IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

ZACHARY ROBINSON, and MICHAEL LEWIS, *et al.*, on behalf of themselves and a class and subclass of similarly situated persons, Plaintiffs, v. LEROY MARTIN JR., E. KENNETH WRIGHT, JR., PEGGY CHIAMPAS, SANDRA G. RAMOS, and ADAM D. BOURGEOIS JR., *et al.*, on behalf of themselves and a class of similarly situated persons, and THOMAS DART, in his official capacity as Sheriff of Cook County, Illinois, Defendants.	)	2016CH13587 CALENDAR/ROOM 06 TIME 00:00 Class Action Case No. _________ (Class Action)

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CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CHANCERY DIV.
CLERK

MOTION FOR AND MEMORANDUM IN SUPPORT OF A
<u>PRELIMINARY INJUNCTION AGAINST DEFENDANT THOMAS DART</u>

Plaintiffs, on behalf of themselves and the Plaintiff classes, by the undersigned counsel, move this Court to preliminarily enjoin Defendant Dart from continuing to detain them in the Cook County Jail solely because they are unable to pay the amount of money fixed as a financial condition of their release. In support of their Motion, Plaintiffs state as follows:

The named Plaintiffs, Zachary Robinson and Michael Lewis, as well as the members of the Plaintiff classes, are arrestees who, though they are presumed innocent and eligible for immediate pretrial release, have been kept in the Cook County Jail since their arrest solely because they cannot afford to pay the amount of money fixed as a financial condition of release. Specifically, Mr. Robinson is currently imprisoned in the Cook County Jail because he cannot afford to pay a deposit

of $1,000 pursuant to the $10,000 D bond order set by Judge Peggy Chiampas. Mr. Lewis is currently imprisoned in the Cook County Jail because he cannot afford to pay a deposit of $5,000 pursuant to the $50,000 D bond order set by Judge Adam D. Bourgeois Jr and maintained by Judge Sandra G. Ramos. Plaintiffs and the members of the Plaintiff classes all could walk out of the Cook County Jail immediately if only they could afford to pay the set amount of money bail.

The United States Supreme Court has repeatedly articulated the fundamental principle that no person can be kept in a jail cell solely because of his or her poverty. Nonetheless, the Judicial Defendants in this case routinely impose impossible financial conditions of release on indigent release-eligible arrestees without making an inquiry into and findings concerning the arrestees' ability to pay the set amount of bond. As a direct consequence, Defendant Dart routinely incarcerates indigent arrestees solely because they cannot afford to pay a sum of money to secure their release. As Cara Smith, the Chief Policy Officer for Defendant Dart has recently acknowledged with regard to pretrial detainees in the County Jail: "[w]e unquestionably have people in the jail who are here solely because they are poor."[1]

The results are devastating. Presumptively innocent people are forced to languish in the Cook County Jail for days, months, or even longer, while arrestees who are similarly situated in every respect except that they have greater financial resources are free to return home to their families, free to continue their educational or job responsibilities, and free to aid effectively in the defense against their criminal charges. Empirical research shows that money-based detention leads to coerced convictions, racial disparities, additional crime due to the criminogenic effects of pretrial incarceration on low risk arrestees, and unnecessary costly incarceration. For example, in

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[1] Maya Dukmasova, DOJ's new stance on bail bonds won't help poor inmates in Cook County Jail, Chicago Reader, (Aug. 25, 2016), *available at* http://www.chicagoreader.com/Bleader/archives/2016/08/25/dojs-new-stance-on-bail-bonds-wont-help-poor-inmates-in-cook-county-jail.

2015, pretrial arrestees in the Cook County Jail served an additional 79,726 "dead days" (218 years) in pretrial custody *above their ultimate sentence term* after conviction.[2] The practice of keeping persons in jail cells because they cannot pay a sum of money without making any inquiry into or findings concerning their ability to pay that sum violates the longstanding and fundamental principles of our legal system which provide for equal justice for all regardless of their financial situation or race.

Because the named Plaintiffs and the many similarly situated other members of the Plaintiff classes are and will continue to be subjected to indefinite durations of detention solely by virtue of the amount of money that they do not have access to, Plaintiffs request that this Court schedule expedited discovery and a hearing with regard to their request for preliminary injunction preventing the continuation of the unlawful wealth-based detention. Specifically, Plaintiffs seek a preliminary injunction preventing Defendant Dart from continuing to detain any release-eligible arrestees who would be released but-for his or her inability to afford a monetary sum set. The practice of jailing release-eligible individuals solely because their release is conditioned on payment of a sum that they are unable to afford has no place in a legal system committed to equal justice.

STATEMENT OF FACTS

I. Background

This case is about the violation – routinely and as a matter of practice and procedure – of the decades-old principle that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th

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[2] See Cook County Sheriff's Office, *A Year In Review: Unjust Incarceration By the Numbers* (Dec. 23, 2015), *available at* http://www.cookcountysheriff.com/press_page/press_%20UnjustIncarceration_12_23_2015.html.

