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THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GARY WAYNE WELCHEN, *et al.*, Plaintiffs, v. THE COUNTY OF SACRAMENTO, *et al.*, Defendants.	2:16-cv-185-TLN-DB PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS (ECF Doc. 35) Hearing: January 12, 2017 Time: 2:00pm Department: Courtroom 2, 15th Floor Judge: Honorable Troy L. Nunley

"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). Where the fundamental right of pretrial liberty is at stake, any deprivation must be narrowly tailored to a compelling interest. Sacramento's wealth-based system of pretrial justice — which ties pretrial freedom solely to someone ability to afford a monetary payment — is an unjustifiably broad attempt to assure court appearance. Rather than "carefully limiting" pretrial detention to those proven to be a flight risk, Sacramento — a county with no meaningful pretrial services — has decided simply to lock up anyone too poor to pay money bail, including those who are absolutely no risk of flight. There are many other effective ways of maximizing court appearance that do not simply jail poor arrestees; Sacramento's pay-for-freedom scheme fails the strict scrutiny that must be applied to deprivations of pretrial liberty.

Each of Defendants' arguments for dismissal fail on the merits, and each will be addressed in turn. For the sake of judicial economy, Plaintiff incorporates by reference the arguments in the contemporaneously filed response to the Attorney General's motion to dismiss. Plaintiff respectfully requests that Defendants' motion to dismiss be denied because (I) the Sacramento County Sheriff is a county official and thus liable for money damages, (II) in addition to the Attorney General and the Sheriff, the County is a proximate cause of Sacramento's money bail system and is independently liable for its role in the unconstitutional scheme of wealth-based detention, and (III) money bail fails strict scrutiny and is excessive in relation to its purpose, thus violating substantive due process.

I. The Sheriff Is a County Official in His Capacity as Jailor, Including His Pre-Arraignment Release and Detention Decisions

In its Motion to Dismiss (ECF Doc. 35), the County of Sacramento effectively concedes that, at minimum, the Sheriff is subject to suit for injunctive and declaratory relief based on Plaintiff's claims. The County is incorrect, however, in arguing that the Sheriff is a state official and thus immune from money damages.

Every Ninth Circuit case to examine whether sheriffs in California are county or state officials has held that they are county officials. This Court should find that the Sacramento County Sheriff is a county official in his capacity as jailor (including pre-arraignment release and detention decisions) because (A) the Supreme Court's analytical framework in *McMillian* establishes the Sacramento County Sheriff as a county official, (B) the reasoning, logic, and holdings from binding Ninth Circuit precedent make clear that the Sheriff is a county official, (C) the Sheriff makes numerous decisions not dictated by state law, further highlighting that he is not a state official, and (D) the County's contrary arguments are not persuasive.

A. *McMillian* Requires a Focus on State Law, Which Makes Clear that the Sheriff Is a County Official

The analytical framework set forth by the United States Supreme Court in *McMillian v. Monroe County*, 520 U.S. 781 (1997), establishes that the Sacramento County Sheriff is a county official when acting as jailor and when making the pre-arraignment release and detention decisions at the heart of Defendants' wealth-based detention scheme.

A critical reason the Sacramento County Sheriff is a county official for the purposes of this lawsuit is because he is defined as such by state law. The Supreme Court has unambiguously stated that, in determining whether an official acts for the state or county, the "inquiry is dependent on an analysis of state law." *McMillian*, 520 U.S. at 786. An "especially important" factor in *McMillian* is the official's status under the state constitution, which points heavily in favor of the Sheriff's capacity as a county official. *Id.* at 787. Following *McMillian*'s direction as to whether the state constitution lists the official as an executive official or a municipal official, *id.* at 789, the California Constitution does not designate sheriffs as state officers or members of the executive branch. Cal. Const. Art. V, § 14(f). Instead, sheriffs are defined in Article XI of the Constitution, which is titled "Local Government." Article XI, section 4 of the California Constitution provides that "County charters shall provide for . . . an elected sheriff . . . ." Cal. Const. Art. XI, § 4. In addition, *McMillian* pays special attention to an official's impeachment procedures, 520 U.S. at 788; the California Constitution does not list sheriffs in Article IV, section 18, which provides for impeachment of a variety of state officers before the Legislature. Cal. Const. Art. IV, § 18. Instead, a sheriff can be removed from office just like any other county or municipal officer: following the accusation of the county grand jury in the county that elected her. Cal. Gov't Code § 3060. The reasoning in *McMillian* thus leads to the sheriff's status as a county official under the California Constitution.

