

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

DAVID DIXON, et al.,)
)
Plaintiffs,)
)
V.) Case 4:19-cv-00112-AGF
)
CITY OF ST. LOUIS, et al.,)
)
Defendants.)

**MENORANDUM IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR A
PRELIMINARY INJUNCTION**

Plaintiffs respectfully move this Court to re-issue a preliminary injunction in this case. When Plaintiffs filed this lawsuit, they challenged Defendants' practice—in violation of the Fourteenth Amendment and the Missouri Supreme Court Rules—of imposing monetary conditions of release that resulted in the detention of hundreds of arrestees without first providing those arrestees a hearing or determining that detention was necessary to advance a compelling state interest. One year and two rounds of amendments to the Missouri Supreme Court Rules later, little has changed. Defendants continue to impose unattainable monetary conditions of release, continue to flout the Constitution and their own court rules, and continue to detain arrested individuals without a meaningful hearing and without adequate justification.

Although the Eighth Circuit vacated the preliminary injunction in this case, it did so only because it concluded that this Court did not fully account for principles of comity in evaluating whether the public interest supported an injunction. Consideration of those principles would not have changed the result. The benefits to the public of an injunction—ending the unconstitutional detention of hundreds of individuals and all the harms to the community that flowed from it—outweighed any resulting tension in federal-state relations.

But whatever the calculus was at the time this Court issued its injunction, the situation now is fundamentally different and leaves no doubt that an injunction would be in the public interest. At this point, Defendants have foregone a year-long opportunity to correct their conduct and bring their practices into compliance with the Missouri Supreme Court Rules and the Fourteenth Amendment. Even more compelling, the current public health pandemic that is spreading throughout St. Louis is at the gates of the city's jails. After COVID-19 infiltrates the jails—widely recognized as “ticking time bombs”—it will exponentially increase the rate of infection in the St. Louis area, to the detriment not only of those affected inmates' health, but also to the entire St. Louis population and its healthcare infrastructure. The requested remedy here would eliminate unnecessary detention that exacerbates the grave danger the virus poses to the public.

Because a preliminary injunction would be in the public interest, and because this Court's earlier ruling resolves the remaining preliminary injunction factors, this Court should grant Plaintiffs' motion.

I. THE PUBLIC INTEREST SUPPORTS AN INJUNCTION BECAUSE DEFENDANT JUDGES CONTINUE TO VIOLATE THE MISSOURI SUPREME COURT RULES AND THE CONSTITUTION

It has long been recognized that jailing someone after conviction solely because of poverty violates the Fourteenth Amendment. “[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.” *Tate v. Short*, 401 U.S. 395, 398 (1971). Almost 40 years ago, the Supreme Court made clear that a court violates the Fourteenth Amendment where it sentences an individual to imprisonment “simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making

alternative orders.” *Bearden v Georgia*, 461 U.S. 660, 674 (1983).

Such actions are even more egregious when they involve the detention of pretrial arrestees who are presumed innocent. Several appellate courts have recently held that the detention of a *pretrial* arrestee without meaningful consideration of that person’s indigence or other possible alternative conditions of release is unconstitutional. *ODonnell, ODonnell v. Harris Cty.*, 892 F.3d 147, 160 (5th Cir. 2018) (citing *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (holding that pretrial imprisonment solely because of indigent status violates due process and equal protection); *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017); *see also United States v. Leisure*, 710 F.2d 422, 425 (8th Cir. 1983) (“[S]etting of bond unreachable because of its amount would be tantamount to setting no conditions at all.”). This Court and other district courts throughout the country have reached the same conclusion.¹

Defendants do not contest that a person cannot be detained solely due to indigence, or that federal and state law require a prompt and individualized determination of pretrial release conditions. June 11, 2019 Memorandum and Opinion, ECF No. 95 at 26. Their sole factual claim at the time of the original motion for preliminary injunction was that the procedures Defendants used were constitutionally adequate and in compliance with the Missouri Supreme Court Rules. *Id.* at 26. They were not. In fact, this Court found that

¹ *See e.g., Pierce v. City of Velda City*, 4:15-CV-570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015); *McNeil v. Cmty. Prob. Servs., LLC*, 1:18-CV-00033, 2019 WL 633012 (M.D. Tenn. Feb. 14, 2019); *Jones v. City of Clanton*, 215CV34-MHT, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758 (M.D. Tenn. 2015); *Schultz v. State*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018); *Edwards v. Cofield*, 3:17-CV-321-WKW, 2017 WL 2255775 (M.D. Ala. May 18, 2017); *Thompson v. Moss Point*, 1:15CV182LG-RHW, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015); *Cooper v. City of Dothan*, 1:15-CV-425-WKW, 2015 WL 10013003 (M.D. Ala. June 18, 2015); *Snow v. Lambert*, CV 15-567-SDD-RLB, 2015 WL 5071981 (M.D. La. Aug. 27, 2015).

Defendants showed a pattern of “systemic non-compliance” with the rules. *Id.* at 27 & n. 10.

Since that time, amendments to the Missouri Supreme Court rules governing conditions of release have gone into effect. However, based on over 580 in-person court observations, as well as a review of the bond Orders for the month of February,² *see* Ex. 1, Decl. of Shannon Besch (“Besch Decl.”) ¶¶ 7, 12, it is apparent that Defendants continue to systemically violate arrestees’ constitutional rights and the Missouri Supreme Court Rules.

The Missouri Supreme Court Rules create a clear rebuttable presumption that arrestees should be released pending trial. “A defendant charged with a bailable offense shall be entitled to be released from custody pending trial or other stage of the criminal proceedings.”³ Mo. Sup. Ct. R. 33.01(a). The rules require that an arrestee be released on their own recognizance *unless* the courts finds that “such release will not secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses.” Mo. Sup. Ct. R. 33.01(c). Even when such a finding is made, the court is still required to impose the least restrictive condition or combination of conditions for release. *Id.* The court “*shall* first consider non-monetary conditions,” and only upon a finding that such conditions cannot ensure the appearance of the arrestee or the safety of the community

² Confined Dockets and the related bond orders were pulled for all but one day in February. Plaintiffs’ counsel inadvertently failed to download orders for February 13, 2020. By the time the error was realized, the confined docket was no longer available on Casenet.

³ “The defendant’s release shall be upon the conditions that: (1) The defendant will appear in the court in which the case is prosecuted or appealed, from time to time as required to answer the criminal charge; (2) The defendant will submit to the orders, judgment and sentence, and process of the court having jurisdiction over the defendant; (3) The defendant shall not commit any new offenses and shall not tamper with any victim or witness in the case, nor have any person do so on the defendant’s behalf; and (4) The defendant will comply fully with any and all conditions imposed by the court in granting release.” Mo. Sup. Ct. R. 33.01(b).

can monetary conditions even be considered. *Id.* (emphasis added). Even then, before setting any monetary condition, the court must first consider the arrestee’s ability to pay, and the Rules are clear that a monetary condition fixed at more than is necessary to secure the appearance of the defendant at trial or the safety of the community “is impermissible.” *Id.*

Further, any determination regarding bail must be based on the individual circumstances of the arrestee and the case, including the following factors:

Based on available information, the court *shall* take into account: the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant’s family ties, employment, financial resources, including ability to pay, character, and mental condition; the length of the defendant’s residence in the community; the defendant’s record of convictions; the defendant’s record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings; whether the defendant was on probation, parole or release pending trial or appeal at the time the offense for which the court is considering detention or release was committed; and any validated evidentiary-based risk assessment tool approved by the Supreme Court of Missouri.

Mo. Sup. Ct. R. 33.01(e) (emphasis added).