Cir. 1978) (*en banc*) (citing *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971)). Every day, the judges in the Judicial Defendant class set cash bonds for release-eligible arrestees in amounts of money that they cannot afford and, as a result, arrestees like Robinson and Lewis are jailed for indefinite durations, despite their presumptive innocence, solely because they are poor. The Judicial Defendants routinely make no inquiry into or findings concerning the arrestees' ability to pay before setting financial conditions of release. Numerous federal courts have reaffirmed the unconstitutionality of such a practice. *See e.g. Walker v. City of Calhoun*, --- F. Supp. 3d ---, No. 4:15-CV-0170-HLM, 2016 WL 361612 (N.D. Ga. Jan. 28, 2016) (granting class-wide preliminary injunction to stop the use of money bond to detain new arrestees without an inquiry into the arrestee's ability to pay); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758 (M.D. Tenn. 2015) (granting class-wide preliminary injunction to stop the use of money bond to detain misdemeanor probationers without an inquiry into the arrestee's ability to pay); *Cooper v. City of Dothan*, No. 1:15-CV-425-WKW, 2015 WL 10013003 (M.D. Ala. June 18, 2015) (issuing Temporary Restraining Order and holding that the practice of requiring secured money bond without an inquiry into ability to pay violates the Fourteenth Amendment); *Jones on behalf of Varden v. City of Clanton*, 2015 WL 5387219 (M.D. Ala. 2015) (declaring secured money bond unconstitutional without an inquiry into ability to pay); *Thompson v. City of Moss Point*, No. 1:15-cv-182, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015) (same).

Recently, the United States Department of Justice has likewise recognized that "[i]ncarcerating individuals solely because of their inability to pay for their release . . . violates the Equal Protection Clause of the Fourteenth Amendment." Statement of Interest of the United States, *Varden v. City of Clayton*, No. 2:15-cv-00034 (M.D. Ala. Feb. 13, 2015) [ECF No. 26 at p. 1]. *See also* Brief for the United States as Amicus Curiae, *Walker, v. City of Calhoun*, 2016 WL 4417421

at *14 (11th Cir. 2016) ("[T]he Fourteenth Amendment prohibits a jurisdiction from categorically imposing different criminal consequences—including and especially incarceration—on poor people without accounting for their indigence."); Attorney General of Maryland, *Letter to Delegates* (Oct. 11, 2016), *available at* http://www.wbaltv.com/blob/view/-/42087600/data/1/-/80dsct/-/Frosh-bail-advisory-letter.pdf ("[A] judicial officer may not impose a financial condition set solely to detain the defendant.").

The Illinois's bail statute, 725 ILCS 5/110-1, *et seq.* ("the Statute"), mandates that the amount of bail shall be considerate of the financial ability of the accused. This mandate is ignored by the practice of setting unaffordable financial conditions of release, a practice that violates the fundamental principles of equal justice enshrined in the Fourteenth Amendment, the right bail in the Eight Amendment, as well as the parallel provisions in the constitution of the State of Illinois, and, as a result of its disparate impact on African Americans, it also constitutes illegal race discrimination in violation of the Illinois Civil Rights Act, 740 ILCS 23/5(a)(2). The requirement of financial conditions of release without regard to ability to pay and in such a way that only poor release-eligible arrestees suffer indefinite pretrial jailing, as well as a host of other collateral consequences, is an unlawful practice that must be stopped. And given the devastating and ongoing injuries inflicted on Plaintiffs and members of the Plaintiff class, it must be stopped as soon as possible.

A. The Named Plaintiffs

This suit is brought by Zachary Robinson and Michael Lewis, on behalf of a putative class of similarly situated detainees. Zachary Robinson was arrested shortly before December 10, 2015, and charged with theft (720 ILCS 5/16-1(a)(A)). Mr. Robinson was booked at the Cook County Jail on that date and has been incarcerated ever since. On December 10, 2015, Mr. Robinson had

a bond hearing in Cook County Central Bond Court before Defendant Judge Peggy Chiampas. During that hearing, the judge did not inquire of him how much he could afford to pay as bond. The judge set a $10,000 "D-Bond," which requires a deposit of 10% of the bond. During Mr. Robinson's preliminary hearing in Branch 48 on January 5, 2016, counsel for Mr. Robinson moved the court to reconsider Ms. Robinson's $10,000 "D-Bond", and requested that Mr. Robinson be released on electronic monitoring. The motion was denied by Judge Sandra G. Ramos.

Mr. Robinson is indigent and currently remains incarcerated because he cannot afford to pay a $1,000 bond deposit. He does not have a bank account, and prior to his arrest 10 months ago, he earned minimal wage at his employment, received food stamps and free healthcare from the government, and had his tuition and costs at Kennedy-King College covered in their entirety by financial aid.

Prior to his arrest, Mr. Robinson had lived with a friend at the same address in the Southside of Chicago for the past three years. Mr. Robinson was employed at Jesse's Meat Mart on Cottage Grove Avenue in Chicago. He was also attending Kennedy-King College in Chicago, and pursuing his Associate's Degree in Construction Management. As a result of his incarceration, he has lost his employment and been unable to continue with his education. There are no opportunities for Mr. Robinson to seek meaningful work or pursue college education at the Cook County Jail.

Michael Lewis was arrested on or about October 3, 2016, and charged with retail theft (720 ILCS 5/16-25(a)(1). Mr. Lewis was booked at the Cook County Jail on that date and has been incarcerated ever since. On October 3, 2016, Mr. Lewis had a bond hearing in Cook County Central Bond Court before Defendant Judge Adam D. Bourgeois Jr. During that hearing, the judge did not inquire of him how much he could afford to pay as bond. The judge set a $50,000 "D-Bond,"

which requires a deposit of 10% of the bond. Mr. Lewis is indigent and currently remains incarcerated because he cannot afford to pay a $5,000 bond deposit.

Mr. Lewis has lived at the same address with his 72-year-old godmother for the past two years in the South Shore neighborhood of Chicago. Prior to his arrest, Mr. Lewis received monthly disability payments of about $700, as well as approximately $6,000 per year as an independent caterer. He paid half of his disability payments toward household utilities and used the remaining money for basic necessities. He does not have a bank account and relies on Medicaid for healthcare coverage. Before being incarcerated, he was caretaker for his godmother, who suffers from dementia. Mr. Lewis suffers from Post-Traumatic Stress Disorder and clinical depression as a result of abuse he suffered as a child. He is currently incarcerated in the Residential Treatment Unit ("RTU") of the Cook County Jail.

