbers and [the word] 10," Ex. G, p. 2–3.

None of the named Plaintiffs was asked whether they could afford to pay bail, or asked any questions at all about their ability to pay. Ex. A, p. 2; Ex. B ¶ 10; Ex. C, p. 3; Ex. D ¶ 12; Ex. E, p. 4; Ex. F ¶ 4; Ex. G, p. 2. None of the named Plaintiffs recalls any explanation of the basis for the bail. Exs. A–G. Several Plaintiffs wanted to ask a question or say something but either were not allowed to, were cut off, or had no opportunity to do so. *Id.*

None of the named Plaintiffs were provided with a court-appointed attorney or the chance to apply for one. Exs. A–G. None can afford to hire a lawyer. *Id.*

Cash bail was imposed in every named Plaintiff's case in amounts varying from $200 through $50,000. Exs. A–G. None of the named Plaintiffs can afford to pay the resulting bail, and each remains in jail for that reason at the time of filing. *Id.* For example, Mr. Ross has now been held in jail because he is unable to pay $200 bail pertaining to a years-old ticket for sleeping in a park. Ex. A, p. 2. And Mr. Lucas, a 65-year-old man who suffers from epileptic seizures, hypertension, and asthma, is being held on a $3,500/10% bail that he cannot afford in connection with a misdemeanor assault charge. Ex. B ¶¶ 7–9.

As a result of being detained on unaffordable bail, each named Plaintiff has suffered or will suffer serious harm including job loss, Ex. C, p. 5; Ex. E, p. 4–5, Ex. G, p. 4; inability to care for family, Ex. A, p. 3; Ex. G, p. 4; medical difficulties, Ex. B. ¶¶ 7–9; lost housing, Ex. F ¶ 7, and missed school exams, Ex. D ¶¶ 17–18.

II. The Named Plaintiffs' Arraignments Are the Result of a Uniform Policy and Practice at the 36th District Court.

The named Plaintiffs' experience is typical of arrestees who are arraigned in the 36th District Court, which is the court where all individuals arrested in the City of Detroit are arraigned. In almost all cases, the five Magistrate Defendants do not provide arrestees any opportunity to address bail and instead determine bail based only on the nature of the alleged crime and the arrestee's criminal history—rather than based on the factors that are required by the Due Process and Equal Protection Clauses, and by Michigan law. Specifically, the Magistrate Defendants make no inquiry into an arrestee's ability to pay, nor do they conduct an individualized inquiry into flight risk or dangerousness or whether non-financial release conditions might suffice to address any such risks. Instead, the Magistrate Defendants set bail by a summary procedure, just like the ones experienced by the named Plaintiffs, at which unrepresented arrestees have no voice whatsoever. Furthermore, prior to the arraignment, guards specifically tell arrestees not to ask

any questions, describe their situation, or do anything more than respond yes or no to the few questions asked of them. Ex. H ¶ 5 (declaration of Richard J. Griffin).

By way of illustration, during the week of April 1–5, 2019, court watchers observed every arraignment session at the 36th District Court. *See* Exs. I, J, K ¶¶ 2–3. There were 266 arraignments that week. Exs. I ¶ 6 (98 arraignments); J ¶ 6 (123 arraignments); K ¶ 6 (45 arraignments). Nearly all arraignments were conducted via a video link between the courthouse and the Detroit Detention Center ("DDC").[3] Exs. I, J, K ¶ 4. Counsel was not appointed at this point, so only 14 arrestees who had been able to retain private counsel were represented; the remaining 252 were arraigned without counsel. Exs. I, J, K ¶ 6.

The typical arraignment lasted only a few minutes, and consisted primarily of one of the Magistrate Defendants reading the charges, possible penalties, and the arrestee's rights while speaking in a rapid-fire manner. Exs. I, J, K ¶ 6. The arrestee's only role was to state her name and respond yes or no when asked if she understood the charges and her rights. *Id.* The Magistrate Defendant then set the date for a preliminary hearing which, by court rule, must be scheduled at least a week from the date of the arraignment, *see* Mich. Ct. R. 6.104(E)(4), and on average was about ten days later. Exs. I, J, K ¶ 8.