Defendant Judges continue, just as at the time this action was filed, to regularly set cash bond amounts in a manner that violates both the Constitution and the Missouri Supreme Court Rules. Between July 1, 2019, and December 11, 2019, court observers witnessed over 580 detention hearings.⁴ In 72 percent of the hearings that resulted in a cash bond being imposed, judges set the cash bond amounts either without obtaining any

⁴ Plaintiffs implemented a court observation program in spring 2019. After the Court issued its Preliminary Injunction, Plaintiffs significantly expanded their court observation program. Court observers included a combination of ArchCity Defenders’ staff, legal interns, and undergraduate interns. *See* Ex. 1, Besch Decl. ¶ 3. Court observers sat in the courtroom and contemporaneously documented specific information about what was said during each hearing, including but not limited to: the individual’s name and case number, the bond at the beginning and end of the hearing; and whether the judge obtained any information about the person’s ability to pay a cash bond, the individual’s employment status, the individual’s housing situation or dependents, and the individual’s physical or mental health. *See id.* ¶ 5. In addition, initial hearing dockets were pulled for all but one day in February, along with the related initial appearance orders. *See supra* n.2.

information about the individual's ability to pay or above what the evidence in front of the judge showed the person could pay. Ex. 1, Besch Decl. ¶ 7. More specifically, in 23 percent of those cases, judges set a cash bond amount without any consideration of an individual arrestee's financial circumstances or ability to pay. *Id.* In 49 percent of those cases, judges set financial conditions above what the evidence showed the person could pay. *Id.*

These jarring statistics are a result of the manner in which the Defendant Judges have implemented—or, more accurately, contravened—the Rules governing initial appearances. Defendants have systematically undermined the opportunity to be heard that the Rules, in theory, guarantee. In particular, Defendant Judges have contracted with a group of private attorneys to represent arrestees for the limited purpose of their initial bond hearings. But those attorneys are prohibited from meeting their clients before initial appearances. *See* Ex. 2, Decl. of Matthew Mahaffey (“Mahaffey Decl.”) ¶ 5. Because the clients are not physically present for the hearing, the attorneys are also prohibited from communicating privately with their clients at any time during the hearing. *See id.* ¶ 7. The only contact the attorney has with the client *at all* is through a video conference during the hearing itself, in open court, with audio available to the prosecutor, judge, and court staff. *See id.*

Because these attorneys are unable to speak with their clients confidentially, they also cannot ask them about any of the factors Defendant Judges are supposed to consider at the hearing pursuant to Rule 33.01(e). As a result, they cannot obtain, let alone present to the judge, evidence related to the arrested individual's ability to afford bail, evidence mitigating any claims of danger to the public or the weight of the evidence presented by the prosecution, evidence addressing whether the individual will likely appear at the next court date, or any other evidence particular to that individual client. Ex. 2, Mahaffey Decl. ¶ 8.

In fact, because the system Defendant Judges have established prevents the contract attorneys from gathering relevant evidence, many appointed attorneys simply come to agreements about bond amounts with the assistant circuit attorney without ever having met or conferred with the arrested person, and only inform their client of the amount agreed to by the prosecutor in open court. *See* Ex. 1, Besch Decl. ¶ 9. When judges accept these agreements, without any further inquiry and with the knowledge that they were not and could not have been the product of any conversation with the arrested person, these judges are failing to make the preliminary findings required by the Rules—that releasing someone on their own recognizance will not secure their appearance or the safety of the community. *See* Mo. R. Civ. P. 33.01(c). They also fail to “first consider non-monetary conditions” or to impose monetary conditions only *after* considering evidence of the arrestee’s ability to pay, as required by the Rules. *See also* Ex. 1, Besch Decl. ¶¶ 7.a, 9.

Even when Defendant Judges inquired into an individual’s financial circumstances before setting a cash bond, they set the bond amount above what the evidence showed that the person could pay in 49 percent of observed hearings. Some examples include:

- The arrestee told the judge she had been homeless since age 13. The judge found her indigent and told her to apply for a public defender. The judge then set bond at \$35,000, 10 percent.⁵
- The judge was informed that the arrestee was homeless. No other financial information was obtained during the hearing. The judge then set bond at \$20,000, 10 percent.
- The arrestee stated in the hearing that he could pay \$1,000. Bond was set at \$30,000, cash only. The arrestee was not released until after the Rule 33.05 hearing seven days later, when bond was reduced to \$10,000, 10 percent, the amount he said he could pay at the initial hearing.⁶

⁵ When a bond is set at “10 percent,” an individual must post at least 10 percent of the total—in this example \$3,500—as security to be eligible for release.

⁶ Rule 33.05 requires the court to review within seven days the conditions of release of any individual who is detained after their initial appearance.

- The judge asked about work history, and the arrestee informed the judge that he works 40 hours per week making \$10 per hour (\$400 per week) and has three children. The judge set the bond amount at \$30,000, 10 percent, commenting “if you somehow make this”

Ex. 1, Besch Decl. ¶ 8.

Further, Defendant Judges regularly set bond in amounts of \$5,000 or less, regardless of the individual’s ability to pay, based on the misguided understanding that the non-profit The Bail Project will automatically and immediately post the bond, even though the organization is a charity with no legal obligation to free anyone from jail and its own discretionary policies and financial constraints regarding who it will assist. Some examples of this pattern include:

- The judge asked if the arrestee could pay the proposed bond amount of \$10,000, 10 percent. The arrestee said he would have to contact The Bail Project. No other information about the arrestee’s ability to pay was introduced. Bond was set by the judge at \$10,000, 10 percent. The arrestee was not bonded out by The Bail Project until after the Rule 33.05 hearing seven days later, when the bond amount was reduced to \$5,000, 10 percent.
- The arrestee told the judge that his family could get \$300 to \$400 together. The appointed attorney asked that bail be set at or below The Bail Project’s \$5,000 limit, which the court granted by setting bail at \$5,000 cash only. The order specifically stated “Defendant to apply for the Bail Project.”
- The arrestee told the judge that he could not post the \$1,500 cash-only bond agreed to by the attorneys. No other evidence was introduced about his ability to pay bond. The arrestee’s attorney told him in open court that he could apply to The Bail Project. Bond was set by the judge at \$1,500 cash.
- The appointed attorney asked for a bond amount of \$5,000, specifically stating that The Bail Project could pay that amount. No other evidence about the arrestee’s ability to pay bond was introduced. Cash bond was set by the judge at \$5,000, and the appointed attorney told the arrestee to apply to The Bail Project. However, The Bail Project did not bond the arrestee out. At his subsequent Rule 33.05 hearing, the judge reduced bond to \$1,500, 10 percent, upon learning that the arrestee had been unemployed for three years. He has never bonded out.

Ex. 1, Besch Decl. ¶ 9.

The Defendant Judges' practice of setting cash bond amounts based on what a contract attorney suggests that *The Bail Project* might be willing to pay is not the same as considering an *arrestee's* financial circumstances and ability to pay, as required by the Constitution, the Missouri Supreme Court Rules, and common sense. As stated before, the Missouri Supreme Court Rules require the judge to take into account evidence of the arrestee's ability to pay *before* setting any cash bond and prohibit setting cash bond amounts greater than that necessary to ensure the appearance of the arrestee at trial or the safety of the community. Mo. Sup. Ct. R. 33.01(c). By setting an amount based solely on what the judge assumes that The Bail Project is willing to post—rather than what the individual arrestee is capable of paying or what is required to ensure his or her appearance or the community's safety—Defendant Judges are routinely flouting the Rules. Further, because The Bail Project posts the entire cash bail amount, these bonds do little to ensure appearances or community safety, and are really nothing more than a sponsored release. As such, the judges are setting cash bond amounts for people they clearly believe can be released on their own recognizance.

Critically, however, the actual effect on the detained individual is not the same as release on recognizance. As the above examples show, The Bail Project does not automatically bond out every person with a cash bail amount of \$5,000 or less. Thus, the judges' assumption that a bond less than \$5,000 will lead to release with help from The Bail Project actually results in many people being detained for, at least, an additional seven days, before they are given a Rule 33.05 hearing that may or may not comply with the Supreme Court Rules. And even for those whom The Bail Project does help after the initial appearance, release is not as speedy as release on recognizance, and so the individual may face an additional day (or more) of unnecessary detention. *See also* Pls.' Mem. in Support of

Mot. for Prelim. Inj., ECF No. 42-1 at 33-37 (describing harms of pretrial detention).

Not only do individual judges consistently violate constitutional and Missouri Supreme Court Rules, but many of the practices described above have actually been formalized by Defendant Judges through their template order forms. The form used for bail decisions at initial appearances has no space for the judge to list any evidence relied on in reaching the bond decision, let alone the factors required by Rule 33.01(e). *See* Ex. 3, Sample Initial Appearance Form. By contrast, the template form used at hearings pursuant to Rule 33.05 has space not only for the judge’s ruling, but also for describing evidence of all the factors (including ability to pay) outlined in Rule 33.01(e) and quoted above. *See* Ex. 4, Sample Rule 33.05 Form. The stark differences in these forms evidences the Defendant Judges’ failure or refusal to apply the factors in Rule 33.01(e) applicable at the initial appearance.

The unnecessary and unconstitutional detention—along with “the collateral consequences of incarceration [that] affect not only arrestees but also, by ripple effect, the stability of their entire families and thus the community,” June 11, 2019 Memorandum and Order, ECF No. 95 at 31—that prompted this Court’s preliminary injunction continues. The Defendant Judges’ systemic failure to provide any meaningful consideration of an individual arrestee’s indigence or other possible less restrictive bail options illustrates why an injunction is both necessary to protect class members’ constitutional rights and in the public interest.