In addition to the California Constitution's designation of sheriffs as county officials, the

state statutes concerning the particular function at issue in this case — overseeing the county jail — further demonstrate that in his capacity as jailor, the Sacramento County Sheriff is a county actor. Government Code section 25303 grants the county boards of supervisors broad fiscal and administrative powers for the management of the individual county jails. Cal. Gov't Code § 25303; *Streit v. Cnty. of Los Angeles*, 236 F.3d 552, 561 (9th Cir. 2001). Crucially, Government Code section 23013 authorizes counties to transfer control of a county jail from the sheriff to a county-created department of corrections, suggesting that the counties control and operate the jails, and not the state. Cal. Gov't Code § 23013. The Ninth Circuit has read these two provisions to "weigh heavily" in favor of the conclusion that county sheriffs act for the county in their capacity as jailors. *Streit*, 236 F.3d at 561–62. Indeed, these provisions of law highlight how the specific function at issue here — the Sheriff's capacity as jailor — is a county responsibility.

Other state statutes strongly recommend the same conclusion. California law explicitly states that the sheriff is a county officer. Cal. Gov't Code § 24000(b) ("The officers of a county are . . . (b) a sheriff."). *McMillian* looks closely at whether the official's salary is set by the county or state, 520 U.S. at 791, and California law dictates that the county board of supervisors sets the salary of the sheriff. Cal. Gov't Code § 25300. Sheriffs must be registered to vote in their respective counties. Cal. Gov't Code § 24001. Critically, the County Sheriff's "services are contracted out by the counties — not the state." *Streit*, 236 F.3d at 562 (citing Cal. Gov't Code § 53069.8).

Consistent with all of these provisions designating county sheriffs as county officials in California when acting as jailor, yet another "crucial factor" that "weighs heavily" in the *McMillian* analysis is which entity pays money damages for section 1983 claims brought against

a sheriff. *Streit*, 236 F.3d at 562; *McMillian*, 520 U.S. at 789. In California, it is the sheriff's county. Cal. Gov't Code § 815.2. Similarly, when the Sacramento County Sheriff is sued, he is represented by the county. Cal. Gov't Code § 26529 ("The county counsel shall defend or prosecute all civil actions and proceedings in which the county or any of its officers is concerned or is a party in his or her official capacity."). Indeed, the County's counsel in this matter is also representing the Sheriff. Federal courts have found these factors critical when assessing the county sheriff's status as a county official regarding management of the jail. *See, e.g.*, *Smith v. Cnty. of Los Angeles*, 535 F. Supp. 2d 1033, 1037–38 (C.D. Cal. 2008) ("If sheriffs and their departments are state actors, then by all logic the state, not the county, should absorb the liability relating to these cases. . . . Indeed, if [the assertion that sheriffs could be state officials] is correct, then the Court wonders whether the wrong lawyers are representing Defendant in this matter, for it would seem that the Sheriff is entitled to a defense paid for and selected by the State of California.").

Under *McMillian*'s focus on state law, the Sacramento County Sheriff is a county official in his capacity and function as jailor. The county's control and management of the county jail, coupled with numerous constitutional and statutory provisions designating the sheriff as a county official, confirm that he acts on behalf of the county when he makes pre-arraignment release and detention decisions.

B. The Analytical Framework of Binding Ninth Circuit Precedent Establishes that the Sheriff Is a County Official

In addition to the fact that the *McMillian* analysis is dispositive that the Sheriff acts for the county in this case, this Court is also bound by the Ninth Circuit's analysis, which has repeatedly found county sheriffs in California to be county officials regarding law enforcement and jail management functions. *Cortez v. Cnty. of Los Angeles*, 294 F.3d 1186, 1187 (9th Cir.