[3] The DDC is a combined lockup facility to which most individuals arrested in Detroit are initially transported.

At the conclusion of the arraignment, the Magistrate Defendants set bail. Out of the 252 uncounseled arraignments, not once did any Magistrate Defendant ask an arrestee if she could afford bail. Exs. I, J, K ¶ 10. Similarly, not once did any Magistrate Defendant make an individualized finding that non-financial release conditions would not suffice to protect against an unmanageable flight risk or an identified and articulable danger to others. Exs. I, J, K ¶ 11. Instead, the Magistrate Defendants typically imposed bail without asking for any information and never affirmatively provided an opportunity to arrestees to present evidence or speak to bail. Exs. I, J, K ¶ 11. The Magistrate Defendants then instructed arrestees to step away from the camera, thus making clear that the arraignment was over and the arrestee was not supposed to speak to bail. Exs. I, J, K ¶ 12.

The result is that the Magistrate Defendants routinely impose secured cash bail conditions that operate as de facto orders of pre-trial detention based solely on access to wealth and that prevent impoverished arrestees from having any opportunity to argue for immediate release. During the week of April 1–5, 212 out of 248 (85.5%) uncounseled arrestees received secured cash bail conditions. Exs. I ¶ 9 (78 out of 91), J ¶ 9 (100 out of 116), K ¶ 9 (34 out of 41).[4]

[4] The disposition of two arraignments was unclear, Ex. I ¶ 9, and in two arraignments bail was denied entirely, Ex. J ¶ 9. The statistics above exclude these four arraignments.

Pre-trial detention during this period can and frequently does lead to job loss and other life disruptions that exacerbate the cycle of poverty, as well as higher rates of guilty pleas, lengthier sentences, and higher post-trial recidivism rates. *See* Compl. ¶¶ 107–27 & nn. 11–29 (citing numerous studies). Meanwhile, wealthier arrestees who are otherwise similarly situated are able to purchase their freedom and avoid such irreparable damage.

If an arrestee cannot afford to pay the secured cash bail conditions imposed at the arraignment, she will be transported to one of three jails operated by the Wayne County Sheriff, Defendant Benny Napoleon ("the Sheriff"), and held there until her next hearing. Arrestees have no viable way to challenge their bail conditions during the week or more between their arraignment and their first hearing in court. Many will not even be assigned their court-appointed counsel until the date of their first hearing, and even those who *are* assigned counsel sooner often do not have a chance to meet their new lawyer until the first hearing. And appointed counsel are not reimbursed for any filings made prior to the first hearing, eliminating any realistic chance that an arrestee might somehow have her bail reconsidered prior to that hearing.

These Arraignment Policies and Practices trap people in jail solely because they cannot afford to buy their freedom, with devastating economic, personal, and legal consequences. For the reasons set forth in Plaintiffs' Complaint, this Policy

infringes upon arrestees' pretrial liberty in violation of their rights to equal protection, substantive and procedural due process, and the assistance of counsel.

III. Plaintiffs Seek Class-Wide Prospective Relief.

The 36th District Court's Arraignment Policies and Practices violate arrestees' substantive due process and equal protection rights against pre-trial and wealth-based detention (counts one and two), their rights to procedural due process (count three), and their Sixth Amendment right to the assistance of counsel (count four). Plaintiffs seek class-wide declaratory and injunctive relief declaring the Arraignment Policies and Practices unconstitutional, and prohibiting the Sheriff from continuing to detain any arrestee who has unaffordable bail imposed pursuant to the Arraignment Policies and Practices.