II. THE PUBLIC INTEREST SUPPORTS AN INJUNCTION TO PREVENT UNNECESSARY DETENTION AND THE SPREAD OF THE CURRENT PANDEMIC BOTH INSIDE AND OUTSIDE OF THE JAIL

A. COVID-19, a global pandemic, has reached St. Louis

We are living in the midst of a pandemic—an extreme, unprecedented, world-wide

health emergency caused by the rapid spread of the deadly coronavirus, COVID-19.⁷ There is no vaccine or cure for this novel virus.⁸ On Friday, March 13, President Trump declared a national emergency.⁹ On that same day, Missouri Governor Michael Parson issued a proclamation declaring a disaster in the State of Missouri.¹⁰

COVID-19 is highly contagious. The Centers for Disease Control and Prevention (“CDC”) advise that the virus passes through coughing and by contact with surfaces.¹¹ The current estimated incubation period is between 2 and 14 days.¹² Approximately 20 percent of people infected experience life-threatening complications, and between 1 percent and 3.4 percent die.¹³ The numbers of people diagnosed reflect only a portion of those infected;¹⁴ very few people have been tested, and many are asymptomatic transmitters.¹⁵ According to

⁷ The World Health Organization has officially classified COVID-19 as a global pandemic. *See* World Health Organization, Director-General Opening Remarks (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁸ *See* Saralyn Cruickshank, “Experts Discuss Covid-19 and Ways to Prevent Spread of Disease,” *John Hopkins Mag.*, Mar. 17, 2020, *available at* <https://hub.jhu.edu/2020/03/17/coronavirus-virology-vaccine-social-distancing-update>.

⁹ Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Mar. 13, 2020, *available at* <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

¹⁰ *See* Gov. Michael Parsons, Executive Order 20-02, <https://www.sos.mo.gov/library/reference/orders/2020>.

¹¹ *See* Center for Disease Control & Prevention, “How It Spreads,” <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html>.

¹² *See* Center for Disease Control & Prevention, “Coronavirus Disease COVID-19 Symptoms” (updated: Feb. 29 2020), <https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html>.

¹³ *See* Brian Resnick & Christina Animashaun, “Why Covid-19 is worse than the flu, in one chart,” *Vox*, Mar 18, 2020, *available at* <https://www.vox.com/science-and-health/2020/3/18/21184992/coronavirus-covid-19-flu-comparison-chart>.

¹⁴ *See* Melissa Healy, “True Number of US Coronavirus Cases is Far Above Official Tally, Scientists Say,” *L.A. Times*, Mar. 10, 2020, *available at* <https://www.msn.com/en-us/health/medical/true-number-of-us-coronavirus-cases-is-far-above-official-tally-scientists-say/ar-BB110qoA>.

¹⁵ *See* Roni Caryn Rabin, “They Were Infected with the Coronavirus. They Never Showed

the CDC, officials and experts urge social distancing, frequent hand-washing, alcohol-based hand sanitizers, and frequent cleaning *and* disinfecting of any surfaces touched by any person.¹⁶

By March 29, 2020, more than 720,000 people have been infected and 33,500 people have died worldwide.¹⁷ In the United States, as of the same date, 142,106 people have contracted COVID-19, the most confirmed infections in the world, and over 2,300 Americans have died from the virus.¹⁸

Missouri is no exception. As of March 29, 2020, Missouri has 903 known cases, an increase of 720 in six days, and the state's death toll has risen to 12, including a St. Louis-area nurse.¹⁹

These numbers will rise. The death toll in Italy, which began experiencing this epidemic about a week earlier than the first diagnosed American case, saw a rise of 30

Signs,” N.Y. Times, Feb. 26, 2020, updated Mar. 6, 2020, *available at* <https://www.nytimes.com/2020/02/26/health/coronavirus-asymptomatic.html>; Aria Bendix, “A Person Can Carry And Transmit COVID-19 Without Showing Symptoms, Scientists Confirm,” Bus. Insider, Feb. 24, 2020, *available at* <https://www.sciencealert.com/researchers-confirmed-patients-can-transmit-the-coronavirus-without-showing-symptoms>.

¹⁶ Centers for Disease Control & Prevention, Steps to Prevent Illness: https://www.cdc.gov/coronavirus/2019-ncov/about/prevention.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fabout%2Fprevention-treatment.html; *see also supra* nn. 2 & 3.

¹⁷ *See* William Feuer, “Global Corona Virus Cases Cross 350,000, Death Toll Passes 15,000, as Pandemic Takes Hold,” CNBC.com, Mar. 23, 2020, *available at* <https://www.cnbc.com/2020/03/23/coronavirus-pandemic-global-cases-cross-350000-death-toll-passes-15000.html>.

¹⁸ *See* Donald G. McNeil, Jr., “The U.S. Now Leads the World in Confirmed Coronavirus Cases,” N.Y. Times, Mar. 26, 2020, *available at* <https://www.nytimes.com/2020/03/26/health/usa-coronavirus-cases.html>.

¹⁹ *See* Erin Heffernan, “St. Louis reports first COVID-19 death, as St. Charles County, state cases climb,” St. Louis Post-Dispatch, Mar. 23, 2020, *available at* https://www.stltoday.com/lifestyles/health-med-fit/coronavirus/st-louis-reports-first-covid--death-as-st-charles/article_b401862f-e8f1-5180-8272-a1ed06abdaf4.html.

percent overnight in the 24 hours between March 5, 2020, and March 6, 2020, and a rise of 25 percent on March 15 alone—a day that killed 368 people in Italy.²⁰ Top infectious disease experts warn that the virus could kill 200,000 Americans alone.²¹

Officials in Missouri have taken drastic measures to prevent the spread of COVID-19. The Governor, Mayor of the City of St. Louis, and County Executive of St. Louis County have all declared states of emergency along with Stay-at-Home Orders.²² The Chief Justice of the Missouri Supreme Court has issued an en banc order directing all courts in the State to adjust operations, postponing all non-essential proceedings and continuing essential functions through technical means where possible.²³

Around the country, officials have also taken substantial steps to curb the spread of the virus. Governors of all 50 states have activated components of their Army and Air National Guard to help with COVID-19.²⁴ A total of 27 states—including California with its

²⁰ See Crispian Balmer & Angelo Amante, “Italy coronavirus deaths near 200 after biggest daily jump,” Reuters, Mar. 6, 2020, <https://www.reuters.com/article/us-health-coronavirus-italy/italy-coronavirus-deaths-near-200-after-biggest-daily-jump-idUSKBN20T2ML>.

²¹ Matt Sedensky and Michael R. Sisak, “Up to 200K COVID-19 deaths foreseen in US as Spain, Italy demand help,” Mercury News, Mar. 29, 2020, *available at* <https://www.mercurynews.com/2020/03/29/up-to-200k-coronavirus-deaths-foreseen-in-us-as-spain-italy-demand-help/>.

²² See Erin Heffernan, *supra* n.20. Although Governor Parson declared a statewide emergency, unlike the City and County of St. Louis, he has failed to issue a statewide stay at home order. Madeline McClain, “Missouri Governor Faces Criticism for Not Issuing Statewide Stay-at-Home Order,” K2Q.com, Mar. 27, 2020, *available at* <https://www.kq2.com/content/news/Missouri-Governor-faces-criticism-for-not-issuing-statewide-stay-at-home-order-569156361.html>.

²³ See Jeff Lehr, “Missouri Supreme Court extends order suspending most in-person court proceedings,” Joplin Globe, Mar. 23, 2020, *available at* https://www.joplinglobe.com/news/crime_and_courts/missouri-supreme-court-extends-order-suspending-most-in-person-court/article_f73f0c4d-dfb5-5364-a602-c24a44824bc1.html.

²⁴ See Howard Altman, “Latest Guard update: More than 12,300 troops mobilized for COVID-19 response,” MilitaryTimes, Mar. 27, 2020, *available at* <https://www.militarytimes.com/news/coronavirus/2020/03/27/latest-guard-update-more-than-12300-troops-mobilized-for-covid-19-response/>.

40 million residents—have issued “stay at home” or “shelter in place” orders.²⁵ Businesses throughout the nation have shut down their operations.²⁶ The universal goal is to minimize contact, particularly among groups of people, to prevent the spread of the virus.

B. Jails Are Not Equipped to Address COVID-19, which Presents a Serious Risk to the Jail and General Populations

During pandemics, jail facilities become “ticking time bombs” as “[m]any people crowded together, often suffering from diseases that weaken their immune systems, form a potential breeding ground and reservoir for diseases.”²⁷ As Dr. Jaimie Meyer, an expert in public health in jails and prisons, recently explained, “[T]he risk posed by COVID-19 in jails and prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.” *See* Ex. 5, Decl. of Dr. Jaimie Meyer (“Meyer Decl.”) at ¶ 7, Mar. 15, 2020, filed in *Velesaca v. Wolf*, 1:20-cv-01803 (S.D.N.Y.). This is due to a number of factors: the close proximity of people detained; the impossibility of social distancing; the lack of medical and hygiene supplies ranging from hand sanitizer to protective equipment; ventilation systems that encourage the spread of airborne diseases; difficulties quarantining individuals who become ill; increased susceptibility of the population in jails and prisons; the fact that jails and prisons normally have to rely heavily on outside hospitals that will be unavailable during a pandemic; and loss

²⁵ Taylor Brown, “Bay Briefing: Newsom tells California residents to shelter-in-place,” S.F. Chron., Mar. 20, 2020, *available at* <https://www.sfchronicle.com/bayarea/article/Bay-Briefing-Newsom-tells-California-residents-15144692.php>; Alicia Lee, “These states have implemented stay-at-home orders. Here’s what that means for you,” CNN, Mar. 28, 2020, *available at* <https://www.cnn.com/2020/03/23/us/coronavirus-which-states-stay-at-home-order-trnd/index.html>.

