

Johnson not enforce a secured financial condition of pretrial release upon an individual unless the bail order includes a finding pretrial detention is necessary because less restrictive conditions of release are inadequate and includes notice that the individual has received an individualized hearing that meets, at a minimum, the procedures laid out in paragraph 5 below. As more fully presented in their brief in support of their Motions for Temporary Restraining Order and Preliminary Injunction, and its accompanying evidentiary attachments,² Plaintiffs state the following in support of their Motion:

1. Plaintiffs and the proposed class are likely to succeed on the merits of their claims that Defendants' bail and pretrial detention policies violate their right to be free of wealth-based detention under the equal protection and due process clauses of the Fourteenth Amendment (Count I); their substantive due process right to pretrial liberty (Count II); their procedural due process rights (Count III); and their Sixth Amendment Right to Counsel (Count IV).

2. Without immediate injunctive relief from this Court, Plaintiffs and the proposed class will continue to suffer immediate, irreparable harm in the form of deprivation of their constitutional right to pretrial liberty and right to be free from wealth-based detention. They will also suffer resulting additional harms, including loss of jobs,

Individuals who are charged with domestic violence offense receive a different process for bail under state law. *See* N.C. Gen. Stat. §15A-534.1.

² For purposes of efficiency and the Court's convenience, Plaintiffs file, simultaneously with their Motion for Temporary Restraining Order and the instant motion, a single, combined memorandum in support of both motions.

loss of homes, disruption of medical care, and disruption to family life, as well as hindering individuals' ability to prepare for their own defense.

3. Entry of an injunction poses no harm to Defendants, as it would release individuals who are unconstitutionally held in Defendant Sheriff's custody and prevent the future unconstitutional pretrial detention of similarly situated individuals.

4. An injunction serves the public interest because it prevents the continued violation of constitutional rights, including such fundamental rights as the right to pretrial liberty and the right to be free of wealth-based detention.

Accordingly, Plaintiffs respectfully ask the Court to issue class-wide preliminary injunctive relief against the system of wealth-based detention that keeps Plaintiffs and proposed class members in jail because they cannot afford to pay a monetary release condition without an inquiry into or findings concerning ability to pay, without consideration of non-financial alternatives, and without any findings that a particular release condition—or pretrial detention—is necessary to meet a compelling government interest. Specifically, Plaintiffs request that the Court enjoin Defendant Sheriff from enforcing a secured financial condition of pretrial release upon an individual, unless Defendant Sheriff is notified in writing that the individual has received an individualized hearing that meets the following minimum requirements:

(a) Notice was provided to the individual at the individualized bail hearing of:

- i. The federal constitutional rights at issue: specifically the right against wealth-based detention and the right to pretrial liberty;

- ii. The applicable legal standard, which is that these rights cannot be infringed unless the government proves that there are no alternative conditions of release that could adequately serve the government's interests in court appearance or public safety; and
 - iii. Notice of the facts being relied on to make the decision.
- (b) Notice was provided to the individual that financial information will be collected at the individualized bail hearing, including an explanation of the significance of the financial information to be collected.
 - (c) The individual was provided an opportunity to be heard before a neutral factfinder and to present and confront evidence and argument on appropriate conditions of release or detention.
 - (d) If an order resulting in an arrestee's *de facto* or transparent detention is entered, there must be a finding that pretrial detention is necessary because there are no alternative conditions of release adequate to serve a compelling government interest in court appearance or public safety. This provision requires that, if a secured financial condition of release is required, there be either an individualized finding that the person can afford to pay it (such that it will not result in detention) or that the pretrial detention of the person is necessary.
 - (e) An order of *de facto* or transparent detention must be accompanied by on-the-record findings setting forth the reasons for the decision and made available to the individual.
 - (f) The individual was provided counsel free of charge at the hearing.

Under Local Rule 65.1(b), Plaintiffs request oral argument on this motion and leave to present the testimony of witnesses, including experts, as may be appropriate depending on the arguments Defendants may raise in their opposition to Plaintiffs' Motion for Preliminary Injunction.

Dated: November 12, 2019

Respectfully submitted,

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**Appearing by special appearance in
accordance with Local Rule 83.1(d).*

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on November 12, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. I further certify that arrangements have been made to deliver a true and correct courtesy copy of the foregoing to the following via Certified U.S. Mail, Return Receipt Requested.

/s/ Irena Como
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Kelly Councilman, Magistrate
David Crabbe, Magistrate
Rhonda Crisp, Magistrate
Bertram Heathcote, Magistrate
Wendy Hunter, Magistrate
Amelia Knauff, Magistrate
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Helena Rodgers, Magistrate
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Terry S. Johnson, Sheriff
Alamance County Detention Center
109 S Maple St.
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The following relief is ordered against Defendant Alamance County Sheriff. Fed. R. Civ. P. 65(d)(2). The injunction covers and is binding on those “who are in active concert or participation” with the parties or the parties’ officers, agents, servants, employees, or attorneys. *Id.*

To remedy the constitutional violations found by the Court, the Court **ORDERS** as follows:

(1) The Sheriff must not enforce a secured financial condition of pretrial release upon an individual, unless the individual first receives an individualized hearing that meets the following minimum requirements:

- (a) Notice is provided to individuals at the individualized bail hearing of:
 - i. The federal constitutional rights at issue: specifically the right against wealth-based detention and the right to pretrial liberty;
 - ii. The applicable legal standard, which is that these rights cannot be infringed unless the government proves that there are no alternative conditions of release that could adequately serve the government’s interests in court appearance or public safety; and
 - iii. Notice of the facts being relied on to make the decision.

(b) Notice is provided to the individuals that financial information will be collected at the individualized bail hearing, and the notice includes an explanation of the significance of the financial information to be collected.

(c) Individuals are provided an opportunity to be heard before a neutral factfinder and to present and confront evidence and argument on appropriate conditions of release or detention.

(d) If an order resulting in an arrestee’s *de facto* or transparent detention is entered, there must be a finding that pretrial detention is necessary because there are no alternative conditions of release adequate to serve a compelling government interest in court appearance or public safety. This provision requires that, if a secured financial condition of release is required, there be

either an individualized finding that the person can afford to pay it (such that it will not result in detention) or that the pretrial detention of the person is necessary.

(e) An order of *de facto* or transparent detention must be accompanied by on-the-record findings setting forth the reasons for the decision and made available to the individual.

(f) Individuals must be provided counsel free of charge at the hearing.

(2) Defendant Sheriff must not enforce any de facto or transparent order of pretrial detention that is not accompanied by a record demonstrating that the substantive findings and procedural safeguards listed in above in paragraph 1 of this Order have been provided. Specifically, this provision requires that, if a secured financial condition of release is required, the Sheriff may not enforce that condition unless there is a finding on the record that the person can afford the amount of money required (such that it will not result in detention) or that the pretrial detention of the person is necessary.

The Court further **ORDERS** that the Sheriff abide by the following **REPORTING** mechanism. The Sheriff shall make weekly public reports to this Court that include:

(a) A list of all individuals who were required to pay a secured financial condition of pretrial release and a copy of the on-the-record findings showing that the individual either could afford the amount required or that detention was necessary; and

(b) A list of all arrestees who were detained prior to an individualized hearing and the reason for detention.

For purposes of ensuring transparency and effective monitoring, Defendants must produce additional relevant data to Class counsel upon reasonable request.

The Parties may move the Court for modification or clarification of these reporting requirements by written motion served on all parties and counsel and on a showing of good cause.

Dated: _____

UNITED STATES DISTRICT JUDGE