ARGUMENT

Under Rule 23 of the Federal Rules of Civil Procedure, the party seeking class certification must show that:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the named parties are typical of the claims or defenses of the class; and

(4) the named parties will fairly and adequately protect the interest of the class.

Fed. R. Civ. P. 23(a). The class must also satisfy one requirement in Rule 23(b).

While the Court must perform a "rigorous analysis" to determine whether to certify a class, *Wal-Mart v. Dukes*, 564 U.S. 338, 351 (2011), the Court may not require the plaintiffs to prove their claims at the class certification stage. *See Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 568 U.S. 455, 466 (2013) ("Merits questions may be considered . . . only to the extent . . . that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."). At the certification stage, plaintiffs need only provide evidence to demonstrate that Rule 23 itself is satisfied; certification is not a "dress rehearsal for the trial on the merits." *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 851–52 (6th Cir. 2013) (internal quotations and citation omitted). Moreover, "it is not always necessary . . . to probe behind the pleadings before coming to rest on the certification question, because sometimes there may be no disputed factual and legal issues that strongly influence the wisdom of class treatment." *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 417 (6th Cir. 2012) (internal quotations and citation omitted).

Class certification is particularly favored when, as here, the named plaintiffs assert civil rights claims that are of a fleeting or transitory nature, such that mootness concerns would make it difficult or impossible for individuals to litigate the issues outside of the class context. *See Johnson v. City of Opelousas*, 658 F.2d

1065, 1070 (5th Cir. 1981) ("[W]e believe that the substantial risk of mootness presented by the facts of this dispute was sufficient to create a need for certification."); *see also Penland v. Warren Cty. Jail*, 797 F.2d 332 (6th Cir. 1986) (citing *Johnson* with approval); *Cmtys. for Equity v. Michigan High Sch. Athletic Ass'n*, 192 F.R.D. 568, 575 (W.D. Mich. 1999). Indeed, given the "short term nature of incarceration in a county jail, a class should be certified when it is the "only vehicle whereby the legality of [a jail's] operation can be determined. *Hiatt v. Adams Cty.*, 155 F.R.D. 605, 608–09 (S.D. Ohio 1994).

It is, therefore, unsurprising that district courts around the country have consistently certified classes similar to this one composed of arrestees subject to bail policies that violate their rights under the Due Process and Equal Protection Clauses by failing to properly account for indigency, flight risk, and danger to the community. *See, e.g.*, *Booth v. Galveston Cty.*, No. 18-cv-00104, 2019 WL 1129492 (S.D. Tex. Mar. 12, 2019); *Edwards v. Cofield*, No. 3:17-CV-321, 2018 WL 4323920 (M.D. Ala. Sept. 10, 2018); *Buffin v. City of San Francisco*, No. 15-cv-04959-YGR, 2018 WL 1070892 (N.D. Cal. Feb. 26, 2018); *ODonnell v. Harris Cty.*, No. H-16-1414, 2017 WL 1542457 (S.D. Tex. Apr. 28, 2017).

I. The Proposed Class Is So Numerous That Joinder of All Proposed Class Members Is Impracticable.

Plaintiffs' proposed class is sufficiently numerous to make joinder impracticable. *See* Fed. R. Civ. P. 23(a)(1). Although there is no strict numerical

test, "substantial" numbers usually satisfy the numerosity requirement. *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006). Where plaintiffs can show that the number of potential class members is large, the numerosity requirement is met "even if plaintiffs do not know the exact figure." *In re Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 601 (E.D. Mich. 1985). "[A] class numbering more than 40 members usually satisfies the impracticability requirement, and classes containing 100 or more members routinely satisfy the numerosity requirement." *Peters v. Cars To Go, Inc.*, 184 F.R.D. 270, 276 (W.D. Mich. 1998) (citation omitted); *see Calloway v. Caraco Pharm. Labs, Ltd.*, 287 F.R.D. 402, 406 (E.D. Mich. 2012); *Cmtys. For Equity*, 192 F.R.D. at 571 ("Numbers alone . . . will dictate impracticability when the numbers are large."). Courts also consider "judicial economy arising from the avoidance of a multiplicity of actions." *Newberg on Class Actions* § 3:12 (5th ed.); *see Calloway*, 287 F.R.D. at 406.

