IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LUCAS LOMAS, CARLOS EAGLIN, On behalf of themselves and all others similarly situated, Plaintiffs, v. HARRIS COUNTY, TEXAS, Defendant.	Case No. (Class Action)

MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The Named Plaintiffs are currently detained in the Harris County Jail. Absent intervention by this Court, they will continue to be kept in jail cells indefinitely without a finding of probable cause supported by oath or affirmation. They are among thousands of warrantless arrestees that Harris County detains every month on the basis of probable cause determinations made on the basis of unsworn assertions of fact.

The Fourth Amendment requires that the government justify a person's prolonged detention with a finding of probable cause supported by oath or affirmation. When a police officer arrests a person without a warrant, a neutral magistrate must promptly determine whether probable cause exists based on sworn facts.

Harris County disregards this basic rule. Harris County detains presumptively innocent people in its jail even though it knows that the factual basis for doing so is not subjected to the rigor of sworn assertions that the Fourth Amendment has required for over 200 years.

Because Plaintiffs are — and because many others in their situation will continue to be — subjected to continued unlawful jailing, Plaintiffs respectfully request that this Court issue a preliminary injunction to require Harris County to comply with federal and state law. The Court should require the County to provide to warrantless arrestees prompt determinations of probable cause supported by oath or affirmation, or else release them. The practice of keeping individuals in jail cells without constitutionally valid findings of probable cause has no place in the American legal system.

STATEMENT OF FACTS

I. Factual Background

A. The Plaintiffs

Lucas Lomas was arrested without a warrant on December 24, 2016, for theft, a felony offense. A Hearing Officer made a finding of probable cause on December 25, 2016, for the warrantless arrest and imposed a secured financial condition of release in the amount of $15,000. The probable cause determination was based on unworn statements. Mr. Lomas is currently in jail. He cannot afford to pay his money bail amount. Mr. Lomas's next court date is set for January 3, 2017.

Carlos Eaglin was arrested without a warrant on December 26, 2016. Later that day, a Hearing Officer made a finding of probable cause and imposed a secured financial condition of release in the amount of $5,000. The probable cause determination was based on unsworn

statements. He cannot afford to pay his money bail amount. Mr. Eaglin is currently in jail. His next court date is set for January 3, 2017.

B. Harris County's Policy and Practice for Probable Cause Determinations

The facts of this case are straightforward: In Harris County, findings of probable cause by a neutral magistrate are not based on facts supported by oath or affirmation.

When a police officer makes an arrest without a warrant, the officer calls a hotline staffed by the District Attorney's Office and describes the circumstances leading to arrest. The Assistant District Attorney on duty decides what, if any, charges are supported by those circumstances. If the ADA on duty believes that the officer's factual recitation supports a charge, the ADA "accepts" the charges. The statements an officer makes to the ADA on duty are not sworn.[1]

Once the ADA "accepts" the charges, the arresting officer types a summary of the facts and a description of the accepted charges into a District Attorney's Intake Management System ("DIMS") terminal. The DIMS summaries are also not sworn.

Harris County accepts into custody all warrantless arrestees who are arrested by other agencies and who are not otherwise released upon paying a predetermined financial condition set pursuant to the County's bail schedule.[2] Many of these arrestees will have been held for two or three days, or more, before the Harris County Jail receives them. As a matter of policy and practice, warrantless arrestees do not receive probable cause determinations before they are in Harris County custody. Harris County also keeps in its custody people who were arrested by the Sheriff's

[1] Sometimes a criminal complaint containing a boilerplate recitation of the charges is produced following the acceptance of charges. However, the bare bones complaint merely recites that officials believe a particular crime to have been committed and does not contain any of the facts leading to that conclusion and therefore does not state any facts to establish the existence of the elements of any criminal offense. Such a complaint cannot—and in practice does not—serve as the basis for a finding of probable cause by the Hearing Officer.

[2] Arrestees able to pay the predetermined sum required for release are permitted to leave the arresting agency's custody after minimal processing. These arrestees will receive a probable cause hearing, if at all, at a subsequent court appearance.

Department and for whom Harris County knows there has been no probable cause determination within a reasonable period of time. It is the routine policy and practice of Harris County to continue to detain warrantless arrestees without probable cause determination for longer than the 24 hours permitted under state law for misdemeanor arrestees and longer than the 48 hours presumptively allowed under state and federal law for felony arrestees.

A Harris County Hearing Officer presides over probable cause hearings, also known locally as "magistrations" or "Article 15.17 hearings," from a courtroom in the Harris County courthouse. Warrantless arrestees attend these hearings via videolink. At this hearing, the Hearing Officer calls an individual's name and reads the charge. The factual basis for the Hearing Officer's determination of probable cause is the DIMS summary, which the ADA reads aloud at the hearing.