2002) ("Since *McMillian v. Monroe County*, we have had several occasions to address [whether county sheriffs are liable under Section 1983 as county officials] and have invariably answered it in the affirmative."); *Streit*, 236 F.3d at 563 (holding that "the Sheriff acts for the County" regarding his function of "oversight and management of the local jail"); *Roe v. Cnty. of Lake*, 107 F. Supp. 2d 1146, 1148 (N.D. Cal. 2000) ("Before and after *McMillian*, the Ninth Circuit has considered a California sheriff a local law enforcement agent for purposes of establishing section 1983 liability under *Monell*.").

As the Ninth Circuit has made clear, it would be error to construe the Sheriff's function too narrowly in an effort to argue that he is a state official. The court in *Streit* specifically rejected the notion that the Sheriff's function should be defined in the granular detail of "the effectuation of the release of persons where it is clear that there is no legal cause for their continued detention." 236 F.3d at 561. The Ninth Circuit properly instructs that, because this case deals with matters relating to release and detention decisions, the Sheriff's function is the "oversight and management of the local jail" and, in this function, he is a county official. *Id.*

C. The Sheriff's Actions in this Case Are Not Controlled by State Law

The County's motion incorrectly argues that the Sacramento County Sheriff is merely following state law and court orders when making pre-arraignment release and detention decisions. As Plaintiff in this case illustrates, the Sheriff was not following any court order, but the county's bail schedule set by the superior court judges. ECF Doc. 31 at ¶ 37. The Superior Court judges, while generally considered state officials, are county officials for the administrative and policymaking functions of adopting the county's bail schedule. *See Weiner v. San Diego Cnty.*, 210 F.3d 1025, 1028 (9th Cir. 2000) ("[T]he official's 'actual function in a particular area' as defined by state law, must be evaluated to determine whether he acts for the

state or the county."); *Wolfe v. Strankman*, 392 F.3d 358, 366 (9th Cir. 2004) (holding that, when judges are sued in their administrative capacity, they have no judicial immunity). The adoption of the county bail schedule is thus not akin to a court order, but it is an administrative act setting the county's bail policy. The Sheriff's actions in this case are thus pursuant to county policy, not court order.

Even if the bail schedule were construed as a court order, it is not an order of detention, and this fact is fatal to the County's attempt to obscure the Sheriff's actions in this case. Unlike the cases dealing with orders of detention, this case involves (at most) a *conditional* order of detention. Before arraignment, all class members are explicitly eligible for release, provided that they can pay enough money to purchase their freedom. Indeed, the whole problem with Sacramento's pretrial detention scheme is that it involves conditional freedom, and that the sole relevant condition is an arrestee's ability to make a monetary payment.

The conditional detention at issue in this case illustrates that the Sheriff makes many decisions not pursuant to any court order or state law. Unlike cases in which the Sheriff is ordered to detain someone, here, the Sheriff must make innumerable decisions about conditional detention and release. It is up to the Sheriff to determine whether the conditions of release are met (i.e., whether an arrestee has posted sufficient bail), when the conditions are met (i.e., whether the Sheriff will accept payment during lockdown hours), how the conditions are met (i.e., from whom and in what various methods the Sheriff will accept payment), and the many administrative, operational, and jail management procedures that dictate an arrestee's options for meeting the condition of release. Cal. Pen. Code § 1269b(a) (assigning the Sheriff's department the authority to accept sufficient bail); Cal. Gov't Code § 26605 (assigning the County Sheriff management and oversight of the county jail). The Sheriff's Department controls all aspects of

the jail, including when in the booking process arrestees are notified of the bail amount, when and if arrestees are given a list of private bail bond companies to call, when and if arrestees are able to make phone calls to relatives or private companies to arrange payment, and so on. *See* ECF Doc. 31 at ¶¶ 34–41. By holding the keys to the jail, the Sheriff also holds the keys to any and every option an arrestee might pursue to meet the condition of release.