²⁶ *See id.*

²⁷ *See* St. Louis Univ., “Ticking Time Bomb”: Prisons Unprepared For Flu Pandemic, ScienceDaily (2006), *available at* <https://www.sciencedaily.com/releases/2006/09/060915012301.htm>.

of both medical and correctional staff to illness.²⁸

The world already knows the extreme risks that jails and prisons pose for the spread of COVID-19. Last month, the virus rapidly spread across China’s prisons and jails.²⁹ The virus has also spread rapidly in Iran, where 85,000 prisoners were temporarily released to protect them and to protect the community from propagation of an outbreak.³⁰ The dangerous conditions jails pose prompted U.S. Secretary of State Mike Pompeo to call for Iran to release Americans detained there because of the “deeply troubling” “[r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention amid increasingly deteriorating conditions defies basic human decency.”³¹

It is only a matter of time until we face similar crises throughout the United States. Missouri confirmed its first case of COVID-19 in a correctional facility on March 23, 2020.³²

²⁸ “The pathway for transmission of pandemic influenza between jails and the community is a two-way street. Jails process millions of bookings per year. Infected individuals coming from the community may be housed with healthy inmates and will come into contact with correctional officers, which can spread infection throughout a facility. On release from jail, infected inmates can also spread infection into the community where they reside.” Laura M. Maruschak et al., *Pandemic Influenza & Jail Facilities & Populations*, Am. J. of Pub. Health (Oct. 2009); see also Dr. Anne Spaulding, *Coronavirus & the Correctional Facility: for Correctional Staff Leadership*, Mar. 9, 2020, https://www.ncchc.org/filebin/news/COVID_for_CF Administrators_3.9.2020.pdf.

²⁹ See Claudia Lauer & Colleen Long, “US prisons, jails on alert for spread of coronavirus,” AP News, Mar. 7, 2020, available at <https://apnews.com/af98b0a38aaabedbc059092db356697>.

³⁰ See Parisa Hafezi, “Iran temporarily frees 85,000 from jail including political prisoners,” Reuters, Mar. 17, 2020, available at <https://www.reuters.com/article/us-health-coronavirus-iran-prisoners/iran-temporarily-frees-85000-from-jail-including-political-prisoners-idUSKBN21410M>.

³¹ See *id.*; see also Jennifer Hansler & Kylie Atwood, “Pompeo calls for humanitarian release of wrongfully detained Americans in Iran amid coronavirus outbreak,” CNN, Mar. 10, 2020, available at <https://cnn.it/2W40pV7>.

³² See Maggie Holmes, “Missouri Department of Corrections announces offender test positive for COVID-19,” KCTV, Mar. 23, 2020, available at https://www.kctv5.com/coronavirus/missouri-department-of-corrections-announces-offender-test-positive-for-covid/article_fedb5da4-6d5b-11ea-bf88-cf2ef9db2b7a.html.

In New York City, 132 detainees and 104 staff members have been infected with COVID-19 on Rikers Island as of March 28, 2020, an infection rate that would rank highest in the world if Rikers were its own city.³³ In Chicago, the numbers tell a similarly devastating tale of the spread of COVID-19. Two detainees tested positive for COVID-19 in the Cook County Jail on March 23, 2020.³⁴ Within 5 days, that number has grown to 89—a more than 4,000 percent increase.³⁵

COVID-19 continues to spread rapidly to jails and prisons around the country. Seven people detained in the Dallas County Jail have tested positive for COVID-19 as of March 27th.³⁶ The District of Columbia Jail has 4 positive cases as of March 29th.³⁷ Two people incarcerated at the Middlesex County Jail in Massachusetts have tested positive for COVID-19 as of March 28th.³⁸ One person incarcerated in the Riverside County Jail in California and three county sheriff's deputies, at least one of whom works at the county jails,

³³ See Asher Stockler, “New York to Release 1,100 Low-level Parole Violators, as Worries Over Prison System’s Vulnerability to Covid-19 Mount,” *Newsweek*, Mar. 28, 2020, *available at* <https://www.newsweek.com/new-york-city-jails-coronavirus-1494852>.

³⁴ See Megan Crepeau & Annie Sweeney, “Two COVID-19 cases identified at Cook County Jail as calls increase for early releases,” *Chi. Tribune*, Mar. 23, 2020; <https://www.chicagotribune.com/coronavirus/ct-coronavirus-jail-cases-releases-20200323-pot4pyw4zrhpnaguawwxztina-story.html>.

³⁵ See Sam Kelly, “Sheriff announces 51 new coronavirus cases at Cook County Jail, raising total to 89,” *Chi. Sun-Times*, Mar. 28, 2020, *available at* <https://chicago.suntimes.com/coronavirus/2020/3/28/21198407/cook-county-jail-coronavirus-covid-19-cases-inmates-89>.

³⁶ See Hannah Jones, “2 More Dallas County Jail Inmates Test Positive for COVID-19,” *NBC Dallas Fort Worth*, Mar. 27, 2020, *available at* <https://www.nbcdfw.com/news/coronavirus/2-more-dallas-county-jail-inmates-test-positive-for-covid-19/2340118/>.

³⁷ “2 more inmates in D.C. jail test positive for COVID-19; total now up to 4,” *ABC7*, Mar. 29, 2020, *available at* <https://wjla.com/news/coronavirus/2-more-inmates-in-dc-jail-test-positive-for-covid-19>.

³⁸ See Adam Sennott, “2 inmates at Middlesex jail test positive for COVID-19,” *Boston Globe*, Mar. 28, 2020, *available at* <https://www.bostonglobe.com/2020/03/29/metro/2-inmates-middlesex-jail-test-positive-covid-19/>.

have tested positive for COVID-19 as of March 28th.³⁹ In Orleans Parish, Louisiana, four jail healthcare workers and five Sheriff's Office employees have tested positive for COVID-19, and at least three incarcerated people were awaiting tests as of March 26.⁴⁰

Medical experts specializing in corrections health urgently recommend a dramatic reduction in the population of detention centers, jails, and prisons. Only such an immediate and drastic reduction will maximize the opportunity for appropriate distancing, for proper sanitization, and personal hygiene and for appropriate care for those who are or may be infected with COVID-19. For example:

- Dr. Mark Stern: “As a correctional health expert, I recommend release of eligible individuals from detention”⁴¹
- Dr. Jonathan Giftos, former Medical Director for Correctional Health Services at Rikers Island: “It’s my view that the only way to really mitigate the harm of rapid spread of coronavirus in the jail system is through depopulation, releasing as many people as possible with focus on those at

³⁹ See Jonah Valdez, “First inmate at Riverside County jail and two more deputies test positive for coronavirus,” The Press-Enterprise, Mar. 28, 2020, *available at* <https://www.pe.com/2020/03/28/first-inmate-at-riverside-county-jail-and-two-more-deputies-test-positive-for-coronavirus/>. Detainees and Sheriff's deputies in the Santa Clara County Jail and detainees in the Fulton County Jail have also tested positive for COVID-19. See Fiona Kelliher, “Santa Clara County jail inmate tests positive for COVID-19,” Mercury News, Mar. 23, 2020, *available at* <https://www.mercurynews.com/2020/03/23/santa-clara-county-jail-inmate-tests-positive-for-covid-19/>; Jason Green, “Coronavirus: 3 Santa Clara County sheriff's deputies test positive,” Mercury News, Mar. 23, 2020, *available at* <https://www.mercurynews.com/2020/03/23/coronavirus-3-santa-clara-county-sheriffs-office-test-positive/>; Asia Burns, “1st Fulton County Jail inmate tests positive for COVID-19,” Atl. J. Const., Mar. 23, 2020, *available at* <https://www.ajc.com/news/breaking-news/breaking-first-fulton-county-jail-inmate-tests-positive-for-covid/Lh5z2tYN9vFdg8OIeDQb2N/>.

⁴⁰ “Coronavirus and Orleans Parish jail: 9 workers test positive; inmates’ tests pending,” WDSU NBC, Mar. 26, 2020, <https://www.wdsu.com/article/coronavirus-and-orleans-jail-6-workers-test-positive-inmates-tests-pending/31932626>.