The treatment of the named Plaintiffs is representative of the Judicial Defendants' systemic practices in all material respects, including that the named Plaintiffs are eligible for immediate release from Cook County custody at any moment, that they remain in custody pursuant to a financial condition of release that they cannot afford, and that the financial condition of release was imposed without any inquiry into or findings concerning their present ability to pay.

B. The Unconstitutional and Illegal Application of Illinois's Bail Statute

Every day, when the Judicial Defendants set conditions of pretrial release, they routinely order pretrial arrestees to pay monetary bail amounts without having made any inquiry into their ability to pay. As a result, they routinely set monetary amounts in excess of what arrestees can afford, thereby automatically converting conditions of release into orders of detention based solely on wealth.

Such a practice violates both the United States constitution and Illinois constitutional and statutory law. With the exception of certain serious cases, including those where a court determines that the defendant's release would "pose a real and present threat" to anyone's physical safety, the Statute mandates that "all persons *shall* be bailable before conviction." 725 ILCS 5/110-4 (emphasis added). Thus, to be clear: this case concerns only those arrestees for whom there is no allegation or finding that the person poses any danger to the community. All plaintiff class members have been deemed eligible for immediate pretrial release. Illinois law provides a separate mechanism for protecting the public from criminal defendants who the State believes to pose any danger to its citizens.

For release-eligible arrestees, the Statute provides two possible alternatives for pretrial release. The first, release on personal recognizance (known as an I-Bond), is rarely made available to release-eligible arrestees. *See* 725 ILCS 5/110-2. According to a Data Analysis Report by the Cook County Bond Court Project, between 2012 and 2014, only about an average of 15% of pretrial arrestees in Cook County were released on their own recognizance. The second alternative is monetary bail. Although money bail is a theoretical opportunity provided by law to all release-eligible arrestees, it is a practical impossibility for many arrestees because they cannot afford the monetary amounts required.

While the Statute requires that monetary bail be set for release-eligible arrestees "*only* when it is determined that *no other conditions* of release will reasonably assure the defendant's appearance in court, that the defendant does not present a danger to any person or the community and that the defendant will comply with all conditions of bond" (725 ILCS 5/110-2) (emphasis added), the Judicial Defendants nonetheless set monetary bonds in the vast majority of all cases. And, while the Statute requires that bail be set in an amount "considerate of the financial ability

of the accused" (725 ILCS 5/110-5(b)(3)), the Judicial Defendants nonetheless regularly fail to conduct any form of inquiry into or make any findings concerning the accused's ability to pay and proceed to require monetary payments in amounts in excess of what the accused can afford. In other words, whatever consideration of the financial ability of the accused is undertaken, it is not a meaningful one. As a result, Defendant Dart regularly detains thousands of release-eligible indigent arrestees who have no practical opportunity to be free before they get their day in court.

ARGUMENT

A preliminary injunction is warranted where the movant demonstrates: "(1) a clearly ascertained right in need of protection, (2) irreparable injury in the absence of an injunction, (3) no adequate remedy at law, and (4) a likelihood of success on the merits of the case." *Clinton Landfill, Inc. v. Mahomet Valley Water Auth.*, 406 Ill. App. 3d 374, 378 (4th Dist. 2010) (quoting *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill.2d 52, 62 (2006)). The named Plaintiffs easily satisfy each of these requirements.

I. Plaintiffs' and Plaintiff Class Members' Fundamental Right to Liberty Is a Clearly Ascertained Right in Need of Protection.

Plaintiffs allege that their detention constitutes a deprivation first and foremost of their right to pretrial liberty. Although Robinson and Lewis are eligible for pretrial release, they are currently being incarcerated in Cook County Jail, 309 and 11 days after their respective arrests, simply because they cannot afford to post bail. Members of the Plaintiff Class likewise are suffering or will suffer the same deprivation of pretrial liberty due to their inability to afford their bond amounts.

The right to physical liberty of a presumptively innocent person is a fundamental right. *See, e.g., United States v. Salerno*, 481 U.S. 739, 750 (1987) (recognizing the "fundamental nature" of "the individual's strong interest in liberty"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 529-30 (2004)

(describing the interest in being free from physical detention by one's own government as "the most elemental of liberty interests"); *Forbes v. Perryman*, 244 F. Supp. 2d 947, 949 (N.D. Ill. 2003) ("The government may not interfere with the fundamental liberty interests of an individual, such as his interest in physical freedom, unless its actions are narrowly tailored to meet a compelling state interest.").

As the United States Department of Justice has recently emphasized, "[l]iberty is particularly salient for defendants awaiting trial, who have not been found guilty of any crime." Statement of Interest of the United States, *Varden v. City of Clayton*, No. 2:15-cv-00034 (M.D. Ala. Feb. 13, 2015) [ECF No. 26 at p. 8]. Because the pretrial freedom of Plaintiffs and the members of the Plaintiff classes has been conditioned on satisfaction of a monetary payment that they cannot afford, they have a clearly ascertained right to liberty in need of protection.

II. Plaintiffs and Plaintiff Class Members Will Suffer Irreparable Constitutional Harm If This Court Does Not Issue an Injunction and They Have No Adequate Remedy at Law.