Additionally, the Sheriff's department sets the booking charge and, through this procedure, wields significant influence over the monetary condition of release. ECF Doc. 31 at ¶ 37. Although the booking charge may seem like a minor procedural mechanism, because no formal charges are brought prior to arraignment, the booking charge is the sole determinant of an arrestee's bail amount. This important procedure is thus intimately intertwined with the claims of this case, and it is conducted by the Sheriff, not determined by state law or court order.

D. The County Does Not Offer Persuasive Reasons to Contradict Supreme Court and Ninth Circuit Precedent

None of the County's arguments attempting to establish the Sheriff as a state official is persuasive. Most fundamentally, the County minimizes or ignores all of the critical factors outlined in *McMillian* that point to the Sheriff's status as a county official (including, most notably the Sheriff's designation as a county official under state law). The County also denies that the Sheriff is responsible for setting an arrestee's bail amount, ignoring the fact that the Sheriff's Department set the booking charge as part of the booking process. ECF Doc. 31 at ¶ 37. Indeed, the booking charge can decide between felonies and misdemeanors, thus determining whether an arrestee is eligible for citation release.

For all of the reasons discussed, the Sheriff is a county official, and the County's argument that he is immune from money damages under the Eleventh Amendment is therefore foreclosed.

II. Binding Ninth Circuit Precedent Holds that, under *Monell*, a Municipality Is Liable for Its Unconstitutional Practices, Even Where Required by State Law

The County's argument that it cannot be held liable for enforcing state law is foreclosed by the Ninth Circuit's holding in *Evers v. Custer County*, 745 F.2d 1196 (9th Cir. 1984), which conclusively holds that a county is liable for violating the federal Constitution, notwithstanding state law to the contrary. In *Evers*, a property owner brought a Due Process challenge against a county for declaring a road public by operation of Idaho law. *Id.* at 1199. The defendant county argued that it should be immune because it was "merely acting in accordance with state law, rather than carrying out County policy." *Id.* at 1203. The Ninth Circuit rejected this argument, explaining that while a county enforcing state law may be acting in "good faith," there is no good-faith exception to *Monell* liability for a county following an unconstitutional state law:

> The County argues that it should be immune because it was merely acting according to state law, rather than carrying out County policy. This argument, however, goes only to the question of the Commissioners' good faith in applying the statute. The fact that the Commissioners are immune from suit under section 1983 because of their good faith does not relieve the County from liability.

Id. at 1203. Indeed, the "central aim of the Civil Rights Act [42 U.S.C. § 1983] was to provide protection to those persons wronged by the misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* (quoting *Owen v. City of Independence*, 445 U.S. 622, 650–52 (1979)) (internal quotation marks omitted). Whether the wrongdoer enforcing state law is a state or municipal official is of no moment, and *Evers* forecloses the defense that the county was merely following state law.

District courts in this circuit have applied *Evers* to hold that a decision to enforce state law can constitute a municipal policy. *See, e.g.*, *Puente Arizona v. Arpaio*, 76 F. Supp. 3d 833, 867 (D. Ariz. 2015) (*citing Evers* 745 F.2d at 1203–04) ("A municipal policy may include the decision to enforce a state law.") (rev'd on other grounds, *Puente Arizona v. Arpaio*, 821 F.3d

1098 (9th Cir. 2016)); *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, 2013 WL 5445483, at *26–28 (D. Ariz. Sept. 30, 2013) (finding that *Evers* supported the conclusion that a policy can be premised on the failure to analyze the constitutionality of statutes before enforcing them). Following state law is no defense to a county's practice of unconstitutional conduct.