⁴¹ Ex. 6, Decl. of Dr. Marc Stern, filed in *Dawson v. Asher*, Case No. 20-cv-409 (W.D. Wash.); see also Ex. 7, Decl. of Medical Professionals Concerned about the Risk of the Spread of COVID-19 in the Cook County Jail and the Illinois Department of Corrections, filed in *In re State & Nat'l Emergency & Protection of the Life & Health of Detainees in the County Jail & Those Who Interact With*, No. 2020 Misc. 0010 (Ill. Cir. Ct.).

highest risk of complication.”⁴²

- Professor Josiah Rich, Professor Scott Allen, and Dr. Mavis Nimoh: “Authorities should release those who do not pose an immediate danger to public safety, while also reducing arrests and delaying sentencings. . . . Those being held in jails simply due to their inability to afford bail, or for minor infractions or violations, can generally be released promptly by the judiciary or even the local sheriff. Those eligible for parole can and should be released.”⁴³
- Professor Josiah Rich, Brown University epidemiologist, is described as stating that the number one change people can make to minimize this threat is simply to reduce the number of imprisoned people.⁴⁴
- Dr. Homer Venters, former chief medical officer for New York City Correctional Health Services: “Consideration should be underway concerning the number of people entering jails and prisons and how each step can be re-evaluated and monitored.”⁴⁵
- A group of doctors who work in New York City’s jails, hospitals, and shelters recently wrote a letter to the city council urging them to take urgent measures to curtail the spread of the virus, including ordering the courts to consider release for anyone in pretrial detention over the age of 60, administratively rescheduling all criminal court proceedings for people who are not currently incarcerated, and ordering the NYPD to stop making low-level arrests for violations and misdemeanors.⁴⁶
- Johns Hopkins University faculty in public health, bioethics, medicine, and nursing wrote a letter to Maryland Governor Larry Hogan calling on him to “consider pre-trial detention only in genuine cases of security concerns” and “[e]xpeditate consideration of all older incarcerated individuals and those with chronic conditions predisposing to severe COVID-19 disease (heart disease, lung disease, diabetes, immune-compromise) for parole or other form of

⁴² “Recipe for disaster: The spread of corona virus among detained populations,” MSNBC, Mar. 18, 2020, *available at* <https://www.msnbc.com/all-in/watch/-recipe-for-disaster-the-spread-of-coronavirus-among-detained-populations-80947781758>.

⁴³ Josiah Rich, Scott Allen & Mavis Nimoh, “We must release prisoners to lessen the spread of coronavirus,” Wash. Post, Mar. 17, 2020, *available at* <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lesser-spread-coronavirus/>.

⁴⁴ Amanda Holpuch, “Calls mount to free low-risk US inmates to curb coronavirus impact on prisons,” The Guardian, Mar. 13, 2020, *available at* <https://www.theguardian.com/us-news/2020/mar/13/coronavirus-us-prisons-jails>.

⁴⁵ Dr. Homer Venters, “4 ways to protect our jails and prisons from coronavirus,” The Hill, Feb. 29, 2020, *available at* <https://thehill.com/opinion/criminal-justice/485236-4-ways-to-protect-our-jails-and-prisons-from-coronavirus>.

⁴⁶ Brad Lander, “Doctors in NYC Hospitals, Jails, and Shelters Call on the City to Take More Aggressive Action to Combat the Spread of Coronavirus,” Medium, Mar. 12, 2020, *available at* <https://medium.com/@bradlander/doctors-in-nyc-hospitals-jails-and-shelters-call-on-the-city-to-take-more-aggressive-action-to-fb75f0b131c2>.

release from prison.”⁴⁷

- In a recent presentation to correctional healthcare workers developed in cooperation with the Centers for Disease Control and Prevention, Dr. Anne Spaulding, a professor of epidemiology and the director of the Emory Center for the Health of Incarcerated Persons, encouraged jurisdictions to consider alternatives to incarceration or detention, such as at-home electronic monitoring, diversionary courts, and community corrections.⁴⁸

In short, there is a consensus among public health experts that jails are uniquely situated to facilitating the rapid spread of COVID-19 and that immediate action, in the form of reducing inmate populations, is needed to combat that threat and protect the public as a whole.

C. St. Louis’s Jails Are at Risk of Becoming Hot Zones Absent Immediate Action

These concerns and recommendations apply with full force to the Medium Security Institution and the City Justice Center. People detained in the Medium Security Institute or the City Justice Center—and those who must interact with them—are subject to all of the potentially problematic conditions outlined in Section B above and cannot employ the CDC-recommended measures for mitigating the spread of COVID-19 detailed in Section A above. *See also* Ex. 8, Decl. of Nathan A. Walls (describing lack of compliance with basic measures to protect against spread of COVID-19, including inability to obtain cleaning supplies even after notifying guards of blood and mucus on walls); Ex. 9, Decl. of Rakeem Clemons (describing lack of sanitary conditions, including scarcity of soap and cleaning supplies). The combination of lack of adequate sanitation, close quarters, and limited medical capacity

⁴⁷ “JHU Faculty Express Urgent Concern about Covid-19 Spread in Prison,” Johns Hopkins Univ., Mar. 25, 2020, *available at* <https://bioethics.jhu.edu/news-events/news/jhu-faculty-express-urgent-concern-about-covid-19-spread-in-prison/>.

⁴⁸ *See* Dr. Anne Spaulding, Coronavirus COVID-19 and the Correctional Facility for the Correctional Healthcare Worker (Mar. 23, 2020), https://www.ncchc.org/filebin/news/COVID_for_CF_HCW_3.9.20.pdf.

creates an intolerably dangerous situation and puts detainees, jail staff, and the communities to which they belong at greater risk of illness and death. The constant cycling of people in and out of the jail makes containment impossible, even if visitations are stopped.

Furthermore, if detainees incarcerated in St. Louis's jails were to become infected with COVID-19 and the virus were to spread rapidly within the jails, many prisoners and detainees would require urgent care, overwhelming the capacity of City of St. Louis Health Services to provide such care, exacerbating the death toll and the risks to all involved.

The relief Plaintiffs request in their preliminary injunction is eminently in the public interest. An order ensuring that any detention is truly necessary to advance the State's compelling interests benefits not only the health and well-being of all those confined in the Jail but also the larger community. The likely result of this preliminary injunction, moreover, will be that some currently detained will be released and others arrested in the future will never be detained at all—reducing crowding at the jail. Indeed, during the time this Court's initial preliminary injunction was in effect, for just 10 days, 171 new hearings resulted in the release of 119 individuals. Ex. 10, Decl. of Alyxandra T. Haag ¶¶ 7-8.

Bearing out both that an injunction would be in the public interest and that individuals continue to be held unnecessarily, the St. Louis Circuit Attorney has already agreed to the release of dozens pretrial detainees, who are now free.⁴⁹ Additionally, Mary Fox, the Director of the Missouri State Public Defender, and 35 other organizations and individuals wrote to the Chief Justice of the Missouri Supreme Court to request significant changes to pretrial detention and bail practices across the state. *See* Ex. 11, Ltr. From Mary

⁴⁹ *See* Laurie Skrivan, "St. Louis city and county to release more than 140 inmates amid virus concerns," St. Louis Post-Dispatch (Mar. 26, 2020), *available at* https://www.stltoday.com/news/local/crime-and-courts/st-louis-city-and-county-to-release-more-than-inmates/article_dd8b30f6-c3ea-5229-b7ac-0aa36ee8f14c.html.

Fox to Mo. Sup. Ct., Mar. 26, 2020. The letter calls on the Court to order judges to immediately release from confinement the following groups of inmates during the pendency of the COVID-19 pandemic:

- (i) those currently serving sentences in any city or county jail in Missouri pursuant to a conviction for a misdemeanor offense; (ii) those currently serving sentences in any city or county jail in Missouri pursuant to a conviction for a municipal ordinance violation; (iii) those confined pretrial on nonviolent misdemeanor, municipal ordinance violation, or nonviolent C, D, and E felony charges; (iv) those confined on technical probation violations or probation violations based on allegations of a municipal ordinance violation, nonviolent misdemeanor, or nonviolent felony; and (v) those in high-risk categories likely to face serious illness or death.

Id.

Similarly, Dr. Fred Rottnek, the lead physician and medical director of the St. Louis County Jail from 2001 to 2016, sent a public letter to the Missouri Supreme Court that described a COVID-19 outbreak in Missouri’s prisons and jails as a “public health nightmare.” *See* Ex. 12, Ltr. from Dr. Rottnek to Mo. Sup. Ct., Mar. 26, 2020, at 6. Sixteen other area medical professionals signed on to his letter. *Id.* at 9-10. The letter explains that “the COVID-19 pandemic has the potential to devastate the lives of both incarcerated individuals and jail personnel, and result in a medical emergency that could overwhelm Missouri’s medical infrastructure.” *Id.* at 2. It further warns that Missouri’s correctional facilities are under-equipped, under-staffed, and poorly set up to comply with the CDC’s directives during such a pandemic. *Id.* at 3-6. Finally, the medical professionals call for the release of medically compromised people, people over the age of 55, people detained on cash bonds they are unable to afford, and “a sufficient number of inmates to guarantee the jail can accommodate adequate social distancing guidelines set forth by the CDC.” *Id.* at 7.