Furthermore, the Rule 23(a)(1) certification requirement is satisfied where additional factors make joinder impracticable. In particular, "[j]oinder of future class members is inherently impracticable." *Miller v. Univ. of Cincinnati*, 241 F.R.D. 285, 290 (S.D. Ohio 2006). Thus, due to the fluid nature of a jail population, actions seeking prospective relief regarding transitory jail time are especially well-suited for class action status. *See Hiatt*, 155 F.R.D. at 608; *see also Allen v. Leis*, 204 F.R.D. 401, 406 (S.D. Ohio 2001).

The proposed class easily meets the Rule 23(a)(1) numerosity requirement. According to its website, the 36th District Court is "the largest district court in the State of Michigan and one of the busiest courts in the United States." Ex. L. And the Wayne County Jails, collectively, constitute the largest county jail system in Michigan, housing approximately 1,600–1,700 detainees per night,[5] approximately half of whom are being held exclusively on charges over which the 36th District Court has jurisdiction. As of 2015, sixty-two percent of detainees in the Wayne County Jails were pre-trial detainees.[6] The size of the pre-trial jail detainee population itself—which, based on the two aforementioned statistics, could approach approximately 500 on any given day—demonstrates that the class satisfies the numerosity requirement. Given Detroit's high poverty rates and the fact that the Federal Reserve estimates that 40% of American families cannot afford to pay for a $400 emergency, it is certain that a large number of pre-trial detainees are in jail because they cannot afford bail. *See* Compl. ¶ 78–80. When the additional future class members who will continue to be unconstitutionally

[5] *See* Hasan Dudar, *Wayne County jail finally gets a new home in Detroit*, Detroit Free Press (March 7, 2018) (providing statistics from the Sheriff), https://www.freep.com/story/news/local/michigan/wayne/2018/03/07/wayne-county-jail-detroit-michigan/402364002/.

[6] Vera Institute of Justice, *Wayne County, MI Incarceration Trends*, summarizing data provided by Wayne County to the Department of Justice's Bureau of Justice Statistics as of 2015, http://trends.vera.org/rates/wayne-county-mi?incarceration=count&incarcerationData=all

arraigned as the result of Defendants' ongoing adherence to the Arraignment Policies and Practices are also considered, the number of arrestees subjected to the Arraignment Policies and Practices easily numbers in the thousands. Because the number of potential plaintiffs in the proposed class vastly exceeds the number who could be joined practicably, Rule 23(a)(1) is satisfied here.

II. Claims by The Proposed Class Raise Common Questions That Will Generate Common Answers.

The claims asserted on behalf of the proposed class include common questions of law and fact that satisfy Rule 23(a)(2). Commonality requires that the class members' claims "depend on a common contention" of fact *or* law such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. Courts must "start from the premise that there need be only one common question to certify a class." *Whirlpool*, 722 F.3d at 853. Courts find common questions of both law and fact "at a high level of generality." *Newberg on Class Actions* § 3:19 (5th ed.) (internal quotations and citation omitted).

Commonality also requires these common questions "to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 349 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009) (emphasis in original)). These "common answers" must "relate[] to the actual theory of liability in the case." *Rikos v.*

Procter & Gamble Co., 799 F.3d 497, 505 (6th Cir. 2015); *see also Cmtys. For Equity*, 192 F.R.D. at 572; *Newberg on Class Actions* § 3:20 (5th ed.) ("When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persona affected.").

