No. 21-124016-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

EDWANDA R. GARRETT,
Defendant-Appellant,

BRIEF OF *AMICUS CURIAE*

Appeal from the District Court of Johnson County, Kansas
Honorable Michael P. Joyce, Judge
District Court Case Nos. 07-CR-2809 and 16-CR-2787

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Kansas (ACLU of Kansas) is a non-profit and non-partisan organization dedicated to preserving and advancing the civil rights and legal freedoms guaranteed by the United States Constitution and the Bill of Rights, and the Kansas Constitution and Kansas Bill of Rights. The ACLU of Kansas has approximately 9,000 members in Kansas. Through its Smart Justice Campaign, the ACLU of Kansas works to reverse the shift towards excessive incarceration and to defend the constitutional rights of Kansans who are involved with the criminal legal system. Two primary focus areas of the Smart Justice Campaign are eliminating fines and fees and reforming probation.

ARGUMENTS AND AUTHORITIES

K.S.A. § 21-6608(c)(7) subjects individuals without financial means to significantly longer and harsher punishments than their wealthier counterparts, in direct contravention of the Equal Protection Clause of the U.S. Constitution. Kansas's wealth-based punishment scheme allows for an individual's probation period to continue "as long as the amount of restitution[2] ordered has not been paid." K.S.A. § 21-6608(c)(7). Practically speaking, this means that under K.S.A. § 21-6608(c)(7), low- and no-income individuals remain on probation for an indefinite period simply because they are unable to pay back their court debt. Those with financial means, by contrast, can pay off their court debt quickly and exit

[2] The term "court debt" is used throughout this brief refer to the types of outstanding fines, fees, and victim restitution payments that may result in a probation extension under K.S.A. § 21-6608(c)(7). "Restitution" orders, as used in the statute, generally include all fees that people on probation must pay, not just victim restitution.

probation. In this way, K.S.A. § 21-6608(c)(7) subjects Kansans to wealth-based punishment in the form of longer probation terms, which cannot survive any appropriate level of review.

Further, K.S.A. § 21-6608(c)(7) deprives those who remain on probation of core fundamental rights due to their poverty. Most notably, continued probation prevents individuals from regaining their right to vote. Continued probation also implicates a person's liberty interest: people unable to buy their way to freedom remain subject to additional incarceration or punishment for violations of other probation conditions.

K.S.A. § 21-6608(c)(7) discriminates based on wealth, in direct contravention of the Supreme Court's bar on punishment based on an individual's ability to pay fines or fees. *Bearden v. Georgia*, 461 U.S. 660 (1983). Because prolonged probation periods directly affect the administration of criminal justice, K.S.A. § 21-6608(c)(7) should be subject to heightened scrutiny. However, even under rational basis review, K.S.A. § 21-6608(c)(7) is unconstitutional because there is no rational connection between prolonging one's probation period and collecting court debt. Extended probation does not make it any more likely someone will be able to pay their court debt and the state has other means to collect such debts.

Ms. Garrett's experience on probation over the last several years is a clear demonstration of the harm K.S.A. § 21-6608(c)(7) causes for people who lack financial means. As set forth more fully below, K.S.A. § 21-6608(c)(7) is facially unconstitutional and should be struck down.

A. K.S.A. § 21-6608(c)(7) imposes wealth-based punishment in violation of the Equal Protection Clause.

The Equal Protection Clause of the U.S. Constitution provides that "No State shall … deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV, § 1. Yet that is precisely what K.S.A. § 21-6608(c)(7) does: it deprives individuals of their freedom by subjecting them to prolonged periods of probation, and all the conditions that come along with it, due solely to their inability to pay off restitution. Because Kansas's statutory scheme does not likewise extend probation for those who can afford to pay off their court debt, K.S.A. § 21-6608(c)(7) imposes an unequal punishment on those without financial means. The statute thus violates the Equal Protection Clause.

In a series of cases dating back several decades, culminating in *Bearden v. Georgia*, the U.S. Supreme Court articulated the need for "sensitive" treatment of low-income people in the criminal justice system and held that the Equal Protection Clause prohibits incarcerating individuals for the non-willful failure to pay fines and fees. 461 U.S. 660, 664, 667-669 (1983). Beginning in *Williams v. Illinois*, 399 U.S. 235 (1970), the Court cast significant doubt on the propriety of systems that single out individuals for differential punishment based on their wealth—exactly what K.S.A. § 21-6608(c)(7) does in regard to the length of probation terms. *Williams* concerned a state statute that allowed a one-year prison term to be added at the end of a person's sentence if they owed outstanding restitution. 399 U.S. at 244. The Court struck this statute down, holding that it constituted "discrimination that rests on ability to pay," and that the Equal Protection Clause requires

that the statutory ceiling placed on imprisonment be the same for all defendants irrespective of economic status. *Id.* at 241, 244. The Court reasoned that once the state decides the outer limits of incarceration to satisfy its penological interests, the ability to pay cannot "subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." *Id.* at 241-242.

The Court went on to apply *Williams* in other contexts and struck down statutes and practices where a person's lack of wealth affected the severity of the sentence they received. For example, in *Tate v. Short*, the Court held that the Equal Protection Clause prohibits jurisdictions from imposing fines "and then automatically converting [the fine] into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." 401 U.S. 395, 398 (1971). Then, in *Bearden v. Georgia*, the Court held that the Equal Protection Clause prohibits the government from incarcerating individuals for their failure to pay fines and fees if the failure to pay was non-willful. 461 U.S. at 667-669. In so holding, the Court reasoned that failure to consider whether nonpayment was willful would deprive a person on probation of their freedom based on their lack of wealth, contrary to the "fundamental fairness required by the Fourteenth Amendment." *Id.* at 673.

The reasoning in *Williams*, *Tate*, and *Bearden* should apply equally to K.S.A. § 21-6698(c)(7) because the statute extends punishment based on an individual's ability to pay, in violation of the Equal Protection Clause. Kansans without financial means are trapped in the probation system until they can pay their restitution. The various extensions of probation go beyond the outer limits of probation defined by the state to satisfy any legitimate penological interests. Importantly, K.S.A. § 21-6608(c)(7) does not require that

the court assess a person's ability to pay before extending probation; consider whether a person has made bona fide efforts to pay off their restitution while on probation; or evaluate other potential avenues for debt collection. Instead, the statute imposes a one-size-fits-all approach that results in prolonged punishment only of the poor. Under *Williams*, *Tate*, and *Bearden*, this statute is plainly unconstitutional.

B. Wealth-based discrimination in the administration of criminal justice is subject to heightened scrutiny.

As discussed, the Supreme Court has repeatedly struck down punishment schemes that subject those without financial means to a disparate level or form of punishment. As numerous courts have held, heightened scrutiny is the appropriate standard for evaluating statutes that discriminate based on wealth in the criminal justice system.[3] *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973) (heightened scrutiny appropriate in cases where "because of their impecunity [plaintiffs] were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."); *Jones v. Governor of Fla.*, 950 F.3d 795, 809 (11th Cir. 2020) ("the Supreme Court has told us that wealth classifications require more searching review in at least two discrete areas: the administration of criminal justice and access to the franchise") (citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996)); *McNeil v. Cmty. Prob. Servs., LLC*, 2019 U.S. Dist. LEXIS 24357,

[3] Some courts have gone further, holding that strict scrutiny applies in these types of cases. *Griess v. Colorado*, 624 F. Supp. 450, 457 (D. Colo. 1985) ("As an indigent, plaintiff was forced to serve more time than a non-indigent solely because of his poverty [...] plaintiff belongs to a class that is completely unable to pay for some benefit [...] [t]he defendants' conduct, then, is to be appraised with strict scrutiny").

at *38 (M.D. Tenn. Feb. 14, 2019) ("Turning to the equal protection claim, the Court is persuaded heightened scrutiny is the appropriate standard to apply because Plaintiffs have demonstrated an inability to afford bail"); *Briggs v. Montgomery*, 2019 U.S. Dist. LEXIS 101625, at *31-*32 (D. Ariz. June 18, 2019) (referencing the test for heightened scrutiny and ultimately finding equal protection was violated because "Plaintiffs have indeed been absolutely deprived of the ability to complete the program in 90 days like other, wealthier participants solely because they are unable to pay the program fee"). K.S.A. § 21-6608(c)(7) implicates heightened scrutiny because it deprives low-income individuals of their ability to complete probation, "because of their impecunity." *San Antonio Indep. Sch. Dist.*, 411 U.S. at 20. The statute forces low-income Kansans to serve indefinite probation periods, solely because of their ability to pay, while their wealthier peers can pay their court debt and end their probation. This wealth classification requires heightened scrutiny because the administration of criminal justice and disenfranchisement of individuals' rights are at stake. Probation itself is a deprivation of liberty and people staying on probation, simply because of their poverty, are at risk of incarceration and further restrictions on their liberty through onerous probation conditions and reporting requirements, thereby triggering a heightened scrutiny review.

C. Continued probation deprives people of an important liberty interest and subjects them to the threat of further deprivation.

Extensions of probation, like the imposition of probation in the first instance, constitute punishment by depriving individuals of the fundamental right to live and move about the world freely. Probation imposes deep and meaningful restrictions on everyday

activities, the violation of which may result in incarceration. Kansas courts agree. Complying with the terms of probation places "significant restraints on the [individual's] freedom." *Miller v. State*, 200 Kan. 700, 704 (1968).

The restraints that probation imposes on Kansans are profound. People on probation are required to submit to mandatory reporting, intrusive questioning, potential surveillance by probation officers, and must report on all aspects of their daily life. As noted by scholars, people on probation often face over 20 mandatory conditions, making it challenging for people to successfully complete their probation terms. *See* Michelle Phelps & Ebony Ruhland, *Governing Marginality: Coercion and Care in Probation*, SOC'Y FOR THE STUDY OF SOC. PROBLEMS (2021), https://doi.org/10.1093/socpro/spaa060; *see also*, Alex Roth, Sandhya Kajeepeta, & Alex Boldin, *The Perils of Probation: How Supervision Contributed to Jail Populations*, Vera Inst. of Justice (2021), https://www.vera.org/publications/the-perils-of-probation-how-supervision-contributes-to-jail-populations. Compliance with these conditions is mandatory, lest individuals be found in violation of their probation and subject to sanctions as a result. People on probation therefore must conform their daily lives to comply, even if it interferes with their work schedules, medical appointments, or caregiving demands. Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 292, 316-317 (2016). Individuals can have difficulty remaining employed (often a condition of probation) and earning money to pay off their restitution. Allison Frankel, Human Rights Watch, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, (2020), https://www.hrw.org/sites/default/files/media_2020/07/us_supervision0720_web_1.pdf.

To make matters worse, extended probation due to inability to pay actually *increases* the total amount a person will owe because of monthly fees the person might be ordered to pay. Thus, a person's poverty can result in them paying *more overall* than their wealthier counterparts who can complete probation on time. *See* Beth M. Huebner & Sarah K.S. Shannon, *Private Probation Costs, Compliance, and the Proportionality of Punishment: Evidence from Georgia and Missouri*, THE RUSSEL SAGE FOUND. J. OF SOC. SCI. (2022), (addressing cost of private probation and describing how continued probation puts individual's liberty interests on "layaway" until they have the ability to pay.). For many low- and no-income individuals, these dynamics permanently trap them in Kansas's probation institution and leave them vulnerable to a higher probability of incarceration.

Failure to abide by the mandatory and discretionary conditions runs the risk of people violating their probation. Revocation is a severe punishment because the judge rescinds the probation sentence and can order a jail or prison sentence up to the maximum of the original offense. Roth, Kajeepeta, & Boldin, *supra*. Revocations are common, suggesting that probation operates as delayed incarceration, rather than as a true alternative to incarceration. Michelle S. Phelps, *Ending Mass Probation: Sentencing, Supervisions, and Revocation*, 28 FUTURE OF CHILD. 1 (2018).

In Kansas, violations of probation conditions constitute a large portion of the number of prison admission each year: some data shows that probation violations account for 20% of all prison admissions. *See* Fiscal Year 2020 Adult Inmate Prison Population Projections Table 14, KANSAS SENTENCING COMM'N (2020), https://sentencing.ks.gov/docs/default-source/publications-reports-and-

presentations/fy2020-prison-population-projection-report.pdf?sfvrsn=5f9afd3f_2). In FY 2018, there were 2,108 probation revocations in Kansas, 61.30% of which were due to "technical" violations of probation—that is, violations that did not include new criminal activity. *See* ACLU of Kansas, *Set up for Failure: The Impossible Probation System in Kansas* 3 (Dec. 2019), https://www.aclukansas.org/sites/default/files/field_documents/mini_probation_report_-_pdf.pdf. Statewide data for that year indicated that 430 of the 2,108 revocations for technical violations were due to failure to pay court debt, signaling that repayment is a barrier to a successful completion of supervision in roughly 20% of cases that result in probation revocation. *Id.* Further, other probation violations, such as the most common violation of "failure to report," may also be due to the inability to pay: When people fall behind on payments, they may stop reporting to their probation officer out of fear of the consequences. *See generally* Sharon Brett, Neda Khoshkhoo, & Mitali Nagrecha, *Paying on Probation: How Financial Sanctions Intersect with Probation to Target, Trap, and Punish People Who Cannot Pay* (2020) (available at https://mcusercontent.com/f65678cd73457d0cbde864d05/files/f05e951e-60a9-404e-b5cc-13c065b2a630/Paying_on_Probation_report_FINAL.pdf).

Continued probation also keeps people at risk of other punishments beyond extension or full revocation. For example, Kansas allows correctional officers to impose short stays in jail of 2-3 days for probation violations, often referred to as "dips," which can be applied to even first-time offenders. K.S.A. § 22-3716(c)(1)(B). Probation officers may impose dips on their own so long as the person on probation waives their right to a

revocation hearing. K.S.A. § 22-3716(b)(4)(A). Between FY 2009 and FY 2019, courts imposed quick dips and jail sanctions of up to 60 days, in 14,220 cases in which a probation violation hearing occurred. *See* Probation Revocation Violation Hearing Data, KANSAS SENTENCING COMM'N (available at https://www.sentencing.ks.gov/statistical-analysis/dashboards/probation-violation).

In all of these ways, extended probation operates as a profound restraint on peoples' liberty and freedom. When probation is extended under K.S.A. § 21-6608(c)(7) indefinitely due to failure to pay court debt, individuals are subjected to a host of onerous conditions and punishments for non-compliance simply because they are too poor to buy their freedom. That is precisely what the Fourteenth Amendment forbids.

D. Even under rational basis, K.S.A. § 21-6608(c)(7) must fail.

Under rational basis review, K.S.A. § 21-6608(c)(7) must serve a legitimate state interest and there must be a rational connection between the indefinite probation period and the goal of collecting restitution. *Jones*, 950 F.3d at 809. Because K.S.A. § 21-6608(c)(7) creates a probation scheme that adversely affects low- and no-income Kansans without any legitimate governmental purpose, the statute cannot stand.

Several courts have held that punishment schemes that explicitly target individuals based on their inability to pay fines and fees do not serve any legitimate purpose. *Jones*, 950 F.3d at 810 ("The continued disenfranchisement of felons who are genuinely unable to pay [legal financial obligations, including all fines, fees, and restitution] and who have made a good-faith effort to do so, does not further any legitimate state interest that we can discern"); *Briggs*, 2019 U.S. Dist. LEXIS 101625 at *34 (finding requirement of continued

participation in a diversion program for inability to pay program fees violated equal protection because "the Court is not persuaded that there is a rational connection between the government's purpose and the means of effectuating that purpose"); *McNeil*, 2019 U.S. Dist. LEXIS 24357 at *43 ("Given the complete absence of evidence supporting the bail system in Giles County for indigent misdemeanor probation arrestees, the Court concludes that, even if it applied the rational basis standard, Defendants have failed to show the current bail system rationally furthers a legitimate governmental interest"); *Griess*, 624 F. Supp. at 456 (in indigency-based equal protection challenge, "[n]ot allowing good-time credit for pre-sentence incarceration, but doing so for prison confinement, is not even rationally related to the states' end of good prisoner behavior"); *see also James v. Strange*, 407 U.S. 128, 140 (1972) (special fee-recoupment procedure authorized only against indigent criminal defendants lacked rational basis as there was no valid reason to treat criminal defendant-debtors and other state debtors differently).

Prolonged probation periods do not help Kansas collect unpaid restitution, and in fact, makes collection *less* likely. Probation compliance is expensive; it often requires frequent drug testing, electronic monitoring, and specialized classes and programs that all have underlying costs. Brett, Khoshkhoo, & Nagrecha, *supra,* at 11-12. The time required to report to the probation officer, participate in the drug testing and specialized classes, and follow any additional rules the court imposes takes time away from the individual's job, caregiving activities, and other activities that improve their financial position. *Id.* All of this makes it less, not more, likely that extending a person's probation term will result in full payment of their court debt.

Probation also limits an individual's ability to earn money in myriad ways. The onerous reporting requirements often require individuals to report to a probation officer and take time off work. Hourly workers lose income while salaried employees risk losing their job for repeated requests for time off, *id.*, and repeatedly requesting time off for probation check-ins could create stigma in the workplace and disadvantage individuals for advancement in their career. *See* Phelps & Ruhland, *supra,* at 9. Reporting in person is burdensome for people with limited financial means because it requires transportation to and from the reporting office. Brett, Khoshkhoo, & Nagrecha, *supra,* at 16. Reporting requirements may also require people to arrange for childcare or find alternatives for other caregiving responsibilities creating additional financial obligations and potential hardships. *Id.* Finally, a person found in violation of their probation is at risk of losing their public benefits, including Supplemental Nutrition Assistance Program, Temporary Assistance for Needy Families, Social Security Disability Insurance, and public housing benefits. 7 U.S.C. § 2020(e)(8)(E)(i)(I) (barring people from receiving Supplemental Nutrition Assistance Program benefits if they violate a condition of probation or parole under federal or state law); 42 U.S.C. § 1382(e)(4)(A)(ii) (same for Social Security Income disability); 42 U.S.C. § 1437(d)(1)(9)(2) (same for public housing benefits). Loss of this public benefit income risks an inability to pay for housing, food, and other basic life necessities—and makes repayment of court debt all but impossible.

If the state's rationale for continuing probation due to nonpayment is that additional months of probation will allow the state to collect outstanding debt, then the state's rationale is not supported in either research or reality. Extended probation does not make

it any more likely that the debt will be repaid, therefore demonstrating that K.S.A. § 21-6608(c)(7) is not rooted in any rational basis.

The lack of rational basis to support K.S.A. § 21-6608(c)(7) is also evident in the fact that Kansas law provides for an alternative debt collection system through the civil process. Under current law, courts can collect restitution through the same means used to enforce other civil judgment debts. *See* K.S.A. § 75-719 ("Collection of debts owed to court or restitution"); *Puckett v. Bruce*, 276 Kan. 59, 63 (2003) ("The administrative judge of each judicial district may assign such cases to an appropriate division of the court for the conduct of civil collection proceedings"). These collection methods are more likely to result in meaningful restitution payments than a prison sentence, which only compounds a defendant's inability to pay by eliminating the opportunity for gainful employment. *See Bearden*, 461 U.S. at 672 ("Revoking the probation of someone who through no fault of this own is unable to make restitution will not make restitution suddenly forthcoming").

E. Extended probation deprives people of other fundamental rights on the basis of their poverty, including the right to vote.

In addition to the restrictions on liberty created by probation, continued extensions due to the inability to pay also interfere with other fundamental rights, most specifically the individual's right to vote. When a person is convicted of a felony, they are ineligible to vote until they complete their sentence, including any term of probation. *See* K.S.A. §§ 21-6613(a)-(b). Because K.S.A. § 6608(c)(7) indefinitely prolongs probation until a person can pay all restitution—and program fees, urinalysis fees, and other costs continue to

accumulate debt—it is very likely a Kansan on felony probation without an ability to pay would be deprived of their right to vote indefinitely.

Voting is a fundamental right and any restrictions on that right based on poverty are subject to strict scrutiny. *See Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966) ("a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard"). Although courts review restrictions of the franchise due to felony convictions under rational basis, state laws creating different classes of felony re-enfranchisement based on wealth implicate heightened scrutiny because voting is a fundamental right. *Jones*, 950 F.3d at 825. ("Quite simply, two strands of Supreme Court law—those embodied in its *Griffin-Bearden* line of cases outlawing different levels of punishment for similarly situated defendants, solely on account of wealth, and those found in the *Harper* line of cases underscoring the importance of access to the ballot—run together in this case"); *Cmty. Success Initiative v. Moore*, No. 19 CVS 15941, 2020 NCBC LEXIS 112 at *12 (2020) ("requiring an unconditional discharge that includes payments of all monetary obligations imposed by the court . . . creates a wealth classification that punishes felons who are genuinely unable to comply with the financial terms of their judgment more harshly than those who are able to comply"); *see also Beth A. Colgan, Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 121-138 (2019) (describing disenfranchisement as a clear punishment that should be subject to strict scrutiny). Additionally, financial requirements to exercise the right to vote violate the Kansas Constitution, which conditions the franchise on only three things: United States citizenship, age, and state residence. KAN. CONST. ART. V, § 1, *see State ex*

rel. Gilson v Monahan, 72 Kan. 492, 495-96 (1905) ("the Legislature can neither take from nor add to the qualifications there set out"); *State v. Beggs*, 126 Kan. 811, 815 (1928) ("[A]ny statute that adds to the constitutional requirement of an elector, or abridges his eligibility, is unconstitutional").

Here, K.S.A. § 21-6608(c)(7) infringes on Kansans' fundamental right to vote by creating different classifications of citizens solely based on their financial status and ability to pay court debt. The wealth barrier to voting that K.S.A. § 21-6608(c)(7) creates does not pass heightened scrutiny because, as described *supra*, the debt collection efforts are not narrowly tailored to Kansas's interest in collecting restitution, fines, and fees. There are other, more effective, means to collect restitution that do not have the negative effect of disenfranchising Kansan voters and trapping them in the probation institution. For these reasons, K.S.A. § 21-6608(c)(7)'s reach deprives individuals of core fundamental rights and is facially unconstitutional.

CONCLUSION

Probation in Kansas operates as a two-tiered system of justice, where wealthy individuals can pay off their restitution and move on with their lives, while low- and no-income individuals are forced to remain on probation indefinitely as they struggle to make ends meet. This system is fundamentally incompatible with the U.S. Supreme Court's Equal Protection Clause jurisprudence and any metric of fairness or equality in the administration of criminal justice. K.S.A. § 21-6608(c)(7) impairs core rights and should be subject to heightened scrutiny. But even applying rational basis review, it still must fail. For these reasons, we urge this Court to strike down K.S.A. § 21-6608(c)(7).

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF KANSAS

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed via the court's electronic filing system, which will serve an electronic copy on all registered participants. A copy was also sent via email to the following:

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APPENDIX OF UNPUBLISHED AUTHORITIES

McNeil v. Cmty. Prob. Servs., LLC

United States District Court for the Middle District of Tennessee, Columbia Division

February 14, 2019, Filed

NO. 1:18-cv-00033

Reporter
2019 U.S. Dist. LEXIS 24357 *; 2019 WL 633012

KAREN MCNEIL, et al., Plaintiffs, v. COMMUNITY PROBATION SERVICES, LLC, et al., Defendants.

Subsequent History: Affirmed by *McNeil v. Cmty. Prob. Servs., LLC, 2019 U.S. App. LEXIS 38165 (6th Cir.) (6th Cir. Tenn., Dec. 23, 2019)*

Prior History: *McNeil v. Cmty. Prob. Servs., LLC, 2019 U.S. Dist. LEXIS 41252 (M.D. Tenn., Jan. 7, 2019)*

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For Kyle Helton, Defendant: Cassandra M. Crane, Robyn Beale Williams, Farrar & Bates, LLP, Nashville, TN.

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Judges: WILLIAM L. CAMPBELL, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM L. CAMPBELL, JR.