Harris County and its employees and agents know that the statements ADAs present to Hearing Officers are not sworn. The County's own officers use the DIMS system after a warrantless arrest. Every time a probable cause hearing is held at the Harris County Jail, Harris County employees are present. On the basis of these unsworn facts, the Hearing Officers find probable cause in almost every case.[3] Thousands of people are held in Harris County jail every month following hearings at which no sworn facts supported a finding of probable cause.

Harris County's policy and practice will keep the Named Plaintiffs in jail beyond the statutory and constitutional periods of reasonable detention without probable cause following a warrantless arrest. Plaintiffs have not received, and will not receive, the prompt probable cause determinations supported by oath or affirmation required by longstanding federal and state law.

ARGUMENT

[3] Sometimes a Hearing Officer concludes that there is not enough information to determine probable cause. Instead of releasing the arrestee, the Hearing Officer tells the Sheriff's Department to continue detaining the person, and urges the ADA to contact the arresting officer to get more information about the circumstances of arrest. At a subsequent hearing, the Hearing Officer again relies on unsworn statements to determine probable cause.

A preliminary injunction is warranted if the movant demonstrates: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011); *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). The named Plaintiffs satisfy each of these requirements.

I. Plaintiffs Are Likely to Succeed on the Merits Because the County Fails to Comply with the Federal and State Requirement to Provide a Prompt Neutral Determination of Probable Cause Supported by Oath or Affirmation Following a Warrantless Arrest

The constitutional principles at issue in this case are well-established. When the police detain someone on an arrest warrant, the Fourth Amendment requires that there be a finding of probable cause by a "neutral and detached magistrate," *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971), supported by "oath or affirmation," U.S. Const. amend IV. When the police arrest someone without a warrant and seek to detain her beyond a reasonable period of time,[4] the Fourth Amendment requires at least as much. *Gerstein v. Pugh*, 420 U.S. 103, 120 n.21 (1975).

In *Groh v. Ramirez*, the Supreme Court explained that the Fourth Amendment "states unambiguously" that a warrant be "based on probable cause and supported by a sworn affidavit." 540 U.S. 551, 557 (2004). It is well settled that "a warrant may issue only on a sworn information." *United States v. Millican*, 600 F.2d 273, 276 (5th Cir. 1979); *see also Kalina v. Fletcher*, 522 U.S. 118, 129 (1997) ("The Fourth Amendment requires that arrest warrants be based 'upon probable cause, supported by Oath or affirmation' — a requirement that may be satisfied by an indictment returned by a grand jury, but not by the mere filing of criminal charges in an unsworn information

[4] The presumptively permissible time limit is 48 hours. *County of Riverside v. McLaughlin*, 500 U.S. 44, 63 (1991).

signed by the prosecutor.") (citing *Gerstein v. Pugh*, 420 U.S. 103, 117 (1975) and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)).[5]

The probable cause requirement for a warrant applies with equal force to a probable cause determination after a warrantless arrest. "[T]he standards are identical." *Gerstein v. Pugh*, 420 U.S. 103, 120 n.21 (1975) (stating that the standard for a post-warrantless-arrest probable cause finding "is the same as that for arrest"). Numerous federal courts have explained that a probable cause determination after a warrantless arrest must be based on facts supplied under oath or affirmation.

> The Supreme Court held in *Gerstein* that the constitutional standard for probable cause is the same whether the government seeks to detain an arrestee pending further proceedings or to obtain an arrest warrant. Accordingly, a probable cause determination for purposes of detention pending further proceedings must be supported by an oath or affirmation.

United States v. Bueno-Vargas, 383 F.3d 1104, 1109 (9th Cir. 2004) (citation omitted); *Haywood v. City of Chicago*, 378 F.3d 714, 718 (7th Cir. 2004) ("The[] . . . argument—that because the Fourth Amendment mentions 'Oath or affirmation' only in connection with the issuance of warrants, less evidence is required to detain a person indefinitely than to arrest him even though the curtailment of liberty is greater—is wooden, and was rejected by the Supreme Court in *Gerstein*." (citing *Gerstein*, 420 U.S. 103 (1975)); *see also Jones v. City of Santa Monica*, 382 F.3d 1052, 1056 (9th Cir. 2004) ("A post-arrest probable cause determination performs the same