Accordingly, courts in the Sixth Circuit have certified class actions in which jailed arrestees or inmates challenge policies or procedures that lengthen their stay in jail or that pertain to the circumstances of pre-trial detention. *See Brown v. City of Detroit*, No. 10–12162, 2012 WL 4470433 (E.D. Mich. Sept. 27, 2012) (class of detainees challenging their detention for more than 48 hours without probable cause); *Allen*, 204 F.R.D. at 406–07 (class of pre-trial detainees challenging payments associated with detention). Similarly, as noted above, courts around the country have repeatedly and consistently certified classes challenging the constitutionality of jurisdiction-wide bail policies that are alleged to violate the Due Process and Equal Protection Clauses. *See, e.g.*, *Edwards*, 2018 WL 4323920, at *1; *Buffin*, 2018 WL 1070892, at *3–4; *ODonnell*, 2017 WL 1542457, at *5–6.

At the core of this case is the common injury inflicted on each member of the proposed class because of the 36th District Court's application of the unconstitutional Arraignment Policies and Practices. All class members suffer the same injury: they were or will be subjected to uncounseled bail hearings that

unconstitutionally fail to consider their ability to pay and fail to include individualized findings, supported by clear and convincing evidence, regarding flight risk, dangerousness, and the availability of more narrowly tailored non-financial release conditions to address any such concerns. Exs. I, J, K. As a result, 85% of arrestees receive cash bail conditions, and many face prolonged detention as a result of their inability to pay cash bail. *Id.*

That injury is "*capable* of classwide resolution," *Rikos*, 799 F.3d at 505 (quoting *Dukes*, 564 U.S. at 350), because the Court can issue a single declaration finding that the Arraignment Policies and Practices unconstitutionally discriminate on the basis of wealth, violate substantive and procedural due process by depriving arrestees of liberty without constitutionally required findings and procedures, and violate the Sixth Amendment by depriving arrestees of the assistance of counsel. This case goes far beyond the "single common question [that] will do." *Dukes*, 564 U.S. at 359 (internal quotations and citation omitted). Indeed, *most* questions of fact and law that will arise in this suit are common across the class. Among the most central common questions of fact are:

- Whether the Magistrate Defendants have a widespread, well-settled policy and practice of setting secured cash bail conditions without inquiring into ability to pay and without making individualized findings that alternative less restrictive bail conditions will not protect against any unmanageable flight risk or an identified and articulable danger to others;

- Whether the Magistrate Defendants have a widespread, well-settled

policy and practice of setting unaffordable secured bail for arrestees without providing arrestees with procedural protections including notice, an opportunity to present and contest evidence, and the assistance of counsel;

- Whether the absence of counsel when bail is initially set leads to worse outcomes for arrestees at trial or during plea bargaining; and

- How long class members must wait in jail after arrest before they have a meaningful opportunity to raise their inability to pay for their release or to request alternative, non-financial conditions.

Among the most common questions of law are:

- Whether imposing unaffordable secured cash bail without providing a hearing at which the arrestee may have her inability to pay properly considered violates substantive due process and equal protection principles guaranteed by the Fourteenth Amendment by discriminatorily depriving less wealthy arrestees of their liberty while wealthier arrestees are able to secure their pre-trial freedom;

- Whether imposing unaffordable secured cash bail without findings on the record by clear and convincing evidence that an arrestee presents an unmanageable flight risk or an articulable and identified danger to others violates class members' substantive due process rights against pre-trial detention;

- Whether the Arraignment Policies and Practices violate the procedural due process guarantees of the Fourteenth Amendment by depriving the class members of an expectation of release without sufficient procedural protections; and,

- Whether the arraignment is a critical stage of the prosecution at which class members are entitled to a state-provided attorney under the Sixth Amendment.

In short, common questions of fact and law pervade this case, satisfying the Rule 23(a)(2) commonality requirement.