Opinion

MEMORANDUM

I. Introduction

Pending before the Court is Plaintiffs' Motion for Preliminary Injunction (Doc. No. 51). Through the Motion, Plaintiffs seek preliminary injunctive relief on Count 15 of their Amended Complaint (Doc. No. 41). In that Count, Plaintiff Indya Hilfort, on behalf of herself and others similarly situated, alleges Defendants Giles County and Sheriff Kyle Helton (the "County Defendants") violate the *Fourteenth Amendment* by detaining indigent individuals who are unable to pay the secured bail **[*3]** amount pre-pre-printed on violation-of-probation arrest warrants.[1] The Motion requests a classwide preliminary injunction on Count 15 enjoining:

> Defendant Giles County, the Sheriff, and their officers, agents, employees, servants, attorneys, and all persons in active concert or participation with them from enforcing against any person on misdemeanor probation in Giles County any secured financial condition of release on a violation of probation warrant determined without an inquiry and findings concerning ability to pay, consideration of alternatives, or a finding by an appropriate judicial officer that pre-revocation detention is necessary to meet a compelling government interest.

(Doc. No. 51).[2]

The Court held a hearing on the Motion on January 31, 2019, where the parties to the Motion[3] submitted exhibits and argued their respective positions. The parties filed Joint Stipulated Facts (Doc. Nos. 212, 213) for purposes of the Motion shortly before the hearing.

II. Stipulated Facts[4]

A. Named Plaintiff Indya Hilfort **[*5]**

1. Named Plaintiff Indya Hilfort is a 27-year-old mother of four children under age 10. She

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[1] Count 15 specifically alleges:

> 560. The *Fourteenth Amendment's Due Process* and *Equal Protection clauses* have long prohibited keeping a person in jail because of the person's inability to make a monetary payment.
>
> 561. Defendants have a policy and practice of violating probationers' substantive right against wealth-based detention by enforcing secured financial conditions of release that are pre-printed on violation-of-probation arrest warrants and that are determined without an inquiry into or findings concerning ability to pay, without any pre-deprivation process, assessment **[*4]** of alternatives to detention, inquiry into whether the Plaintiffs pose a danger to the community or a risk of flight, or any findings regarding the need for detention in light of any particular government interest. Because the monetary amounts are predetermined without reference to the person's ability to pay, they operate to detain only those indigent misdemeanor-probationer arrestees who cannot afford them, but without any findings that pre-revocation, wealth-based detention is necessary to meet a compelling government interest. If the Plaintiff could pay the monetary amount, she would be released immediately.
>
> 562. These violation-of-probation warrants are routinely issued for the arrest of indigent misdemeanor probationers who, like Named Plaintiff Indya Hilfort, are supervised on probation only because they cannot afford to pay in full their court costs and probation fees.

(Doc. No. 41, at 116-17).

[2] The Court entered a temporary restraining order early in the litigation, which the parties agreed to extend pending a ruling on the preliminary injunction motion. (Doc. Nos. 45, 50).

[3] For purposes of the preliminary injunction motion on Count 15, the "parties" are the Plaintiffs and the County Defendants. Other Counts of the Amended Complaint name as defendants, in addition to the County Defendants, two private probation companies and certain individual employees of those companies. Before the preliminary injunction hearing, the Court ruled that these private defendants should not participate in the hearing, except by proposing relevant questions for witnesses. (Doc. No. 197). No witnesses were called at the hearing, but the Court permitted counsel for the private defendants to present argument on several points during the hearing. Also, the County Defendants have incorporated the arguments made in the briefs of the private defendants. (Doc. No. 112, at 1, n 2).

[4] The Court omits the footnote citations to the record contained in the parties' Joint Stipulated Facts (Doc. No. 212).

lives with her mother and children outside of Pulaski, Tennessee.

2. She completed a GED, obtained her Certified Nursing Assistant certification, and works currently as a cashier at a gas station and makes roughly $250 to $500 per week.

3. Ms. Hilfort struggles to provide basic necessities—like food, clothing, and electricity— for herself, her mother, and her children. Her electricity has been shut off several times in the last six months due to her inability to pay the bill.

4. Ms. Hilfort was convicted of a misdemeanor offense in Giles County General Sessions Court on December 8, 2016 and sentenced to 11 months and 29 days in jail. She was required to serve 10 days in jail. The remaining jail sentence was suspended for an 11-month-and-29-day term on probation, beginning December 8, 2016. She was subsequently convicted of a misdemeanor offense in Giles County Circuit Court on September 25, 2017 and sentenced to 11 months and 29 days in jail, which was suspended for an 11-month-and-29-day term on probation.

5. For both offenses, Ms. Hilfort was placed on supervised probation with Defendant Community **[*6]** Probation Services, LLC ("CPS").

6. On July 9, 2018, Ms. Hilfort was arrested pursuant to a warrant issued in Lawrence County for an incident that allegedly occurred in July 2017. She was released from custody after arrest because she borrowed money to pay a discounted up-front fee of $300 to a commercial bondsman. She agreed to pay the money back and promised to pay the bondsman another $300 when she received a paycheck. After her release, Ms. Hilfort pawned her car title and used money from her next paycheck to pay the bondsman $300, but she still owes most of the rest of the money she borrowed.

7. As required by her terms of probation, Ms. Hilfort informed a CPS probation officer about the Lawrence County arrest the next day, on July 10, 2018.

8. On July 11, 2018, Ms. Hilfort learned that a violation-of-probation arrest warrant had been issued in Giles County with a $2,500 bond amount on it as a result of the Lawrence County arrest.

9. No one had asked Ms. Hilfort if she could afford $2,500.

10. At all times the arrest warrant was active, Ms. Hilfort could not afford to pay $2,500, or even the $287.50 nonrefundable fee (ten percent of the bond, plus an additional $37.50 fee), which is **[*7]** what a commercial bonding company would have charged her, to be released.

11. Ms. Hilfort states that at all relevant times for this claim her income has been insufficient to pay the secured financial condition of release.

12. If Ms. Hilfort is unable to pay a secured bond amount required for release, she will be kept in jail until, at the earliest, the Thursday after she is arrested, when she will be taken to court for a violation-of-probation hearing.

13. If arrested on a violation-of-probation warrant requiring her to pay $2,500 for her freedom and unable to pay bond, Ms. Hilfort will be separated from her children and will miss shifts at her job.

B. Misdemeanor Violation-of-Probation Warrants in Giles County

14. The General Sessions and Circuit Court judges issue misdemeanor VOP warrants alleging violations of probation.

15. Warrants alleging violations of misdemeanor probation in Giles County either (1) designate a secured financial condition that the arrestee must pay in order to be released from jail (*i.e.*, an amount of "money bail"); or state (2) "hold," meaning that the person will not have an opportunity to pay money bail to be released, and she will be detained until, at the earliest, **[*8]** her first court appearance; (3) "ROR," which is an abbreviation for "release on recognizance" and means that the person who is arrested must be released immediately after booking on the condition that the person promises to appear in court; or (4) "cite," meaning that the person who is the subject of the warrant cannot be arrested and instead must be informed of a court date and released following an encounter with law enforcement.

16. There are five judges in Giles County from the 22nd Judicial District and General Sessions Court who determine conditions of release on misdemeanor violation-of-probation warrants. Judge Robert Richardson determines conditions of release for all people whose misdemeanor cases are being heard in General Sessions Court. Four Circuit Court Judges determine conditions of release for all people whose misdemeanor cases are assigned to Circuit Court.

17. If issued by Circuit Court, warrants solely for nonpayment may authorize arrest and, in three instances in 2018, required a secured money bail amount to be paid as a condition of release following arrest.

18. There is no evidence in the record for this motion [sic] of General Sessions misdemeanor violation-of-probation **[*9]** warrants issued solely for nonpayment issued in 2018 that require secured money bail as a condition of release.

19. VOP arrest warrants that allege violations *other* than, or in addition to, nonpayment may designate a secured financial condition that the arrestee must pay in order to be released from jail (*i.e.*, an amount of "money bail").

C. Secured Money Bail May Be Required as a Condition of Release Following Arrest for Allegedly Violating Misdemeanor Probation

20. The money bail amounts designated on violation-of-probation arrest warrants are determined prior to arrest, and without an opportunity for the probationer to be heard or present evidence regarding ability to pay or conditions of release. The probationer is not present when the bond amounts are determined.

21. Sometimes the judicial officer reviews materials and financial information available in the probationer's case file and considers that information when determining conditions of release. The judge does not make factual findings concerning the person's ability to pay, the necessity of detention, or the adequacy of alternative conditions of release.

22. When asked, "When setting a bond, do you make an inquiry into the petitioner's **[*10]** ability to pay that bond?" Judge Richardson responded, "No." (Richardson Dep. 30:18-20.) When asked, "So how are you assessing at this point, when a violation of probation warrant is ought, whether that person is indigent or not?" Judge Richardson responded, "Well, again, I'm not in a position to make that [assessment] at that time." (Richardson Dep. 49:13-17.)

23. When asked, "[W]hen you decide to set a money bond, do you make an inquiry into the probationer's ability to pay bond?" . . . Judge

Parkes responded, "If your question is do I ask the probation if—do I somehow ask the probationer, 'Are you going to be able to make this bond,' the answer is no." (Parkes Dep. 46:1-15.)

24. Conditions of release, including money bond amounts, cannot be altered by anyone other than a General Sessions or Circuit Court Judge.

D. People Arrested for Allegedly Violating Misdemeanor Probation Who Do Not Pay Secured Money Bail Amounts

25. Individuals who are able to pay money bail will be informed of a date to appear in court for arraignment by the Sheriffs' deputies and released from custody. Those who cannot afford to pay money bail are kept in jail while they wait for a court date to be set by the **[*11]** General Sessions Court or Circuit Court.

26. General Sessions Court Judge Richardson conducts arraignment proceedings by video on Mondays, Tuesdays, Wednesdays, and Fridays for recently arrested misdemeanor probationers whose cases were filed in General Sessions Court.

27. During the arraignment proceeding, the General Sessions judge asks whether the person can afford the bond amount listed on the arrest warrant. If she cannot, the judge appoints a public defender and, because counsel has been appointed, refuses to consider reducing the monetary payment required for release or releasing the person on her recognizance at the arraignment. There is no opportunity during General Sessions arraignment for the person to obtain a bond reduction or seek alternative conditions of release, and counsel is not present at the arraignment. The Judge does not make any factual findings about the necessity of detention or the adequacy of alternatives in light of any compelling government interest.

28. Individuals with cases in General Sessions Court who cannot pay money bail will typically be scheduled for a probation-revocation hearing within 10 to 14 days of arraignment.

29. Circuit Court arraignments **[*12]** occur by video, with the arrestee located in the jail while the judge is physically located elsewhere, once a month.

30. No attorney is assigned to an individual prior to arraignment. The public defender is present in the jail, but does not meet with misdemeanor VOP arrestees (or any other arrestees) until after the arraignment proceedings conclude.

31. An individual arrested on a Circuit Court misdemeanor violation-of-probation warrant who cannot pay money bail will be detained between the time of arrest and arraignment—which could be up to 30 days—without seeing a judge.

32. As a matter of practice, with respect to misdemeanor cases in General Sessions Court, public defenders do not visit their clients prior to the revocation hearing, and arrestees do not know who represents them—and therefore do not know whom to contact. With respect to misdemeanor cases in Circuit Court, arrestees do not have a public defender assigned to represent them until *after* the jailhouse arraignment proceeding, which proceeding occurs up to 30 days after arrest. For all people detained in the jail, phone calls to lawyers cost money. If an arrestee is able to obtain paper, envelopes, and stamps, she can mail **[*13]** a letter, subject to the postal service's delivery practices and timing.

33. If an arrestee whose case is assigned to Circuit Court wishes to seek a bond reduction,

she will typically have to wait until the next date that Circuit Court is scheduled to be in session, which is usually about two weeks after arraignment, for the motion to be heard.

34. Circuit Court is in session three days per month, but the sessions are not evenly spaced throughout the month: two of the three monthly sessions are typically on consecutive days.

35. The first in-court proceeding for General Sessions arrestees occurs 10 to 14 days after arrest, and for Circuit Court arrestees, 30 days or more after arrest.

E. The Sheriff Enforces Secured Money Bail Amounts Required for Release Following Arrest Pursuant to a Misdemeanor VOP Warrant

36. The Sheriff enforces every money bail amount designated on any VOP warrant, including VOP warrants issued solely for nonpayment.

37. The Sheriff does not know whether money bail amounts are set according to any inquiries or factual findings made by a judicial officer concerning ability to pay or the need for detention.

38. The Sheriff enforces the money bail amounts designated on **[*14]** VOP warrants even though the condition of release is unaccompanied by a record showing that a judicial officer provided an inquiry and findings regarding the arrestee's ability to pay and the need for detention.

39. When a person is arrested on a VOP warrant, she typically learns the money bail amount required for release after she is served with the warrant.

40. If the person can access enough money to pay the money bail amount designated on her VOP warrant, or the premium required by a commercial bail bondsman, the Sheriff's department will release her immediately upon payment.

41. If the arrestee cannot access enough money to pay the money bail amount designated on the warrant, the Sheriff's department will detain her in jail until the Sheriff's deputies transport her to court for her revocation hearing.

F. The First Court Appearance

42. Individuals confined in Giles County Jail due to their inability to pay secured money bail are brought to court to adjudicate the allegations. People who are still detained at this hearing often plead guilty to the alleged misdemeanor probation violations.

43. If they are not sentenced at that appearance, they will be brought back to jail and detained **[*15]** until they pay the monetary amount required for release or the case is resolved.

44. Although a judge might consider a bond-reduction motion at a Thursday revocation hearing, he will not make an inquiry into ability to pay or findings concerning ability to pay or the need for detention. The bond hearing—like all proceedings in General Sessions Court—will not be on the record.

45. Secured money bail amounts that are required as conditions of release after arrest on misdemeanor VOP warrants operate to jail indigent individuals who cannot afford to pay the predetermined sum of money.

G. Crystal Webb's Experiences

46. Crystal Webb was arrested on April 23, 2018 pursuant to a violation-of-probation warrant issued by the Giles County General Sessions Court and requiring her to pay a

$2,500 secured financial condition of release. At the time, Ms. Webb was unemployed and relied on limited government benefits. She also shared some income and expenses with her adult, disabled son. Ms. Webb's declaration states: "While on probation, I have been renting a room at a friend's house for about $350 per month. Sometimes he asks me to pitch in for utilities, and I have paid as much as $200 per month, though **[*16]** I often cannot afford to pay anything. At times, our water has been cut off because we couldn't afford to pay the water bill. Without much money, I have struggled to afford both food and a place to live. In the past year, I have sometimes had to go without food for up to four days because I had no money and have had to rely on friends to feed me. I often can't afford to buy shampoo, toothpaste, clothing, and other basic items I need for basic life." Because she could not afford $2,500 or the few hundred dollars a commercial bonding company would have charged her, she remained in jail for ten days after arrest and before she appeared in court for a revocation hearing.

H. Facts Relating to the Number of Misdemeanor VOP Warrants Issued Between January And August 2018

47. The Sheriff enforces secured money bail on well over one hundred misdemeanor violation-of-probation warrants every year.

48. For example, between January and August 2018, the sheriff executed approximately 281 warrants for alleged violations of probation.

49. The Sheriff enforced secured financial conditions of release on approximately 130 VOP arrest warrants.

50. Between January 1, 2018 and July 19, 2018, 13 people were detained **[*17]** in the Giles County jail for longer than 24 hours because they did not pay money bail required for release following arrest pursuant to a misdemeanor violation-of-probation warrant.

51. As of September 14, 2018, there were at least 14 outstanding violation-of-probation warrants with money bail on them.

III. Analysis

In determining whether to issue a preliminary injunction pursuant to *Rule 65 of the Federal Rules of Civil Procedure*, the Court is to consider: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest. *See, e.g., Doe v. Univ. of Cincinnati, 872 F.3d 393, 399 (6th Cir. 2017)*.

Plaintiffs argue they have shown a likelihood of success on the merits on their claim that detaining indigent misdemeanor probation arrestees based on a secured bail amount imposed in the absence of the arrestee, and without an inquiry into the ability to pay, consideration of alternatives, and a finding that detention is necessary violates the equal protection and due process guarantees of the *Fourteenth Amendment*.

In a series of cases, the federal courts have addressed the equal protection and due process implications of **[*18]** the detention of indigent individuals based solely on their indigency. In *Williams v. Illinois, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970)*, the Supreme Court held that a statute requiring a defendant to remain in jail to "work off" fines and court costs was unconstitutional under the *Equal Protection Clause*:

> We conclude that when the aggregate

> imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay . . .
> * * *
> . . . [The State] may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.

399 U.S. at 240-241, 242. Similarly, in *Tate v. Short, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971)*, the Court relied on the *Williams* analysis under the *Equal Protection Clause* in striking down a state statute and municipal ordinance that permitted incarceration to "work off" traffic fines: "'[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.'" *401 U.S. at 398* (quoting *Morris v. Schoonfield, 399 U.S. 508, 509, 90 S. Ct. 2232, 26 L. Ed. 2d 773 (1970)*). The Court pointed out that imprisonment did not further any penal objective of the State because the indigent defendant cannot **[*19]** pay the fines while in prison, and the State is saddled with the cost of feeding and housing the defendant for the period of imprisonment. *Id.* On the other hand, the Court explained, there are alternatives that serve the State's interest in enforcing payment of fines, such as collection of fines in installments. *Id. See also Frazier v. Jordan, 457 F.2d 726 (5th Cir. 1972)* (holding that "default imprisonment" for those unable to pay fines for violation of noise ordinance created a suspect class defined by wealth that was not supported by a compelling state interest.)

In *Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)*, the Supreme Court addressed a challenge to the automatic revocation of an indigent defendant's probation for failure to pay a fine and restitution. Reviewing the analysis in *Williams, Tate*, and other cases, the Court explained that "[d]ue process and equal protection principles converge in the Court's analysis in these cases." *461 U.S. at 665*. Noting the parties' vigorous arguments as to whether the strict scrutiny or rational basis standard applied to the equal protection question, the Court suggested the issue could not be divorced from due process analysis:

> There is no doubt that the State has treated the petitioner differently from a person who did not fail to pay the imposed **[*20]** fine and therefore did not violate probation. To determine whether this differential treatment violates the *Equal Protection Clause*, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine. Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose . . .' *Williams v. Illinois, supra, 399 U.S., at 260, 90 S. Ct., at 2031* (Harlan, J., concurring).

461 U.S. at 666-67 (footnotes omitted).

In applying that analysis, the Court concluded it was fundamentally unfair to revoke probation automatically without inquiring into the reasons for the failure to pay:

> We hold, therefore, that in revocation proceedings for failure to pay a fine or **[*21]** restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the *Fourteenth Amendment*.

Id. at 672-73 (footnote omitted).

The issue presented here, involving indigent defendants and the imposition of secured bail for pretrial release, has not been considered by the Supreme Court, but has been the subject of numerous lower court decisions. In *Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978)*, the plaintiffs **[*22]** challenged, among other things, the pretrial detention of indigent defendants in Florida solely because they were unable to post bail as a condition of release. While the case was pending, the Supreme Court of Florida promulgated a new rule listing six forms of release, one of which contemplated the execution of a bail bond with sureties or the deposit of cash in lieu thereof. *572 F.2d at 1055*. The plaintiffs argued the new rule was deficient in the case of indigents because it did not require a presumption against money bail and a presumption for the other enumerated forms of release. *Id. at 1056*.

In rejecting the plaintiffs' argument, the Fifth Circuit acknowledged, based on *Williams* and *Tate*, that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Id. at 1056*. Applying that principle to pretrial bail, the court explained, requires a balancing of the state's "compelling interest in assuring the presence at trial of persons charged with crime" and the understanding that the accused individuals "remain clothed with a presumption of innocence and with their constitutional rights intact." *Id.* Those considerations led the court to conclude that equal protection **[*23]** and due process prohibit the setting of bail in excess of "what is necessary to reasonably assure defendant's presence at trial." *Id. at 1057*.

In that regard, the court pointed out the difficulty with the use of a "master bond schedule," one that lists the amount of bail for each listed offense and automatically sets the bail amount based only on the offense charged:

> Utilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meetings [sic] its requirements. The incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal

protection requirements.

Id., at 1057. The court ultimately decided, however, that the revised rule on bail was not facially unconstitutional because it required judges to consider "all relevant factors" in determining "what form of release is necessary to assure the defendant's appearance." *Id. at 1058*.

A more recent challenge to the setting of bail was presented in *Jones v. City of Clanton, 2015 U.S. Dist. LEXIS 121879, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015)*. In *Jones*, the plaintiff challenged the practice of a municipal court in using a bail schedule for misdemeanor arrests. Those able to pay the bail amount obtained immediate release, while those unable to pay **[*24]** were jailed until the next weekly court date. *2015 U.S. Dist. LEXIS 121879, [WL] at *1*. After the lawsuit was filed, the municipal court changed its policy to allow misdemeanor arrestees to be released on an unsecured appearance bond unless they had an outstanding warrant for failure to appear or posed a danger to themselves or others. *Id.* Those who did not obtain immediate release were provided a hearing within 48 hours of arrest to make an individualized determination as to whether the person may be released, and if so, under what conditions. *2015 U.S. Dist. LEXIS 121879, [WL] at *1-2*.

The court reviewed the holdings of *Bearden* and *Pugh* and reasoned that "the use of a secured bail schedule to detain a person after arrest, without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail, violates the *Due Process Clause of the Fourteenth Amendment*." *2015 U.S. Dist. LEXIS 121879, [WL] at *2*. In concluding that the new policy facially complied with existing law, the court commended the defendants for revising its procedures:

> Bail schemes such as the one formerly enforced in the municipal court result in the unnecessary pretrial detention of people whom our system of justice presumes to be innocent. This period of detention 'has a detrimental impact on the individual. It often means loss of a job; it disrupts **[*25]** family life; and it enforces idleness.' *Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*. It can also impede the preparation of one's defense, *see id. at 533* (noting that pretrial detention hinders a defendant's 'ability to gather evidence, contact witnesses, or otherwise prepare his defense'); it can induce even the innocent to plead guilty so that they may secure a quicker release, *see* Andrew D. Leipold, 'How the Pretrial Process Contributes to Wrongful Convictions,' *42 Am.Crim. L.Rev. 1123, 1154 (2005)*; and it may result in a period of detention that exceeds the expected sentence, *see* Stephanos Bibas, 'Plea Bargaining Outside the Shadow of Trial,' *117 Harv. L.Rev. 2463, 2492 (2004)*. Moreover, unnecessary pretrial detention burdens States, localities, and taxpayers, and its use appears widespread: nationwide, about 60 % of jail inmates are pretrial detainees, and the majority of those people are charged with nonviolent offenses. *See* Todd D. Minton and Zhen Zeng, U.S. Dep't of Justice, Bureau of Justice Statistics, Jail Inmates at Midyear 2014, at 4, http://www.bjs.gov/content/pub/pdf/jim14.pdf (PDF replication in this litigation (doc. no. 75)); Richard Williams, Bail or Jail, State Legislatures, May 2012, http://www.ncsl.org/research/civil-and-criminaljustice/ bail-or-jail .aspx (PDF

> replication in this litigation [***26**] (doc. no. 75)).
>
> Criminal defendants, presumed innocent, must not be confined in jail merely because they are poor. Justice that is blind to poverty and indiscriminately forces defendants to pay for their physical liberty is no justice at all. By enacting a new policy that takes account of the circumstances of those who come before its courts, the Clanton Municipal Court has made marked strides in improving the quality of the justice it delivers.

*2015 U.S. Dist. LEXIS 121879, [WL] at *3*.