[5] *See also, e.g.*, *Nathanson v. United States*, 290 U.S. 41, 47 (1933) ("Under the Fourth Amendment, an officer may not properly issue a warrant . . . unless he can find probable cause therefor from facts or circumstances presented to him *under oath or affirmation.* Mere affirmance of belief or suspicion is not enough.") (emphasis added); *Frazier v. Roberts*, 441 F.2d 1224, 1227 (8th Cir. 1971) ("[T]he Fourth Amendment requires that only information related to the magistrate on Oath or affirmation is competent upon which to base a finding of probable cause; that unsworn oral statements may not form a basis for that decision."); *Tabasko v. Barton*, 472 F.2d 871, 873 (6th Cir. 1972) (the affidavit for the search warrant must contain sworn statements which represent proof of probable cause); *Carter ex rel M.C. v. Doyle*, 95 F. Supp. 2d 851, 860 (N.D. Ill. 2000) ("The Fourth Amendment requirement that arrest warrants be based 'upon probable cause, *supported by Oath or affirmation*' may be satisfied by an indictment returned by a grand jury, but not by the mere filing of criminal charges in an unsworn information signed by the prosecutor.") (emphasis in original) (citation omitted)); *State v. Brown*, 297 Mont. 427, 431 (1999) ("[A] sworn complaint or affidavit provides the basis for the determination of probable cause warranting criminal charges.") (citations omitted).

function for those arrested without warrants as a pre-arrest probable cause determination does for suspects arrested with warrants." (citations omitted)); *King v. Jones*, 824 F.2d 324, 327 (4th Cir. 1987) ("The post-arrest *Gerstein v. Pugh* hearing is required to fulfill the same function for suspects arrested without warrants as the pre-arrest probable cause hearing fulfills for suspects arrested with warrants."); *Wisconsin v. Koch*, 499 N.W.2d 152, 160 (Wis. 1993) ("The post-arrest probable cause determination is required to fulfill the same function for suspects arrested without warrants as the pre-arrest probable cause determination fulfills for suspects arrested with warrants."); *In re Walters*, 543 P.2d 607, 613 (Cal. 1975) (en banc) ("[T]he standard for determining probable cause to detain is the same as that for arrest . . . ."); *See In re Three Minors*, 684 P.2d 1121, 419 (Nev. 1984) ("[F]airness requires that probable cause not be based entirely on unsworn hearsay evidence.") (citing *Gerstein*, 420 U.S. at 118), *abrogated on other grounds by William S. v. State*, 122 Nev. 432 (2006). Because Harris County magistration hearings proceed on unsworn assertions, thousands of warrantless arrestees fail to receive constitutionally adequate probable cause determinations within a reasonable period of time every month.

No case has ever held that a post-arrest finding of probable cause satisfied the Fourth Amendment where the determination of probable cause was not based on a sworn statement. Courts have upheld probable cause determinations only when the facts supplied for finding probable cause are sworn. For example, in *Jones v. City of Santa Monica*, 382 at 1055, the court considered a facial challenge to the Santa Monica police department's post-arrest procedure in which the arresting officer completed a form that required a "signed declaration, under penalty of perjury, that the 'foregoing is true and correct to the best of my knowledge and belief.'" The issue was whether the use of a pre-printed probable cause application was acceptable. The court held that it was, "so long as it is accompanied by a '*sworn* complaint which incorporates by reference

other factual materials which, together with the complaint, establish probable cause for detention.'" *Id.* at 1056 (emphasis added) (citation omitted). The court reasoned that this procedure would satisfy issuance of an arrest warrant, and thus the procedure also met the requirements of a post-arrest probable cause determination. *Id.*; *see also Clay v. State*, 382 S.W.3d 465, 466 (Tex. App. 2012) (upholding the constitutionality of issuing a search warrant based upon an affidavit made under oath over telephone).

The requirement to predicate probable cause on sworn statements is an important one. Though the letter of the Constitution provides reason enough for a local government to comply with the Fourth Amendment's oath or affirmation provision, courts have relied on the sound rationale of the requirement for centuries. The logic undergirding the Founders' explicit insertion of this constitutional protection is that sworn statements provide a critical safeguard in the unlawful deprivation of a person's liberty:

> [S]igning a statement under penalty of perjury satisfies the standard for an oath or affirmation, as it is a signal that the declarant understands the legal significance of the declarant's statements and the potential for punishment if the declarant lies. A leading treatise agrees and explains that the "true test" for whether a declaration is made under oath or affirmation "is whether the procedures followed were such that perjury could be charged therein if any material allegation contained therein is false."

United States v. Bueno-Vargas, 383 F.3d 1104, 1111 (9th Cir. 2004) (quoting 2 Wayne R. LaFave, Search and Seizure § 4.3(e), at 474–75 (3d ed. 1996)).

Without the oath or affirmation requirement, the deterrence value is lost. The facts supplied in the DIMS forms cannot provide the basis for a fair and reliable probable cause determination. In *Riverside*, the Supreme Court elaborated on *Gerstein* and explained that, whatever procedures a locality may use to implement *Gerstein*'s requirements, it may not dispense with a fair and reliable determination of probable cause:

> [F]lexibility has its limits; *Gerstein* is not a blank check. A State has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause. The Court recognized in *Gerstein* that a person arrested without a warrant is entitled to a fair and reliable determination of probable cause and that this determination must be made promptly.