"The second and third elements of the preliminary injunction standard are closely related" because "irreparable harm, occurs only where the remedy at law is inadequate." *Happy R Sec., LLC v. Agri-Sources, LLC*, 2013 IL App (3d) 120509, ¶ 36 (internal quotations omitted). A remedy at law is inadequate where monetary damages cannot adequately compensate the Plaintiff's injury and the injury cannot be measured by pecuniary standards. *Id.* That is precisely the case for the Plaintiffs and Plaintiff Class members here because "[i]t is clear that money cannot make up for the loss of freedom inherent in [constitutionally improper] incarceration." *Faheem-El v. Klincar*, 600 F. Supp. 1029, 1041 (N.D. Ill. 1984). *See also Pinzon v. Lane*, 675 F. Supp. 429, 435 (N.D. Ill. 1987) (finding that Plaintiff Class members had no adequate legal remedy where deprivation of their liberty in violation of the Due Process Clause was at stake); *C.J. v. Dep't of Human Servs.*,

331 Ill. App. 3d 871, 891 (1st Dist. 2002) (finding that insanity acquittees involuntarily committed to state mental health facility had no adequate remedy at law for the continuous violation of their due process rights).

Without intervention from this Court, the Plaintiffs and the classes of similarly situated release-eligible arrestees who they represent will continue to suffer the serious and irreparable harm of being jailed. Imprisoning a human being – indeed thousands of human beings - in jail in violation of fundamental constitutional rights is undoubtedly an irreparable harm to the individual's body and mind. "Freedom from imprisonment — from government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); *C.J. v. Dep't of Human Servs.*, 331 Ill. App. 3d 871, 879 (1st Dist. 2002) ("The Supreme Court has recognized that the State's confinement of an individual for any purpose significantly infringes on that individual's liberty and requires due process protection.").

Illinois courts recognize that "transgressions of a continuing nature" constitute irreparable harm. *Witter v. Buchanan*, 132 Ill. App. 3d 273, 292 (1st Dist. 1985); *Tierney v. Vill. of Schaumburg*, 182 Ill. App. 3d 1055, 1060 (1st Dist. 1989). Here, Plaintiffs and members of the Plaintiff Classes are presumptively innocent persons who are continuously jailed for indeterminate durations of time. Even one additional night in jail is a harm to a person that cannot be later undone, but it is not uncommon for members of the Plaintiff Classes to languish in jail pretrial for many months. As such, Plaintiffs and the Plaintiff Classes are suffering irreparable harm. *See, e.g.*, *C.J. v. Dep't of Human Servs.*, 331 Ill. App. 3d 871, 891 (1st Dist. 2002) (holding that insanity

acquittees who were involuntarily committed to a state mental health facility showed irreparable injury where Department of Human Services policy restricted plaintiffs' liberty interest in freedom of bodily movement without exercising professional judgment constituting continuous due process violation); *Faheem-El v. Klincar*, 600 F. Supp. 1029, 1041 (N.D. Ill. 1984) ("Plaintiff's imprisonment, if constitutionally improper, constitutes irreparable harm."); *Swansey v. Elrod*, 386 F. Supp. 1138, 1144 (N.D. Ill. 1975) (finding that "continued incarceration [of juvenile pretrial detainees] in Cook County jail under present conditions causes irreparable harm"); *United States v. Bogle*, 855 F.2d 707, 710–711 (11th Cir. 1988) (holding that the "unnecessary deprivation of liberty clearly constitutes irreparable harm"); *Rodriguez*, 155 F.Supp. 3d. at 771 (finding irreparable harm because plaintiffs were unconstitutionally deprived of their liberty when the defendants "jail[ed] [them] on secured money bonds without an indigency inquiry"); *Walker*, 2016 WL 361612, at *14 (holding that "an improper loss of liberty" resulting from the plaintiffs' "being jailed simply because [they] could not afford to post money bail" "constitutes irreparable harm").

Moreover, even a few days in jail can have devastating consequences in a person's life, such as the loss of a job or the inability to arrange safe alternate care for minor children. It also exposes arrestees to the risk of unsanitary and unsafe conditions. The Cook County Jail — the largest jail in Illinois and the third largest in the nation[3] — is notorious for its overcrowding and dangerous environment, concerns which Defendant Dart shares.[4]

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[3] Breeanna Hare and Lisa Rose, *Pop. 17,049: Welcome to America's largest jail* (Sept. 26, 2016), http://www.cnn.com/2016/09/22/us/lisa-ling-this-is-life-la-county-jail-by-the-numbers/.

[4] For example, in April 2016, Defendant Dart released six videos involving 14 different Cook County correctional officers from cases where a civilian oversight board had sustained allegations of excessive force. *See* Conor Friedersdorf, *The Sheriff Who Wants the Public to See How Brutal His Jail Guards Can Be*, The Atlantic, (Apr. 18, 2016), http://www.theatlantic.com/politics/archive/2016/04/the-sheriff-who-wants-the-public-to-see-how-brutal-his-jail-guards-are/478662/; Stefano Esposito, *Cook County sheriff posts videos showing inmates mistreated*, Chicago Sun Times, (Apr. 15 2016), http://chicago.suntimes.com/politics/cook-county-sheriff-posts-videos-showing-inmates-mistreated/.