In *Rodriguez v. Providence Community Corrections, Inc., 155 F. Supp. 3d 758 (M.D. Tenn. 2015)*, a former judge in this District granted a preliminary injunction in a case challenging, among other things, the practice by Rutherford County officials of detaining indigent individuals based on "preset" secured bonds. The plaintiffs, misdemeanor probationers, sought classwide relief on their claim that holding indigent defendants on secured money bonds violates the *Fourteenth Amendment*. *Id., at 761-62*. The evidence at the preliminary injunction hearing showed that before issuing arrest warrants for probationers accused of violating the conditions of their probation, Rutherford County General Sessions Court and Circuit Court judges set an amount for a secured bond on the warrant. *Id., at 762-63*. These secured bonds required the probationer to make a monetary payment in order to obtain [***27**] release pending his or her revocation hearing, but "[a]t no point in this process do Defendants inquire into probationers' indigency or consider whether another method of ensuring attendance at the revocation hearings might be equally effective." *Id. at 763*. Those probationers who could not make bond payments were kept in jail pending their eventual hearings. *Id.* The court found some probationers received an informal hearing when the judges come to the jail on Mondays and Fridays as part of a "ten-day docket." *Id.* During these proceedings, probationers met with judges and prosecutors, and were given the option of immediately pleading guilty and receiving a sentence, or requesting representation and waiting for a formal revocation hearing. *Id.* The judges and prosecutors did not engage in any sort of inquiry into indigency during these hearings. *Id.* Probationers who did not plead guilty had to wait in jail for as long as 30 to 60 days before their actual court date. *Id.*

After reviewing *Pugh, Tate, Bearden*, and other cases, the court concluded the plaintiffs had shown a likelihood of success on the merits that the use of "preset secured money bonds" - secured money bonds assigned without an inquiry [***28**] into ability to pay or alternative methods of ensuring attendance — violates both due process and equal protection guarantees. *Id., at 767-70*. *See also Weatherspoon v. Oldham, 2018 U.S. Dist. LEXIS 30386, 2018 WL 1053548 (W.D. Tenn. Feb. 26, 2018)* (summarizing the holdings of *Bearden* and *Pugh* as prohibiting the setting of money bail as a condition of release without inquiry into ability to pay and without meaningful consideration of other possible alternatives.)

More recently, in a series of district and circuit court cases, plaintiffs in Harris County, Texas brought a class action challenging the constitutionality of the County's system of setting bail for indigent misdemeanor arrestees. *O'Donnell v. Harris County, 892 F.3d 147, 152 (5th Cir. 2018)*. After eight days of hearings,

the district court found that, although state law required bail to be set at a post-arrest hearing during which several factors were to be considered, the practice of the Harris County courts was much different. *Id. at 153-54*. The court found the hearings were delayed, and when they were held, did not offer any opportunity for arrestees to submit evidence of inability to post bond. *Id.* Less than 10% of misdemeanor arrestees were assigned an unsecured personal bond; the rest were assigned secured bonds. *Id.* Officials imposed secured bonds even after becoming aware of the arrestee's indigence, **[*29]** and that by imposing the bond, the arrestee would remain detained. *Id.*

The district court rejected the County's argument that imposing secured bonds served its interest in ensuring the arrestee appeared at a future court date and committed no further crime. The court reviewed empirical data suggesting the opposite: release on secured bond did not assure a greater rate of appearance or of law-abiding conduct before trial. *Id. at 154*. The data also suggested the expected outcomes for an arrestee who cannot afford bail are significantly worse than other arrestees - they were more likely to plead guilty, and their sentences were on average twice as long. *Id.* The court noted that pretrial detention can also lead to loss of job, family stress, and even an increase in likeliness to commit crime. *Id. at 155*. Having concluded the plaintiffs had established a likelihood of success on the merits on their procedural due process and equal protection claims, the district court granted preliminary injunctive relief in the form of new procedures and ordered the release of numerous detainees who had been subjected to deficient procedures. *Id. at 155*.

On appeal, the Fifth Circuit agreed the County's bail system violated both due process **[*30]** and equal protection, but it did not accept the district court's definition of the liberty interest at stake for purposes of procedural due process. The appeals court framed the arrestee's liberty interest less broadly, describing it as "a right to bail that appropriately weighs the detainees' interest in pretrial release and the court's interest in securing the detainee's attendance." *Id. at 156-57*. Even with that narrowed definition, however, the court easily found the County's procedures were inadequate to protect the arrestee's liberty interest. *Id. at 159*.

Turning to the relief ordered by the district court, the Fifth Circuit agreed due process required the following procedures: (1) notice [to the arrestee] that the financial and other resource information collected by pretrial services is for the purpose of determining eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; and (3) an impartial decisionmaker. *Id. at 159-60*. The court disagreed, however, with the district court's requirement that factfinders issue written statements supporting imposition of secured bail, and that bail hearings be held within 24 hours of arrest. *Id. at 160*. The court **[*31]** modified those procedures to require judges "to specifically enunciate their individualized, case-specific reasons" for imposing secured bail, and to hold a bail hearing within 48 hours of arrest. *Id.*

In considering the defendants' challenge to the district court's equal protection analysis, the appeals court concluded that intermediate scrutiny was appropriate under applicable Supreme Court precedent because "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." *Id. at 162*. The court also found no error in the district court's conclusion 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." *Id.* The court summed up its reasoning as follows:

> 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 **[*32]** 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 a second appeal after remand, the Fifth Circuit granted a stay of the district court's revised injunction, in a split panel opinion. *Odonnell v. Goodhart, 900 F.3d 220 (5th Cir. 2018)* ("*Odonnell II*"). The majority explained that in considering the plaintiffs' equal protection challenge, heightened scrutiny applies when an arrestee claims both an inability to afford bail and an absence of meaningful consideration of other possible alternatives to secured bail. *Id., at 226-27*. The court concluded that rational basis review is appropriate, however, when an arrestee claims only an inability **[*33]** to afford bail. *Id. Cf. Buffin v. City and County of San Francisco, 2018 U.S. Dist. LEXIS 6853, 2018 WL 424362, at *10 (N.D. Cal. Jan. 16, 2018)* (applying strict scrutiny analysis in evaluating the plaintiffs' equal protection and due process challenges to County's pretrial bail system).

In *Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018)*, the plaintiff brought a class action challenge to the City of Calhoun's policy of using a secured bail schedule to set bond amounts. Those who could not afford the bond amount were held in jail until the next weekly court session. *Id. at 1252*. After suit was filed, the City altered the policy to permit three forms of release: (1) arrestees charged with State offenses would be released immediately if they could pay the secured bond amount; (2) arrestees charged with State offenses who did not post bail would be entitled to a bail hearing with court-appointed counsel within 48 hours from arrest (if they were able to prove at the hearing they were indigent, they would be released on a recognizance bond); and (3) all arrestees charged with violating a city ordinance would be released on unsecured bond (if they failed to appear, they would be assessed the bail-schedule amount). *Id. at 1252-53*. The district court held the revised policy was unconstitutional because indigent defendants were required to wait 48 hours for a hearing. *Id. at 1253*.

On appeal, **[*34]** the Eleventh Circuit agreed with the City that heightened scrutiny equal protection analysis did not apply because the

revised bail policy did not result in the total deprivation of pretrial release, "[r]ather they must merely wait some appropriate amount of time to receive the same benefit as the more affluent." *Id. at 1261-62*. In reaching that conclusion, the court distinguished *O'Donnell*, which, it explained, involved some amount of upfront payment for release in most cases and no individualized assessment occurred in setting bail. *Id. at 1261 n. 10*; *1266 n. 12*. The court observed, however, that "neither *Bearden* nor [*Pugh v.*] *Rainwater* is a model of clarity in setting out the standard of analysis to apply." *Id. at 1265*. In the court's view, "*Bearden* and *Rainwater* command that courts should apply something akin to a procedural due process mode of analysis to claims like Walker's . . ." *Id.* The court ultimately concluded that the 48-hour hearing requirement was presumptively constitutional. *Id. at 1266-67*.

In *Schultz v. State of Alabama, 330 F. Supp. 3d 1344 (N.D. Ala. 2018)*, the plaintiffs filed suit challenging the bail system for pretrial arrestees in Cullman County, Alabama. Comparing the bail system at issue in *Walker* with the bail system that operated in Cullman County, the court found *Walker* to **[*35]** be distinguishable because those indigent arrestees were guaranteed release within 48 hours, while arrestees in Cullman County were not: "Cullman County affords that guaranty only to criminal defendants who have the financial means to post a bond at the time of arrest in an amount set in the county's bail schedule." *Id. at 1360*. By contrast, in Cullman County:

> indigent defendants cannot secure their release merely by proving that they are indigent according to a uniform standard of indigency. Instead, within 72 hours of arrest, to obtain pretrial release in Cullman County, an indigent criminal defendant, without the assistance of counsel, must prove not only that he is indigent but also that he is not a flight risk or a threat to himself or the community. If a judge, applying no particular legal standard, decides that a defendant is indigent but that the defendant is a danger to himself or his community or a flight risk, then the judge may set bail at a level that the defendant cannot afford, creating a *de facto* detention order.
>
> * * *
>
> Under Cullman County's pretrial procedures, a dangerous arrestee who can post bond immediately returns to the community to which she is a threat, suffering only the **[*36]** inconvenience of detention of no more than two hours.

Id. at 1360.

The court ultimately determined the plaintiff was substantially likely to prove both her equal protection and due process claims. Reading *Walker* as requiring application of a rational basis analysis, the court easily concluded Cullman County's discriminatory bail practices deprived indigent criminal defendants of equal protection because the challenged distinction did not rationally further a legitimate state purpose. *Id. at 1361, 1365 n. 23*. In reaching that decision, the court considered the three compelling interests identified by the defendants -- providing pretrial release as quickly as possible, ensuring defendants appear at trial, and protecting the community from dangerous criminal defendants -- and concluded the secured money bail procedures were not necessary to serve any of those interests. *Id. at 1361-65*. After reviewing expert evidence, the court pointed out that "secured bail is no more effective than other conditions to assure a criminal defendant's appearance at

court proceedings, and secured bail is not necessary to secure a criminal defendant's appearance." *Id. at 1363*. Expert evidence also showed that there is "no statistically significant difference between [*37] the rates at which criminal defendants released on secured and unsecured bail are charged with new crimes." *Id.*

The court went on to find that the plaintiff was also likely to be able to prove his substantive and procedural due process claims, finding the Cullman County bail system to be strikingly similar to the one considered by the Fifth Circuit in *O'Donnell, supra*. The court identified the following deficiencies in the Cullman County system: (1) absence of adequate notice to arrestees of what is at stake at an initial appearance (during which they are not afforded assistance of counsel, which exacerbates the other defects); (2) absence of an opportunity to be heard at the initial appearance; (3) absence of an evidentiary standard to be satisfied before ordering an unaffordable secured bond that serves as a *de facto* detention order; and (4) absence of factual oral or written findings (as opposed to checking boxes of factors "considered"). *Id. at 1366-74*.

Relying primarily on the *O'Donnell* cases, the court in *Daves v. Dallas County, Texas, 341 F. Supp. 3d 688, 693-95 (N.D. Tex. 2018)* determined the plaintiffs had shown a likelihood of success on the merits in establishing their equal protection and procedural due process claims in a case challenging the pretrial detention system in Dallas [*38] County, Texas. The court explained the injunctive relief it ordered was largely taken from the *O'Donnell* cases, and essentially includes "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 697*; *see also Caliste v. Cantrell, 329 F. Supp. 3d 296, 312 (E.D. La. 2018)* (holding that due process requires notice to the individual of the importance of ability to pay in determining bond, an opportunity to be heard on the issue, findings on the record regarding ability to pay, and considerations of alternative conditions of release; court's inquiry into defendant's ability to pay must occur *prior to* pretrial detention).

As in the cases described above, Plaintiffs in this case claim the secured bail system in Giles County violates the equal protection and due process rights of indigent misdemeanor probation arrestees. Turning to the equal protection claim, the Court is persuaded heightened scrutiny is the appropriate standard to apply because Plaintiffs have demonstrated an inability to afford bail and an absence of meaningful consideration of other possible alternatives to secured bail. *O'Donnell, 892 F.3d at 162*. The evidence presented by the parties demonstrates the secured bail amounts written [*39] on the arrest warrants for misdemeanor probationers are determined prior to arrest, and without an opportunity for the arrestee to be heard or present evidence regarding ability to pay or alternative conditions of release. (Stipulated Facts, ¶ 20). In addition, the judges writing in the secured bail amounts do not make factual findings concerning the person's ability to pay, the necessity of detention, or the adequacy of alternative conditions of release. (*Id.* ¶ 21).

Individuals who are able to pay the secured bail amount written on the warrant are informed of a date to appear in court for an arraignment, and are released from custody by the Sheriff's deputies. (*Id.* ¶ 25). Those who cannot afford to pay the bail amount are kept in jail while they wait for a court date to be set by the General

Sessions or Circuit Courts. (*Id.* ¶¶ 25, 46). For example, the evidence submitted by Plaintiffs shows that Mr. Clinnon Alexander was detained for 22 days before his first in-court appearance because he could not afford to pay either a $500 cash bond (requiring him to pay the full $500) or a $10,000 secured bond (meaning he could have paid a 10% nonrefundable premium to a commercial bonding agent) **[*40]** required for his release. (Plaintiffs' Exs. 21, 23, 24, 57, 58). Mr. James Matthew Allen was detained for over 21 days before his first in-court appearance because he could not afford to pay either a $210 cash bond or a $5,000 secured bond required for his release. (Plaintiffs' Exs. 21, 25, 26). Even the initial post-arrest hearings do not provide an opportunity for indigent arrestees to obtain bail reductions[5] or to seek alternative conditions of release, nor are there any factual findings made about the necessity of detention. (*Id.* ¶¶ 27, 33). As in *O'Donnell*, "poor arrestees . . . are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond." *Id.* Thus, to survive an equal protection challenge, the distinction created by the current bail system in Giles County between indigent misdemeanor probation arrestees and other arrestees must be narrowly tailored to meet a compelling governmental interest. *Id.*[6]

The defense largely relies on procedural arguments in opposing Plaintiffs' request for a preliminary injunction, and has not made any significant arguments that the bail system described in the stipulated **[*41]** facts serves any compelling governmental interest.[7] Even if the Court assumes Defendants have a legitimate interest in ensuring arrestees appear at their revocation hearings and in protecting the community from dangerous criminals, however, Defendants have presented no proof to suggest the current bail system furthers those interests. For example, Defendants have presented no statistical evidence of the court-appearance rates or new criminal activity rates of those released after arrest.

Indeed, the studies described by Plaintiffs' experts,[8] suggest that these governmental interests are not served by the current bail system. For example, Judge Morrison states in his Affidavit:

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[5] Teresa Mattox testified in a deposition that in the 12 years she has served as Jail Administrator, she has never seen the General Sessions Judge change a bond amount at arraignment. (Plaintiffs' Ex. 66, at 38).

[6] Unlike the indigent arrestees in *Odonnell II*, where the Fifth Circuit applied rational basis review in considering a motion for stay, the indigent arrestees in this case are not assured of a hearing, within 48 hours after arrest, on the secured bail amount and possible alternatives to bail. *900 F.3d at 226-27*.

[7] Defendants suggested at the hearing that Giles County judges were simply following state law when they put secured bail amounts on arrest warrants before issuance and without a hearing. At the Court's request, the parties filed supplemental briefs on the issue. (Doc. Nos. 221, 222). A review of the briefs leads the Court to conclude there is no state statute authorizing or requiring such a procedure. Indeed, the state statute listing factors for determining conditions of release appears to contemplate input from the arrestee. *See Tenn. Code Ann. § 40-11-118(b)* (listing factors court is to consider in setting bail include the defendant's "employment status," "family ties and relationships," "mental condition," "identity of responsible members of the community who will vouch for the defendant's reliability," and "ties to the community"); *see also Weatherspoon v. Oldhom, 2018 U.S. Dist. LEXIS 30386, 2018 WL 1053548, at *3 (W.D. Tenn. Feb. 26, 2018)* (discussing statutes governing pretrial release and detention in Tennessee). In any event, the requirements of the federal Constitution supersede conflicting state law under the *Supremacy Clause*. *See, e.g.*, ***Cooper v. Aaron, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5, 79 Ohio Law Abs. 452 (1958)***; *Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384, 191 L. Ed. 2d 471 (2015)*.

[8] Plaintiffs have filed the Expert Report of Michael R. Jones, Ph.D (Plaintiffs' Exs. 60-63) and the Affidavit of Judge Truman Morrison (Plaintiffs' Exs. 63-64) in which these studies are described. The Court notes the testimony of these experts has been cited by other courts in addressing similar issues. *See Schultz, 330 F. Supp. 3d at 1350, 1361-65 (Dr. Jones and Judge Morrison)*; *ODonnell v. Harris Cty., Texas, 251 F. Supp. 3d 1052, 1066 (S.D. Tex. 2017)* (Judge Morrison).

> In the District of Columbia, since 2014 we have released an average of more than 93% of all arrestees, a much higher percentage than all but a few court systems in the United States. In the 2017 [sic], 94% of arrestees were released and 98% of those who were released remained arrest-free from violent crimes during pretrial release. 86% of released defendants remained arrest-free from all crimes of any kind. Of those released pretrial, 88% made all scheduled court appearances during the pretrial [***42**] period. . . . the District accomplishes these high rates of non-arrest and court appearances, again, without using money bonds.

(Plaintiffs' Ex. 63, ¶ 37). According to Dr. Jones:

> . . . the longer that lower-risk defendants are kept in pretrial detention beyond one day, the greater the likelihood that they will fail to appear in court after they are eventually released, again, when controlling for other relevant characteristics.
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> Detaining lower-risk defendants for longer than one day affects the likelihood of criminal activity up to two years later. Defendants who are released within 2 to 3 days are 17% more likely to engage in new criminal activity up to two years later compared to comparable defendants released within 24 hours. For those held 4 to 7 days, this longer-term recidivism worsens to 35%, and when release is delayed for 8 to 14 days, the recidivism rate further increases to 51%. This pattern of worsening recidivism as release is delayed is observed for moderate-risk defendants as well.

(Plaintiffs' Ex. 60, ¶¶ 26, 28) (citation omitted). On the other hand, Defendants have not shown that arrestees who are able to pay the secured bail amount are more likely to appear for [***43**] their revocation hearing and less likely to commit crime. As pointed out by the court in *Schultz*, "a dangerous arrestee who can post bond immediately returns to the community to which she is a threat, suffering only the inconvenience of detention of no more than two hours." *330 F. Supp. 3d at 1360*.

Given the complete absence of evidence supporting the bail system in Giles County for indigent misdemeanor probation arrestees, the Court concludes that, even if it applied the rational basis standard, Defendants have failed to show the current bail system rationally furthers a legitimate governmental interest. *See Schultz, 330 F. Supp. 3d at 1361-65*.

As to Plaintiffs' due process claim, the Court is persuaded by the authority described above that the system of setting secured bail as described in the stipulated facts is constitutionally deficient in failing to provide notice and an opportunity for the arrestee to be heard, and for failing to provide oral or written findings regarding the arrestee's ability to pay, alternative conditions of release, and the need for pre-revocation detention. *See, e.g., Caliste, 329 F. Supp. 3d at 312*; *Schultz, 330 F. Supp. 3d at 1366-74*.

Defendants argue that, even if the Court concludes the secured bail system at issue here is constitutionally infirm, they are not the parties [***44**] who should be enjoined. Defendant Helton contends that, as Sheriff, he is required to execute the arrest warrants issued by Giles County judges, and cannot second-guess the validity of those warrants. Relying on *Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 98 S. Ct. 2018, 2021, 56 L. Ed. 2d 611 (1978)*, Defendants argue that to

demonstrate municipal liability, Plaintiffs must show the local government's policy or custom was the "moving force" behind the alleged constitutional violation. *See, e.g.*, *Powers v. Hamilton Cnty. Pub. Def. Comm'n, 501 F.3d 592, 607 (6th Cir. 2007)*. According to Defendants, the "moving force" underlying the constitutional claims at issue here is the issuance of arrest warrants with secured bail amounts, which is solely within the purview of the judges.

The custom or policy Plaintiffs challenge in Count 15, however, is the practice of the Sheriff in *detaining* misdemeanor probation arrestees who cannot satisfy the secured bail amount written on the arrest warrant. As the official in charge of the operation of the county jail, the Sheriff effectuates the detention of these indigent misdemeanor probation arrestees. *See, e.g.*, *Wright v. Fentress Cnty., Tenn., 313 F. Supp. 3d 886, 891 (M.D. Tenn. 2018)*; *Doe #1 v. Cravens, 2018 U.S. Dist. LEXIS 51979, 2018 WL 1522401, at *4 (M.D. Tenn. Mar. 28, 2018)*; *Tenn. Code Ann. § 8-8-201(a)(3)* ("It is the sheriff's duty to . . . [t]ake charge and custody of the jail of the sheriff's county, and of the prisoners therein; receive those *lawfully* committed, and keep them personally, **[*45]** or by deputies or jailer, until discharged by law. . . ") (emphasis added); *see also Shorts v. Bartholomew, 255 Fed. Appx. 47, 52 (6th Cir. 2007)*. Even if the Sheriff is not the "moving force" underlying the constitutional violations here, he is still an appropriate party to be enjoined under *Ex Parte Young, 209 U.S. 123, 156, 28 S. Ct. 441, 452, 52 L. Ed. 714 (1908)* because he has an independent duty to refrain from violating the federal Constitution. *See also Cooper v. Aaron, 358 U.S. at 17*; *Moore v. Urquhart, 899 F.3d 1094, 1103 (9th Cir. 2018)*.

Despite Defendants' arguments to the contrary, the relief requested by Plaintiffs does not require the Sheriff or his deputies to refrain from *serving* arrest warrants, nor does it require they second-guess the validity of arrest warrants. As stated above, the injunctive relief requested focuses on the Sheriff's role as *jailer* in detaining misdemeanor probation arrestees *after* arrest based solely on the individual's inability to pay the secured bail amount written on the arrest warrant. Complying with such injunctive relief does not require the Sheriff, or his employees, to engage in any kind of legal analysis to understand that detaining an arrestee based on such an arrest warrant with a secured bail amount *cannot* be the basis for constitutional detention under the system described in the stipulated facts.[9] The Fifth Circuit in *O'Donnell* approved similar **[*46]** injunctive relief regarding the sheriff in that case. *892 F.3d at 165* ("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.")

To the extent Defendants challenge the issuance of injunctive relief before the Court rules on Plaintiffs' pending motion for class certification, that challenge is without merit. The Court may grant preliminary injunctive relief protecting class members under *Fed. R.*

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[9] The Court finds it unnecessary to determine whether a 48-hour detention period on a secured bail amount would be constitutionally acceptable as there is no evidence that a 48-hour "hearing or release" practice exists in Giles County. *See Walker, 901 F.3d at 1266-67*. Also, the Court notes that, for purposes of Count 15, Plaintiffs are not challenging the detention of arrestees pursuant to a "hold" arrest warrant.

Civ. P. 23(b)(2),[10] based upon its general equity powers. *See* Rodriguez, 155 F. Supp. 3d at 767 ("A district court may, in its discretion, award appropriate classwide injunctive relief prior to a formal ruling on the class certification issue based upon either a conditional certification of the class or its general equity powers."); Fish v. Kobach, 189 F. Supp. 3d 1107, 1148 (D. Kan.), *aff'd*, 691 F. App'x 900 (10th Cir. 2016), and *aff'd*, 840 F.3d 710 (10th Cir. 2016), and order enforced, 294 F. Supp. 3d 1154 (D. Kan. 2018) ("[C]ase law supports this Court's authority to issue classwide injunctive relief based on its general equity powers before deciding the class certification motion."); O.B. v. Norwood, 170 F. Supp. 3d 1186, 1200 (N.D. Ill.), aff'd, 838 F.3d 837 (7th Cir. 2016) ("[i]t is unnecessary to certify, or even conditionally **[*47]** certify, Plaintiffs' proposed class at this time. . . 'The lack of formal class certification does not create an obstacle to classwide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons.'"); *see also* Gooch v. Life Inv'rs Ins. Co. of Am., 672 F.3d 402, 433 (6th Cir. 2012) ("The bar on one-way intervention does not prohibit preliminary injunctions that precede class certification, nor does it apply to mandatory classes."); Wood v. Detroit Diesel Corp., 213 Fed. Appx 463 (6th Cir. 2007) (concluding that harm outlined in declarations of putative class members was sufficient to justify preliminary injunctive relief even though named plaintiffs had not demonstrated such harm).[11]

For the reasons described above, the Court concludes Plaintiffs have established a strong likelihood of success on the merits of the constitutional claims raised in Count 15. As for the other Rule 65 considerations, the Court is persuaded Plaintiff Hilfort and other similarly-situated **[*48]** indigent misdemeanor probation arrestees will suffer irreparable harm, namely, the unconstitutional deprivation of their liberty, absent the injunction. Detention of these arrestees, who are otherwise deemed eligible for release, solely due to the inability to pay the secured bail amount on the arrest warrant can result in loss of work, separation from family, undue pressure to plead guilty, and other negative consequences as outlined in Dr. Jones' Report. (Plaintiffs' Ex. 60, ¶¶ 23-36). This threatened harm outweighs any harm to Defendants or to the public interest. Defendants have presented no evidence demonstrating the injunctive relief requested will result in increased danger to the community given that these indigent arrestees are otherwise deemed eligible for release. Nor have Defendants demonstrated the release of these indigent arrestees will likely result in their failure to appear for court hearings. Finally, Defendants have not demonstrated the costs of alternatives to detention for these arrestees are greater than the costs of incarceration.