500 U.S. 44, 55 (1991). *Riverside* recognizes that the consequences flowing from a finding of probable cause are enormous: A finding of probable cause can authorize the physical detention of the person's body by her government. Those who drafted the Fourth Amendment ensured that the government could only exercise that solemn power based on reliable information.

Probable cause is "defined in terms of facts and circumstances 'sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense.'" *Gerstein*, 420 U.S. at 111-12 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)); *see also Henry v. United States*, 361 U.S. 98 (1959); *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949)). In assessing whether the "facts and circumstances" exist to find probable cause, a neutral officer must rely on the arresting officer's recitation of facts and his "on-the-scene assessment of probable cause." *Gerstein*, 420 U.S. at 113-14. The absence of oath or affirmation results in a breakdown in this vital step. The probable cause determination is fatally defective if the magistrate cannot rely on the officer's assessment because the attestation is not sufficiently trustworthy. Justice Frankfurter long ago stressed the need to provide checks to the arrest process:

> "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication."

McNabb v. United States, 318 U.S. 332, 343 (1943). Harris County flouts this basic requirement and detains thousands of people based on fundamentally defective probable cause determinations that do not ensure proper accountability for those making the serious and often life-changing allegations upon which detention is based.

Because Harris County's post-arrest magistration hearings are not based on facts supported by oath or affirmation, they cannot satisfy *Gerstein* and *Riverside*'s requirement of a prompt neutral determination of probable cause for continued detention.

In *Gerstein*, the Supreme Court expressed the strong preference for basing arrests on warrants obtained by police in advance in order to ensure "[m]aximum protection of individual rights." *Gerstein*, 420 U.S. at 113. But the Court recognized that to require pre-arrest warrants in all cases would be impracticable. It therefore stressed that, if an officer must arrest a person without first securing a warrant, then a probable cause determination must swiftly follow the warrantless arrest. *Gerstein*, 420 U.S. at 113–14.

In *Riverside*, the Court held that a probable cause determination must occur within 48 hours after a warrantless arrest to be considered presumptively prompt. 500 U.S. at 63. If an arrestee does not receive a determination within 48 hours, the delay must be justified by "the existence of a bona fide emergency or other extraordinary circumstances." *Id.* at 57.

No emergency or extraordinary circumstance exists here. Harris County violates Plaintiffs' rights as a matter of course every day by failing to release them after it fails to provide a prompt judicial determination of probable cause supported by an oath or affirmation. Numerous federal courts have condemned extended detention beyond the 48-hour period contemplated by *Gerstein*

and *Riverside*.[6] Defendant similarly flouts this basic requirement by detaining arrestees without ensuring probable cause determinations that it knows are unsupported by oath or affirmation.

Additionally, Texas law requires that all misdemeanor arrestees be brought before a magistrate within 24 hours or be released on an affordable bond and requires all felony arrestees to be brought before a magistrate within 48 hours or be released on an affordable bond. Tex. Code Crim. P. Ann. § 17.033(a)–(b) ("[A] person who is arrested without a warrant and who is detained in jail must be released on bond, in an amount not to exceed $5,000, not later than the 24th hour after the person's arrest if the person was arrested for a misdemeanor and a magistrate has not determined whether probable cause exists to believe that the person committed the offense. If the