Additionally, continued pretrial detention causes devastating and long-lasting harm with respect to the outcomes in arrestees' criminal cases. As with other jurisdictions, compared to defendants who are released on bond, Plaintiff Class members who are detained pretrial have a harder time preparing for their defense, gathering evidence and witnesses, and meeting with their lawyers, and they are more likely to be coerced to plead guilty even if they are innocent.[5] They are also ultimately more likely to be convicted and sentenced to prison than those defendants who are released on bond.[6] In Cook County, persons against whom charges were instituted in the years from 2011 to 2013 and who remained in custody pretrial were half as likely to be found not guilty or to have their charges dismissed as defendants who were never in custody. Persons facing the least serious felony charges who were kept in custody were one-fourth as likely to be found not guilty or have their charges dismissed as defendants who were never in custody. Also, persons facing the most serious felony charges who were in pretrial custody were five times as likely to be sentenced to the Illinois Department of Corrections ("IDOC") as defendants who were never in custody pending the disposition of their cases. Those persons accused of the least serious felony charges and who were held in pretrial custody were ten times as likely to be given sentences of imprisonment as those who were released.

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[5] *See, e.g.*, Mary T. Phillips, New York City Criminal Justice Agency, Inc. "A Decade of Bail Research in New York City," 115 (2012) (A decade-long research project examining the bail system in New York City finding that [t]he data suggest that detention itself creates enough pressure to increase guilty pleas without the need for the extra inducement of a reduced charge").

[6] *See, e.g.*, C.T. Lowenkamp, M. VanNostrand, and A.M. Holsinger, Laura and John Arnold Foundation, "The Hidden Costs of Pretrial Detention," (2013) (analyzing 153,407 records representing all defendants arrested and booked into a Kentucky jail between July 1, 2009, and June 30, 2010 and finding that when other relevant statistical controls are considered, defendants detained until trial or case disposition are 4.44 times more likely to be sentenced to jail and 3.32 times more likely to be sentenced to prison than defendants who are released at some point pending trial. The jail sentence is 2.78 times longer for defendants who are detained for the entire pretrial period, and the prison sentence is 2.36 times longer).

Individuals who are detained in Cook County pending trial are also more likely to get an enhanced sentence. According to Cook County docketing records, persons against whom charges were instituted in 2011 through 2013 and who were in custody throughout their pretrial period received prison sentences that were on average one year longer than those received by defendants who were released on pretrial bond. Fewer than 20% of the persons who remained in custody throughout their pretrial period received non-detention penalties, including fines, probation, conditional discharge, community service and/or restitution. In contrast, more than 60% of the persons who were released on bond throughout their pretrial period received such penalties in lieu of incarceration.

Ultimately, forcing people to risk all of these additional harms because they cannot raise enough money to avoid them only further contributes to the unnecessary and irreparable harm visited on the Plaintiffs and other members of the Plaintiff Class in this case.

III. Plaintiffs Are Likely to Succeed on the Merits of Their Constitutional and Statutory Claims.

A. Detention Based On Inability to Pay Violates Basic Equal Protection and Due Process Law and Constitutes Excessive Bail.

The constitutional principles at issue in this case are well-established. Decades ago, the United States Court of Appeals for the Fifth Circuit reviewed Florida's post-arrest detention procedures and acknowledged that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (*en banc*) (citing *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971)). The Fifth Circuit went on to state: "[w]e have no doubt that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release,

pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint." Rainwater, 572 F.2d at 1058.

Plaintiffs and the Plaintiff Class members are release-eligible arrestees who cannot afford the pay their monetary bonds and less restrictive alternatives exist to reasonably assure their future appearances. Their continued detention on this basis violates the federal constitutional principles recognized decades ago in *Rainwater*. Further, in light of the "limited lockstep" approach[7] employed by Illinois courts to interpret cognate provisions of the state and federal constitutions," *People v. Caballes*, 221 Ill. 2d 282, 314 (2006), the Judicial Defendants' application of the Statute likewise violates the Illinois Constitution.

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

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

These principles have been applied in a variety of other contexts where the government has sought to keep a person in jail solely because of the person's inability to make a monetary payment.

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[7] Under this approach, the court first looks to the federal constitution, and only if federal law provides no relief will the court turn to the state constitution to determine whether a specific criterion justifies departure from federal precedent. *In re Lakisha M.*, 227 Ill. 2d 259, 278 (2008) (citing *People v. Caballes*, 221 Ill. 2d 282, 309-10 (2006)).

See, e.g., Tate, 401 U.S. at 398 ("[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."). In *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983), the Supreme Court explained that to "deprive [a] probationer of his conditional freedom simply because, through no fault of his own he cannot pay [a] fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment." For this reason, the Court held that a necessary pre-condition for a state to jail an individual for non-payment is an inquiry into that person's ability to pay. *Id.* at 672.

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

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

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

Relying on this Supreme Court precedent, federal appellate courts have likewise recognized that schemes that operate to jail the poor do not pass constitutional muster. *See, e.g., Frazier v. Jordan,* 457 F.2d 726, 728–29 (5th Cir. 1972) (finding that alternative sentencing scheme of $17 dollars or 13 days in jail was unconstitutional as applied to those who could not

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

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

In holding that it could not put a person in jail simply because the person could not afford the cost of electronic monitoring services, the *Flowers* court recounted the fundamental federal precedent from a variety of contexts, explaining that, just as "it violates the Constitution's guarantee of equal protection under the laws to convert a fine-only sentence into a prison term based on inability to pay," it would also violate the Constitution to turn a sentence of electronic

monitoring into a jail sentence simply because the defendant could not afford to pay for the service. *Id.* at 1300-01.[8]

If poverty status has no place in determining sentencing outcomes, it certainly has no place in pretrial detention of the presumptively innocent. *Rainwater*, 572 F.2d at 1057; *see generally* Statement of Interest of the United States, *Varden v. City of Clayton*, No. 2:15-cv-00034 (M.D. Ala. Feb. 13, 2015) [ECF No. 26]. The fundamental principles in *Bearden*, *Williams*, and *Flowers* thus apply equally to pretrial and post-trial confinement. In other words, the analysis in *Flowers* would have been the same if the question was whether to jail an *innocent* defendant *prior to trial* simply because he could not afford the U.S. Probation Department's *pretrial* electronic monitoring services.