District courts in other circuits have reached the same conclusion, and their reasoning is persuasive. *See, e.g.*, *Davis v. City of Camden*, 657 F. Supp. 396, 404 (D.N.J. 1987) ("[T]he fact that state law mandates that a municipality implement a particular policy does not render the municipality's affirmative adoption of that policy any less of a municipal policy than when state law merely authorizes the municipality's action, or when state law is silent."). In *RHJ Med. Ctr., Inc. v. City of DuBois*, 754 F. Supp. 2d 723 (W.D. Pa. 2010), the court rejected the municipality's argument that it could not be held liable for enforcing state laws. *Id.* at 764 ("The Defendant seems to assert that it is the sovereign state, and not the municipality, that should be held liable for enacting unconstitutional laws which are applied by the municipality. This cannot be correct."). The court explained that, if following state law were a defense for unconstitutional action by a municipality, "there would be a clear violation of rights, without a remedy. This inappropriate and unacceptable conclusion would stand in the face of the bedrock principles upon which our Republic was founded." *Id.* Relying on Supreme Court precedent, the court in *City of DuBois* held that "[m]unicipalities cannot shirk their responsibility to follow this oath [to uphold the federal Constitution], and do not receive immunity for blindly following laws passed by a state." *Id.* at 765. Because municipalities always have a choice — indeed, an obligation — to follow the federal Constitution, a county can be held liable for its decision to violate the federal Constitution and follow contrary state law instead.

Like the Ninth Circuit in *Evers*, the Eleventh Circuit and other courts have correctly found *Monell* liability against municipalities who were following state law. *See, e.g.*, *Cooper v. Dillon*, 403 F.3d 1208, 1223 (11th Cir. 2005) ("While the unconstitutional statute authorized [the municipal official] to act, it was his deliberate decision to enforce the statute that ultimately deprived [the plaintiff] of constitutional rights and therefore triggered municipal liability."). The reasoning of these decisions is persuasive because counties *do* have a choice whether or not to enforce unconstitutional laws:

> [T]he argument that municipal liability should not attach when municipal officials effectuate a state mandated policy because the officials had no choice but to implement the policy can be met with the observation that not only do these officials have such a choice, but they may be obliged not to implement the state law if they wish to avoid personal liability under § 1983. Municipal officials cannot blindly implement state laws; they are required to independently assess the constitutionality of the laws . . . .

Davis v. City of Camden, 657 F. Supp. 396, 402 (D.N.J. 1987). The County has a choice of whether to follow an unconstitutional state law or the constitutional mandate that no person be kept in jail solely due to her inability to make a monetary payment.

Just as the County cannot insulate its unconstitutional custom and practice by hiding behind state law, so too is it prevented from hiding behind state judges. In *Anela v. City of Wildwood*, 790 F.2d 1063 (3d Cir. 1986), the Third Circuit held that a city's routine compliance with an unconstitutional bail schedule, issued by a municipal judge, was sufficient to give rise to the city's liability for damages. *Id.* at 1069. The fact that the city was merely following a judge's orders was no defense to the constitutional violation. *Id.* at 1067 ("The issuance of a bail schedule by the municipal court does not excuse City officials from complying with the New Jersey Supreme Court's rule."). The court held that the city "must bear responsibility" for its practice of enforcing the unconstitutional bail schedule. *Id.*

The County incorrectly argues that *Monell* liability requires a choice. Of course, the County has a choice — and even an obligation — to follow the federal Constitution rather than contrary state law. But more importantly, no concept of "choice" is required for *Monell* liability — all that is required is a county custom or practice of keeping people in jail solely because they cannot afford to make a monetary payment. *Monell*, 436 U.S. at 691. The Supreme Court has never held that a "choice" is required for *Monell* liability, and the County's citations on this point are taken out of context. For example, the issue in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) — like in *Monell* — was when a municipality could be liable for the acts of employees. *Id.* at 479. *Pembaur* thus reiterated *Monell*'s holding that there is no *respondeat superior* liability under Section 1983 and that, for a county to be liable for an unconstitutional policy, it must be the county's policy, not simply an individual county employee's action. *Id.* at 478. Similarly, *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), deals only with the question of whether a fatal shooting by a police officer could rise to the level a municipal "policy." *Id.* at 821–23. These cases are not deciding whether a municipality can be liable for following state law; they are simply defining a municipal "policy" so as to exclude any theory of *respondeat superior*. *Pembaur* makes clear that its entire discussion centers on the distinction between individual acts and municipal acts. *Id.* at 479–80 ("The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality' — that is, acts which the municipality has officially sanctioned or ordered.") (emphasis in original). This Court should reject the County's invitation to pull stray quotes out of context; none of the Supreme Court cases cited by the

County establishes — either by reasoning or holding — that a "choice" is required for *Monell* liability. Even though counties always have the choice to follow the federal Constitution, *Monell* does not require a "choice" to establish liability. An unconstitutional practice suffices.