III. The Named Plaintiffs' Claims Are Typical of the Claims of the Proposed Class.

The Plaintiffs in this case have claims typical of people who are subject to the Arraignment Policies and Practices. To meet the typicality requirement, the named plaintiffs' claims must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The commonality and typicality requirements of Rule 23(a) tend to merge." *Dukes*, 564 U.S. at 349 n.5. And, "[l]ike the test for commonality, the test for typicality is not demanding and the interests and claims of the various plaintiffs need not be identical." *Reese v. CNH Am., LLC*, 227 F.R.D. 483, 487 (E.D. Mich. 2005).

"A claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if [the] claims are based on the same legal theory." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007). So long as the class and its representatives have similar legal theories arising from the same practice or course of conduct, the requirement is met "even if substantial factual distinctions exist between the named and unnamed class members." *Rankin v. Rots*, 220 F.R.D. 511, 518 (E.D. Mich. 2004).

Each named Plaintiff's claim is based on her pre-trial detention pursuant to the Arraignment Policies and Practices, just like each putative class member's claim. Pursuant to the Arraignment Policies and Practices, every named Plaintiff and every class member's bail was (or will be) set in a summary, uncounseled

arraignment in which no individualized findings (or inquiry) into their ability to pay was (or will be) conducted. Accordingly, the named Plaintiffs and other class members languish in jail (or will do so) because of their inability to pay secured cash bail conditions. None of the named Plaintiffs have received any unusual treatment that affects the typicality of their claims. Their claims arise from the same course of conduct and are brought under the same legal theory. In other words, the named Plaintiffs' experiences exemplify the ways that the Arraignment Policies and Practices typically harm the members of the class.

IV. The Named Plaintiffs Are Competent and Dedicated Class Representatives.

The named Plaintiffs also fulfill the final requirement under Rule 23(a): they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To determine the issue of adequacy of representation, the Sixth Circuit has articulated two criteria: "1) the representative must have common interests with unnamed members of the class[;] and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996) (internal quotations and citation omitted). "The adequate representation requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members." *Id.*

In this case, the first adequacy criterion is met for reasons set forth in the commonality and typicality discussions above. The named Plaintiffs do not have interests that are in any way contrary to the rest of the class. The relief they seek—declaratory and injunctive relief from unconstitutional policies and practices—would benefit the entire class equally. There are no conflicts between the named Plaintiffs and the class.

The named Plaintiffs are also ready and willing to take an active role in litigating this case, including by responding to discovery as needed. They have met with counsel, are aware of the duties and obligations that apply to representative plaintiffs in class litigation, and are committed to seeking relief on behalf of all class members.

The second adequacy criterion, adequacy of counsel, is also clearly satisfied here. Adequacy of counsel is met where "class counsel are qualified, experienced and generally able to conduct the litigation, and to consider whether the class members have interests that are not antagonistic to one another." *Beattie*, 511 F.3d at 562-63. Plaintiffs' counsel are highly qualified and experienced civil rights attorneys who are able and willing to conduct this litigation on behalf of the class. Plaintiffs' counsel from the American Civil Liberties Union Foundation, the American Civil Liberties Union Fund of Michigan, and Covington & Burling LLP, collectively have extensive experience litigating complex class action cases and

civil rights cases, including cases concerning unconstitutional pre-trial systems. Exs. M ¶¶ 2, 4, 5; N ¶¶ 3, 4, 8; O ¶ 4. As evidenced by the cited declarations and the cases noted therein, counsel have a history of zealous advocacy on behalf of their clients, as evidenced by the filings in those cases. Accordingly, Plaintiffs meet Rule 23(a)(4)'s adequacy requirement.

V. Certification of the Class for Prospective Relief is Appropriate Under Rule 23(b)(2).

The proposed class in this case is ideal for certification under Rule 23(b)(2). To certify a class under Rule 23(b)(2), the party seeking class certification must show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "This is a simple inquiry in most cases." *Newberg on Class Actions* § 4:28 (5th ed.). The requirement of a generally applicable set of actions "ensures that the class's interests are related in a manner that makes aggregate litigation appropriate . . . and therefore efficient." *Id.* Thus, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes*, 564 U.S. at 360.