In the context of pretrial arrestees, the rights at stake are even more significant because their liberty is not diminished by criminal conviction — they are presumed innocent. As Justice Douglas famously questioned: "To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. . . . Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?" *Bandy v. United States*, 81 S. Ct. 197, 197-98 (1960).

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

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

Rainwater's reasoning is dispositive of this case, which does not assert any facial invalidity to Illinois's bail statute. The *en banc* court held that the Florida Rule did not facially require the setting of monetary bail for arrestees but it also explained that, if such a thing were to happen to an indigent person, it would be unconstitutional.[9] In other words, the court held that the Florida courts could not be expected to enforce the new Rule — which had been amended during the litigation in that case — in a manner that violated the Constitution by requiring monetary payments to secure the release of an indigent person. Ultimately, the Fifth Circuit recognized the binding constitutional principles at stake here: "[t]he incarceration of those who cannot [afford a cash payment], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."[10] *Id.*

The wealth-based scheme of pretrial detention and release does exactly what *Rainwater* and the entire line of precedent on which it relied rejects: it subjects release-eligible arrestees in

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[9] *Rainwater* refused to require non-monetary conditions of release to be prioritized in all cases — including those of the non-indigent — noting that, at least for wealthier people, some might actually prefer monetary bail over release with certain other conditions, and that the court would not invalidate a state Rule that allowed for those other conditions in appropriate cases. *Id.* at 1057.

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

the Plaintiff Class who cannot afford to pay their monetary bond to pretrial incarceration, and it reserves freedom for those who can pay. Every member of the Plaintiff Class is eligible for release, but continue to be detained because of their lack of financial resources. Defendant Dart cannot constitutionally detain them and violate their rights to pretrial freedom based on their inabilities to make a monetary payment. *Cf. Bearden*, 461 U.S. at 667-68 (holding that "if [a] State determines a fine or restitution to be the appropriate and adequate penalty for [a] crime, it may not thereafter imprison a person solely because he lacked the resources to pay it").

State courts in other jurisdictions have rejected money-based detention schemes. And, though on its face Illinois's bail statute does not reflect a money-based scheme, the same principles apply here where, in practice, the Plaintiffs and Plaintiff Class members have no non-monetary avenue to attain pretrial release. *See State v. Blake*, 642 So. 2d 959, 968 (Ala. 1994) (striking down statute that allowed indigent arrestees to be held for 72 hours solely because they could not afford monetary payments to secure their release prior to their first appearance because "the classification system it imposes is not rationally related to a legitimate governmental objective");[11] *Lee v.*

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

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

Lawson, 375 So. 2d 1019, 1023-24 (Miss. 1979) ("A consideration of the equal protection and due process rights of indigent pretrial detainees leads us to the inescapable conclusion that a bail system based on monetary bail alone would be unconstitutional" and a presumption of non-monetary release "will go far toward the goal of equal justice under law.").[12]

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

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

Id. at 2519. The Court held that Turner's imprisonment was unconstitutional because the South Carolina court did not comply with the procedures that were essential to "fundamental fairness." *Id.* at 2520. In the same way, when conditioning an arrestee's release on a particular monetary

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

payment, the Judicial Defendants must make an inquiry to and "an express finding" that "the defendant has the ability to pay" the ordered amount. *Id.* at 2519. Otherwise, the order of release would be converted into an order of detention for an indigent person. Without such an inquiry and finding, Defendant Dart's continued detention of Plaintiffs and the Plaintiff Class members is impermissible.

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

In *Bearden*, the Supreme Court explained that it would be difficult ever to find a legitimate state reason for jailing a person when he or she could not pay. In the post-conviction context, the Court explained that the state's interest in "ensuring that restitution be paid to the victims" is insufficient, because "[r]evoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming." *Bearden*, 461 U.S. at 670. Similarly, any interest in removing the defendant "from the temptation of committing other crimes" in order to protect society and rehabilitate him is also insufficient, as this would amount to "little more than punishing a person for his poverty." *Id.* at 671. In the pre-trial context, the only valid interest in a money bond is assuring future appearance after release. By definition, that interest cannot be served through a sum greater than the person can afford. And, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose [of assuring the accused's presence for trial] is 'excessive' under the Eighth Amendment." *Rainwater*, 572 F.2d at 1057.

There is nothing wrong, of course, with the concept of giving an already released person an additional financial incentive to appear. As the federal Bail Reform Act contemplates, when a person can afford to pay a sum, the thought of later losing that money for nonappearance might create at least some additional incentive for a released person to appear. But when the amount is set without a finding that the person can pay and it operates to detain a person simply because the person cannot afford to make the payment through which that incentive to return would have been created, then it fails to serve any legitimate interest. Without that finding, an order of release is turned into an order of detention based on wealth. And, when a financial condition *does* result in continued pretrial detention, the ordered payment cannot have been the least restrictive method for a release-eligible arrestee to secure his or her freedom and return to court.