[6] *Lopez v. City of Chicago*, 464 F.3d 711, 722 (7th Cir. 2006) (holding that the detectives who held Plaintiff without a judicial probable cause determination beyond the 48–hour safe harbor of *Riverside* had to justify the delay by demonstrating the existence of an emergency or other extraordinary circumstance); *Turner v. City of Taylor*, 412 F.3d 629, 641 (6th Cir. 2005) (finding "no question that" plaintiff would succeed on his *Gerstein-Riverside* claim if it was proven that he was detained approximately 100 hours without a probable cause determination and without proper justification); *Alkire v. Irving*, 330 F.3d 802, 815 (6th Cir. 2003) (holding that the defendant county could be liable for *Riverside* violations where it, as a matter of "course or custom," did not hold court often until Tuesday mornings and never on weekends or holidays and thus likely routinely held warrantless arrestees who did not post bond from late Friday through Sunday morning without a probable cause determination); *Cherrington v. Skeeter*, 344 F.3d 631, 643–44 (6th Cir. 2003) (holding that the record established a violation of *Riverside*'s 48-hour rule where defendants had failed to identify any emergency or extraordinary circumstance); *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1481 (9th Cir. 1993) (holding the defendant county liable for plaintiff's extended detention in violation of *Gerstein-Riverside*); *Sivard v. Pulaski Cnty.*, 959 F.2d 662, 668–69 (7th Cir. 1992) (holding complaint that stated that plaintiff "was wrongfully detained pursuant to the policy and custom of the defendants," combined with uncontroverted evidence that plaintiff was detained for 17 days before being taken before a judge, was sufficient to state a claim for municipal liability); *Bernard v. City of Palo Alto*, 699 F.2d 1023, 1027 (9th Cir. 1983) ("The County is responsible for operating the jail and has custody over arrestees. The County determined the detention policies and practices designed to satisfy *Gerstein* that are challenged here. By virtue of its power to release arrestees unconstitutionally detained, the County is in a position to protect the fourth amendment rights of arrestees."); *Deaton v. McMillin*, No. 3:08CV763-DPJ-FKB, 2012 WL 393087, at *7 (S.D. Miss. Feb. 6, 2012) (granting summary judgment to Plaintiff establishing liability on her *Riverside* claim because the County's policymaker offered unrebutted testimony of a widespread practice that was the "moving force" behind plaintiff being detained for more than 48 hours without a probable cause hearing); *Lingenfelter v. Bd. of Cnty. Com'rs of Reno Cnty.*, 359 F.Supp.2d 1163 (D. Kan. 2005) (holding that the defendant county, as custodian of the plaintiff held beyond 48 hours of arrest without a determination of probable cause, could be held liable for a *Gerstein* violation); *Dunn v. City of Chicago*, 231 F.R.D. 367, 374–76 (N.D. Ill. 2005), *amended on reconsideration*, No. 04 C 6804, 2005 WL 3299391 (N.D. Ill. Nov. 30, 2005) (permitting class certification where Plaintiffs alleged that the City of Chicago failed to enact a policy requiring adherence to the 48-hour rule; (2) failed to provide proper training on the 48-hour rule and to discipline violations of the rule; and (3) showed deliberate indifference to the widespread use of the "hold past call procedure" and to the volume of detentions lasting more than 48 hours without judicial approval).

person is unable to obtain a surety for the bond or unable to deposit money in the amount of the bond, the person must be released on personal bond.").[7]

To deny a person arrested and placed in a jail cell without a warrant "his fourth amendment right to a reasonably prompt probable cause hearing is to trivialize the due care which the constitution requires." *Austin v. E. Grand Rapids*, 685 F. Supp. 1396, 1401 (W.D. Mich. 1988). Because its probable cause determinations are not supported by oath or affirmation, Harris County unlawfully detains people arrested without a warrant beyond the presumptively permissible 48 hours allowed under *Gerstein-Riverside* and beyond the 24- and 48-hour periods permitted under Texas law.[8]

II. Plaintiffs Will Suffer Irreparable Constitutional Harm If This Court Does Not Issue an Injunction

Without intervention from this Court, Plaintiffs and the class of similarly situated people that they represent will continue to suffer the serious and irreparable harm of being jailed without a constitutionally sufficient finding of probable cause. Imprisoning a person in a jail cell in violation of her constitutional rights is undeniably an irreparable harm. "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

[7] A subsection that would have exempted Harris County from this 24-hour requirement, Tex. Code Crim. P. Ann. § 17.033(a-1), has expired, *id.* at (e).

[8] After appropriate factual development, Plaintiffs reserve the right to argue that, under the circumstances of this case, detaining warrantless arrestees for periods less than 48 hours may be unreasonable. *See Sanders v. City of Houston*, 543 F. Supp. 694 (S.D. Tex. 1982), aff'd 741 F.2d 1379 (5th Cir. 1984) (issuing a permanent injunction against the City of Houston enjoining it from detaining warrantless arrestees for more than 24 hours without a proper determination of probable cause); *see also Lockett v. State*, 2006 WL 940648 at *1 (Tex. App. Apr. 13, 2006) ("[T]he Houston police department operates under a permanent injunction preventing it from detaining persons without a warrant for more than twenty- four hours without taking the person before a magistrate.").

has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

Even one additional night unlawfully in jail is a harm to a person that cannot be later undone. *See, e.g.*, *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 v. Providence Community Corrections, Inc.*, --- F. Supp. 3d ---, 2015 WL 9239821 (M.D. Tenn. 2015) (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 v. City of Calhoun*, --- F. Supp. 3d ---, 2016 WL 361612 at *14 (N.D. Ga. Jan. 28, 2016) (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").[9]

Time 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 children. The Supreme Court, discussing people who were detained without a warrant or a judicial determination of probable cause, noted that

> The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty.

Gerstein, 420 U.S. at 114 (citations omitted).