For these reasons, Plaintiffs' Motion for Preliminary Injunction (Doc. No. 51) is **GRANTED**, as follows. Pursuant to Rule 65, it is ORDERED **[*49]** that: Defendant Giles

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[10] Rule 23(b)(2) provides:

> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
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> * * *
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> (2) 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;

[11] The private defendants have also opposed injunctive relief based on the argument that Plaintiff Hilfort is not really indigent. That argument does not materially advance the analysis of the constitutional claims at issue here because one of the constitutional infirmities Plaintiffs complain of is the absence of an *opportunity* to demonstrate indigency before the setting of a secured bail amount.

County, the Sheriff, and their officers, agents, employees, servants, attorneys, and all persons in active concert or participation with them are enjoined from detaining any person on misdemeanor probation in Giles County based on a secured financial condition of release (*i.e.*, secured bail amount) on a violation of probation warrant if the warrant is not accompanied by a record showing that the condition (*i.e.*, secured bail amount) was imposed after: (1) notice to the arrestee and an opportunity to be heard by an appropriate judicial officer; and (2) findings by that judicial officer concerning the arrestee's ability to pay, alternatives to secured bail, and whether pre-revocation detention is necessary to meet a compelling governmental interest.

As for the question of posting a bond, given that the members of the putative class are indigent, the Court exercises its discretion to waive the security required by *Rule 65(c)*. *See, e.g.*, *Appalachian Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co., 714 F.3d 424, 431 (6th Cir. 2013)* (observing that the rule in Sixth Circuit has long been that the district court possesses discretion over whether to require the posting of security under *Rule 65*); *see also Schultz, 330 F. Supp. 3d at 1376*; *Daves, 341 F. Supp. 3d at 697-98*.

This Preliminary Injunction Order shall remain in effect pending further **[*50]** order of the Court.

The Court is of the opinion that the parties should participate in a judicial settlement conference within 90 days of entry of this Order. The Magistrate Judge shall issue any necessary orders, including the referral to another Magistrate Judge, regarding the judicial settlement conference.

It is so **ORDERED**. /s/ William L. Campbell, Jr.

WILLIAM L. CAMPBELL, JR.

UNITED STATES DISTRICT JUDGE

PRELIMINARY INJUNCTION ORDER

Pending before the Court is Plaintiffs' Motion for Preliminary Injunction (Doc. No. 51). For the reasons set forth in the accompanying Memorandum, Plaintiffs' Motion for Preliminary Injunction (Doc. No. 51) is **GRANTED**, as follows.

Pursuant to *Rule 65*, it is ORDERED that: Defendant Giles County, the Sheriff, and their officers, agents, employees, servants, attorneys, and all persons in active concert or participation with them are enjoined from detaining any person on misdemeanor probation in Giles County based on a secured financial condition of release (*i.e.*, secured bail amount) on a violation of probation warrant if the warrant is not accompanied by a record showing that the condition (*i.e.*, secured bail amount) was imposed after: (1) notice to the arrestee and **[*51]** an opportunity to be heard by an appropriate judicial officer; and (2) findings by that judicial officer concerning the arrestee's ability to pay, alternatives to secured bail, and whether pre-revocation detention is necessary to meet a compelling governmental interest.

The Court exercises its discretion to waive the security required by *Rule 65(c)*.

This Preliminary Injunction Order shall remain in effect pending further order of the Court.

The Court is of the opinion that the parties should participate in a judicial settlement conference within 90 days of entry of this

Order. The Magistrate Judge shall issue any necessary orders, including the referral to another Magistrate Judge, regarding the judicial settlement conference.

It is so **ORDERED**.

/s/ William L. Campbell, Jr.

WILLIAM L. CAMPBELL, JR.

UNITED STATES DISTRICT JUDGE

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Briggs v. Montgomery

United States District Court for the District of Arizona

June 18, 2019, Decided; June 18, 2019, Filed

No. CV-18-02684-PHX-EJM

Reporter
2019 U.S. Dist. LEXIS 101625 *; 2019 WL 2515950

Deshawn Briggs, et al., Plaintiffs, v. William Montgomery, et al., Defendants.

Subsequent History: Motion granted by *Briggs v. County of Maricopa, 2020 U.S. Dist. LEXIS 110052, 2020 WL 3440288 (D. Ariz., June 23, 2020)*

Motion granted by, in part *Briggs v. Adel, 2020 U.S. Dist. LEXIS 124514, 2020 WL 4003123 (D. Ariz., July 14, 2020)*

Motion granted by, in part, Motion denied by, in part *Briggs v. Cty. of Maricopa, 2021 U.S. Dist. LEXIS 61386 (D. Ariz., Mar. 30, 2021)*

Stay denied by *Briggs v. Cty. of Maricopa, 2021 U.S. Dist. LEXIS 80709, 2021 WL 1627233 (D. Ariz., Apr. 26, 2021)*

Motion granted by *Briggs v. Cty. of Maricopa, 2021 U.S. Dist. LEXIS 83683, 2021 WL 1725553 (D. Ariz., Apr. 30, 2021)*

Summary judgment denied by, Dismissed by, in part, Motion denied by *Briggs v. Treatment Assessment Screening Ctr. Inc., 2021 U.S. Dist. LEXIS 248128 (D. Ariz., Dec. 29, 2021)*

Prior History: *Briggs v. Montgomery, 2019 U.S. Dist. LEXIS 240754 (D. Ariz., Mar. 15, 2019)*

Counsel: **[*1]** For Deshawn Briggs, on behalf of themselves and all others similarly situated, Mark Pascale, on behalf of themselves and all others similarly situated, Taja Collier, McKenna Stephens, Plaintiffs: Akeeb Dami Animashaun, Katherine Chamblee-Ryan, LEAD ATTORNEYS, Civil Rights Corps, Washington, DC; Joshua David R Bendor, Timothy Joel Eckstein, LEAD ATTORNEYS, Osborn Maledon PA, Phoenix, AZ.

For William Montgomery, in his official capacity as County Attorney of Maricopa County, County of Maricopa, Defendants: Ann Thompson Uglietta, Jennifer Gail Lockerby, LEAD ATTORNEYS, Maricopa County Attorneys Office - Civil Services Division, Phoenix, AZ; Joseph James Branco, LEAD ATTORNEY, Maricopa County Attorneys Office - Phoenix (Central Ave.), Phoenix, AZ.

For Treatment Assessment Screening Center Incorporated, Defendant: Kelly Ann Kszywienski, Robert Arthur Henry, LEAD ATTORNEYS, Snell & Wilmer LLP - Phoenix, AZ, Phoenix, AZ.

Judges: Eric J. Markovich, United States Magistrate Judge.

Opinion by: Eric J. Markovich

Opinion

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ORDER

Pending before the Court are Defendants Maricopa County and Maricopa County Attorney William Montgomery's Motion to Dismiss (Doc. 34) and Defendant Treatment Assessment Screening Center, Inc.'s Motion to [*2] Dismiss (Doc. 36). All appropriate responses and replies have been filed, and the Court heard oral arguments from the parties on May 22, 2019. For the reasons explained below, the Court will deny the motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed their first amended class action complaint ("FAC") on October 12, 2018. (Doc. 20). Plaintiffs allege civil rights claims pursuant to *42 U.S.C. § 1983* and the *Fourth* and *Fourteenth Amendments of the United States Constitution* and seek monetary damages and injunctive relief. Plaintiffs are four named individuals who represent themselves and a class of similarly situated people. *Id.* at 6-7. Plaintiffs' allegations concern a marijuana deferred prosecution program ("MDPP" or "the program") operated by the Maricopa County Attorney's Office ("MCAO") and Treatment Assessment Screening Center ("TASC"). *Id.* ¶ 47. Plaintiffs also allege Defendant Bill Montgomery, the elected County Attorney ("CA") for Maricopa County, is liable in his official capacity for his role in operating and administering the diversion program, and that Montgomery is the final policymaker for Maricopa County on matters relating to diversion programs. *Id.* ¶ 45.

Plaintiffs allege that Defendants "jointly operate a possession of marijuana diversion program [*3] that penalizes the poor because of their poverty." *Id.* ¶ 1. Specifically, Plaintiffs' complaint alleges that:

7. The length of time a person spends in the diversion program and whether the person ultimately completes the program and avoids felony criminal prosecution depends on whether she can pay the program's required fees.
8. In order to complete the program and avoid felony criminal prosecution, participants in the marijuana diversion program must pay a fee of $950 or $1000.
9. Participants must also pay $15 or $17 for each drug and alcohol test; they may be required to take as many as three or four tests each week.
10. The program is two-tiered: people who meet program requirements—completing a three-hour drug education seminar and routine drug and alcohol testing—and are wealthy enough to pay the $950 or $1000 program fee complete the program in 90 days and are no longer subject to felony criminal prosecution.
11. But participants who cannot pay the program fees are forced to stay in the program for at least six months and until they can pay off the money owed to MCAO and TASC, even if they have satisfied every program requirement other than payment.
12. During the "pay-only" period, [*4] participants remain subject to felony criminal prosecution during the additional time they are forced to remain in the diversion program.
13. These participants also remain subject to all of the diversion program's requirements.
14. These requirements include reporting to a TASC location, as often as four times per week, so that the participant's urine can be collected and tested.
15. Participants who remain on diversion solely because of their inability to pay program fees must also continue to pay $15

or $17 each time they are required to submit to a drug and alcohol test.
16. The perverse result is that poor people are ultimately charged more money—potentially hundreds of dollars more—than similarly situated participants who can afford to pay to finish the program in 90 days.
17. Participants who cannot afford to pay for diversion may also be terminated from the program altogether and referred for felony prosecution.
18. This can happen in at least two ways.
19. First, Defendants require diversion participants to make a minimum monthly payment towards the $950 or $1000 program fees at a rate set by Defendant TASC.

20. A participant who fails to pay the minimum monthly payment set by Defendant **[*5]** TASC can be terminated from the program and prosecuted.
21. Defendants do not inquire into a participant's ability to pay before setting the minimum monthly fee.
22. Defendants' policy does not include any exception for participants who do not pay the minimum monthly amount solely because they cannot afford it.
23. Second, participants are not allowed to take the drug and alcohol tests the program requires if they cannot afford to pay for them.
24. For example, if a participant cannot pay the $15 or $17 fee for a drug and alcohol test, she is not allowed to take the test at all.
25. Therefore, if a participant reports for a drug and alcohol test without the required fee, she will be turned away, and she will receive a violation for missing the test.
26. In other words, an unpaid drug and alcohol test is a failed test.

27. If a participant misses too many drug and alcohol tests—even if she missed them solely because she could not afford to pay for them—she will be failed out of the diversion program and prosecuted for felony possession of marijuana.

28. Defendants enforce these policies even when they know that diversion participants are poor or even homeless, and even when they know that participants **[*6]** are sacrificing basic necessities to pay fees.

. . .

30. Diversion participants who alert TASC employees that they cannot afford the required fees are told that they will be failed from the program if they do not pay and to do whatever it takes to get the money.

Id. at 2-5 (footnote omitted).

Plaintiffs state five claims for relief: 1) wealth-based discrimination in violation of the *Fourteenth Amendment* by Plaintiffs Briggs and Pascale and others similarly situated against all Defendants for monetary damages; 2) wealth-based discrimination in violation of the *Fourteenth Amendment* by Plaintiff Stephens and others similarly situated against all Defendants for injunctive relief, and by Plaintiff Collier on her own behalf against Defendant TASC for injunctive relief; 3) wealth-based discrimination in violation of the *Fourteenth Amendment* by Plaintiff Collier against all Defendants for damages and against Defendant TASC for injunctive relief; 4) unreasonable search and seizure in violation of the *Fourth* and *Fourteenth Amendments* by Plaintiffs Briggs and Pascale and others similarly situated against all Defendants for damages; and 5) unreasonable search and seizure in violation of the *Fourth* and *Fourteenth Amendments* by Plaintiff Stephens

and others similarly situated against all Defendants for injunctive relief, [*7] and by Plaintiff Collier on her own behalf against Defendant TASC for injunctive relief. (Doc. 20 at 47-51).

On November 20, 2018 Defendant TASC filed a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*. (Doc. 36). TASC alleges that: "(1) TASC cannot be liable for any of the harm Plaintiffs allege; (2) even if TASC could be liable to Plaintiffs, Plaintiffs' substantive claims (alleging violations of the *Fourth* and *Fourteenth Amendments*) fail as a matter of law; and (3) even if Plaintiffs had a substantive claim for relief, Plaintiff Briggs' claims are time-barred." *Id.* at 1. TASC further states that at a minimum, Plaintiffs should be required to amend their complaint to clarify their claims and eliminate immaterial allegations in compliance with *Fed. R. Civ. P. 8*. *Id.*

Also on November 20, 2018, Defendants Maricopa County and William Montgomery ("the County Defendants") filed a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(1)* and *12(b)(6)*. (Doc. 34). The County Defendants allege that dismissal is warranted for the following reasons:

> (1) Because the County Attorney acts as a State official, not a County official, when he establishes and implements a marijuana deferred prosecution program, Plaintiffs' *§ 1983 Monell* liability claims/requests for relief against the County and County Attorney [*8] must be dismissed [Counts 1-5];
>
> (2) *11th Amendment* sovereign immunity bars *§ 1983* damages claims against the County Attorney in his capacity as a State official; further, the County Attorney in his capacity as a State official is not a "person" for purposes of *§ 1983*. Plaintiffs' *§ 1983* damages claims against him thus must be dismissed [Counts 1, 3 and 4];
>
> (3) Because the County Attorney's policies and practices in establishing and implementing a marijuana deferred prosecution program are prosecutorial functions, absolute prosecutorial immunity bars Plaintiffs' *§ 1983* damages claims against the County Attorney [Counts 1, 3 and 4], requiring concomitant dismissal of Plaintiffs' redundant *§ 1983* damages claims asserted against the County;
> (4) Plaintiff Briggs' claims [Counts 1 and 4] are statutorily time-barred; and
>
> (5) For the reasons set forth in Part IV of TASC's Motion to Dismiss, Plaintiffs fail to state claims for relief for alleged wealth discrimination under the *14th Amendment's* Due Process and *Equal Protection Clauses* or for alleged unreasonable search and seizure under the *4th Amendment*, as a matter of law [Counts 1-5].

Id. at 1.[1] The County Defendants join in parts IV and V of Defendant TASC's motion to dismiss. *Id.*

II. STANDARD OF REVIEW

Pursuant to *Fed. R. Civ. P. 12(b)(6)*, the Court may grant a motion [*9] to dismiss when the plaintiff fails to state a claim upon which relief can be granted. A complaint must contain a "short and plain statement of the grounds for the court's jurisdiction," a "short and plain statement of the claim showing that the pleader is entitled to relief," and "a demand for the

[1] The County Defendants later withdrew their absolute prosecutorial immunity argument. *See* Doc. 81.

relief sought." *Fed. R. Civ. P. 8(a)*. While *Rule 8* does not demand factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. "Threadbare recitals of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

A dismissal for failure to state a claim "is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support cognizable legal theory." *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)* (internal citation omitted); *see also Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980)* (*Rule 12(b)(6)* dismissal motion "can be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim."). However, "the court [is not] required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*.

To survive a motion to dismiss under *Rule 12(b)(6)*, a pleading must allege facts sufficient "to raise a right to relief above the speculative **[*10]** level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim must be plausible, allowing the court to draw the reasonable inference that the defendant is liable for the conduct alleged. *Ashcroft, 129 S. Ct. at 1949*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly, 550 U.S. at 557*). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal, 556 U.S. at 678*.

"In adjudicating a *Rule 12(b)(6)* motion to dismiss, . . . a court does not resolve factual disputes between the parties on an undeveloped record. Instead, the issue is whether the pleading states a sufficient claim to warrant allowing the [plaintiffs] to attempt to prove their case." *Coleman v. City of Mesa, 230 Ariz. 352, 363, 284 P.3d 863 (2012)*; *see also Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)* ("factual challenges to a plaintiff's complaint have no bearing on the legal sufficiency of the allegations under *Rule 12(b)(6)*"), *overruling on other grounds recognized by Jack Loumena v. Walter P. Hammon, 2015 U.S. Dist. LEXIS 155511, 2015 WL 7180679 (N.D. Cal. Nov. 16, 2015)*. Thus, Defendants' motions do not require the Court to make factual determinations regarding Plaintiffs' indigency, or whether Plaintiffs have proved that Defendants have a policy or policies that unconstitutionally discriminate against indigents. The Court **[*11]** only considers whether Plaintiffs have sufficiently stated their claims to justify allowing those claims to move forward.

The Court must view the complaint in the light most favorable to the nonmoving party, with every doubt resolved on his behalf, and with that party's allegations taken as true. *See Abramson v. Brownstein, 897 F.2d 389, 391 (9th Cir. 1990)*. Generally, the court only considers the face of the complaint when deciding a motion under *Rule 12(b)(6)*. *See Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002)*. Consideration of matters outside the pleading converts the *Rule 12(b)(6)* motion to a *Rule 56* motion for summary judgment, unless one of two exceptions are met:

> First, a court may consider material which is properly submitted as part of the complaint on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment. If the documents are not physically attached to the complaint, they may be considered if the documents' authenticity . . . is not contested and the plaintiff's complaint necessarily relies on them. Second, under Fed. R. Evid. 201, a court may take judicial notice of matters of public record.

Lee, 250 F.3d at 688-89 (internal quotations and citations omitted); *see also* Harris v. Cty. of Orange, 682 F.3d 1126, 1132 (9th Cir. 2012) ("documents not attached to a complaint may be considered if no party questions their authenticity and the complaint relies on those documents."). **[*12]** The Court "may take judicial notice of court filings, as they are matters of public record, and '[i]t is also well established that a federal district court can take judicial notice of its own records.'" Baca ex rel. Nominal Defendant Insight Enterprises, Inc. v. Crown, 2010 U.S. Dist. LEXIS 81419, 2010 WL 2812712, at *2 (D. Ariz. July 12, 2010) *aff'd sub nom.* Baca v. Crown, 458 F. App'x 694 (9th Cir. 2011) (citations omitted). "[While a] court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment . . . a court may not take judicial notice of a fact that is subject to reasonable dispute." Lee, 250 F.3d at 689. Here, the Court previously ruled that it shall take judicial notice of Exhibits B—F attached to the County Defendants' motion to dismiss and that by so doing the Court does not convert the motion to dismiss into a motion for summary judgment.

III. DISCUSSION

Plaintiffs seek relief pursuant to 42 U.S.C. § 1983. "Section 1983 provides a cause of action against any person who deprives an individual of federally guaranteed rights 'under color' of state law." Filarsky v. Delia, 566 U.S. 377, 383, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (2012). "Anyone whose conduct is 'fairly attributable to the state' can be sued as a state actor under § 1983." *Id.* (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)). "To prevail on a claim under § 1983, a plaintiff must show that (1) acts by the defendants, (2) under color of state law, (3) deprived him of federal rights, privileges, or immunities, **[*13]** and (4) caused him damage." Platt v. Moore, 2018 U.S. Dist. LEXIS 43544, 2018 WL 2058136, at *2 (D. Ariz. Mar. 15, 2018) (citing Thornton v. City of St. Helens, 425 F.3d 1158, 1163-64 (9th Cir. 2005)), *appeal filed* April 12, 2019.

Plaintiffs' claims concern a class of persons that Plaintiffs refer to as "pay-only participants"[2]—persons who cannot afford to pay the MDPP fee within 90 days and are required to stay on the program longer. Plaintiffs challenge three policies that apply to indigent diversion program participants and allegedly caused the constitutional violations at issue in this suit:

> 1) participants who are unable to pay minimum monthly payments or fees for mandatory urine tests are terminated from the program (the "wealth-based termination policy"); 2) participants who cannot afford to pay the program fees in 90 days are subject to longer terms of intrusive supervision than similarly-situated participants who are able to pay (the "wealth-based extended supervision policy"); and 3) participants who are

[2] "'Pay-only' refers to a period of criminal supervision during which the person is supervised only because she has not paid all of her debt." (Doc. 20 at 3 n.6).

supervised in the program solely due to their inability to pay program fees are subject to routine suspicionless urine testing for drugs and alcohol (the "wealth-based extended urine testing policy").

(Doc. 45 at 3-4) (internal citations omitted).

A. Defendant Treatment Assessment Screening Center, Inc.'s Motion to Dismiss

i. Policy, Decision, **[*14]** or Custom

TASC first argues that it cannot be liable as an entity because it has not established any policies that Plaintiffs may be challenging. TASC further states that Plaintiffs have failed to allege any facts regarding policies that TASC adopted, or any custom that TASC had the discretion to implement, that is so persistent and widespread that it became a permanent and well-settled entity policy. (Doc. 36 at 7).

In *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*, the Supreme Court held that local governments and local government officials sued in their official capacity are "persons" for purposes of *§ 1983* and may be held liable for constitutional violations arising from a government policy or custom. In *Tsao v. Desert Palace, Inc., 698 F.3d 1128 (9th Cir. 2012)*, the Ninth Circuit held that *Monell* also applies to suits against private entities. "To create liability under *§ 1983*, the constitutional violation must be caused by a policy, practice, or custom of the entity, or be the result of an order by a policy-making officer." *Id. at 1139* (internal quotations and citations omitted); *Monell, 436 U.S. at 690-91* (local governments "can be sued directly under *§ 1983* for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, **[*15]** or decision officially adopted and promulgated by that body's officers . . . Moreover, . . . local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels.").

Thus, to state a claim against TASC under *Monell* and *Tsao*, Plaintiffs must show that (1) TASC acted under color of state law, and (2) that the alleged constitutional violation was caused by a policy or custom. *Tsao, 698 F.3d at 1139*. The Court finds that Plaintiffs have pled enough facts to state a claim for entity liability against TASC sufficient to survive a motion to dismiss.

First, Plaintiffs have sufficiently pled that TASC acted under color of state law via its agreement with MCAO to operate the MDPP.[3] The FAC alleges that MCAO and TASC jointly operate the MDPP, that TASC has a contract with MCAO to operate, administer, and supervise the program, and that TASC supervises all people whose prosecutions for simple possession of marijuana have been diverted. (Doc. 20 ¶¶ 1, 47, 67).

The second thing that Plaintiffs must show is that TASC had a policy, custom, or pattern that was the actionable **[*16]** cause of Plaintiffs' injuries. *Tsao, 698 F.3d at 1143*. A policy may be either formal or informal: "'Congress included customs and usages [in *§ 1983*] because of the persistent and widespread

[3] The court considers four tests to determine "whether a private [party's] actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test." *Tsao, 698 F.3d at 1140* (internal quotations and citation omitted). Because neither party argues this point, the Court will not address it further here.

discriminatory practices of state officials . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law.'" *Monell, 436 U.S. at 691* (quoting *Adickes v. S. H. Kress & Co., 398 U.S. 144, 167-168, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*). As this Court explained in *Milke v. City of Phoenix, 2016 U.S. Dist. LEXIS 171649, 2016 WL 5339693, at *15 (D. Ariz. Jan. 8, 2016)*,

> An informal policy . . . exists when a plaintiff can prove the existence of a widespread practice that, although not authorized by an ordinance or an express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law. To be viable, a plaintiff must do more than point to a single constitutional deprivation, a random act, or an isolated event. Instead, a plaintiff . . . must show a pattern of similar incidents in order for the factfinder to conclude that the alleged informal policy was so permanent and well settled as to carry the force of law.

(internal quotations and citations omitted). Thus, even if TASC does not have an official policy, liability may be established "by acquiescence in a longstanding practice **[*17]** or custom which constitutes the 'standard operating procedure' of the local governmental entity." *Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989)*.