Congress addressed this constitutional problem when it passed the Bail Reform Act, which prohibits the imposition of "a financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(2). Attorney General Robert Kennedy eloquently explained why a consensus of federal judges, academics, legislators, prosecutors, and federal officials sought to eradicate wealth-based detention from the federal system.[13] And in his famous remarks given at the signing of the federal Bail Reform Act, which eradicated the use of wealth-based detention in the federal

[13] Over 50 years ago, Bobby Kennedy testified that "b]ail has become a vehicle for systematic injustice. Every year in this country, thousands of persons are kept in jail for weeks and even months following arrest. They are not yet proven guilty. They may be no more likely to flee than you or I. But, nonetheless, most of them must stay in jail because, to be blunt, they cannot afford to pay for their freedom... Plainly our bail system has changed what is a constitutional right into an expensive privilege." Aug. 4 1964, Testimony on Bail Legislation before the Senate Judiciary Committee, *available at* http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf. Many Federal judges, from Learned Hand to Skelly Wright, condemned the evils of money bail and advocated the subsequent reforms to the federal system. In his famous concurring opinion in *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963), Judge Skelly Wright explained:

> The result of this system in the District of Columbia is that most defendants, for months on end, languish in jail unable to make bond awaiting disposition of their cases....
>
> When the long-delayed bail reforms finally become a reality, it is hoped that the accent will be on allowing defendants release on their own recognizance, with adequate and certain penalties for non-appearance. Today Fugitives do not go very far or maintain their status as such very long, so no money guarantee is required to insure their appearance when ordered.

system, President Johnson explained:

> The defendant with means can afford to pay bail. He can afford to buy his freedom. But the poorer defendant cannot pay the price. He languishes in jail weeks, months, and perhaps even years before trial. He does not stay in jail because he is guilty. He does not stay in jail because any sentence has been passed. He does not stay in jail because he is any more likely to flee before trial. He stays in jail for one reason only — he stays in jail because he is poor.[14]

Nearly fifty years after President Johnson's passionate remarks and forty years after *Rainwater*, these basic constitutional principles are being ignored by the Judicial Defendants every day. While some arrestees in Cook County easily obtain pretrial release by paying the monetary bonds, poor arrestees charged with the same offenses languish in a crowded and inhumane jail simply because they cannot afford their monetary bonds and have not been offered any alternative avenue to obtain release. This practice of applying the Statute in a manner that jails the poor and frees the rich for no reason other than their wealth is not a system consistent with the "fundamental fairness," *Bearden*, 461 U.S. at 673, enshrined in the Fourteenth Amendment.

2. There Are Simple and Effective Constitutional Alternatives to Jailing the Poor.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).[15] Other jurisdictions have

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[14] *Remarks at the Signing of the Bail Reform Act of 1966*, (June 22, 1966) *available at* http://www.presidency.ucsb.edu/ws/?pid=27666.

[15] In evaluating the federal Bail Reform Act, which authorized pretrial detention only for people charged with "serious felonies," under its heightened scrutiny test for fundamental rights, the Supreme Court found that the federal statute survived because it addressed a "compelling" and "overwhelming" interest of preventing additional pretrial criminal activity by operating "only on individuals who have been arrested for a specific category of extremely serious offenses" and who "Congress specifically found" to be especially dangerous and to pose a "particularly acute problem." *Salerno*, 481 U.S. at 750; *id.* at 747 ("The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes."). Moreover, the Court relied on the numerous aspects of the federal law that made it narrowly tailored, such as that, even as applied only to the most serious federal offenses, it required "a full-blown adversarial hearing," the representation of counsel, and a heightened evidentiary burden of proof, *id.* at 742, 750, before a person could be held in custody prior to trial. The Court ultimately upheld the law because "Congress' careful delineation" required an individualized finding that a particular "arrestee presents an identified and articulable threat to an individual or the community." *Id.* at 751. The Illinois Bail Statute contains a similar provision. *See* 725 ILCS 5/110-6.1 ("Denial of bail in non-probationable felony offenses). That provision is not at issue here because, by definition, all members of the Plaintiff Class have been provided with a monetary bail

taken this constitutional obligation seriously and instituted simple alternatives to the odious system of jailing the poor and freeing the rich. For instance, Washington, D.C. arrestees (other than those charged with limited offenses) are released on recognizance with appropriate non-financial conditions. *See* D.C. Code § 23-1321. And, except under limited circumstances where detention prior to trial is found to be warranted, *see* D.C. Code § 23-1322, the Washington, D.C., bail statute prohibits a judicial officer from imposing a financial condition to assure the safety of any other person or the community, or to reasonably assure the defendant's presence at all court proceedings if such condition will result in the preventive detention of the person. D.C. Code § 23-1321(c)(3).

The Federal Bail Reform Act uses a comparable statutory scheme that forbids arrestees from being subject to preventative detention merely to assure their future court appearances. *See* 18 USCA § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.").[16] By virtue of these provisions, the federal government and the District of Columbia both removed money bail virtually entirely from their court systems after the Department of Justice, Congress, and an overwhelming consensus of legal experts concluded that the old system of post-arrest detention based on money bail was fundamentally unfair and unconstitutional. In Washington, D.C. and under the federal system, the result of following *Rainwater*'s guidance and relying on recognizance or unsecured bond has not been chaos. Quite to the contrary. For instance, in Washington, D.C., the court typically releases "about 90 percent

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and, as such, none have been found to pose "a real and present threat to the physical safety of any person or persons" sufficient to preclude their release. *Id.*

[16] *See also Pierce v. City of Velda City*, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015) (ordering the City of Velda City to "offer every person in the custody of the City on arrest, either without a warrant or on the initial warrant issued, for any violation that may be prosecuted by the City, release from the custody of the City on recognizance or on an unsecured bond as soon as practicable after booking," with the only exception being "persons as are brought before the court within 24 hours of arrest for potential imposition of conditions for release other than the posting of money bond in cases involving intentionally assaultive or threatening conduct or for a determination that release must be denied to prevent danger to a victim, the community or any other person under applicable constitutional standards").

of the people who have been arrested" without them making any monetary payment, and "[i]n the past five years, about 90 percent of defendants released were not arrested again before their cases were resolved."[17]

In other words, there are a wide range of reasonable measures for setting conditions of pretrial release that comport with the Fourteenth and Eighth Amendments, but a poverty-based post-arrest detention scheme makes a mockery of the "carefully limited" circumstances in which continued detention of a presumptively innocent arrestee is allowed. *Salerno*, 481 U.S. at 755. For example, in addition to or instead of setting monetary bond that a person can afford after appropriate inquiry into the person's ability to pay, in appropriate cases, conditions of release can include employ electronic monitoring, pretrial social services and supervision, drug testing and treatment, text message and phone call reminders, unsecured bond, or a variety of other non-financial conditions that are not only more effective, but far less costly than wealth-based pretrial detention.