[9] *Wanatee v. Ault*, 120 F.Supp.2d 784, 789 (N.D. Iowa 2000) ("[U]nconstitutional incarceration generally constitutes irreparable harm to the person in such custody."); *SEC v. Bankers Alliance Corp.*, 1995 WL 317586, *3 (D.D.C.1995) ("As for the question of irreparable harm in the absence of a stay, clearly Mr. Lee will be harmed by being incarcerated."); *Lake v. Speziale*, 580 F. Supp. 1318, 1335 (D. Conn. 1984) (granting preliminary injunction requiring court to inform child support debtors of their right to counsel because unlawful incarceration would be irreparable harm); *Cobb v. Green*, 574 F.Supp. 256, 262 (W.D. Mich. 1983) ("There is no adequate remedy at law for a deprivation of one's physical liberty. Thus the Court finds the harm asserted by plaintiff is substantial and irreparable.").

Time in jail also exposes arrestees to the risk of unsanitary conditions, infection, and other medical and safety emergencies prevalent in Texas jails.[10] The Harris County Jail — the largest jail in Texas and the third largest in the nation — is notorious for its overcrowded, inhumane, and life-threatening conditions. Every year since 2009, an average of nine people being held prior to trial have died in the Harris County Jail, including three at the hands of guards. Indeed, physical abuse by guards against inmates is endemic in the jail. The Houston Chronicle recently uncovered stories of: a guard choking an inmate so hard that handprints were left on the inmate's neck; six guards beating an inmate for flashing a mirror at a guard station; and guards who permit and encourage inmates to attack other inmates.[11] Between 2010 and 2015, there were 120 disciplinary actions against Harris County guards who had beaten, kicked, and choked inmates, including 15 inmates who were handcuffed at the time of the assault. *Id.* In six cases, criminal charges were filed. *Id.* Dozens of jail employees have been disciplined for having sex with inmates or bringing in contraband. *Id.* Violence among inmates is also rampant. *Id.* An average of 11 fights break out every day. *Id.*

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[10] *See, e.g.*, Bureau of Justice Statistics, Sexual Victimization In Prisons And Jails Reported By Inmates, 2011-12-Update, *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4654 (finding that 3.2% of jail inmates reported being sexually abused during their current stay in jail); *see also, e.g.*, Conor Friedersdorf, *Harris County Jails Prove Impervious to Reform* (Dec. 30, 2015), available at http://www.theatlantic.com/politics/archive/2015/12/harris-county-jails/422202/ (discussing the prevalence of abuse by Harris County guards against inmates, killings and suicides among inmates held pretrial, and "jail administrators abject[] fail[ure] to bring the system up to acceptable standards" even after a federal Department of Justice investigation); James Pinkerton, et al., *Harris County Jail considered 'unsafe and unhealthy' for inmates, public* (Nov. 21, 2015), available at http://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-Jail-is-unsafe-and-unhealthy-for-6649163.php (discussing the prevalence of tuberculosis and inadequate medical and mental health care in the Harris County Jail; stating that since the DOJ's investigation in 2009, at least 19 inmates died of treatable or preventable illnesses); Marcia Johnson and Luckett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW J. L. & Soc. Pol'y 42 (2012) (discussing overcrowding and inhumane conditions in the Harris County Jail).

[11] James Pinkerton and Anita Hassan, *Jailhouse jeopardy: Guards often brutalize and neglect inmates in Harris County Jail, records show* (Oct. 3, 2015), available at http://www.houstonchronicle.com/news/special-reports/article/Violence-neglect-by-jailers-common-in-county-6548623.php.

The jail is ridden with disease. Tuberculosis is prevalent and spreads easily among the inmate population.[12] A college student, who was struggling with a heroin addiction but was otherwise healthy, contracted bacterial meningitis while in jail and died. At least 19 inmates died of preventable or treatable illnesses between 2009 and 2015. *Id.* In those cases, the jail's inability or unwillingness to provide proper and timely care may have contributed to the deaths. *Id.* Even when medical neglect does not result in death, inmates suffer. In one case, a guard denied food to an inmate with diabetes as punishment for a fight. *Id.* In another, guards withheld insulin from an individual with diabetes, causing him to become violently ill, almost slipping into a coma. *Id.* Inmates wait in line for health care at the jail's clinic, but those needing routine help are regularly displaced when there is an emergency. *Id.*

The County has also proven incapable of keeping pace with the needs of inmates suffering from mental illnesses. One inmate committed suicide almost an hour after guards were required, and failed, to conduct a state-mandated check on the inmate's well-being. *Id.* The guards later attempted to cover up their breach of protocol by faking cell check logs. *Id.* Thousands of people in the jail take psychiatric medication, but there are only about 400 beds for inmates with mental health problems. Former Sheriff Adrian Garcia recently acknowledged that the jail needs 3,000. *Id.*

Harris County continues to subject hundreds of people every day to all of these additional harms without lawfully establishing probable cause for continued detention. Forcing people to suffer in these conditions inflicts irreparable harm on Plaintiffs and other Class members. Plaintiffs ask this Court to issue an injunction requiring the County, pending final resolution of this case on

[12] James Pinkerton, Anita Hassan, and Lauren Caruba, *Harris County Jail considered 'unsafe and unhealthy' for inmates, public* (Nov. 21, 2015), available at http://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-Jail-is-unsafe-and-unhealthy-for-6649163.php.

the merits, to provide prompt, neutral determinations of probable cause on the basis of sworn statements to all warrantless arrestees or else to release them from its custody.