The County suggests that the Supreme Court has since undermined *Evers*, but this suggestion misreads precedent. The issue in *Los Angeles County v. Humphries* was whether *Monell*'s "policy or custom" requirement applies to suits for injunctive relief — not whether a county can be liable for conduct taken pursuant to state law. 562 U.S. 29, 33 (2010) ("The county then asked us to review this last-mentioned Ninth Circuit holding, namely, the holding that *Monell*'s 'policy or custom' requirement applies only to claims for damages but not to claims for prospective relief.") This was the sole question resolved by the *Humphries* Court and it is a question that is simply not at issue in this case. The issue here is whether a municipality can be liable for a policy or custom of enforcing an unconstitutional state law. While *Humphries* did not address this question, the *Evers* court directly addressed it and found that a municipality could be liable in such circumstances. 745 F.2d at 1203 (holding that the fact that the County "was merely acting according to state law . . . *does not relieve the County from liability*") (emphasis added).

Humphries did not overturn *Evers* — it overturned *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989). 562 U.S. at 34. The County suggests that the Ninth Circuit's approach to *Monell* liability was effectively overturned by the Supreme Court. The County attempts to give the imprimatur of Supreme Court approval to dicta not constituting law reviewed by the Court. Furthermore, the Court's language involving the role of "choice" in *Monell* liability in *Humphries* merely reiterated the fact that a municipality cannot be held liable under § 1983 "solely because it employed a tortfeasor." *Id.* at 35. Again, these other questions — such as

whether a municipality is vicariously liable for the torts of its employees or whether injunctive relief requires a municipal policy or practice — are simply irrelevant to *Evers*'s unrebutted finding that a municipality is liable for its unconstitutional conduct regardless of state law.

Estate of Brooks ex rel. Brooks v. United States, 197 F.3d 1245 (9th Cir. 1999), also did not overrule *Evers*. In that case, the Ninth Circuit held that Alameda County was not liable under *Monell* for the plaintiff's detention where he was held on the basis of a state law that only permitted his release by order of the federal government. *Id.* at 1248. The court's holding expressly relied on the fact that the plaintiff was detained under federal authority. *Id.* ("Whereas *Oviatt* was a case involving whether the left hand knew what the right hand was doing, this is a case involving whether *my* left hand [i.e., the county] knows what *your* right hand [i.e., the federal government] is doing."). Unlike in *Brooks* — where federal rather than county policy was the cause of detention — Plaintiff's detention in this case is a result of the County's practices. The county in *Brooks* had no authority to bring Brooks before a federal magistrate or to release him. *Id.* In contrast, county jail officials in Sacramento *do* have extensive authority to act within the state criminal justice system, and Sacramento could implement policies that would not result in unconstitutional wealth-based detention. Moreover, even if county officials did not have such authority under state law in the present case, *Brooks* would be distinguishable in another key respect: Brooks did not allege that the County could have acted differently, notwithstanding state law. 197 F.3d at 1248. Yet Plaintiffs' central contention is that even if state law did mandate the County's conduct, the County has not just a choice, but a duty to obey the United States Constitution where it contradicts state law. *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) ("[T]he prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, or

whatever guise in which it is taken."). Because the issue was not raised in *Brooks*, the Ninth Circuit did not have occasion to overrule its own prior holding in *Evers* that a municipality is liable for violating the federal Constitution even when required to do so by state law.

Evers was prior Ninth Circuit authority and therefore was binding on the panel in *Brooks* and *Humphries*. These subsequent Ninth Circuit cases not only concerned different questions than *Evers*, but *could not* have overturned *Evers* even if they had addressed the same issues. It cannot be that *Brooks* overruled *Evers* (especially not *sub silencio*) on a question the parties did not even litigate. In addition to violating binding Ninth Circuit precedent, such a result would be inconsistent with the basic principle of federal law, established since *Ex parte Young*, that a federal court has the authority to enjoin ongoing constitutional violations purportedly authorized by state law.