Here, the FAC alleges both formal and informal policies. Plaintiffs specifically reference the MDPP client contract, which includes a provision stating that program participants may be terminated and referred for prosecution for failure to pay the program fees or failure to test as scheduled. (Doc. 20 ¶¶ 139, 140). The FAC also alleges informal policies or practices: no one at TASC assesses a person's ability to pay before referring the person back for prosecution because they could not pay for urine tests; no one at MCAO assesses ability to pay before prosecuting people who have failed diversion solely because of their inability to pay; Defendants do not waive the program fee for anyone regardless of financial circumstances; and Defendants contend that they allow for reduced fees for urine screens, but in practice these reductions are almost never granted. (Doc. 20 at ¶¶ 151-154).

Accordingly, the Court rejects TASC's argument that Plaintiffs have failed to plead a persistent and widespread custom or practice such that it constitutes a permanent and well-settled entity policy. (Doc. 36 **[*18]** at 8-9). TASC notes that neither Briggs nor Stephens have alleged that they made any statements to TASC regarding their alleged inability to pay; Pascale states that TASC deferred payment for his orientation fee and found him ineligible for a reduction in testing fees; and Collier is the only plaintiff who alleges she told TASC she could not pay and was not invited to apply for a reduction or waiver. TASC contends that these allegations are insufficient to establish a persistent and widespread practice. However, Plaintiffs state that they are not arguing that the indigent are entitled to fee waivers; they are challenging TASC's policies of requiring program participants to remain on the program longer when they cannot afford to pay the program fee, and the requirement that pay-only participants must also continue to pay for additional urine screenings as long as they do remain on the program. Further, Plaintiffs are seeking to have this matter certified as a class action. While the existence of a persistent and widespread practice, policy, or custom will require discovery for Plaintiffs to prove their

claims and to establish a class, at this early stage in the proceedings, the FAC **[*19]** states sufficient allegations to survive a motion to dismiss. *See Milke, 2016 U.S. Dist. LEXIS 171649, 2016 WL 5339693 at *18* ("A *Monell* claim must be based on more than 'a single constitutional deprivation, a random act, or an isolated event.' There must be 'a pattern of similar incidents.'" (quoting *Castro v. Cty. of Los Angeles, 797 F.3d 654, 671 (9th Cir. 2015)).*

Finally, the Court rejects TASC's argument that it has no authority to establish policies regarding the development or implementation of the MDPP because deferred prosecution programs are established by the state legislature and the Arizona Prosecuting Attorneys' Advisory Council ("APAAC") establishes the program guidelines. (Doc. 36 at 8). These issues are discussed further below in the County Defendants' motion to dismiss, but the Court notes that Plaintiffs do not challenge the establishment of the program generally—Plaintiffs challenge the three specific policies detailed above, and Plaintiffs have pled that none of these policies were set by state law—they were jointly enacted by the CA/MCAO and TASC.[4]

Accordingly, accepting Plaintiffs' allegations as true, as the Court must on a motion to dismiss, Plaintiffs have sufficiently pled a *§ 1983* claim for entity liability against TASC based on the three challenged policies.

ii. Qualified Immunity

TASC **[*20]** alternatively argues that because Plaintiffs cannot bring a claim for entity liability against it, to the extent Plaintiffs assert an individual claim against it, TASC is shielded by qualified immunity. Plaintiffs contend that qualified immunity does not apply because qualified immunity only protects individual employees, not corporate entities like TASC.

"Qualified immunity is an immunity from suit." *Trevino v. Gates, 99 F.3d 911, 916 (9th Cir. 1996)*. It "shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle v. Howards, 566 U.S. 658, 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012)*; *see also Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)*. The Supreme Court has "described the doctrine's purposes as protecting government's ability to perform its traditional functions by providing immunity where necessary to preserve the ability of government officials to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service." *Richardson v. McKnight, 521 U.S. 399, 407-08, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997)* (internal quotations and citation omitted).

Here, TASC relies on the Supreme Court's decision in *Filarsky v. Delia, 566 U.S. 377, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (2012)* for its argument that qualified immunity extends to non-government employees working in close proximation with public employees. **[*21]** In *Filarsky*, the Court held that a private attorney temporarily retained by the city was entitled to seek qualified immunity. *566 U.S. 377, 132 S. Ct. 1657, 182 L. Ed. 2d 662*. The Court found that "immunity under *§ 1983* should not vary depending on whether an individual working

[4] TASC further alleges that the CA is the final policymaker for Maricopa County on matters relating to diversion programs, and because the CA acts on behalf of the State, Plaintiffs' allegations concern State policies. (Doc. 36 at 8). This argument is addressed in section B(i) below.

for the government does so as a full-time employee, or on some other basis[,]" and noted that "[a]ffording immunity not only to public employees but also to others acting on behalf of the government similarly serves to ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service." *Id. at 389-90* (internal quotations and citations omitted). The Court also distinguished its prior decision in *Richardson, 521 U.S. 399, 117 S. Ct. 2100, 138 L. Ed. 2d 540*, where it held that guards employed by a privately-run prison facility were not entitled to seek qualified immunity. The Court explained that "*Richardson* was a self-consciously 'narrow[ ]' decision" and "was not meant to foreclose all claims of immunity by private individuals." *Filarsky, 566 U.S. at 393*. Rather, "the particular circumstances of that case—'a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially **[*22]** in competition with other firms'—combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under *§ 1983*." *Id.* (quoting *Richardson, 521 U.S. at 413*).

The Court finds that this case is more like *Richardson* than *Filarsky*. Here, like in *Richardson*, "the most important special government immunity-producing concern—unwarranted timidity—is less likely present, or at least is not special, when a private company subject to competitive market pressures operates a [deferred prosecution program]." *Richardson, 521 U.S. at 409*. "In other words, marketplace pressures provide [TASC] with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or 'nonarduous' employee job performance." *Id. at 410*. Further, TASC is a private entity that entered into a contract with Maricopa County to "assume a major lengthy administrative task . . . with limited direct supervision by the government" and undertook that task for profit and likely in competition with other providers of drug rehabilitation services. *See also Halvorsen v. Baird, 146 F.3d 680, 685-86 (9th Cir. 1998)* (finding that private firm providing municipality with involuntary commitment services for inebriates was not entitled to qualified immunity under *Richardson* and noting that whether a firm is for-profit or **[*23]** not-for-profit is immaterial because both compete for municipal contracts and both have incentives to display effective performance). This case is clearly unlike *Filarsky*, where the Supreme Court found qualified immunity for a private attorney retained by the city for a limited period of time to assist with one aspect of an investigation.[5]

The Court also notes that Plaintiffs' claims are against TASC as an entity, not individual TASC employees. The Ninth Circuit has specifically rejected an expansion of *Filarsky* to include immunity for all service contractors. *Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014)*, *aff'd*, *136 S. Ct. 663, 193 L. Ed. 2d 571 (2016)*, *as revised* (Feb. 9, 2016). In

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[5] TASC also relies on *Filarsky's* reasoning that:

> Sometimes, as in this case, private individuals will work in close coordination with public employees, and face threatened legal action for the same conduct . . . Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity.

566 U.S. at 391. This is of no moment, however, because Plaintiffs' claims are against TASC and the County Defendants as entities, not individual employees. And, as discussed further in section B below, the Court finds that the CA acted for the county, not the state, and that Plaintiffs have sufficiently pled a *Monell* claim against the county.

Gomez, the court noted that *Filarsky* "did not establish any new theory," and although it provided a broad reading of qualified immunity, it was "applicable **[*24]** only in the context of § 1983 qualified immunity from personal tort liability[,]" and thus was not available for Telephone Consumer Protection Act claims against the defendant company. *Id. at 881*. The court emphasized that "[w]here immunity lies, an injured party with an otherwise meritorious tort claim is denied compensation, which contravenes the basic tenet that individuals be held accountable for their wrongful conduct. Accordingly, immunity must be extended with the utmost care." *Id. at 882* (internal quotations and citation omitted).

The Court also finds the other cases TASC relies upon distinguishable. In *Young v. Cty. of Hawaii, 947 F. Supp. 2d 1087 (D. Haw. 2013)*, *aff'd*, *578 F. App'x 728 (9th Cir. 2014)*, the court held that a humane society officer qualified for qualified immunity where the humane society was an independent contractor hired by the county to carry out its animal control program. The court noted that "private defendants are not covered by immunity unless 'firmly rooted tradition' and 'special policy concerns involved in suing government officials' warrant immunity." *Id.* (quoting *Richardson, 521 U.S. at 404*). In *Young*, the officer was "duly appointed by law to execute search warrants and perform law enforcement functions like those of the police." *Id. at 1108*. Further, special policy concerns supported granting immunity **[*25]** because "[a]nimal control officers, like police officers, should be encouraged to perform their public duties without 'unwarranted timidity' that may decrease their effectiveness in responding to public danger." *Id.* (quoting *Harlow v. Fitzgerald, 457 U.S. 800, 814, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*). The court also distinguished the special policy concerns at issue in *Richardson*, noting that there, "the prison performed its task 'independently, with relatively less ongoing direct state supervision[,]' . . . [and s]uch freedom allowed the private contractor prison to respond to market pressures to adjust employee behavior." *Id. at 1109*. In contrast, in *Young*, there was "close government collaboration and supervision that restrict[ed] [the humane society's] ability to respond as a private firm to market pressures." *Id.* Accordingly, the court concluded that the officer was protected by qualified immunity because of the police department's collaboration with the humane society and its supervision over the humane society's work. *Id.*[6]

In the present case, there is no "firmly rooted tradition" that would support extending qualified immunity to TASC as a private entity operating a diversion program—TASC is not performing a traditional prosecutorial function of determining who **[*26]** to prosecute; it is carrying out the day to day operations of the program. Further, there is no evidence of "close government collaboration and supervision" by the county defendants over TASC's work. TASC's main argument in its motion is that none of the three policies that Plaintiffs challenge exist, and if they do, the responsibility falls on the shoulders of the CA. But there is no evidence before the Court at this time suggesting that the CA closely supervises TASC in its day to day operations, such as meeting with program participants, collecting

[6] Defendants also cite *Fabrikant v. French, 691 F.3d 193 (2d Cir. 2012)* (court found private animal rescue organization and its employees acted under color of state law and were entitled to qualified immunity) and *Herrera v. Santa Fe Pub. Sch., 41 F. Supp. 3d 1027 (D. N.M. 2014)* (court applied qualified immunity to private school security company based on Tenth Circuit precedent), but both are out of circuit cases that are not binding on this Court.

payments, or administering urine screens.

In sum, the Court finds that the FAC states claims against TASC as a private entity, not individual TASC employees, making qualified immunity inapplicable here. Further, the principles that supported an extension of qualified immunity in *Filarsky* and *Young* are not present here.

iii. Punitive Damages Claim

TASC contends that even if Plaintiffs could state a claim against it, the Court should strike the punitive damages claim based on *City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981)*. In *Newport*, the Supreme Court held that "a municipality is immune from punitive damages under *42 U.S.C. § 1983*." *453 U.S. at 271*. The Court notes that TASC fails to make a meaningful argument on **[*27]** this point and simply cites *Newport* without any explanation. Plaintiffs maintain that punitive damages are warranted and that *Newport* is inapplicable to cases of private entity liability.

Based on TASC's lack of argument on this issue, and because this case is still in the early stages and discovery may reveal evidence sufficient to warrant a punitive damages award, the Court declines to dismiss Plaintiff's punitive damages claim at this time. *See Arredondo v. Ortiz, 365 F.3d 778, 781 (9th Cir. 2004)* ("Normally we decline to address an issue that is simply mentioned but not argued.").

iv. Failure to State a Claim

a. *Wealth discrimination*

TASC argues that Plaintiffs fail to state a claim for wealth-based discrimination under the *Fourteenth Amendment* because the indigent are not a suspect class and wealth is not a fundamental right.

"The *Due Process Clause of the Fourteenth Amendment* imposes procedural constraints on governmental decisions that deprive individuals of liberty or property interests." *Nozzi v. Hous. Auth. of City of Los Angeles, 806 F.3d 1178, 1190 (9th Cir. 2015)*, *as amended on denial of reh'g and reh'g en banc* (Jan. 29, 2016). "Thus, the first question in any case in which a violation of procedural due process is alleged is whether the plaintiffs have a protected property or liberty interest and, if so, the extent or scope of that interest." *Id. at 1190-91*. "The property interests **[*28]** that due process protects extend beyond tangible property and include anything to which a plaintiff has a 'legitimate claim of entitlement.'" *Id. at 1191* (citation omitted).

"The *Equal Protection Clause of the Fourteenth Amendment* prohibits the government from denying equal protection of the laws." *Buffin v. City and Cty. of San Francisco, 2018 U.S. Dist. LEXIS 6853, 2018 WL 424362, * 7 (N.D. Cal. Jan. 16, 2018)*. "While Equal Protection is typically used to analyze government actions that draw a distinction among people based on specific characteristics, it is also used if the government discriminates among people as to the exercise of a fundamental right." *Id.*

Financial need alone does not identify a suspect class for purposes of equal protection analysis. *Maher v. Roe, 432 U.S. 464, 471, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977)* ("In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services."); *see also Rodriguez v. Cook, 169 F.3d 1176, 1179 (9th Cir. 1999)* ("indigent prisoners are not a suspect class"). Thus, "where wealth is involved, the *Equal Protection Clause* does not require absolute equality or precisely equal advantages." *San*

Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

Claims alleging "categorically worse treatment for the indigent" require a "hybrid analysis of equal protection and due process principles." *Walker v. City of Calhoun, GA, 901 F.3d 1245, 1261 (11th Cir. 2018)*, *cert. denied sub nom. Walker v. City of Calhoun, Ga., 139 S. Ct. 1446, 203 L. Ed. 2d 681 (2019)*. In *Bearden v. Georgia, 461 U.S. 660, 665, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)*, the Supreme Court explained that "[d]ue process and equal protection principles converge in the Court's **[*29]** analysis in these cases." Thus, "we generally analyze the fairness of relations between the criminal defendant and the State under the *Due Process Clause*, while we approach the question of whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the *Equal Protection clause*." *Id.* In *Bearden*, the Supreme Court held that the trial court erred in automatically revoking probation when the petitioner could not pay his fine without first determining that the petitioner had not made sufficient bona fide efforts to pay or that there were no adequate alternate forms of punishment. *461 U.S. at 662*. The Court noted that there was substantial similarity between the question of whether considering indigent status in revoking probation violates the *Equal Protection Clause* and the due process question of whether it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine. *Id. at 665-66*. Thus,

> the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative **[*30]** means and purpose, [and] the existence of alternative means for effectuating the purpose . . ."

Id. at 666-67 (quoting *Williams v. Illinois, 399 U.S. 235, 260, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970)* (Harlan, J., concurring)); *see also MacFarlane v. Walter, 179 F.3d 1131, 1139 (9th Cir. 1999)* ("*Bearden* delineated the factors to be balanced in examining an equal protection claim involving a lack of financial resources and the working of the criminal justice system"), *cert. granted, opinion vacated sub nom. Lehman v. MacFarlane, 529 U.S. 1106, 120 S. Ct. 1959, 146 L. Ed. 2d 790 (2000)*.

"Both defendants granted probation and those accepted into preprosecution diversion programs have a 'conditional liberty' interest—freedom from imprisonment or freedom from prosecution and the possibility of a criminal record and imprisonment—which may not be revoked in violation of the procedural and substantive requirements of due process." *State v. Jimenez, 1991-NMSC-041, 111 N.M. 782, 786, 810 P.2d 801 (1991)* (citing *Black v. Romano, 471 U.S. 606, 610, 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985)*). "Similarly, the different treatment of individuals in the criminal justice system based on ability to pay restitution as a condition of either probation or preprosecution diversion invokes the same concerns for a defendant's right to equal protection." *Id.* (citing *Bearden, 461 U.S. at 664*). However, while "*Bearden* requires the sentencing court to consider, before revoking probation for a nonwilful failure to pay a fine or restitution, whether alternatives to *imprisonment* are adequate to serve the relevant **[*31]** state interests in deterrence and punishment . . . different considerations apply

to termination of a preprosecution diversion agreement." *Id. at 787*. "A defendant accepted into a diversion program has a protected liberty interest in remaining free from prosecution . . . The relevant alternatives in such a case, therefore, are not alternatives to imprisonment but alternatives to termination from diversion and consequent prosecution." *Id.*

Here, the Plaintiffs "have a 'conditional liberty' interest . . . [in] freedom from prosecution and the possibility of a criminal record and imprisonment." *Jimenez, 111 N.M. at 786*. And, this interest can be impacted to a great extent: when pay-only participants are required to stay in the program beyond 90 days solely because of inability to pay the program fee, they remain subject to all of the program terms including prohibitions on alcohol use, leaving the county or the state, and taking any prescription medication without reporting it to TASC, plus the required urine screens. (Doc. 20 ¶ 118). Moreover, participants live in fear of the ultimate consequence of being terminated from the program, referred for felony prosecution, and sentenced to prison. While TASC argues that Plaintiffs **[*32]** have not been absolutely deprived of the ability to complete the program, Plaintiffs have indeed been absolutely deprived of the ability to complete the program in 90 days like other, wealthier participants solely because they are unable to pay the program fee. *See Walker, 901 F.3d at 1261-62* (district court was wrong to apply heightened scrutiny because pursuant to *Rodriguez* and the cases following it, "differential treatment by wealth is impermissible only where it results in a *total* deprivation of a benefit *because* of poverty[,]" and under the standing bail order, indigents suffered no absolute deprivation—"they must merely wait some appropriate amount of time to receive the same benefit as the more affluent.").

Defendants contend that the program fees are rationally related to a legitimate government interest because the state has an interest in having program participants, rather than taxpayers, fund the program. (Doc. 36 at 12). However, Plaintiffs' claim is not, as Defendants suggest, that the indigent are automatically entitled to fee waivers, or that the initial fee determination must consider the individual's financial status. (Doc. 36 at 13); *see Rodriguez, 169 F.3d at 1180* ("the Constitution only requires waiver of filing fees **[*33]** in a narrow category of cases where the litigant has a 'fundamental interest at stake.'" (quoting *M.L.B. v. S.L.J., 519 U.S. 102, 117 S. Ct. 555, 562, 136 L. Ed. 2d 473 (1996)*)). Rather, Plaintiffs are challenging the three specific policies about how the program fees are enforced against those who cannot afford to pay them. (Doc. 67 at 20). Plaintiffs admit that it would be rational for Defendants to create a payment plan and enforce it with civil debt-collection remedies if needed, but the challenged policy is not just a payment plan, it requires individuals to remain in the program and subject to all of its other terms and conditions.[7] *Id.* Plaintiffs do not object to a payment schedule; they object to the onerous conditions and extending the risk of prosecution. (Doc. 87 at 31).

Defendants further state that additional program interests include rehabilitation, holding the offender accountable, and relieving the burden on the judicial system. (Doc. 36 at 10). However, none of these proffered reasons explains why participants who are unable to

[7] At oral argument, counsel for Plaintiffs explained that you have to call TASC every day to see if you are required to report for a urine screen, and you can be tested up to four times a week, with a cost of $15-17 each time. (Doc. 87 at 23). "So actually in a perverse way, just because you're poor and you couldn't pay the fees for 90 days, you ultimately have to pay more to complete diversion than somebody who had the money to get off diversion faster." (Doc. 87 at 23:17-20).

pay the program fee within 90 days must stay on the program longer and to continue to abide by all of the program rules, rather than being allowed to complete all of the non-monetary program requirements and set up an extended **[*34]** payment plan until the fee is paid off.[8] And, as Plaintiffs note, "no rehabilitative or retributive interest is served by terminating people who, but for their poverty, would have successfully completed the program and avoided prosecution." (Doc. 67 at 21).

While the Court is not persuaded that there is a rational connection between the government's purpose and the means of effectuating that purpose, or that no adequate alternative measures exist, the Court need not make a definitive finding on these issues at this juncture. Plaintiffs have sufficiently pled a prima facie case of wealth discrimination based on the policies that subject participants who are unable to pay the program fee to a longer period of time in the MDPP and all of the conditions that come along with it, including the urine screenings and the required fees for those screenings, and the ultimate possibility of being failed from the program and referred for felony prosecution solely because they are unable to pay the fees within 90 days. *See Williams, 399 U.S. at 241-42* ("[o]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted **[*35]** defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency."); *see also Mueller v. State, 837 N.E.2d 198, 204 (Ind. Ct. App. 2005)* ("Completely foreclosing a benefit that the State offers to defendants . . . based solely on an inability to pay a fee or fine, violates the *Fourteenth Amendment* . . . the argument that the fees help offset the cost of running the pretrial diversion program is not sufficient to establish a rational basis for distinguishing between the indigent and those able to pay the fees."); *Moody v. State, 716 So.2d 562, 565 (Miss. 1998)* (citing *Bearden* and holding that "an indigent's equal protection rights are violated when all potential defendants are offered one way to avoid prosecution and that one way is to pay a fine, and there is no determination as to an individual's ability to pay such a fine . . . The automatic nature of the fine is what makes it discriminating to the poor, in that only the poor will face jail time."); *Jimenez, 111 N.M. at 784* (holding that under *Bearden*, "the state may terminate a diversion agreement, even if the sole ground is the defendant's nonwilful failure to make restitution, but only if there are no adequate alternatives to termination which will meet the state's legitimate penological interests.").

Further, while TASC contends that **[*36]** Plaintiffs' conclusory allegation of inability to pay is insufficient for an equal protection claim and that Plaintiffs must show that they made all reasonable efforts to pay but were unable to do so through no fault of their own, the Court rejects TASC's characterization of Plaintiffs' claims as "conclusory." Plaintiffs have pled their financial circumstances in sufficient detail[9] to support their claim that "because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit[]"—the opportunity to complete the program in 90 days like other,

[8] As Plaintiffs' counsel stated, "[j]ust because of the size of someone's pocketbook doesn't change what kind of rehabilitation you need." (Doc. 87 at 30:2-4).

[9] *See* FAC (Doc. 20 ¶¶ 31-36, 215-17, 240-45, 260-62, 271, 307-10, 342-43, 348, 359, 363, 377-81, 407, 409).

wealthier participants and thereby be free of the conditions required for staying on the program as well as the fear of being failed from the program, prosecuted, and jailed. *San Antonio Indep. Sch. Dist., 411 U.S. at 20*; *see also Bearden, 461 U.S. at 668* (distinguishing situations where the probationer has willfully refused to pay or has failed to make sufficient bona fide efforts to seek employment or borrow money—such situations "may reflect an insufficient concern for paying the debt" and the state is then "justified in revoking probation and using imprisonment as an appropriate [***37**] penalty for the offense.").

Finally, the Court finds the decision in *Walker, 901 F.3d 1245*, distinguishable. There, the Eleventh Circuit considered a standing bail order whereby arrestees were released immediately if they were able to post bail, but arrestees who did not post bail immediately were held for 48 hours until a bail hearing took place. Arrestees who could prove indigency at the hearing were released on a recognizance bond. The court found that the claim was properly analyzed under a hybrid due process and equal protection framework—while the *Eighth Amendment* prohibits excessive bail, plaintiff challenged "not the amount and conditions of bail *per se*, but the process by which those terms are set, which [plaintiff] alleges invidiously discriminate against the indigent." *Id. at 1258-60*. The court concluded that under the standing bail order, indigents suffered no absolute deprivation—"they must merely wait some appropriate amount of time to receive the same benefit as the more affluent." *Id. at 1261-62*. Here, like in *Walker*, Plaintiffs do not challenge the amount of the program fees per se, but the method of how the fees are collected. But unlike *Walker*, in the present matter Plaintiffs are not merely waiting "some appropriate amount [***38**] of time to receive the same benefit as the more affluent." The *Walker* court found that a 48-hour detention period was reasonable for those unable to immediately post bail, but here, Plaintiffs are required to spend double the amount of time or more on diversion simply because they are unable to pay. Extending an individual's time in the program by several months can hardly be considered appropriate even under the standard of rational basis review.