III. An Injunction Will Serve the Public Interest and Will Not Harm Defendants

"It is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (citation, quotation, and brackets omitted); *see also Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (same); *Giovani Carandola v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("The final prerequisite to the grant of a preliminary injunction is that it serve the public interest. Again, we agree with the district court that upholding constitutional rights surely serves the public interest."); *G & V Lounge v. Michigan Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

Nor would an injunction harm Defendant. The County already has in place a means of bringing an arrestee to a hearing before a magistrate who makes a determination of probable cause on unsworn statements. Requiring that these statements be supported by oath or affirmation would not be a significant burden. It would simply force law enforcement to assert the facts alleged to comprise the elements of a criminal offense under penalty of perjury. The County would be required to do only what every city and county throughout the country is required to do every day: release from jail presumptively innocent people after 48 hours following a warrantless arrest or provide prompt judicial determination of probable cause supported by an oath or affirmation to justify their continued detention.

Continuing to keep people in jail without constitutionally compliant findings of probable cause has significant negative consequences for the public interest. First, it is enormously expensive to house people in jail. Thus, local governments should adequately justify jailing of

presumptively innocent people using properly rigorous procedures.[13] Second, illegal jailing can devastate lives by disrupting stable employment and child custody arrangements. Third, even just 72 hours in jail after an arrest leads to worse outcomes for all involved by increasing poverty, hurting an arrestee's family, and making it more likely that an arrestee will commit crimes in the future. *Cf.* DOJ, National Institute of Corrections, at 24-29;[14] *see also, e.g.*, International Association of Chiefs of Police, Resolution (October 2014), 121st Annual Congress at 15-16 ("[D]efendants rated low risk and detained pretrial for longer than one day before their pretrial release are more likely to commit a new crime once they are released, demonstrating that length of time until pretrial release has a direct impact on public safety.");[15] Paul Heaton, *et al.*, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. (forthcoming) (finding that individuals detained pretrial are more likely to commit future crimes).[16]

IV. The Court Should Use Its Discretion Not to Require the Posting of Security

Federal Rule of Civil Procedure 65(c) normally requires the moving party to post security to protect the other party from any financial harm likely to be caused by a temporary injunction if that party is later found to have been wrongfully enjoined. Rule 65(c), however, "vest[s] broad discretion in the district court to determine the appropriate amount of an injunction bond," *DSE v. United States*, 169 F.3d 21, 33 (D.C. Cir. 1999), including the discretion to require no bond at all. *See Steward v. West*, 449 F.2d 324, 325 (5th Cir. 1971) (affirming a finding that no injunction

[13] *See* Vera Institute of Justice, *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration* (May 2015), available at http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/05/The-Price-of-Jails-report.pdf (explaining that even the reported costs of approximately $50 to $570 per inmate per day in custody at local jails around the country was a significant underestimate of the cost to local jurisdictions of incarceration in local jails); Texas Criminal Justice Coalition, *A Blueprint for Criminal Justice Policy Solutions in Harris County* (Jan. 2015) at 2 (noting that in fiscal year 2013, Harris County spent almost $500,000 per day to run the jail).

[14] *Available at* http://static.nicic.gov/UserShared/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf.

[15] *Available at* http://www.theiacp.org/Portals/0/documents/pdfs/2014Resolutions.pdf.

[16] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809840.

bond need be posted); *see also Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013) ("[T]he district court retains the discretion to set the bond amount as it sees fit or waive the security requirement." (citation omitted)); *RoDa Drilling v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) ("[T]rial courts have wide discretion under Rule 65(c) in determining whether to require security . . . ."); *Clarkson Co, v. Shaheen*, 544 F.2d 624, 632 (2nd Cir. 1976) ("[B]ecause, under Fed. R. Civ. P. 65, the amount of any bond to be given upon the issuance of a preliminary injunction rests within the sound discretion of the trial court, the district court may dispense with the filing of a bond." (citations omitted)); *Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 896 (1st Cir. 1988) ("posting of a bond is not a jurisdictional prerequisite to the validity of a preliminary injunction"); *Donohue v. Mangano*, 886 F. Supp. 2d 126, 163 (E.D.N.Y. 2012) ("[A] district court has wide discretion to dispense with the bond requirement of Fed.R.Civ.P. 65(c) where there has been no proof of likelihood of harm . . . ."); *Council on American-Islamic Rels. v. Gaubatz*, 667 F. Supp. 2d 67, 81 (D.D.C. 2009) (same). The Court should use its considerable discretion to find that no security (or a nominal security) be required in this case for several important reasons.