Finally, the County rests much of its argument on its belief that state law is solely responsible for Sacramento's money bail scheme, overlooking the fact that the Sheriff and County also play a critical role in enacting the money bail system. There is no rule in Section 1983 litigation that only one party can cause a constitutional violation, and the Sheriff, County, and Attorney General all play an instrumental role in wealth-based detention. Indeed, if any one of them refused to jail arrestees based solely on wealth-status, Plaintiff and Class Members would not suffer wealth-based jailing. Despite the County's attempts to pin full responsibility on the state, every government official and entity involved in the implementation of money bail can be held liable for its unconstitutional part in wealth-based detention.

III. Sacramento's Bail Scheme Infringes on Plaintiff's Fundamental Right to Pretrial Freedom and Does Not Survive Strict Scrutiny

For judicial economy, Plaintiff reincorporates by reference all of his arguments in response to the Attorney General's motion to dismiss, which are directly applicable to the

majority of the County's arguments in defense of its money bail system. The County's additional arguments do not save its system of wealth-based detention from the strict scrutiny required of such infringements of pretrial liberty.

The County's argument that money bail is contemplated by the Eighth Amendment is irrelevant, because Plaintiff's challenge is to a non-individualized, blanket application of wealth-based detention that operates to jail people who are poor. Plaintiff is not arguing that money bail can never be used (for example, as part of an order of release and as genuine collateral for someone who can afford it and for whom money bail will provide an incentive to return). In other words, none of Plaintiff's constitutional arguments would bar an individual judge from ordering release and adding, as a condition of release, a requirement that the defendant post a refundable money bail deposit as genuine collateral. Money bail should only be used where it is the most effective means of securing appearance, not as a detention order for people who are poor. Plaintiff is not seeking the total eradication of all money bail; the challenge in this case is against money bail as a *de facto* detention order based on wealth-status. Thus, despite the permissibility of specific money bail orders in appropriate individual cases, money bail cannot be used in the indiscriminate, broad-based, and arbitrary manner that amounts to wealth-based detention.

The County misses that fact that although many pretrial conditions may be permissible in individual cases, they cannot be applied in a manner that discriminates based on wealth-status. For example, electronic monitoring, home detention, other conditions are imposed by judges in various cases, but the county could not enact a wealth-based system to impose such liberty restrictions. A county could not decide that only poor arrestees are subject to electronic monitoring and, in the same way, it cannot apply money bail in a way that results in wealth-

based detention.

The County's argument that a limited period of detention is authorized by *County of Riverside v. McLaughlin* also ignores the fundamental claim at issue: although the County can detain (or release) everyone for a limited period of time, it cannot condition release on wealth-status for any period of time. In *State v. Blake*, 642 So. 2d 959, 968 (Ala. 1994), the Alabama Supreme Court struck down a state statute that allowed for 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. *Id.* at 968; *see also id.* at 966 ("Putting liberty on a cash basis was never intended by the founding fathers as the basis for release pending trial.") (quoting decision of lower court). By analogy, although the County could detain all arrestees for 48 hours, this fact serves as no justification for detaining all Muslim arrestees for 48 hours while letting all Christian arrestees go free. Even if limited detention is permissible across-the-board, discriminatory detention is never permissible, and no person should have to spend a single day in jail solely because she cannot afford a monetary payment.

The County further obscures Plaintiff's arguments by incorrectly stating that Plaintiff is arguing that all arrestees must be immediately released if they are too poor to pay money bail. The County may release all arrestees. It may release all arrestees charged with non-violent offenses. It may release all arrestees with no prior failures to appear. It might even decide to detain all arrestees for a short period of time before an individualized assessment can be made. But it cannot condition release on wealth-status; such an infringement on pretrial liberty is not narrowly tailored to address an acute societal problem.

At root, the County fails to show that Sacramento's wealth-based detention system is narrowly tailored to advance a compelling government interest. The existence of effective non-

wealth-based pretrial justice systems proves this point.

IV. Conclusion

For all of the reasons discussed above and in the contemporaneously filed response to the Attorney General's motion to dismiss, Plaintiffs respectfully request that this Court deny the County's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 29, 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following counsel:

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