On March 30, 2020, the Missouri Supreme Court, in response to “recent inquiries,” issued a letter to judges that did not dictate action. Instead, it merely reminded them that

Rule 33.01—the very Rule that, as described above, Defendants continue to violate—governs pretrial release. Ex. 13, Ltr. from Chief Justice, George W. Draper III (Mar. 30, 2020).

The practices of other jurisdictions, however, evidence that the requested relief is in the public interest. Chief justices of state supreme courts across the country have issued orders similar to the one requested by advocates in Missouri. For example, Chief Justice Stuart Rabner of the New Jersey Supreme Court issued an order that led to the review of thousands of cases and the release of an estimated 1,000 people.⁵⁰ Chief Justice Mike McGrath of the Montana Supreme Court asked all judges in the state to “review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for non-violent offenses,” in light of the COVID-19 pandemic.⁵¹ Chief Justice Donald Beatty of the South Carolina Supreme Court also issued an order urging judicial circuits to release people charged with non-violent offenses and avoid issuing bench warrants.⁵² Chief Justice John Minton, Jr. of the Kentucky Supreme Court similarly asked judges and clerks in the state “to clear out all of the jail inmates you safely can, ahead of the virus, if you aren’t doing so.”⁵³

⁵⁰ See Kara Scanell, “New Jersey is releasing about 1,000 inmates from county jails,” CNN.com, Mar. 23, 2020, *available at* https://edition.cnn.com/world/live-news/coronavirus-outbreak-03-23-20-intl-hnk/h_2f47b2dacdb0790f25dd0d08acbf954b.

⁵¹ “Montana Chief Justice requests that non-violent jail inmates be released to curb COVID-19 spread,” KRTV, Mar. 24, 2020, *available at* <https://www.krtv.com/news/montana-and-regional-news/montana-chief-justice-asks-that-non-violent-jail-inmates-be-released-to-curb-covid-19-spread>.

⁵² See Daniel J. Gross, “Dozens of inmates released from Greenville jail amid growing COVID-19 concerns,” Greenville News, Mar. 20, 2020, *available at* <https://www.greenvilleonline.com/story/news/local/south-carolina/2020/03/20/dozens-released-greenville-south-carolina-jail-due-covid-19-fears/2883854001/>.

⁵³ Toby Sells, “Reformers Urge Release of Many from Jail, Prisons to Stop Coronavirus Spread,” Memphis Flyer, Mar. 25, 2020, *available at* <https://www.memphisflyer.com/NewsBlog/archives/2020/03/25/reformers-urge-release->

Trial judges, corrections officials, and other government entities across the country have also acted on their own initiative to release detainees. In Cleveland, criminal court judges have released dozens of pretrial detainees and anticipate the eventual release of some 300 detainees from the Cuyahoga County Jail; in this release, “almost any kind of inmate was considered.”⁵⁴ District court judges in New Orleans have issued orders for immediate release from jail for individuals awaiting trial and detained on certain conditions.⁵⁵ The Texas Commission on Jail Standards advised jails to release detainees and employ cite-and-release policies to reduce bookings.⁵⁶ Travis County is releasing inmates charged with non-violent criminal offenses.⁵⁷ Fulton County, Georgia is releasing inmates early and postponing those serving intermittent “weekend” sentences.⁵⁸ The Washington County Jail in Oregon is

of-many-from-jail-prisons-to-stop-coronavirus-spread.

⁵⁴ “Ohio jail Releases Hundreds of Inmates Due to Coronavirus Concerns,” Okla. News 4, Mar. 23, 2020, *available at* <https://kfor.com/health/coronavirus/ohio-jail-releases-hundreds-of-inmates-due-to-coronavirus-concerns/>. Releases also occurred in Erie and Richland counties in Ohio. *See* Peggy Gallek, “Erie County Reducing Jail Population Due to COVID-19 Concerns,” Fox8 (Mar. 17, 2020, <https://fox8.com/news/coronavirus/erie-county-reducing-jail-population-due-to-covid-19-concerns/>; “Richland County Jail Releasing Some Non-violent, Low-level Offenders Due to COVID- 19,” Richland Source (Mar. 18, 2020), https://www.richlandsource.com/news/covid19/richland-county-jail-releasing-some-non-violent-low-level-offenders/article_0df572a8-692d-11ea-99aa-1fdd2d880565.html.

⁵⁵ *See* “Orleans Criminal Court judges order release of certain inmates amid coronavirus crisis,” NBC WDSU, Mar. 26, 2020, *available at* <https://www.wdsu.com/article/orleans-criminal-court-judges-order-release-of-certain-inmates-amid-coronavirus-crisis/31943462>.

⁵⁶ *See* Sydney Isenberg, “Texas jails to release non-violent misdemeanor inmates due to coronavirus pandemic,” KXXV, Mar. 18, 2020, *available at* <https://www.kxxv.com/news/local-news/texas-jails-to-release-non-violent-misdemeanor-inmates-due-to-coronavirus-pandemic>.

⁵⁷ *See* “Travis County Judges Releasing Inmates to Limit Coronavirus Spread, Report Claims,” KVUE, Mar 16, 2020, *available at* <https://www.statesman.com/news/20200316/travis-county-judges-releasing-inmates-to-limit-coronavirus-spread>.

⁵⁸ *See* Blis Savidge, “Fulton County To Release Inmates Early In Light Of Pandemic” GPB, Mar. 16, 2020, *available at* <https://www.gpbnews.org/post/fulton-county-release-inmates-early-light-pandemic>.

releasing inmates and ensuring that all remaining inmates have their own cell.⁵⁹ Lackawanna and Mercer Counties in Pennsylvania are also reviewing and releasing prisoners.⁶⁰ In Charlotte, North Carolina, the Mecklenburg County Jail has begun releasing inmates and is actively considering more pretrial detainees who have misdemeanor or felony charges for release.⁶¹ Hillsborough County, Florida, is releasing non-violent, pretrial detainees.⁶² Spokane County, Washington, released low-level inmates,⁶³ and Kitsap County has released non-violent inmates and is considering more for release.⁶⁴

In addition to these efforts, attorneys on both sides of the system in other jurisdictions are working collaboratively to get people out of prisons and jails. The San Francisco Public Defender and District Attorney have both directed their staffs to agree to

⁵⁹ See Drew Reeves, “Washington County Jail Releases Some Inmates to Prevent Spread of COVID- 19,” Fox 12 Or., Mar.17, 2020, *available at* https://www.kptv.com/news/washington-county-jail-releases-some-inmates-to-prevent-spread-of/article_34cdc2c2-68d3-11ea-bfc0-3725e49b0c0c.html.

⁶⁰ See Kevin Hayes, “Lackawanna County Reviews Possible Release of Low Level Inmates to Mitigate Spread of COVID-19,” PA Homepage, Mar.18, 2020, *available at* <https://www.pahomepage.com/top-news/lackawanna-county-to-release-low-level-inmates-to-mitigate-spread-of-covid-19>; Gerry Ricciutti, “Mercer County Jail Releases Some Lower-Level Offenders Amid COVID- 19 Outbreak,” WKBN, Mar. 18, 2020, *available at* <https://www.wkbn.com/news/local-news/mercy-county-jail-releases-some-lower-level-offenders-amid-covid-19-outbreak/>.

⁶¹ See Michael Gordon & James Alexander, “Mecklenburg begins releasing jail inmates to avoid cellblock outbreak of COVID-19,” Charlotte Observer, Mar. 18, 2020, *available at* <https://www.charlotteobserver.com/news/coronavirus/article241279836.html>.

⁶² See “Hillsborough County sheriff will release 164 ‘low-level’ offenders in jail for ‘non-violent’ crimes,” Fox 13, Mar. 19, 2020, *available at* <https://www.fox13news.com/news/hillsborough-county-sheriff-will-release-164-low-level-offenders-in-jail-for-non-violent-crimes>.

⁶³ See “48 low-level inmates released from Spokane County Jail,” KHQ-Q6, Mar. 17, 2020, *available at* https://www.khq.com/coronavirus/low-level-inmates-released-from-spokane-county-jail/article_5fc7e406-68a3-11ea-b73e-132316bf68fd.html.