As the Supreme Court has recognized, "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) class actions. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997);

see Dukes, 564 U.S. at 361; 8 *Newberg on Class Actions* § 25:20 (4th ed. 2002) ("Rule 23(b)(2) was drafted specifically to facilitate relief in civil rights suits."). In actions primarily seeking injunctive relief, the (b)(2) requirement is "almost automatically satisfied." *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994). "What is important is that the relief sought by the named plaintiffs should benefit the entire class." *Id*. at 59.

The class proposed here is exactly the kind of class that Rule 23(b)(2) embraces. *See id.* The class's interests are related in a manner that warrants aggregate litigation. Defendants have acted on grounds that apply generally to the class—Defendants' unconstitutional policies and practices apply to every arrestee who is or will be arraigned by the 36th District Court and faces detention because she cannot afford the resulting secured cash bail conditions. Injunctive and declaratory relief are appropriate to the class precisely because the only adequate relief here is enjoining Defendants' unconstitutional policies and practices and declaring their unconstitutionality. Furthermore, it is far more efficient for this Court to grant injunctive and declaratory relief protecting the entire class than to extend that relief piecemeal through individual suits. Indeed, class certification is necessary because the inherently transitory nature of the constitutional harms at issue here mean that any individual class member's claim would likely become moot before it could be addressed on the merits. *See Johnson*, 658 F.2d at 1070

(5th Cir. 1981); *Cmtys. for Equity*, 192 F.R.D. at 575; *Hiatt*, 155 F.R.D. at 608–09. Accordingly, this Court should certify the class under Rule 23(b)(2). *See, e.g.*, *ODonnell*, 2017 WL 1542457, at *8 (certifying a class, under Rule 23(b)(2), of "misdemeanor arrestees who are detained by Harris County . . . for whom a secured financial condition of release has been set and who cannot pay the amount necessary for release on the secured money bail because of indigence").

VI. Plaintiffs' Counsel Should Be Appointed Class Counsel Under Rule 23(g).

Federal Rule of Civil Procedure 23(g) requires that the court appoint class counsel for any class that is certified. Fed. R. Civ. P. 23(g)(1). Class counsel must "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). A court must consider factors including: (1) "the work counsel has done in identifying or investigating potential claims in this action"; (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action"; (3) "counsel's knowledge of the applicable law"; and (4) "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

The undersigned counsel satisfy these requirements. First, Plaintiffs' counsel have interviewed Plaintiffs and other class members, performed relevant legal research and drafting, and investigated the facts and legal claims raised in this case for many months. Ex. M ¶ 7; Ex. N ¶¶ 4, 10; Ex. O ¶ 14. Second, Plaintiffs'

counsel have significant experience litigating class action and civil rights actions. Ex. M ¶¶ 2, 4–5; Ex. N ¶¶ 3, 8; Ex. O ¶ 4; *supra* Section IV. Third, Plaintiffs' counsel include specialized national experts in litigating the constitutionality of bail policies. Ex. N ¶¶ 4, 9. Finally, Plaintiffs' counsel are prepared to contribute significant resources to the representation of this class. Ex. M ¶ 7; Ex. N ¶ 11; Ex. O ¶¶ 5–14. Therefore, Plaintiffs' counsel satisfies the four criteria in Rule 23(g), and they respectfully request appointment as class counsel.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court certify the class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. Plaintiffs also request that undersigned counsel be appointed class counsel under Rules 23(a)(4) and (g). In the alternative, if Defendants contest material issues of fact necessary for class certification, Plaintiffs request the opportunity to conduct discovery related to class certification and a subsequent hearing.

Respectfully Submitted,

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Dated: April 14, 2019

CERTIFICATE OF SERVICE

I affirm that this motion for class certification and supporting brief will be served concurrently with the service of the Summons and Complaint in this matter.

/s/ Philip Mayor
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