First, the likelihood of the Defendant suffering any monetary harm from an injunction requiring the County to comply with federal law is almost non-existent. *See, e.g.*, *Gaubatz*, 667 F. Supp. 2d at 81 (requiring no bond where the defendant would not be substantially injured by the issuance of an injunction); 11A Charles A. Wright, Arthur R. Miller, et al., Federal Practice and Procedure § 2954 (2d ed.) ("[T]he court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant."). If granted, the preliminary injunction would require Defendant to ensure prompt probable cause determinations supported by oath or affirmation are provided to anyone in its custody. The Defendants would suffer no financial harm from that requirement.

Second, many of the Plaintiffs and other Class members are poor, and all are currently incarcerated. The Court can exercise its discretion to waive the bond or else set a nominal bond where Plaintiffs seek to enforce constitutional rights and a bond would serve as a barrier to judicial review. "The court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review." *Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) (citations omitted); *Swanson v. Univ. of Hawaii Prof. Assembly*, 269 F. Supp. 2d 1252, 1261 (D. Haw. 2003) (waiving the security requirement for public employees based on ability to pay and also because the injunction sought enforcement of constitutional rights); *Walker v. City of Calhoun*, 2016 WL 361612, at *14 (Jan. 28, 2016 N.D. Ga.) (granting a preliminary injunction in a similar bail lawsuit and waiving the bond requirement "because Plaintiff and the Class members are indigent"); *see also* 11A Wright & Miller § 2954 (courts can waive the bond requirement in cases involving poor plaintiffs).

Finally, Plaintiffs are likely to succeed on the merits. The outcome of any future trial, if necessary, is likely to reaffirm the basic principles that have been repeatedly reaffirmed by the Supreme Court, the Fifth Circuit, and federal and state courts across the country.[17]

[17] Although this case is a prototypical situation for which the class action vehicle was created, and the class action certification motion was contemporaneously filed with this preliminary injunction motion, this Court need not rule on the Plaintiff's class certification motion or formally certify a class in order to issue preliminary injunctive relief. *See, e.g.*, Newberg on Class Actions § 24:83 (4th ed. 2002) ("The absence of formal certification is no barrier to classwide preliminary injunctive relief."); Moore's Federal Practice § 23.50, at 23-396, 23-397 (2d ed.1990) ("Prior to the Court's determination whether plaintiffs can maintain a class action, the Court should treat the action as a class suit."); *see also, e.g., Lee v. Orr*, 2013 WL 6490577 at *2 (N.D. Ill. 2013) ("The court may conditionally certify the class or otherwise order a broad preliminary injunction, without a formal class ruling, under its general equity powers. The lack of formal class certification does not create an obstacle to classwide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons."); *N.Y. State Nat. Org. For Women v. Terry*, 697 F. Supp. 1324, 1336 (S.D.N.Y.1988) (holding that "the Court acted in the only reasonable manner it could under the circumstances, ruling on the continuation of [the] temporary restraining order and leaving the question of class certification for another day."); *Leisner v. New York Tel. Co*., 358 F. Supp. 359, 371 (S.D.N.Y.1973) ("[R]elief as to the class is appropriate at this time even though when the preliminary injunction motion was heard, the class action had not yet been certified."); *Illinois League of Advocates for the Developmentally, Disabled v. Illinois Dep't of*

CONCLUSION

For the reasons stated above, the Court should grant Plaintiffs' motion for preliminary injunctive relief requiring Harris County to provide sufficiently prompt neutral determinations of probable cause that are supported by oath or affirmation to all warrantless arrestees or else to release them.

Respectfully submitted,

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Human Servs., 2013 WL 3287145 at *4 (N.D. Ill. 2013) ("At this early stage in the proceedings, the class allegations in the Second Amended Complaint are sufficient to establish Plaintiffs' standing to seek immediate injunctive relief on behalf of the proposed class. At a later stage, we may revisit whether that classwide representation is inappropriate, but until that time, we will preserve the status quo (within the limits set forth in the TRO) with respect to all potential class members."); *Gooch v. Life Investors Ins. Co. of Am*., 672 F.3d 402, 433 (6th Cir. 2012) ("Simply put, there is nothing improper about a preliminary injunction preceding a ruling on class certification.").