⁶⁴ See Andrew Binion, “Kitsap County Jail taking steps to reduce chance of COVID-19 infections,” Kitsap Sun, Mar. 18, 2020, *available at* <https://www.kitsapsun.com/story/news/2020/03/18/kitsap-county-jail-taking-steps-reduce-chance-covid-19-infections/2869893001/>.

the release of pretrial detainees who are at heightened risk for illness.⁶⁵ In Kentucky, the Department of Public Advocacy, the state's Public Defender System, has moved the state to release all pretrial detainees in county and regional jails.⁶⁶ The Salt Lake County, Utah, District Attorney announced on March 20, 2020, that up to 200 people would be released in the coming two weeks.⁶⁷ Twenty-nine pretrial defendants, who were being held on cash bond, have already been released from Boyle, Mercer, and Lincoln counties.⁶⁸ Public defenders in at least five other jurisdictions, including New York,⁶⁹ New Orleans,⁷⁰ Santa

⁶⁵ See Darwin Graham, "San Francisco Officials Push to Reduce Jail Population to Prevent Coronavirus Outbreak," Appeal, Mar. 11, 2020, *available at* <https://theappeal.org/coronavirus-san-francisco-reduce-jail-population>; Jeffrey Cawood, "San Francisco Public Defender Seeks 'Immediate Release' Of Some Jail Inmates Due To Coronavirus," Daily Wire, Mar. 16, 2020, *available at* <https://www.dailywire.com/news/san-francisco-public-defender-seeks-immediate-release-of-some-jail-inmates-due-to-coronavirus>.

⁶⁶ See "Defenders want dozens of defendants released from jail to reduce COVID-19 threat," The Advocate Messenger, Mar. 16, 2020, *available at* <https://www.amnews.com/2020/03/16/defenders-want-dozens-of-defendants-released-from-jail-to-reduce-covid-19-threat/>.

⁶⁷ See Jessica Miller, "Hundreds of Utah inmates will soon be released in response to coronavirus," Mar. 21, 2020, *available at* https://www.sltrib.com/news/2020/03/21/hundreds-utah-inmates/?fbclid=IwAR3r8BcHeEkoAOcyP3pmBu9XWkEj4MMsDC_LUH4YZn2QGd18hALk4vM9X1c.

⁶⁸ See Jim Mustian, "Inmates Fearful of Virus Argue for Release" PBS, Mar. 18, 2020, *available at* <https://www.pbs.org/newshour/health/get-out-of-jail-inmates-fearful-of-virus-argue-for-release>.

⁶⁹ See Jane Wester, "Legal Aid Sues for Release of 116 NYC Inmates, Saying Coronavirus Mitigation 'Virtually Impossible' in Jails," N.Y. Law J., Mar. 20, 2020, *available at* <https://www.law.com/newyorklawjournal/2020/03/20/legal-aid-sues-for-release-of-116-nyc-inmates-saying-coronavirus-mitigation-virtually-impossible-in-jails/?slreturn=20200229153544>.

⁷⁰ See Nicholas Chrastil, "Public Defenders Request the Release of all Non-Violent Offenders in Jail due to Coronavirus," The Lens, Mar. 12, 2020, *available at* <https://thelensnola.org/2020/03/12/public-defenders-request-the-release-of-all-non-violent-offenders-in-jail-clue-to-corona-virus>.

Barbara,⁷¹ Colorado,⁷² and Chicago⁷³ have called for the release of all low-level or non-violent detainees. The Philadelphia District Attorney's office has moved to release most people charged with non-violent offenses or misdemeanors.⁷⁴ Officials in Philadelphia, as well as Delaware and Montgomery Counties, have been working to release or parole prisoners early.⁷⁵ Thirty-three elected prosecutors from across the nation, in jurisdictions ranging from California to Mississippi, recently signed a public statement calling for urgent measures to "dramatically reduce the number of incarcerated individuals," to protect incarcerated populations from the threat of COVID-19.⁷⁶ Jurisdictions around the country have also taken steps to reduce the number of people in custody by suspending arrests⁷⁷ and

⁷¹ See Delaney Smith, "Santa Barbara Public Defender Calls for Release of Low-Level Offenders," Santa Barbara Indep., Mar. 17, 2020, *available at* <https://www.independent.com/2020/03/17/santa-barbara-public-defender-calls-for-release-of-low-level-offenders>.

⁷² See Elise Schmelzer, "Colorado public defenders, advocates call for drastic change to prevent coronavirus in jails, prisons," Denver Post, Mar. 17, 2020, *available at* <https://www.denverpost.com/2020/03/17/colorado-public-defenders-criminal-justice-coronavirus/>.

⁷³ See "Public Defenders Call for Release of Detainees Over Coronavirus Pandemic," NBC 5 Chi., Mar. 23, 2020, *available at* <https://www.nbcchicago.com/news/local/public-defenders-call-for-release-of-detainees-after-correctional-officer-tests-positive/2242701/>.

⁷⁴ See "Philly DA Larry Krasner urges for early release of low-risk prisoners to prevent spread of COVID-19," Fox 29, Mar. 19, 2020, *available at* <https://www.fox29.com/news/philly-da-larry-krasner-urges-for-early-release-of-low-risk-prisoners-to-prevent-spread-of-covid-19>.

⁷⁵ See Samantha Melamed & Mike Newall, "With Courts Closed by Pandemic, Philly Police Stop Low-level Arrests to Manage Jail Crowding," Phila. Inquirer, Mar. 18, 2020, *available at* <https://www.inquirer.com/health/coronavirus/philadelphia-police-coronavirus-covid-pandemic-arrests-jail-overcrowding-larry-krasner-20200317.html>.

⁷⁶ Henry Culvyhouse, "DPA Requests Release of Pretrial Detainees," The Daily Indep., Mar. 18, 2020, *available at* https://www.dailyindependent.com/news/dpa-requests-release-of-pretrial-detainees/article_3b8416c2-695d-11ea-b683-e3d21bdf59cc.html.

⁷⁷ The Chief Judge of the Washington, D.C., Superior Court "issued an emergency order allowing police and prosecutors to exercise discretion to determine whether a person arrested should be held until their first court appearance or given citation release with notice of their future court date." D.C. Sup. Ct. Issues Emergency Order, District of Columbia Courts Newsroom, Mar. 16, 2020, http://www.dccourts.gov/sites/default/files/Order_3-16-20.pdf. The Los Angeles County Sheriff's Department has released over 600 inmates and

refusing to book people into jails.⁷⁸ The broad-ranging relief jurisdictions are engaging in across the country demonstrates that Plaintiffs' request here is clearly within the public

directed officers to reduce arrests. *See* Alene Tchekmedyan, Paige St. John & Matt Hamilton, "L.A. County Releasing Some Inmates from Jail to Combat Coronavirus," *L.A. Times*, March 16, 2020, *available at* <https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus>. The Philadelphia Police have been instructed to delay arrests for low-level crimes—a decision supported by the Fraternal Order of the Police. *See* Samantha Melamed & Mike Newall, "With Courts Closed by Pandemic, Philly Police Stop Low-level Arrests to Manage Jail Crowding," *Phila. Inquirer*, Mar. 18, 2020, *available at* <https://www.inquirer.com/health/coronavirus/philadelphia-police-coronavirus-covid-pandemic-arrests-jail-overcrowding-larry-krasner-20200317.html>. The Fort Worth Police have indicated that they will stop arresting people for misdemeanors. *See* Nichole Manna, "Fort Worth police will give citations for low-level crimes amid coronavirus outbreak," *Fort Worth Star Telegram*, Mar. 17, 2020, <https://www.star-telegram.com/news/coronavirus/article241254951.html>. And the Collin County, Texas, Sheriff has directed police departments to cite and release people suspected of non-violent offenses. *See* Charles Scudder, "Facing coronavirus concerns, Collin County sheriff asks police not to bring petty criminals to jail," *Dallas Morning News*, Mar. 12, 2020, <https://www.dallasnews.com/news/public-health/2020/03/12/facing-coronavirus-concerns-collin-county-sheriff-asks-police-not-to-bring-petty-criminals-to-jail>. Racine County, Wisconsin, has suspended arrests for non-violent offenses "to protect law enforcement and the inmates confined in the Racine County Jail." Racine Cty. Sheriff's Office, Facebook (Mar. 15, 2020), <https://www.facebook.com/pg/RacineCountySheriffsOffice/posts>; Alyssa Mauk, "Sheriff suspends non-violent arrests due to COVID-19," *J. Times*, Mar. 14, 2020, https://journaltimes.com/news/local/crime-and-courts/sheriff-suspends-non-violent-arrests-due-to-covid/article_141c020d-b911-5453-a04a-e67b8070d17c.html. In Denver and Aurora, Colorado, the police will no longer send an officer to report low-level incidents. *See* Elise Schmelzer, "Denver, Aurora police no longer sending officers to low-level crimes to minimize spread of coronavirus" *Denver Post*, Mar. 14, 2020, <https://www.denverpost.com/2020/03/13/denver-aurora-police-coronavirus/>.