The American Bar Association's seminal Standards for Criminal Justice, which have been relied on in more than 100 Supreme Court decisions for decades, call for the presumption of release on recognizance, followed by release pursuant to the least restrictive *non-financial* conditions. *American Bar Association Standards for Criminal Justice – Pretrial Release* (3rd ed. 2007) ("ABA Standards").[18] The ABA Standards also, like the D.C. and federal bail statutes, forbid any "financial condition of release that results in the pretrial detention of a defendant solely due to the

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[17] Ann E. Marimow, *When it comes to pretrial release, few other jurisdictions do it D.C.'s way* (July 4, 2016), *available at* https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html ("About "two-thirds of defendants are released with terms that include drug testing, stay-away orders or weekly phone or in-person reporting" and "[a]bout 10 percent get tighter monitoring, such as GPS ankle bracelets and home confinement.").

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

defendant's inability to pay." ABA Standards at § 10-1.4(e). The ABA Standards are widely viewed as authoritative in a variety of contexts,[19] and they are seen as the seminal text reflecting best practices by the leading commentators on post-arrest procedures. Department of Justice, National Institute of Corrections, *Fundamentals of Bail* (2014) at 75.

In sum, the Constitution guarantees that the poor will not face a different criminal legal system than the system faced by wealthier people. Because the Plaintiffs and the similarly situated impoverished arrestees that they represent are being jailed, or will be jailed, based solely on their inability to pay the monetary bonds, and because they will suffer severe collateral consequences in the outcomes of their criminal cases as a result, they are highly likely to prevail on the merits of their constitutional claims.

B. Wealth-Based Detention Has the Effect of Racially Discriminating Against African American Members of the Plaintiff Class in Violation of the Illinois Civil Rights Act.

Plaintiffs are also likely to succeed on the merits of their statutory racially discriminatory impact claim. The Illinois Civil Rights Act of 2003 ("ICRA") states: "No unit of State, county, or local government in Illinois shall . . . utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, national origin, or gender." 740 ILCS 23/5(a)(2). In other words, ICRA provides a cause of action where a governmental unit uses a method of administration that creates a disparate impact on racial minorities. *See generally Cent. Austin Neighborhood Ass'n v. City of Chicago*, 2013 IL App (1st) 123041, ¶ 10.

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

Defendant Dart's utilization of criteria and methods administration in detaining those who cannot afford to post bail has a disparate impact on African American members of the Plaintiff Class, including Robinson and Lewis. This practice results in the disproportionate pretrial incarceration of individuals who are less wealthy as compared to those of greater financial means. Because of the economic disparities in Cook County between African Americans and whites,[20] arrestees in that racial minority group are disproportionately jailed pretrial as a result of the Judicial Defendants' administration of the Statute.

For instance, of those defendants in Cook County against whom Class 4 felony charges were instituted in the years from 2011 to 2013, only 15.8% of the African American defendants were released on bond throughout their pretrial period as compared to 32.4% of non-African American defendants who were released on bond throughout their pretrial period. Conversely, 49.3% of the African American Class 4 felony defendants remained in custody throughout their pretrial period, while only 29.8% of the non-African American Class 4 felony defendants remained in custody throughout their pretrial period. The differential bond versus custody outcomes for African American versus non-African American defendants is likewise stark with respect to defendants charged with other classes of felonies from 2011 to 2013, as demonstrated by Cook County docketing records. Further, because arrestees who are jailed pretrial suffer devastating collateral consequences with respect to the outcomes of their criminal cases, the disparate impact on African Americans is extensive and long-lasting.

As discussed in section III(A)(2) above, there are obvious less restrictive alternatives to keeping people in jail because of their poverty and to making detention and release decisions based

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[20] *Data USA: Cook County, IL, Poverty by Race & Ethnicity*, available at https://datausa.io/profile/geo/cook-county-il/#poverty_ethnicity

on wealth. The successful reliance on alternatives to money bail in jurisdictions like Washington, D.C., and the growing use of those alternatives across the country demonstrate that there are other viable means available to achieve the purposes of bail that will not have the effect of discriminating against Cook County's poor and racial minorities. *See Cent. Austin Neighborhood Ass'n*, 2013 IL App (1st) 123041, ¶ 1 (as with federal civil rights statutes, if plaintiffs can prove their allegations under ICRA, the burden shifts to defendants to demonstrate that their practice is necessary to attain a legitimate non-discriminatory policy-objective, and upon such a showing, the burden shifts back to plaintiffs to show a viable alternative means to achieve the legitimate objective without discriminatory effects). Thus, the Plaintiffs are overwhelmingly likely to succeed on the merits of their claim under ICRA.

CONCLUSION

For the reasons stated above, the Court should, after appropriate proceedings, grant preliminary injunctive relief, enjoining Defendant Dart from detaining any release-eligible arrestees who would be released but-for their inability to afford their ordered bond amounts.

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Respectfully submitted,

/s/

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