"The *sine qua non* of a *Bearden*-. . . style claim . . . is that the State is treating the indigent and the non-indigent categorically differently. Only someone who can show that the indigent are being treated systematically worse solely because of [their] lack of financial resources,—and not for some legitimate State interest—will be able to make out such a claim." *Walker, 901 F.3d at 1260* (internal quotations and citation omitted). The FAC makes sufficient allegations, if taken as true, to support such a claim.[10] *See Mueller, 837 N.E.2d at 205* ("The concept that our criminal justice system should be operated as far [*sic*] as reasonably possible without regard to a defendant's financial resources is axiomatic and beyond dispute. Allowing some defendants and not others to completely avoid prosecution [***39**] and a potential criminal conviction, based solely on

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[10] The parties also dispute whether rational basis review or some form of heightened scrutiny applies to Plaintiffs' claims. It is clear from this Court's review of the case law that the Court must apply *Bearden's* four factors to Plaintiffs' *Fourteenth Amendment* claims, and that the *Bearden* framework requires something more than traditional rational basis review. *See* ***MacFarlane, 179 F.3d at 1141*** (explaining that *Bearden* requires "heightened scrutiny" and that the *Bearden* factors must also be weighed); *Buffin, 2018 U.S. Dist. LEXIS 6853, 2018 WL 424362 at * 9* (applying "heightened review" to wealth-based detention challenge); *see also San Antonio Indep. Sch. Dist., 411 U.S. at 117* (Marshall, J., dissenting) (noting that the Supreme Court "has frequently recognized that discrimination on the basis of wealth may create a classification of a suspect character and thereby call for exacting judicial scrutiny.").

their respective abilities to pay certain fees, violates this fundamental principle."); *San Antonio Indep. Sch. Dist., 411 U.S. at 88-89* (Marshall, J., dissenting) ("It is, of course, true that the Constitution does not require precise equality in the treatment of all persons. . . . But this Court has never suggested that because some 'adequate' level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The *Equal Protection Clause* is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that all persons similarly circumstanced shall be treated alike." (internal quotations and citation omitted)); *see also MacFarlane, 179 F.3d at 1141* ("crucial factor" was that additional incarceration was caused solely by the petitioners' indigency).

b. *Fourth Amendment*

TASC argues that Plaintiffs' claims in Counts Four and Five regarding the urine screenings are solely a *Fourteenth Amendment* issue, not a *Fourth Amendment* issue, because Plaintiffs are not challenging the urine tests per se, but the process by which participants are able to complete the tests. (Doc. 36 at 15-16). Plaintiffs contend that they have stated **[*40]** a valid *Fourth Amendment* claim based on Defendants' policy that requires pay-only participants (who must remain in the program longer than 90 days) to continue to submit to urine screens. Plaintiffs allege this is a suspicionless search that only applies to the indigent because they are unable to pay the program fee.

"The touchstone of the *Fourth Amendment* is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights, 534 U.S. 112, 118-19, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001)* (internal quotations and citation omitted); *see also United States v. Scott, 450 F.3d 863, 867 (9th Cir. 2006)* ("Under modern *Fourth Amendment* jurisprudence, whether a search has occurred depends on whether a reasonable expectation of privacy has been violated."). "Usually, *Fourth Amendment* reasonableness means that a search or seizure must be supported by probable cause, though pat-downs and similar minor intrusions need only be supported by reasonable suspicion." *Scott, 450 F.3d at 868.* However, the court may "relax these requirements when special needs, beyond the need for normal law enforcement, make an insistence on the otherwise applicable level of suspicion impracticable." *Id.* (internal quotations and **[*41]** citations omitted).

In *Scott, 450 F.3d 863*, the court considered whether warrantless searches, including drug testing, imposed as a condition of pretrial release, required a showing of probable cause, despite the defendant's consent to the search conditions when he signed the pretrial release form. The court noted that "[w]hile government may sometimes condition benefits on waiver of *Fourth Amendment* rights . . . its power to do so is not unlimited." *Id. at 867-68.* Thus, "Scott's consent to any search is only valid if the search in question (taking the fact of consent into account) was reasonable." *Id. at 868*; *but see Knights, 534 U.S. at 119* ("a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens). The *Scott* court rejected the government's argument that the drug tests were justified by special needs: (1) protecting the community from criminal defendants released pending trial, and (2)

ensuring the defendants appeared at trial. *450 F.3d at 869.* As to protecting the community, the court found this was the exact opposite of a special need because the government interest in preventing crime by anyone is legitimate and compelling and is a quintessential general law enforcement purpose. *Id. at 870.* While the court **[*42]** found the second reason—ensuring appearance at trial—more persuasive, the court still found that "the connection between the object of the test (drug use) and the harm to be avoided (non-appearance in court) [was] tenuous." *Id.* The court further found that the search was not reasonable under the totality of the circumstances approach: pretrial releasees have greater privacy and liberty interests than probationers, and "the assumption that Scott was more likely to commit crimes than other members of the public, without an individualized determination to that effect, is contradicted by the presumption of innocence[.]" *Id. at 872-74*; *contra Knights, 534 U.S. at 120* ("the very assumption of the institution of probation is that the probationer is more likely than the ordinary citizen to violate the law" (internal quotations and citation omitted)). The court thus concluded that because there was no probable cause to test Scott for drugs, the drug test violated the *Fourth Amendment*. *Scott, 450 F.3d at 874*; *contra Knights, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497* (holding that a warrantless search of a probationer's apartment, supported by reasonable suspicion and that the probationer consented to as a condition of his probation, was reasonable under the *Fourth Amendment* based on the totality of the circumstances).

Here, TASC argues **[*43]** that the government's interests in reducing recidivism, rehabilitation, protecting society, and ensuring that program participants are clean from drugs and alcohol at the time they complete the program outweighs Plaintiffs' privacy interests. Plaintiffs counter that there is no legitimate government interest because Defendants have determined that the government interests in punishment, deterrence, and recidivism can be met by successfully completing the program in 90 days, and the only reason Plaintiffs were required to stay on the program beyond 90 days and submit to additional urine screenings was due to their inability to pay the program fees. TASC alternatively argues that Plaintiffs' consent made the searches permissible, but as Plaintiffs note, consent is not the only factor because the Court must also consider whether the consent was voluntary and whether the condition being consented to was constitutional. *See Scott, 450 F.3d at 866* ("The 'unconstitutional conditions' doctrine limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary." (citation omitted)) and 871 ("Scott's assent to his release conditions does not by **[*44]** itself make an otherwise unreasonable search reasonable."). The Court finds that these are issues of factual dispute that cannot be resolved at this time. Plaintiffs have adequately pled a claim under the *Fourth Amendment* sufficient to survive Defendants' motion to dismiss. Discovery will reveal evidence that will enable the finder of fact to determine whether the government's interest does outweigh the Plaintiffs' privacy interests, whether the special needs exception applies, and whether Plaintiffs' consent to the urine screens as part of the MDPP's terms made the searches permissible.

c. *Statute of limitations*

TASC argues that Plaintiff Briggs' claims are barred for the reasons set forth in the County Defendants' motion to dismiss. The Court will address this argument in Section B(iii) below.

v. *Rule 8*

Finally, TASC argues that if the Court does not dismiss Plaintiffs' claim(s) pursuant to *Rule 12(b)(6)*, Plaintiffs should be required to amend and streamline their complaint to comply with *Rule 8(a)* and *(d)(1)*. TASC contends that the 480-paragraph, 53-page complaint is "verbose, confusing, contains numerous irrelevant facts . . . citations to news articles . . . and references to an unrelated contract" and that "it is unclear which allegations **[*45]** in the FAC Plaintiffs deem relevant to their claims because each alleged cause of action simply contains conclusory allegations of violations of Plaintiffs' constitutional rights . . ." (Doc. 36 at 20-21). Plaintiffs contend that they have explained the challenged policies in detail (Doc. 20 ¶¶ 120-34, 135-52), that each count specifies the challenged policy that harmed the plaintiff and what relief is sought (*Id.* at ¶¶ 445-80), and that the information Defendants challenge provides background on the policies (*Id.* at ¶¶ 56-61), offers sources for allegations (*Id.* at n.3-6), and explains the relationship between MCAO and TASC (*Id.* at ¶¶ 175-177).

A complaint must contain a "short and plain statement of the grounds for the court's jurisdiction," a "short and plain statement of the claim showing that the pleader is entitled to relief," and "a demand for the relief sought . . ." *Fed. R. Civ. P. 8(a)*; *Johnson v. City of Shelby, Miss., 574 U.S. 10, 135 S. Ct. 346, 346, 190 L. Ed. 2d 309 (2014)* ("Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,' . . . they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted."); *McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996)* (the complaint must set forth "who is being sued, for **[*46]** what relief, under what theory, with enough detail to guide discovery"). "[A] dismissal for a violation under *Rule 8(a)(2)*, is usually confined to instances in which the complaint is so verbose, confused and redundant that its true substance, if any, is well disguised." *Hearns v. San Bernardino Police Dep't, 530 F.3d 1124, 1131 (9th Cir. 2008)* (internal quotations and citations omitted).

The Court declines to require Plaintiffs to amend their complaint. While the FAC is lengthy and includes some extraneous background information that is not material to the claims for relief, the Court will allow this action to proceed forward on the FAC. *See Hearns, 530 F.3d at 1127* (district court abused its discretion by dismissing FAC with prejudice solely because of its length; "although each [complaint] set forth excessively detailed factual allegations, they were coherent, well-organized, and stated legally viable claims"); *contra McHenry v. Renne, 84 F.3d 1172, 1177-78 (9th Cir. 1996)* (affirming district court's dismissal of complaint with prejudice where complaint was "argumentative, prolix, replete with redundancy, and largely irrelevant," consisted "largely of immaterial background information," and "Despite all the pages, requiring a great deal of time for perusal, one cannot determine from the complaint who is being sued, for what relief, and on what **[*47]** theory, with enough detail to guide discovery."); *Nevijel v. N. Coast Life Ins. Co., 651 F.2d 671, 674 (9th Cir. 1981)* (affirming district court's dismissal where complaint was "verbose, confusing and conclusory"). Here, despite its length, "[t]he [FAC] is logically organized, divided into a description of the parties, a chronological factual background, and a presentation of enumerated legal claims, each of which lists the liable Defendants and legal basis therefor." *Hearns, 530 F.3d at 1132*.

While it does contain some "excessive detail", the FAC is "intelligible and clearly delineate[s] the claims and the Defendants against whom the claims are made." *Id.*

Further, the Court's Notice to the Parties of the MIDP project and General Order 17-08 states that the parties are required to provide "information as to facts that are relevant to the claims and defenses in the case," and also allows a party to limit its response as long as the party explains the basis of the objection. (Doc. 5 at 4). General Order 17-08 also specifies exactly what information must be provided in the mandatory initial discovery requests, including documents "that you believe may be relevant to any party's claims or defenses," and requires the parties to state the relevant facts and legal theories supporting **[*48]** their claims and defenses. *Id.* at 7-8. Given these provisions, it should be clear to all parties what information must be disclosed, and exchanging MIDP responses will help clarify the facts and legal theories supporting each party's claims and defenses, to the extent that those may be unclear.

B. Defendants Maricopa County and Maricopa County Attorney William Montgomery's Motion to Dismiss

i. *Monell* Claims

Defendants first argue that Plaintiffs' § 1983 *Monell* claims fail because the County Attorney acts on behalf of the State, not the County, when he establishes and implements the MDPP. (Doc. 34 at 12). Thus, Defendants argue that Plaintiffs' claims against Maricopa County and the CA in his official capacity[11] fail as a matter of law and must be dismissed with prejudice. *Id.* at 13.

"To hold a local government liable for an official's conduct, a plaintiff must first establish that the official (1) had final policymaking authority 'concerning the action alleged to have caused the particular constitutional or statutory violation at issue' and (2) was the policymaker for the local governing body for the purposes of the particular act." *Weiner v. San Diego Cty., 210 F.3d 1025, 1028 (9th Cir. 2000)* (quoting *McMillian v. Monroe Cty., Ala., 520 U.S. 781, 785, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997)*).

a. Whether the CA acts for the state or the local government **[*49]**

"'Ordinarily, an official designated as an official of a county . . . is a county official for all purposes.'" *Platt, 2018 U.S. Dist. LEXIS 43544, 2018 WL 2058136, at *17* (quoting *Ceballos, 361 F.3d at 1182*). "Under Arizona law, a county attorney is an officer of the county." *Id.* (citing *Ariz. Rev. Stat. § 11-401*). "However, some county officials may serve the county and the state." *Id.* "In this situation, the court determines whether the officer is a state or county official by reviewing state law to determine whether the officer's alleged actions fit within the range of his state or county functions." *Id.*[12]

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[11] "[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent[.]" *Monell, 436 U.S. at 691 n.55*; *see also McMillian, 520 U.S. at 785 n.2* ("a suit against a governmental officer in his official capacity is the same as a suit against [the] entity of which [the] officer is an agent" and "victory in such an official-capacity suit imposes liability on the entity that [the officer] represents" (internal quotations and citations omitted)).

[12] In *Platt*, the court found that the defendant acted for the state when he pursued uncontested forfeiture of plaintiff's car, and therefore the county was not liable under *Monell* for the officer's actions. The court based this conclusion on Arizona statutes: *A.R.S. § 11-532* (county attorneys conduct prosecutions on behalf of the state); *§ 13-4301(1)* ("attorney for the state" is defined as "an attorney designated by . . . a county attorney . . . to investigate, commence, and prosecute" a forfeiture action); and ***§ 13-4309*** (attorney for the state

In *McMillian*, the parties agreed that the sheriff had final policy making authority in the area of law enforcement, but disputed whether the sheriff was a policymaker for the county or for the state when acting in a law enforcement capacity. *520 U.S. at 785*. The Court explained that this inquiry is guided by two principles: First, the question is not whether the official acted for the state or the county "in some categorical, 'all or nothing' manner[; o]ur cases . . . instruct us to ask whether government officials are the final policymakers for the local government in a particular area, or on a particular issue." *Id.* "Second, our inquiry is dependent on an analysis of state law." *Id. at 786*.

Thus, in the **[*50]** present matter, "Maricopa County's liability on [Plaintiffs' claims] turns on whether the Maricopa County Attorney was acting 'as a policymaker for the state or for the county' when engaging in the culpable action or inaction." *Milke, 2016 U.S. Dist. LEXIS 171649, 2016 WL 5339693 at *16* (quoting *Goldstein v. City of Long Beach, 715 F.3d 750, 753 (9th Cir. 2013)*); *see also Platt, 2018 U.S. Dist. LEXIS 43544, 2018 WL 2058136, at *17*. "'This determination is made on a function-by-function approach by analyzing under state law the organizational structure and control over the district attorney.'" *Id.* (quoting *Goldstein, 715 F.3d at 753*). "The precise level of control, however, is not dispositive as the determination turns on whether the county attorney 'was acting *on behalf of* the state or the county' when setting the harmful policy." *Id.* (quoting *Goldstein, 715 F.3d at 755*).

The parties vigorously dispute whether the CA was acting on behalf of the state or the county for purposes of the challenged policies. The District of Arizona's decision in *Milke* is instructive:

> Both the Arizona Constitution and Arizona statute describe county attorneys as county officers. *Ariz. Const. art. XII, § 3*; *A.R.S. § 11-401*. County attorneys are elected by the voters of each county and county attorneys must reside in the county where they are elected. *Ariz. Const. art. XII, § 3*; *A.R.S. § 11-404*. County attorneys' salaries are fixed by the county boards of supervisors. *Ariz. Const. art XII, § 4*. And the boards of supervisors are responsible for **[*51]** "[s]upervising] the official conduct" of county attorneys. *A.R.S. § 11-251*. These "structural provisions provide a helpful starting point" indicating county attorneys are local officials but these provisions are not enough on their own. *Goldstein, 715 F.3d at 755*. The Court must also conduct a "functional inquiry" regarding actual job duties and identify who exercises control over county attorneys. *Id.*
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> In Arizona, a county attorney is responsible for the appointment of "deputies, stenographers, clerks and assistants necessary to conduct the affairs of" the county attorney's office. *A.R.S. § 11-409*. The county board of supervisors must approve all appointments and the board sets the appointees' salaries. *Id.* As for fiscal matters, a county attorney must "[d]eliver receipts" to the board of supervisors "for monies or property received in the county attorney's official capacity." *A.R.S. 11-532*. A county attorney also acts as a "legal advisor to the board of supervisors" as well as the attorney for school districts and the community college district. *Id.* Arizona counties also have a policy of indemnifying county officers and employees. (Doc. 46 at 20). In terms of prosecutions, a county

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may make uncontested forfeiture proceedings available).

attorney must "[a]ttend the superior and other courts within the county [***52**] and conduct, *on behalf of the state*, all prosecutions for public offenses." A.R.S. § 11-532 (emphasis added). Thus, in most situations a county attorney appears to be acting as a local official, reporting to a local board of supervisors and subject to control by the local board of supervisors. A county attorney is, however, explicitly identified as acting on behalf of the state when prosecuting crimes.

A county attorney is also subject to a limited degree of control by the Arizona Attorney General. The Arizona Attorney General serves as the "chief legal officer of the state" and has "charge of and direct[s] the department of law." A.R.S. § 41-192. The "department of law" is "composed of the attorney general and the subdivisions of the department" created by law. A.R.S. § 41-193. The department of law is responsible for prosecuting and defending "in the supreme court all proceedings in which the state or an officer thereof in his official capacity is a party." *Id.* In addition, "[a]t the direction of the governor, or when deemed necessary by the attorney general," the department of law must "prosecute and defend any proceeding in a state court other than the supreme court in which the state or an officer thereof is a party or has [***53**] an interest." *Id.* While the department of law "[e]xercise[s] supervisory powers over county attorneys of the several counties in matters pertaining to that office," the Attorney General can only "require reports [from county attorneys] relating to the public business" of their offices. *Id.* In other words, neither the Attorney General nor the department of law has day-to-day control over the operation of county attorneys' offices.

*Milke, 2016 U.S. Dist. LEXIS 171649, 2016 WL 5339693 at *16-17*; *see also Puente Arizona, 2016 U.S. Dist. LEXIS 162578, 2016 WL 6873294 at *24* (noting Arizona law provisions indicating generally that CA is an officer of the county, but that *Ariz. Rev. Stat. § 11-532* "provides a clear answer" that CA conducts prosecutions on behalf of the state). In *Milke* the District of Arizona further noted that,

> Viewed as a whole, the foregoing situation is very similar to that presented under California law as explored in *Goldstein v. City of Long Beach, 715 F.3d 750 (9th Cir. 2013)*. In California, the Attorney General has "direct supervision over every district attorney" but that was deemed evidence of only a "limited" amount of control. *Id. at 756*. The California Attorney General is "limited to requiring a district attorney to make reports," which is "far short of a power to dictate policy to district attorneys statewide." *Id.* In addition, the California "Attorney General is not given the power [***54**] to force a district attorney to act or adopt a particular policy, but instead may step in and prosecute any violations of law himself or herself." *Id. at 757*. Finally, California law requires counties, not the state, "defend and indemnify the district attorney in an action for damages." *Id. at 758*. Based on all of these provisions, the Ninth Circuit concluded a California "district attorney acts on behalf of the state when conducting prosecutions," but a district attorney "represents the county when establishing administrative policies and training related to the general operation of the district attorney's office." *Id. at 759-60*.

Milke, 2016 U.S. Dist. LEXIS 171649, 2016 WL

5339693 at *17. Thus, in *Milke* we concluded that "[b]ased on the substance of Arizona law, and the similarities between the situation in Arizona and California, the Maricopa County Attorney is a local policymaker when it comes to administrative policies such as direct supervision of other prosecutors and official policies." *Id.* Therefore, "[b]ecause Milke's *Monell* claim [was] based on such administrative policies . . . the Maricopa County Attorney can be sued in his capacity as a local policymaker for Maricopa County." *Id.*

Here, Defendants argue that under Arizona law, the CA acts for the state when he **[*55]** prosecutes offenders for felony possession of marijuana, and that state laws authorizing the establishment and implementation of the MDPP depend upon the CA's role as a prosecutor for the state. (Doc. 34 at 13-14). Specifically, the CA decides whether (a) there will be a MDPP, (b) an offender is eligible for the MDPP program, (c) an offender is offered participation in the MDPP, and (d) an offender has completed or failed the program. *Id.* at 14. Defendants contend that "[b]ecause these prosecutorial decisions and actions effectuate the disposition of justiciable criminal charges per § 13-3405 against eligible offenders, they fall entirely within the prosecutorial function of the County Attorney." (Doc. 34 at 14).

While there is no doubt that the CA acts for the state when conducting prosecutions, it does not follow that the CA also acts for the state when he exercises his policymaking authority to establish and implement deferred prosecution programs, or when he set the specific policies at issue in this suit.[13] The difference turns on whether the CA is performing a prosecutorial function or an administrative function. As the court noted in *Goldstein*, "[t]here can be a 'meaningful analytical distinction' **[*56]** between policies and training relating to prosecutorial functions and an index made and maintained as an administrative matter." 715 F.3d at 762 (challenge focused on failure to create index of informants, their reliability, and benefits provided to them, and failure to train prosecutors to use index). Here, like in *Goldstein*, "the local administrative policies challenged by [Plaintiffs] are distinct from the prosecutorial act" and "[t]he conduct at issue . . . does not involve prosecutorial strategy, but rather administrative oversight of systems used to help prosecutors comply with their constitutional duties." 715 F.3d at 759, 762. Stated another way, the issue in this suit is not the CA's decision whether to prosecute an individual for possession of marijuana or refer him or her to the MDPP, but his role in establishing and implementing the MDPP and its allegedly discriminatory policies. As the court noted in *Goldstein*, "several circuits have come to the same conclusion that we reach here, that district attorneys act as county officers when deciding administrative policy and procedures related to training or supervision, even though they act as state officers when conducting prosecutions." 715 F.3d at 765 (Reinhardt, J., concurring) **[*57]** (collecting cases); *see also* Weiner, 210 F.3d at 1031 (finding that under California law, district attorney acts for the state when deciding whether to prosecute, but also noting that district attorney is not a state officer for all purposes); Del Campo v. Kennedy, 491 F. Supp. 2d 891, 899 (N.D. Cal. Dec. 5, 2006) ("The role of the prosecutor encompasses all actions in relation to preparing to prosecute, prosecuting crimes and establishing policy and training employees in this area." (internal

[13] While A.R.S. § 11-365 states that the CA has sole discretion to decide whether to divert or defer prosecution of an offender, which arguably implicates the CA's role as a prosecutor for the state, this case is not about a prosecutorial discretion function.

quotations and citation omitted)).