⁷⁸ In Wisconsin, Milwaukee County will not book alleged misdemeanants. *See* Bruce Yielmetti, "Federal, state courts curtail most activities, and the jail is booking fewer defendants," *Milwaukee J. Sentinel*, Mar. 13, 2020, *available at* <https://www.jsonline.com/story/news/crime/2020/03/13/coronavirus-milwaukee-county-trials-canceled-jail-bookings-limited/5040956002/>. In Youngstown, Ohio, the Mahoning County jail is refusing all non-violent misdemeanor arrests. *See* "Local county jails making changes due to coronavirus outbreak," *WKBN*, Mar. 12, 2020, *available at* <https://www.wkbn.com/news/coronavirus/mahoning-county-jail-refusing-some-inmates-due-to-coronavirus-outbreak/>. Jails across Washington State are not booking low-level alleged offenders, including for drug and property crimes. *See* Michael Lang, "Washington Jails Limiting Inmate Bookings Over Coronavirus Concerns," *N. Coast News*, Mar. 11, 2020, *available at* <https://www.northcoastnews.com/news/washington-jails-limiting-inmate-bookings-over-coronavirus-concerns>.

interest.

III. PRINCIPLES OF COMITY DO NOT PRECLUDE THIS COURT FROM ISSUING A PRELIMINARY INJUNCTION

Concern about “comity between the state and federal judiciaries,” *Dixon v. City of St. Louis*, 950 F.3d 1052, 1056 (8th Cir. 2020), does not undermine the substantial public interest that supports a preliminary injunction. Although the Eighth Circuit directed this Court to consider any applicable federalism concerns when evaluating the public interest, the Circuit also was clear—in vacating and remanding for further consideration rather than reversing—that it remains within this Court’s authority to re-issue a preliminary injunction. Indeed, in *In re SDDS Inc.*, 97 F.3d 1030 (8th Cir. 1996), the case that the Eighth Circuit cited as establishing that comity should be considered in evaluating this *Dataphase* factor, the court ultimately held, after accounting for federalism concerns, that an injunction *should* issue. That was true, moreover, even though the basis for the injunction in *SDDS*—that parallel state court litigation was barred under principles of res judicata—is something that state courts are equally well-equipped to decide. The court nonetheless concluded that the interest in “judicial economy” and avoiding “duplicative litigation” overcame the notion that “interference with a state court proceeding is generally opposed by public policy.” *Id.* at 1041. Certainly, if the interest in judicial economy in a *single* dispute is weighty enough to overcome comity concerns, then so is the combined interest in preventing the unconstitutional detention of scores of individuals and slowing the spread of a virus that has precipitated a national public health crisis.

Not only are the other considerations relevant to the public interest particularly strong here, but also the federalism interest is relatively weak. This is true for four reasons.

First, the Supreme Court has explained that principles of comity are at their height in areas where the States enjoy “wide regulatory latitude,” not when a “suit . . . involve[s] any

fundamental right or classification that attracts heightened judicial scrutiny.” *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 431 (2010). This case, which concerns Plaintiffs’ core liberty and due process interests, falls into the latter category.⁷⁹ Defendants’ practice, from before this lawsuit was filed to this day, has been to issue de facto detention orders by imposing unaffordable money bail without any finding, let alone one by clear and convincing evidence, that detention is necessary to advance a compelling state interest. As this Court concluded—and the Eighth Circuit did not question—“heightened scrutiny” applies to this infringement of Plaintiffs’ fundamental rights. *See* June 11, 2019 Memorandum and Order, ECF No. 95 at 29.

Second, Defendants continue to defy the Missouri Supreme Court’s Rules. The Eighth Circuit explained that a proper accounting for federalism in this case requires that this Court look beyond the language of the new Rules as written by the Missouri Supreme Court to “their implementation” in practice by Defendants. *Dixon*, 950 F.3d at 1056. Consistent with that directive, the “gravamen” of Plaintiffs’ claims continues to be that Defendants disregard the state-wide policy established by the Missouri Supreme Court. *See* June 11, 2019 Memorandum and Order, ECF No. 95 at 27. Thus, although respect for our system of federalism dictates that “needless friction with state policies” be avoided, *Dixon*, 950 F.3d at 1056 (quoting *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941)), any such “friction” is absent here. *Cf. ODonnell v. Harris Cty.*, 260 F. Supp. 3d 810, 821 (S.D. Tex. 2017) (rejecting that the public interest warranted a stay of injunction against bail practices where “[t]he Texas legislature, indeed the Texas Constitution, d[id] not permit the type of

⁷⁹ Plaintiffs do not question that, as a general matter, Defendant Judges have “wide . . . latitude” to control their rules of practice, but the federal constitutional rights at issue here impose a limit on that discretion, as reflected in the numerous cases holding similar bail practices unconstitutional. *See supra* n.1 (collecting cases).

pretrial preventive detention in misdemeanor cases that Harris County[’s practices] systematically and routinely accomplishe[d]”).

Third, the nature of Defendant Judges’ continued unconstitutional practices weakens any comity interest here. Principles of comity can further federal-state relations by giving state authorities an opportunity to “correct” any alleged violation of federal rights. *See, e.g., Leggins v. Lockhart*, 822 F.2d 764, 768 n.5 (8th Cir. 1987). Here, however, the continued need for a preliminary injunction evidences that Defendants have already been provided and foregone that opportunity. This is especially true given this Court’s prior rigorous findings that Defendants had, for years, violated the Missouri Supreme Court Rules governing this issue, and this Court’s observation that, as the deadline for new Rules approached, they were unable to explain any plans concerning how they would even begin to implement them. *See* Hr’g Tr. at 17:11-15, June 14, 2009 (“[I]n light of these [amendments to the Missouri Supreme Court Rules] which have been published since December, coupled with this litigation, I’m somewhat appalled that there has been no consideration and discussion with respect to what is going to happen with the 700 people you tell me are sitting there.”).

Rather than correct the substance of the constitutional defects in their practices after this Court’s injunction was stayed and the new Rules took effect, Defendant Judges have, at most, altered the form of the violation. Defendant Judges still fail to provide any notice to recently arrested individuals that their ability to pay, flight risk, and danger to the community will be at issue in their initial appearance. *See Turner v. Rogers*, 564 U.S. 431, 131 (2011) (notice of “critical issue[s]” is a minimum requirement of due process). And now, rather than explicitly instruct arrested individuals not to challenge their bond until a public defender is appointed—their prior practice—Defendant Judges appoint a contract attorney to immediately argue on behalf of the arrested individual, even though the attorney has never

met with the individual, has no familiarity with his or her background, and has no means of confidentially speaking to the individual to gather evidence relevant to setting bail. This equally effective means of denying arrested individuals a meaningful opportunity to be heard—and thus of violating both the U.S. Constitution and the Missouri Supreme Court Rules—demonstrates that declining to issue an injunction under principles of comity would be in vain.

Fourth, Plaintiffs’ requested relief still leaves Defendant Judges with the full ability to ensure that the State’s compelling interests are served. *Cf. Purnell v. Mo. Dep’t of Corr.*, 753 F.2d 703, 709 (8th Cir. 1985) (“Deference is due the states, as governmental units, not their courts, their executives, or their legislatures, save as these bodies represent the state itself.” (citation omitted)). As Plaintiffs have previously explained, Plaintiffs do not seek the release of any specific individual or ask that this Court prohibit the use of money bail. Plaintiffs seek only to ensure that, when setting conditions of release, Defendant Judges provide an individualized hearing and impose no conditions greater than necessary to ensure an individual’s appearance at trial or to protect the public. Thus, Defendant Judges will remain fully capable of vindicating Missouri’s highest interests—a principle concern of the comity doctrine—even if an injunction issues.

IV. THE COURT’S ORDER SHOULD REQUIRE SPEEDY COMPLIANCE

Finally, Plaintiffs seek a preliminary injunction with the same substantive relief as that ordered in this Court’s June 11, 2019 Memorandum and Order, but that also requires Defendant Commissioner of Corrections Dale Glass to comply in a timely manner. In particular, Plaintiffs request that this Court require compliance within three days for any individuals currently detained on no higher than a Class C felony and within seven days for any individual currently detained on a Class A or B felony. For individuals not yet arrested,

Plaintiffs request that the Court order Defendant Glass not enforce any order that was not the result of a hearing within 24 hours. These abbreviated time frames is appropriate in light of the significant risk that COVID-19 poses and the likelihood that those detained on low level felonies, or even misdemeanors, are not being lawfully held.

Although Defendants objected to a seven-day compliance period when this Court issued its initial preliminary injunction, those objections lack merit here for two reasons, even beyond the immediate threat posed by COVID-19. First, the number of class members currently detained is 40 percent lower. When this Court issued its preliminary injunction, there were 902 individuals detained on state charges. Decl. of Dale Glass, ECF No. 99-1 ¶ 2. As of March 30, 2020—the most recent date for which data is available—only 528 individuals are currently held on state charges. *See* Ex. 14, “Inmate Population Data.”⁸⁰ Second, Defendants did not raise their objection to the seven-day time frame until after this Court issued its injunction, even though Plaintiffs had included that time frame in their request for relief. Appropriate preparations would have made compliance feasible.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court re-issue the preliminary injunction.

Dated: March 30, 2020

Respectfully Submitted,

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⁸⁰ The data included in Exhibit 10 is also available online at <https://www.stlouis-mo.gov/government/departments/public-safety/corrections/corrections-inmate-population-data.cfm>.

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