In *Del Campo*, the court concluded that the district attorney acted as a local policymaker when contracting with a private organization to administrate a bad check writers diversion program. The court looked to the diversion program statutes and noted several important factors in reaching this conclusion: Under California law, the decision to implement diversion programs is left "to the county board of supervisors, conditioned on the approval of the district attorney, in order to meet the individual needs of each county." *491 F. Supp. 2d at 899-900*. And, "[t]he purpose of conditioning the program's implementation on the district attorney's approval was to allow the district attorney to retain discretionary power over eligibility requirements, not to couch the entire program within **[*58]** the district attorney's prosecutorial power." *Id. at 900*. Thus, "[t]he history of the statutory scheme leads the Court to conclude that the legislature had no intention of implementing a state-wide diversion program. Instead, the legislature reinforced the local aspect of the diversion program . . ." *Id.* The court found that the district attorney's decisions to contract with a private entity, structure the distribution of work, and run the program were "purely administrative decisions that have no connection to the District Attorney's role as a prosecutor." *Id.* Thus, the alleged factual basis for the lawsuit was not connected to the district attorney's prosecutorial function. *Id.*

Here, like in *Del Campo*, the decision whether to implement a diversion program is left to the local county. *See A.R.S. § 11-361* (A "deferred prosecution program" is defined as "a special supervision program in which *the county attorney of a participating county* may divert or defer, before a guilty plea or a trial, the prosecution of a person who is accused of committing a crime . . ." (emphasis added)); *A.R.S. § 11-362(A)* (The program "*shall be administered by the county attorney of each participating county* according to the guidelines established by **[*59]** the Arizona prosecuting attorneys' advisory council." (emphasis added)); *see also A.R.S. § 11-363* (allowing counties, in their discretion, to establish a county attorney deferred prosecution fund). Had the Arizona legislature wanted to implement a state-wide program, it certainly could have, but it did not. Further, also like *Del Campo*, the decisions at issue here—the CA's decision to contract with a private entity (TASC), structure the distribution of work, and run the program, including setting and enforcing its policies—are all "purely administrative decisions that have no connection" with the CA's role as a prosecutor.[14]

Defendants also argue that "[b]y requiring county attorneys to follow the APAAC Deferred Prosecution Guidelines, the Legislature intended to impose statewide minimum standards for 'the conduct of any deferred prosecution program as defined by *A.R.S. § 11-361* within the State of Arizona.'" (Doc. 34 at 14). However, the state does not

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[14] The cases Defendants rely on to compel the opposite conclusion are out of circuit decisions not binding on this Court. *See Davis v. Grusemeyer, 996 F.2d 617, 629 (3d Cir. 1993)* (finding oversight of bad check restitution program "is by definition intimately related to [DA's] prosecutorial powers, as it concerns who the district attorney will and will not bring criminal charges against."); *Shouse v. Nat'l Corrective Grp., Inc., 2010 U.S. Dist. LEXIS 126108, 2010 WL 4942222, at *6 (M.D. Pa. Nov. 30, 2010)* (court noted that the Third Circuit uses a "functional approach" to determine whether a prosecutor is entitled to absolute immunity for conduct associated with the judicial phase of the criminal process, or qualified immunity for the prosecutor's administrative or investigative roles; but court did not undertake the kind of detailed analysis required by the Ninth Circuit in examining state statutes to determine the state or local nature of the precise function at issue).

actually supervise deferred prosecution programs or the county attorneys' administration of those programs. While the CA is required to provide reports on the MDPP to the Arizona legislature, *see* A.R.S. § 11-362(B), here, as the courts noted in *Milke* and *Goldstein*, this reporting **[*60]** requirement merely reflects a general state oversight, not actual state control or supervision of the day-to-day operations of the CA's office or the MDPP.[15] And, as Plaintiffs note, the APAAC guidelines only provide suggestions about the program's content; "a merely advisory set of guidelines and an obligation to report to the state what the county decides to do in its discretion do not covert county policy into state policy." (Doc. 45 at 5-6; 14).[16]

All of this shows that it is within each county's discretion whether to establish a deferred prosecution program. And while the CA must maintain records and submit reports to the state, and follow APAAC guidelines in establishing a program, there is no direct state involvement in establishing, administering, or otherwise operating a deferred prosecution program. To the contrary, the statutes specifically state that only on request of the CA, APAAC may provide technical assistance to develop or refine the program. A.R.S. § 11-362(C). Taken all together, the statutes show an intent by the state legislature that deferred prosecution programs are local programs, that it is up to each county/CA to determine whether to have such a program and how the program will **[*61]** be established and administered, and that the state has only general oversight over the programs of the counties that decide to participate. In sum, the Court rejects the County Defendants' argument that Plaintiffs' claims are predicated upon the CA's function as a prosecutor on behalf of the state. The Court finds that Plaintiffs' claims are specific to the CA's administrative role, acting on behalf of Maricopa County, in developing, implementing, authorizing, or otherwise adopting the three policies that Plaintiffs challenge. Plaintiffs' damages claims are not based on the CA's decision to refer individuals to the MDPP, or on his decision to prosecute participants who are terminated from the MDPP. Thus, the Court concludes that that CA acts as a local policymaker for purposes of the challenged conduct in this suit.

b. Policymaking authority

As explained above, pursuant to § 1983 and *Monell*, "a local government may be liable for constitutional torts committed by its officials according to municipal policy, practice, or custom." *Weiner, 210 F.3d at 1028*. "'[A] policy is a deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing **[*62]** final policy with respect to the subject matter in question.'" *Puente Arizona, 2016 U.S. Dist. LEXIS 162578, 2016 WL 6873294 at *23* (quoting *Chew v. Gates, 27 F.3d 1432, 1444 (9th Cir. 1994)*). "These policies may be set by the government's lawmakers, 'or by those whose edicts or acts may fairly be said to represent official policy.'" *McMillian, 520 U.S. at 784-85* (quoting *Monell, 436 U.S. at 694*).

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[15] For example, the APAAC guidelines section entitled "Mandated Reporting" states that each county attorney operating a program will maintain statistics on the number of enrollees, number of persons who successfully complete the program, and number of persons who were enrolled and who were subsequently convicted of a felony, and provide this information to APAAC each year.

[16] For example, the guidelines state that they are intended to provide minimum standards and that they do not prevent individual prosecutors from adding provisions. Section B is entitled "Suggested Program Content" and notes that every effort should be made to include the suggested components, within the discretion of the prosecutor.

Here, Defendants appear to argue that Maricopa County lacks policymaking authority concerning the MDPP: "the FAC does not allege any specific facts showing that the County engaged in any decision-making or actions to establish, administer, control, fund, or supervise the MDPP or the decisions and actions of the County Attorney and his prosecutors. Thus, the FAC lacks any allegations that the County Attorney's policies, practices, and customs undertaken in connection with the MDPP are subject to § 1983 *Monell* liability. Instead, the FAC's allegations point only to decisions and actions undertaken by the County Attorney and his prosecutors in their capacity as prosecutors on behalf of the State." (Doc. 34 at 17).[17] The Court rejects this argument. As explained above, the Court finds that the CA acts for the county, not the state, in administering the MDPP program. Second, the FAC names the CA as a defendant in his official capacity, which is in essence a suit against **[*63]** the County. Plaintiffs allege that the CA acts on behalf of and is the final policymaker for the County with respect to the MDPP, (Doc. 20 at ¶ 45, n.7), and Defendants admit that the CA is the MDPP's relevant policymaker (Doc. 34 at 13). Plaintiffs further allege that the County is liable for the CA's administration of the program and of TASC's administration and supervision of participants in the program. (Doc. 20 ¶ 46; Doc. 45 at 9).[18]

The Court also looks to the January 27, 2009 Memorandum of Understanding Between Maricopa County Attorney and TASC ("MOU") to guide its analysis on this issue. The MOU appears to use the terms "county attorney" and "MCAO" interchangeably. While the document is entitled MOU between "Maricopa County Attorney" and is signed by former CA Andrew Thomas, the first line of the document states that "The Maricopa County

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[17] Defendants' argument in their motion is not so much about policymaking authority of the County or the CA, but that the board of supervisors has not taken any action regarding the MDPP. (Doc. 34 at 17). Defendants cite A.R.S. § 11-201(A) for the proposition that the powers of the county may only be exercised by the board of supervisors. However, the full sentence of the statute specifically states that "[t]he powers of a county shall be exercised only by the board of supervisors *or by agents and officers acting under its authority and authority of law*." (emphasis added). The CA is clearly an agent or officer of the county. *See* A.R.S. § 11-532 (the county attorney is the public prosecutor of the county).

[18] Plaintiffs further state that the evidence they have gathered thus far suggests that Maricopa County has delegated its policymaking authority for the MDPP to the CA, and either directly or through the CA, to TASC as well. (Doc. 45 at 9 n.9). As to Plaintiffs' argument that the County is liable for TASC's administration and supervision of MDPP participants, Plaintiffs state that the Court need not reach the issue if it determines that Maricopa County is liable for the CA's unlawful administration of the program. (Doc. 45 at 21-22); *see* Lemmons v. Cty. of Sonoma, 2018 U.S. Dist. LEXIS 7526, 2018 WL 452108, *3 (N.D. Cal. Jan. 17, 2018) ("By ceding control and final decision making to [private entity] as it relates to providing adequate healthcare to prisoners, [private entity's] policies effectively become the policies of Sonoma County" and county can be liable for constitutional injuries); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 705 n.9 (11th Cir. 1985) (county was liable for any constitutional deprivations caused by policies or customs of private entity that county contracted with to provide medical services in county jail; "where a governmental entity delegates the final authority to make decisions then those decisions necessarily represent official policy."); Herrera v. Cty. of Santa Fe, 213 F. Supp. 2d 1288, 1292 (D. N.M. July 16, 2002) (where county contracted with private company to manage and operate detention center, county delegated final policy-making authority to private entity and any custom or policy of entity with respect to operation of detention center constitutes a policy of the county for purposes of § 1983 liability).

Here, Plaintiffs argue that the County is responsible for establishing the MDPP and has authorized TASC to design and run the day-to-day operations of the program; the County is therefore liable for any custom or policy established by TASC in the course of that operation. (Doc. 45 at 22). Plaintiffs state that "[d]iscovery will allow Plaintiffs and this Court to determine which policies the County is responsible for based on its delegation of policymaking authority to Montgomery and TASC and/or its acquiescence in their unconstitutional practices." (Doc. 45 at 23) (footnote omitted). The Court agrees. While Plaintiffs make a number of allegations in the FAC, as the pleadings make clear, this case involves many disputed issues of fact that the Court cannot resolve at this juncture and that require discovery.

Attorney's Office ("MCAO"), and TASC, Inc., ("TASC") entered into a Memorandum of Understanding effective 16 April 1990 to clarify and set forth initial guidelines for the implementation of the Maricopa County Attorney/TASC Adult Deferred Prosecution Program ("ADPP") **[*64]** for first time felony drug offenders." The very next line states that "MCAO and TASC agree that the 1990 MoU should be replaced with this Memorandum of Understanding . . . to reflect the current understanding and practice[.]" The remainder of the document refers to the CA, the County Attorney's Office, and the MCAO. While Defendants offer this document as evidence of Maricopa County's lack of involvement in the MDPP, this is a distinction without a difference. For all intents and purposes, Maricopa County and the MCAO are essentially the same thing when it comes to entity liability, as is a claim against the CA in his official capacity.[19]

Further, the substance of the MOU makes clear that the CA/MCAO worked jointly with TASC to "create a structured program" and "hold the offender accountable." The MOU states, among other terms, that "TASC's operation of the ADPP has successfully implemented the County Attorney's objectives"; that "TASC through the County Attorney Submittal Form ("submittal") will report to MCAO the status of each offender's participation and/or compliance with ADPP requirements"; "The County Attorney will receive a submittal from TASC documenting the successful completion"; **[*65]** "Documentation of all areas of non-compliance will be sent to the County Attorney's Office"; "Documentation of all program failures will be sent to the County Attorney"; "TASC agrees to provide MCAO with a report showing program success rates"; and "TASC will arrange a payment plan with the defendant and collect payments on behalf of MCAO . . . TASC will send the County Attorney a list of those defendants who have paid along with a check for the collected amount."

In sum, based on the pleadings and this Court's reading of the MOU, the Court finds that the FAC has adequately pled policymaking authority by the county sufficient to survive the motion to dismiss.

ii. *Eleventh Amendment* Sovereign Immunity

Defendants next argue that because the CA acts on behalf of the State in establishing and implementing the MDPP, *Eleventh Amendment* sovereign immunity bars Plaintiffs from recovering damages against the State or a State official in his official capacity. (Doc. 34 at 19).

Because the Court finds that the CA acts on behalf of the county in establishing and implementing the MDPP and the specific policies at issue in this suit, this argument is moot. *See Eason v. Clark Cty. Sch. Dist., 303 F.3d 1137, 1141 (9th Cir. 2002)* ("the *Eleventh Amendment* does not extend to counties and municipal corporations"); *Del Campo v. Kennedy, 491 F.Supp.2d 891 (N.D. Cal. Dec. 5, 2006)* (district **[*66]** attorney acts as county policymaker in implementing certain aspects of misdemeanor diversion program for bad check writers and thus is not a state actor entitled to *Eleventh Amendment* immunity).

iii. Statute of Limitations

Finally, Defendants argue that Arizona's two-

[19] This is made clear in the Behavior Specific Adult Diversion Program Contract that Plaintiffs attach to their Response. Although not the contract governing the MDPP, Plaintiffs offer this as evidence of what they believe may be a similar contract existing that does govern the MDPP. The behavior contract states that it is entered into and between "Maricopa County ("County"), a political subdivision of the State of Arizona, through the Maricopa County Attorney's Office ("MCAO"), and TASC[.]"

year statute of limitations bars Plaintiff Briggs' claims. (Doc. 34 at 23).

"The defendant . . . bears the burden of proof as to each element of a statute of limitations based affirmative defense." *Lopez v. Bans, 2016 U.S. Dist. LEXIS 160533, 2016 WL 6821860, *3 (E.D. Cal. Nov. 18, 2016)*. The Court may dismiss a claim as untimely under *Rule 12(b)(6)* "when the running of the statute of limitations is apparent on the face of the complaint." *Id.* (internal quotations and citation omitted).

"Actions brought pursuant to *42 U.S.C. § 1983* are governed by the forum state's statute of limitations for personal injury actions." *Knox v. Davis, 260 F.3d 1009, 1012 (9th Cir. 2001)*. "In Arizona, the courts apply a two-year statute of limitations to *§ 1983* claims." *TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999)*. "'Although state law determines the length of the limitations period, federal law determines when a civil rights claim accrues.'" *Knox, 260 F.3d at 1013* (quoting *Morales v. City of Los Angeles, 214 F.3d 1151, 1153-54 (9th Cir. 2000)*). "Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *TwoRivers, 174 F.3d at 991*. "Once a claim accrues, the limitations period begins to run, and any suits filed outside the **[*67]** limitations period will be time barred." *Lopez, 2016 U.S. Dist. LEXIS 160533, 2016 WL 6821860 at *3*.

"The continuing violations doctrine extends the accrual of a claim if a continuing system of discrimination violates an individual's rights up to a point in time that falls within the applicable limitations period." *Douglas v. Cal. Dept. of Youth Authority, 271 F.3d 812, 822 (9th Cir. 2001)*. In *Gutowsky v. County of Placer, 108 F.3d 256, 259 (9th Cir. 1997)*, the court held that the continuing violations theory applies to *§ 1983* actions. The court noted that a *Monell § 1983* municipal liability claim must allege "'execution of a government's policy or custom . . . [that] inflicts the injury.'" *Id.* (quoting *Monell, 436 U.S. at 694*). Thus, "[i]f the continuing violations doctrine were inapplicable to *Monell* actions, it is difficult to ascertain exactly when such claims would accrue[.]" *Id.*

> [There are] two methods by which a plaintiff may establish a continuing violation. First, the plaintiff may show a serial violation by pointing to a series of related acts against one individual, of which at least one falls within the relevant period of limitations . . . Second, a plaintiff may show a systematic policy or practice of discrimination that operated, in part, within the limitations period—a systematic violation.

Douglas, 271 F.3d at 822 (internal quotations and citations omitted); *see also Gutowsky, 108 F.3d at 259* ("a continuing violation may be established through **[*68]** a series of related acts against one individual, or by a systematic policy or practice of discrimination"; court found plaintiff's "papers were replete with evidence of an ongoing practice and policy that denied [employment advancement] opportunity to women"). Further, for a systemic violation claim, "if both discrimination and injury are ongoing, the limitations clock does not begin to tick until the invidious conduct ends." *Douglas, 271 F.3d at 822* (quotations and citation omitted). "However, . . . a mere continuing *impact* from past violations is not actionable." *Knox, 260 F.3d at 1013* (internal quotations and citations omitted) (finding continuing violation theory did not apply where plaintiff received permanent and complete suspension letter withdrawing her legal mail and visitation privileges; plaintiff failed to establish that a

new violation occurred each time she was denied visitation or mail privileges, and subsequent denials were merely continuing effect of original suspension); *see also* *Shannon v. Babb, 103 F. App'x 201 (9th Cir. 2004)*; *Poole v. City of Los Angeles, 41 F. App'x 60 (9th Cir. 2002)*.

Plaintiffs filed their original complaint on August 23, 2018. (Doc. 1). Briggs took his final urine test on August 23, 2016 and completed the program on August 25, 2016. (Doc. 45 at 25).

Defendants argue that Briggs' "latest plausible **[*69]** accrual date is August 8, 2016, when Briggs knew or had reason to know of his injury stemming from his inability to pay at the time of his first of fifteen urinalysis tests occurring beyond the initial 90 days of the program." (Doc. 34 at 23-24) (citation omitted). Thus, Defendants conclude that, "[w]orking backwards from Briggs' last test on August 23, 2016, accrual occurred at the latest on August 8, 2016 if Briggs was subject to one test each day for the fifteen days directly prior to his last test." *Id.* at 24.

Conversely, Plaintiffs contend that Briggs' claims did not begin to accrue until he completed the diversion program on August 25, 2016. (Doc. 45 at 24). Because Briggs was subject to Defendants' "systematic violations until he completed the program . . . the limitations clock to challenge that continuing series of violations relating to his unlawful supervision in the diversion program did not begin to tick until he completed the program." *Id.*

The Court finds that Briggs' claims may fall within either or both of the two methods for establishing a continuing violation set forth in *Douglas*. First, Briggs has pointed to a series of related acts—multiple drug tests occurring past the 90-day **[*70]** period that he alleges were conducted in violation of the *Fourth Amendment* and only because he was unable to pay the program fee. Second, Briggs also alleges Defendants have a policy, practice, and/or custom that discriminates against the poor; indeed, Briggs brings his *Fourth* and *Fourteenth Amendment* claims not just on his own behalf, but also on behalf of a class of others similarly situated. Finally, because Briggs alleges a systemic violation claim, "the limitations clock does not begin to tick until the invidious conduct ends"—in this case, on August 25, 2016, when Briggs completed the program. *Douglas, 271 F.3d at 822*. Accordingly, the Court finds that Plaintiff Briggs' claims are not barred by the statute of limitations.

IV. CONCLUSION

"Complaints under the Civil Rights Act are to be liberally construed." *Thomas v. Younglove, 545 F.2d 1171, 1172 (9th Cir. 1976)*. The Court "cannot say with certainty at this early stage in the litigation that plaintiffs can prove no set of facts which would entitle them to relief." *Id.* Accordingly, for the reasons explained above,

IT IS HEREBY ORDERED denying the motions to dismiss. (Docs. 34 and 36).

IT IS FURTHER ORDERED Defendants shall file their responsive pleadings within fourteen (14) days of the date of this order. *Fed. R. Civ. P. 12(a)(4)*; *see* (Doc. 79).

Dated this 18th day of June, **[*71]** 2019.

/s/ Eric J. Markovich

Eric J. Markovich

United States Magistrate Judge

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Cmty. Success Initiative v. Moore

North Carolina Superior Court, Wake County

September 4, 2020, Decided; September 4, 2020, Filed

FILE NO. 19 CVS 15941

Reporter
2020 NCBC LEXIS 112 *

COMMUNITY SUCCESS INITIATIVE, et al., Plaintiffs, v. TIMOTHY K. MOORE, in capacity as Speaker of the House of Representatives, his official North Carolina et al., Defendants.

Subsequent History: Injunction granted at, in part *Cmty. Success Initiative v. Moore, 2020 NCBC LEXIS 113 (Sept. 4, 2020)*

Judges: [*1] Lisa C. Bell, Superior Court Judge. Keith O. Gregory, Superior Court Judge. Judge Dunlow concurring in part and dissenting in part.

Order by: Lisa C. Bell; Keith O. Gregory

Order

ORDER

This matter comes before the undersigned three-judge panel upon Plaintiffs motion for summary judgment or, in the alternative, a preliminary injunction.

In this litigation, Plaintiffs seek a declaration that *N.C.G.S. § 13-1*, the North Carolina statute providing for the restoration of rights of citizenship—which includes the right to vote—for persons convicted of a crime, is facially unconstitutional and invalid under the North Carolina Constitution to the extent it prevents persons on probation, parole, or post-release supervision from voting in North Carolina elections. Specifically, Plaintiffs contend *Section 13-1 of our General Statutes* violates *Article I, Sections 10*, *11*, *12*, *14*, and *19* of our Constitution. Plaintiffs seek to enjoin Defendants, their agents, officers, and employees from 1) preventing North Carolina citizens released from incarceration or not sentenced to incarceration from registering to vote and voting due to a felony conviction, and 2) conditioning restoration of the ability to vote on payment of any financial obligation.

Procedural History

Plaintiffs filed their initial [*2] complaint in this matter on November 20, 2019, and an amended complaint on December 3, 2019. Defendants filed answers to and motions to dismiss the amended complaint in January 2020; the motions to dismiss were subsequently withdrawn. On May 11, 2020, Plaintiffs filed the present motion for summary judgment or, in the alternative, a preliminary injunction.

On June 17, 2020, this action was transferred to a three-judge panel of Superior Court, Wake County, pursuant to *N.C.G.S. § 1-267.1* and *N.C.G.S. § 1A-1, Rule 42(b)(4)*. On June 24, 2020, the Chief Justice of the Supreme Court of North Carolina, pursuant to *N.C.G.S. § 1-267.1*, assigned the undersigned three-judge panel to preside over the facial constitutional challenges raised in this litigation.

On August 19, 2020, Plaintiffs' motion was virtually heard by the undersigned three-judge panel via WebEx pursuant to the Chief Justice's orders regarding virtual hearings in light of the COVID-19 pandemic. The matter was thereafter taken under advisement.

Voting Qualifications for Individuals Convicted of Felonies

Article VI, Section 2 of the North Carolina Constitution delineates certain qualifications, or disqualifications, affecting a person's ability to vote in our State. Relevant to this case is *Article VI, Subsection 2(3)*, which dictates that "[n]o person **[*3]** adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law." *N.C. Const. art. VI, § 2(3)*.

Plaintiffs' action challenges the "manner prescribed by law"-—-*N.C.G.S. § 13-1*—in which voting rights are automatically restored to individuals convicted of felonies. The current iteration of this statute reads as follows:

> Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the occurrence of any one of the following conditions:
>
> (1) The unconditional discharge of an inmate, of a probationer, or of a parolee by the agency of the State having jurisdiction of that person or of a defendant under a suspended sentence by the court.
>
> (2) The unconditional pardon of the offender.
>
> (3) The satisfaction by the offender of all conditions of a conditional pardon.
>
> (4) With regard to any person convicted of a crime against the United States, the unconditional discharge of such person by the agency of the United States having **[*4]** jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.
>
> (5) With regard to any person convicted of a crime in another state, the unconditional discharge of such person by the agency of that state having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.

N.C.G.S. § 13-1.

Undisputed Material Facts Regarding the History of Restoration of Rights of Citizenship in North Carolina[1]

The manner prescribed by law to restore the rights of citizenship for certain persons has a long and relevant history. In 1835, North Carolina amended its constitution to permit the enactment of general laws regulating the methods by which rights of citizenship—including the right to vote-—are restored to persons convicted of "infamous crimes." Infamous crimes included offenses which warranted "infamous punishments." Thereafter in 1840, a general law was passed regulating

[1] The Court does not make findings of fact on a motion for summary judgment; instead, to be "helpful to the parties and the courts," the Court should "articulate a summary of the material facts which [the Court] considers are not at issue and which justify entry of judgment." *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975)*.

the restoration of rights, including granting the courts unfettered discretion in restoring rights of citizenship.

After the civil war, North Carolina adopted a new constitution which allowed all men to vote, eliminated [*5] property-based voting limitations, and abolished slavery. Persons convicted of specific crimes were not expressly forbidden by the constitution from voting; however, a combination of constitutional amendments—including an amendment in 1875 that provided for the disenfranchisement of persons convicted of felonies and infamous crimes—and laws passed over the following decades maintained limitations on the restoration of rights for persons convicted of certain crimes, thereby continuing to deny such persons the ability to vote. Judicial discretion remained part of the process for restoring a person's rights of citizenship.

These limitations lasted until 1971, when, as a result of the efforts of the only two African Americans in the legislature, the reference to infamous crimes was removed from the constitutional provision and voting rights were taken away from only persons convicted of felonies. In 1973, there were three African American legislators who again attempted to amend *N.C.G.S. § 13-1* to automatically restore citizenship rights upon completion of an active sentence. They were unsuccessful, only succeeding in removing additional procedural barriers that disproportionately impacted African Americans [*6] and the poor.

Today, the restoration of rights under *N.C.G.S. § 13-1* is automatic upon a person's "unconditional discharge" and is not expressly subject to a discretionary decision by a government official, e.g., a judge. But while the final decision to restore a person's rights of citizenship is not left to the discretion of a judge, there do remain a number of discretionary decisions, especially in sentencing, that have a direct effect upon when a person's right to vote is restored, along with the qualifications and requirements that must ultimately be satisfied before a person convicted of a felony is permitted to vote. Importantly in this case, one such group of decisions pertain to the assessment of monetary costs arising from a felony conviction, e.g., fees, fines, costs, restitution, and other debts.

In deliberating on Plaintiffs' claims, we found it appropriate and compelling to consider the legislative history of *N.C.G.S. § 13-1*. While Defendants predominantly urge us to consider only the history of *N.C.G.S. § 13-1* from the 1971 and 1973 legislative sessions, this does not accurately reflect the legislative origination and evolution of North Carolina's restoration of rights statute, which we find necessary to rule on Plaintiffs' [*7] claims. Today, *N.C.G.S. § 13-1* remains written almost exactly as it was after the 1973 amendments, which precludes the restoration of citizenship rights until the completion of the sentence, including any period of parole, post-release supervision or probation.

Summary Judgment

Plaintiffs contend the challenged statute violates rights guaranteed by five specific provisions of the Declaration of Rights in our Constitution: *Article I, Sections 10*, *11*, *12*, *14*, and *19*.

Article I, Section 10, declares that "[a]ll elections shall be free." *N.C. Const. art. I, § 10*.

Article I, Section 11, declares that "[a]s political rights and privileges are not dependent upon or modified by property, no property qualification

shall affect the right to vote or hold office." N.C. Const. art. I, § 11.

Article I, Section 12, declares, in relevant part, that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances[.]" N.C. Const. art. I, § 12.

Article I, Section 14, declares, in relevant part, that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained[.]" N.C. Const. art. I, § 14.

Article I, Section 19, declares, in relevant part, that "[n]o person shall be denied the equal protection of the laws." N.C. Const. art. I, § 19.

*Applicable [*8] Legal Standards*

On a motion for summary judgment, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2017). Moreover, "[s]ummary judgment, when appropriate, maybe rendered against the moving party." *Id.*

When, as here, the case is a declaratory judgment action challenging the facial constitutionality of a statute, the coui-ts presume "that any act passed by the legislature is constitutional," and "will not strike it down if [it] can be upheld on any reasonable ground." State v. Bryant, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (quoting State v. Thompson, 349 N.C. 483, 491, 508 S.E.2d 277, 281-82 (1998)); Cooper v. Berger, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018) (explaining that courts will not declare a law invalid unless it is determined to be "unconstitutional beyond a reasonable doubt"). Accordingly, "[a]n individual challenging the facial constitutionality of a legislative act 'must establish that no set of circumstances exists under which the [a]ct would be valid.'" Thompson, 349 N.C. at 491 (second alteration in original) (quoting United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697 (1987)).

However, while "North Carolina caselaw generally gives acts of the General Assembly great deference, such deference **[*9]** is not warranted when the burden shifts to a law's defender after a challenger has shown the law to be the product of a racially discriminatory purpose or intent." Holmes v. Moore, N.C. App. , , 840 S.E.2d 244, 256 (2020) (internal citation and quotation omitted) (citing Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265-6, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). When this burden shifts, "the general standard applied to facial constitutional challenges is also inapplicable because the *Arlington Heights* framework dictates the law's defenders must instead 'demonstrate that the law would have been enacted without' the alleged discriminatory intent." Id. at , 840 S.E.2d at 256-7 (quoting Hunter v. Underwood, 471 U.S. 222, 228, 105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985)). "Discriminatory purpose 'may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.'" Id. at , 840 S.E.2d at 255 (quoting Washington v. Davis, 426 U.S. 229, 242, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)).

Claim on Violation of the Free Elections Clause

Plaintiffs first contention is that N.C.G.S. § 13-1 violates the Free Elections Clause of the North Carolina Constitution. As to this contention, this majority of the three-judge panel concludes that there is a genuine issue of material fact and that neither Plaintiffs nor Defendants are entitled to judgment as a matter of law. The Motion for Summary Judgment is denied as to this claim.

Claim on Violation of the Equal Protection Clause

Plaintiffs' second contention is **[*10]** that N.C.G.S. § 13-1 violates the Equal Protection Clause of the North Carolina Constitution by depriving all persons with felony convictions who are not incarcerated but are on probation, parole or post-release supervision with substantially equal voting power. The majority finds that as to this contention there is a genuine issue of material fact and neither Plaintiffs nor Defendants are entitled to judgment as a matter of law.

Plaintiffs' next contend that N.C.G.S. § 13-1 violates the Equal Protection Clause in three separate ways. First, by depriving all persons with felony convictions subject to probation, parole or post-release supervision, who are not incarcerated, of the right to vote. Second, by depriving the African American Community of substantially equal voting power. And third, by creating an impermissible class-based classification by conditioning the restoration of the right to vote on the ability to make financial payments. The panel was presented with extensive evidence on these contentions through the submission of expert reports. Plaintiffs offered, and the panel admitted, the reports of Dr. Frank Baumgartner, Dr. Orville Vernon Burton, and Dr. Traci Burch. Legislative Defendants offered the testimony of Dr. Keegan Callanan. The panel allowed **[*11]** the admission of Dr. Callanan's report over the objection of Plaintiffs, ruling by separate Order that the arguments raised by Plaintiffs would be considered in determining the weight to be given to Dr. Callanan's report. The majority concludes, for the purposes of this order, that Dr. Callanan's report was unpersuasive in rebutting the testimony of Plaintiffs' experts, was flawed in some of its analysis and, while Dr. Callanan is an expert in the broad field of political science, his experience and expertise in the particular issues before this panel are lacking. Therefore, the majority assigns no weight to the report.

As to the first and second bases for the alleged violation of the Equal Protection Clause, this majority of the three-judge panel concludes that there is a genuine issue of material fact and that neither Plaintiffs nor Defendants are entitled to judgment as a matter of law.

As to the third basis for the alleged violation of the Equal Protection Clause, that N.C.G.S. § 13-1 creates in impermissible class-based classification by conditioning the restoration of the right to vote on the ability to make financial payments, the majority of this three judge panel concludes that there is no genuine issue of material fact and Plaintiffs **[*12]** are entitled to judgment as a matter of law. In making this conclusion, we acknowledge that the United State Supreme Court has determined that the right to vote is a fundamental right. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 561-62, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). We further acknowledge that while the United States Supreme Court has held that wealth is not a

"suspect classification" that calls for heightened scrutiny, *San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973)*; *Ortwein v. Schwab, 410 U.S. 656, 660, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973)*, it has further held that when a wealth classification is used to restrict the right to vote or in the administration of justice, it is subject to heightened scrutiny, not the rational basis review urged by Defendants in this case. *M.L.B. v. S.L.J., 519 U.S. 102, 124, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996)*.

As Defendants correctly argue, the express words of *N.C.G.S. § 13-1* do not in and of themselves create different classifications of persons convicted of felonies—all such persons remain disenfranchised until they have been "unconditionally discharged." However, by requiring an unconditional discharge that includes payments of all monetary obligations imposed by the court, *N.C.G.S. § 13-1* creates a wealth classification that punishes felons who are genuinely unable to comply with the financial terms of their judgment more harshly than those who are able to comply. By requiring payment of all monetary obligations, *N.C.G.S. § 13-1* provides that individuals, **[*13]** otherwise similarly situated, may have their punishment alleviated or extended solely based on wealth.

We also note that, because of the judicial discretion built into the criminal laws, the amount of the financial burden, as well as the length of a probationary term, imposed by a judge varies from judge to judge, district to district, or division to division. The amount of restitution, if any is owed, is subject to the cooperation of a witness and the diligence of the prosecutor in obtaining a restitution amount sought. As noted above, this is not unlike the judicial discretion allowed when a felon was required to petition a court for restoration of citizenship rights, or the discretion of the character witnesses a petitioning felon was required to produce. Or, as testified by Senator Henry Michaux, "the whole statute is an impediment to having . . . rights restored depending on the psyche of the judge who is going to render that decision." *Michaux Dep at 46:9-13.* Further, probation may be extended for up to five years, then an additional three with the consent of the probationer, to allow time for the compliance with the financial obligation of restitution. The impact is that a person **[*14]** remains disenfranchised for up to eight years because he has been unable to pay—an impermissible and unconstitutional wealth-based restoration of citizenship rights, including the right to vote. Because we find Plaintiffs prevail as a matter of law on this issue, by separate order, we also grant Plaintiffs' request for a preliminary injunction to alleviate irreparable harm.

Claim on Violation of the Right to Free Assembly and the Right to Free Speech

Plaintiffs' third contention is that *N.C.G.S. § 13-1* violates the *Right of Free Assembly and Petition* and the *Right to Free Speech Clauses of the North Carolina Constitution*. As to this contention, this three-judge panel concludes that there is no genuine issue of material fact and that Defendants are entitled to judgment as a matter of law. Summary Judgment is therefore granted in favor of Defendants as to this claim.

Claim on Violation of the Ban on Property Qualifications.

Plaintiffs final contention is that *N.C.G.S. § 13-1* violates the Constitutional ban on Property

Qualification by conditioning restoration of the right to vote on having property (i.e. sufficient means to pay financial obligations imposed pursuant to a felony judgment.)

Section 13-1 of our General Statutes imposes upon a person convicted **[*15]** of a felony the requirement of an "unconditional discharge"—and, consequently, the inherent qualifications persons must meet to obtain such a discharge—to regain the right to vote. Even though *N.C.G.S. § 13-1* was enacted due to *Article VI, § 2(3)*, of our Constitution, this statute, like all enacted laws, must not run counter to a constitutional limitation or prohibition, including those guaranteed in the Declaration of Rights contained in *Article I* of our Constitution. *Section 11 of Article I* declares that "[a]s political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office," *N.C. Const. art. I, § 11*. Importantly, the "fundamental purpose" for which the Declaration of Rights was enacted is "to provide citizens with protection from the State's encroachment upon these [enumerated] rights." *Corum v. Univ. of N.C., 330 N.C. 761, 782, 413 S.E.2d 276, 290 (1992)*.

Article I, § 11, of our Constitution is clear: no property qualification shall affect the right to vote. Therefore, when legislation is enacted that restores the right to vote, thereby establishing qualifications which certain persons must meet to exercise their right to vote, such legislation must not do so in a way that makes the ability to vote dependent on a property **[*16]** qualification. The requirement of an "unconditional discharge" imposed by *N.C.G.S. § 13-1* does exactly that—the ability for a person convicted of a felony to vote is conditioned on whether that person possesses, at minimum, a monetary amount equal to any fees, fines, and debts assessed as a result of that person's felony conviction.

As to this contention, this majority of the three-judge panel concludes that there is no genuine issue of material fact and that Plaintiffs are entitled to judgment as a matter of law. The Motion for Summary Judgment is granted in favor of Plaintiffs on this claim. Because we find Plaintiffs prevail as a matter of law on this issue, by separate order, we also grant Plaintiffs' request for a preliminary injunction to alleviate irreparable harm.

Conclusion

Upon considering the pleadings, parties' briefs and submitted materials, numerous amicus briefs, arguments, and the record established thus far, this majority of the three-judge panel determines that there is no genuine issue of material fact that *N.C.G.S. § 13-1* violates the *Equal Protection Clause of the North Carolina Constitution* by creating an impermissible class-based classification by conditioning the restoration of the right to vote on the ability to **[*17]** make financial payment, and, therefore, concludes that Plaintiffs are entitled to judgment as a matter of law; that there is no genuine issue of material fact that *N.C.G.S. § 13-1* violates the *Ban on Property Qualifications of the North Carolina Constitution* and, therefore, concludes that Plaintiffs are entitled to judgment as a matter of law; that there is a genuine issue of material fact whether *N.C.G.S. § 13-1* violates the *Equal Protection Clause of the North Carolina Constitution* in the other manners put forth by Plaintiffs, as discussed above, and neither party is entitled to judgment as a matter of law; that there is a genuine issue of material fact whether *N.C.G.S. § 13-1* violates the *Free Elections*

Clause of the North Carolina Constitution and neither party is entitled to judgment as a matter of law; and, that there is no genuine issue of material fact that *N.C.G.S. § 13-1* does not violate the Right to Free Speech or Right of Assembly and Petition provisions of the North Carolina Constitution and, therefore concludes that Defendants are entitled to judgment as a matter of law.

The Honorable John M. Dunlow concurs in part and dissents in part from portions of this Order.

For the foregoing reasons, Plaintiffs' motion for summary judgment, or in the alternative **[*18]** a preliminary injunction, is GRANTED in part and DENIED in part as follows:

I. Count 1 (*Free Elections Clause*) Summary Judgment is DENIED.

II. Count 2 (*Equal Protection Clause*) Summary Judgment is GRANTED in part. Preliminary Injunction is GRANTED under separate order.

III. Count 3 (*Freedom of Speech and Assembly Clauses*) is GRANTED in favor of Defendants.

IV. Count 4 (*Ban on Property Qualifications*) is GRANTED. Preliminary Injunction is GRANTED under separate order.

SO ORDERED, this the 4 day of September, 2020.

/s/ Lisa C. Bell

Lisa C. Bell, Superior Court Judge

/s/ Keith O. Gregory

Keith O. Gregory, Superior Court Judge

as a majority of this Three Judge Panel

Concur by: John M. Dunlow (In Part)

Dissent by: John M. Dunlow (In Part)

Dissent

ORDER ON SUMMARY JUDGMENT (DISSENT)

Judge Dunlow concurring in part and dissenting in part.

Article VI, Section 2, Part 3 of the North Carolina Constitution provides:

> (3) Disqualification of felon. No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.

Plaintiffs' **[*19]** complaint in this action does not challenge this North Carolina Constitutional provision denying convicted felons the right to vote. This particular provision has not been declared unconstitutional. In fact, this provision was previously challenged and found to be constitutional. *Fincher v. Scott, 352 F. Supp. 117 (M.D.N.C. 1972)*, aff'd *411 U.S. 961, 93 S.Ct. 2151, 36 L.Ed.2d 681 (1973)*.

Plaintiffs' complaint here makes a facial challenge to *N.C.G.S. § 13-1*, the statute enacted by the legislature prescribing the manner by which a convicted felon's rights of citizenship (which includes the right to vote) are restored. That statute provides:

> Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall

have such rights automatically restored upon the occurrence of any one of the following conditions:

(1) The unconditional discharge of an inmate, of a probationer, or of a parolee by the agency of the State having jurisdiction of that person or of a defendant under a suspended sentence by the court.

(2) The unconditional pardon of the offender.

(3) The satisfaction by the offender of all conditions of a conditional pardon.

(4) With regard to any person convicted of a crime against the United States, the unconditional discharge of such person by the agency of the United States having **[*20]** jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.

(5) With regard to any person convicted of a crime in another state, the unconditional discharge of such person by the agency of that state having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.

N.C.G.S. § 13-1

In assessing Plaintiffs' facial challenge to this statute, this Court is bound to adhere to the principles of law previously enunciated by our appellate courts. Our Supreme Court has made it clear that, "[A] facial challenge to a legislative act is . . . the 'most difficult challenge to mount successfully.'" *State v. Bryant, 359 N.C. 554, 564, 614 S.E.2d 479, 485 (2005)* (*quoting United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697(1987)*. Here, the plaintiff must show that, "there are no circumstances under which the statute might be constitutional.'" *N.C. State Bd. Of Educ. v. State, 371 N.C. 170, 814 S.E.2d 67, 74 (2018)* (*citing Beaufort Cty. Bd. Of Educ. v. Beaufort Cty. Bd. Of Comm'rs, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009)*). "The fact that [the challenged] statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *State v. Thompson, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998)* (*quoting Salerno, 481 U.S. at 745*).

In addition to the extremely high bar faced by plaintiffs' facial challenge to *N.C.G.S. § 13-1*, this Court is also required to presume this duly enacted North Carolina statute is constitutional. **[*21]** *Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. Of Comm'rs, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991)*. This Court must give great deference to acts of the General Assembly, and this Court must not declare an act unconstitutional unless this Court determines that it is unconstitutional *beyond a reasonable doubt. See Rhyne v. K-Mart Corp., 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004)* and *Cooper v. Berger, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018)*.

It is with these guiding principles of law in mind that we now turn to the application of those guidelines to the facts and circumstances of the present action.

The Plaintiffs, throughout their complaint, briefs, filings and arguments, complain of North Carolina's "disenfranchisement scheme", "disenfranchisement statute", and "disenfranchisement of citizens." The disenfranchisement of which Plaintiffs complain is in no way attributable to *N.C.G.S. §*

13-1. No reasonable reading of the plain language of N.C.G.S. § 13-1 could be interpreted to disenfranchise any person. Rather, the sole purpose of N.C.G.S. § 13-1 is to provide a mechanism whereby individuals who have been convicted of a felony offense may be re-enfranchised.

Plaintiffs' expert, Dr. Frank R. Baumgartner's, report provides little support for Plaintiffs' theory or a finding that N.C.G.S. § 13-1 has a disparate impact on one race as opposed to another. Dr. Baumgartner, submitted a 36 page report detailing his analysis as to, "five sets of issues related to the disenfranchisement **[*22]** of persons who are on probation or post-release supervision *following a felony conviction* in North Carolina state court." (emphasis added) *Dr. Frank R. Baumgartner, Expert Report on North Carolina's Disenfranchisement of Individuals on Probation and, Post-Release Supervision, May 8, 2020, p.2.* (Hereinafter referred to as "Dr. Baumgartner's Report"). In his report, Dr. Baumgartner finds, "the disenfranchisement of persons on probation and post-release supervision from a North Carolina state court conviction differentially affects different racial groups. Although Blacks comprise just 22 percent of the voting age population in North Carolina, they comprise 42 percent of persons disenfranchised while on probation or post-release supervision." *Dr. Baumgartner's Report, p. 3-4.* All of Dr. Baumgartner's analysis is made on the impact of disenfranchisement resulting from a felony conviction and the provisions of Article VI, Section 2, Part 3 of the North Carolina Constitution. Dr. Baumgartner's Report does not contain, and Plaintiffs have not otherwise offered, any expert analysis as to the number of persons re-enfranchised under the provisions of N.C.G.S. § 13-1, nor as to the racial demographics of persons re-enfranchised **[*23]** under the provisions of N.C.G.S. § 13-1.

This lack of evidence as to the effects of N.C.G.S. § 13-1 is particularly troubling in this case where the majority has found discriminatory intent to be a motivating factor in the enactment of N.C.G.S. § 13-1. As a result of that finding, which was based on Dr. Baumgartner's analysis, the majority declined to accord any judicial deference to the act of the legislature in adopting N.C.G.S. § 13-1 and applied a strict scrutiny standard in reviewing the legislative act.

Our North Carolina Supreme Court has previously addressed the legislative intent associated with the adoption of Chapter 13 of the North Carolina General Statutes. In the case of State v. Currie, 284 NC 562, 202 S.E.2d 153 (1974), our Supreme Court, in reviewing the legislative history of N.C.G.S. § 13-1 thru 13-4, held, "It is obvious that the 1971 General Assembly in enacting Chapter 902 [now Chapter 13] intended to substantially relax the requirements necessary for a convicted felon to have his citizenship restored." *Id. at 565, 202 S.E.2d at 155.* This holding by our Supreme Court mitigates against a finding by this panel that the General Assembly, in enacting N.C.G.S. § 13-1, acted with discriminatory intent.

This Judge, as does the majority, finds Dr. Baumgartner's Report to be thorough, credible, believable, and compelling. The fundamental flaw in Plaintiffs' case lies not in Dr. Baumgartner's analysis, **[*24]** but in the Plaintiffs' assertion (and burden to prove beyond a reasonable doubt) that the Legislature's enactment of N.C.G.S. § 13-1 is the cause of Dr. Baumgartner's findings.

The majority also finds the right to vote is a fundamental right, and, "when a wealth

classification is used to restrict the right to vote or in the administration of justice, it is subject to heightened scrutiny, not the rational basis review urged by Defendants in this case." Our Supreme Court has held, "the right to vote, per se, is not a constitutionally protected right." *White v. Pate, 308 N.C. 759, 768, 304 S.E. 2d 199, 205 (1983)* (*quoting Rivera-Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9, 72 L.Ed. 2d 628, 635, 102 S.Ct. 2194 2199 (1982)*). *See also Comer v. Ammons, 135 N.C. App. 531, 522 S.E.2d 77 (1999)*. Moreover, convicted felons, who have lost their voting rights, lack any fundamental interest to assert. *See Johnson v. Bredesen, 624 F. 3d 742(2010)*.

N.C.G.S § 13-1 does not create a wealth classification. The only classes created by the challenged statute is convicted felons who have completed their sentence and convicted felons who have not completed their sentence. The challenged statute does not itself impose any fines, fees, or other costs on people convicted of felonies who are on probation, parole, or post-release supervision. The monetary obligations of which Plaintiffs complain are imposed by other provisions of North Carolina law that are not challenged by the Plaintiffs in [***25**] this action.

CONCLUSION

There is no dispute that disenfranchisement (that is the subject of this action) is the result of a felony conviction. There is no dispute that the complained of disenfranchisement is mandated by *Article VI, Section 2, Part 3 of the North Carolina Constitution*. There is no dispute that Plaintiffs' complaint does not challenge *Article VI, Section 2, Part 3 of the North Carolina Constitution*. Plaintiffs have failed to offer any evidence as to the impact of *N.C.G.S. § 13-1* on the number of persons re-enfranchised under the statute's provisions, or as to the racial demographics of persons re-enfranchised under the statute's provisions. As such, this Court must accord great deference to the acts of the Legislature. Because the challenged statute does not affect a fundamental right, nor does it create an impermissible wealth-based classification, nor have the Plaintiffs shown a disparate impact on a suspect class resulting from the challenged statute, rational basis review is the appropriate standard to be applied in this facial challenge.

Count 1 (*Free Elections Clause*)

Judge Dunlow concurs in the result reached by the majority as to Count I (*Free Elections Clause*) in that Plaintiffs' Motion for Summary [***26**] Judgment is DENIED. For the reasons specified hereinabove, Judge Dunlow would find there is no genuine issue of material fact and grant summary judgment in favor of the Defendants on this claim.

Count 2 (*Equal Protections Clause*)

Count 2 (a)

The majority finds there is a genuine issue of material fact as to whether *N.C.G.S. § 13-1* violates the *Equal Protection Clause of the North Carolina Constitution* by depriving all persons with felony convictions who are not incarcerated but are on probation, parole or post-release supervision with substantially equal voting power. For the reasons specified hereinabove, Judge Dunlow would find there is no genuine issue of material fact and grant summary judgment in favor of the Defendants on this claim.

Count 2 (b)

The majority finds there is a genuine issue of material fact as to whether *N.C.G.S. § 13-1* violates the *Equal Protection Clause of the North Carolina Constitution* by depriving the African American community of substantially equal voting power, and denies the Plaintiffs' Motion for Summary Judgment. For the reasons specified hereinabove, Judge Dunlow would find there is no genuine issue of material fact and grant summary judgment in favor of the Defendants on this claim.

Count 2 (c)

The majority finds there is no genuine issue of material fact **[*27]** as to whether *N.C.G.S. § 13-1* violates the *Equal Protection Clause of the North Carolina Constitution* by creating an impermissible class-based classification by conditioning the restoration of the right to vote on the ability to make financial payments and grants summary judgment in favor of the Plaintiffs. For the reasons specified hereinabove, Judge Dunlow would find there is no genuine issue of material fact and grant summary judgment in favor of the Defendants on this claim.

Count 3 (*Freedom of Speech and Assembly Clauses*)

Judge Dunlow concurs in the result reached by the majority as to Count III (*Freedom of Speech and Assembly Clauses*) in that Plaintiffs' Motion for Summary Judgment is DENIED. For the reasons specified hereinabove, Judge Dunlow would find there is no genuine issue of material fact and grant summary judgment in favor of the Defendants on this claim.

Count 4 (*Ban on Property Qualifications*)

The majority finds there is no genuine issue of material fact as to whether *N.C.G.S. § 13-1* violates *Article I, § 11 (Ban on Property Qualifications) of the North Carolina Constitution* and grants summary judgment in favor of the Plaintiffs. For the reasons specified hereinabove, Judge Dunlow would find there is no genuine issue of material **[*28]** fact and grant summary judgment in favor of the Defendants on this claim.

This the 4 day of September, 2020.

/s/ John M. Dunlow

John M. Dunlow

Superior Court Judge

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