IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

KATHERINE GUILL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No.19-CV-1126
	)	Class Action
BRADLEY R. ALLEN, SR., et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO JUDICIAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Judicial Defendants do not contest the merits of Plaintiffs' claims except for those related to provision of counsel. Judicial Defendants instead argue that their compliance with this Court's preliminary injunction moots the remainder of the case. This argument fails for several reasons: (1) Judge Lambeth has not guaranteed that he will keep the new bail procedures in place without an injunction, and indeed has strongly suggested that he will in fact change the procedures at his first opportunity; (2) Judge Lambeth faces considerable pressure from other stakeholders to change the bail procedures; and (3) Judge Lambeth has the authority to change or rescind the bail procedures at any time without an injunction.

With respect to Plaintiffs' claims of a right to counsel under the Due Process Clause and Sixth Amendment, the factual record establishes that first appearances in Alamance County are a critical stage that requires assistance of counsel.

Judicial Defendants further argue that they are entitled to sovereign immunity. But Judicial Defendants waived sovereign immunity by consenting to this Court's jurisdiction, and are otherwise not entitled to sovereign immunity because they are directly responsible for the challenged action and can provide the relief sought.

Judicial Defendants' motion for summary judgment should therefore be denied.

ARGUMENT

I. COMPLIANCE WITH THE PRELIMINARY INJUNCTION DOES NOT MOOT PLAINTIFFS' CLAIMS IN COUNTS I, II, AND III

Judicial Defendants cannot "evade judicial review . . . by temporarily altering questionable behavior." *Porter v. Clarke*, 852 F.3d 358, 364 (4th Cir. 2017) (quoting *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001)). Defendants cannot avoid this Court's jurisdiction unless they meet their "heavy burden" of proving that it is "absolutely clear" that their violations cannot reasonably be expected to recur. *Id.* Defendants do not meet this standard.

The new administrative orders concerning bail—which were enacted to comply with this Court's preliminary injunction—do not represent the irrevocable change of heart required to demonstrate that the constitutional deprivations could not recur. In fact, Judge Lambeth has already attempted to alter the new bail policy in a way that would have violated the preliminary injunction. In the absence of a court order, he remains free to unilaterally change or rescind the new bond policy at any time, which would be consistent with criticisms of the policy from Defendants and other county officials whom Judge Lambeth considers "vital."

A. Defendants' Unconstitutional Practices Are Likely to Recur Given Judge Lambeth's Lack of Commitment to Maintaining the New Policies and His Prior Attempt to Rescind a Key Aspect of the Policy

Mid-litigation "voluntary cessation of a challenged practice rarely moots a federal case." *City News and Novelty v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). The standard for determining whether a defendant's voluntary conduct has mooted a case is "stringent." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). A defendant who voluntarily ceases challenged conduct "bears the formidable burden of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 190. This "formidable," "heavy," or "rigorous" burden of proof to show that the behavior is not at risk of recurrence applies to governmental entities as well as private actors. *See Wall v. Wade*, 741 F.3d 492, 497–98 (4th Cir. 2014) (declining to decide whether a government actor, in claiming mootness for change of behavior, will be held to a "less demanding burden of proof" than a private party).

A defendant fails to meet the "formidable burden" of proving mootness when the defendant "retains the authority and capacity to repeat an alleged harm." *Porter*, 852 F.3d at 364 (quoting *Wall*, 741 F.3d at 497); *see also Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 192 (4th Cir. 2018) ("[A] defendant does not meet its burden of demonstrating mootness when it retains authority to reassess the challenged policy at any time." (quotation marks omitted)); *Town of Nags Head v. Toloczko*, 728 F.3d 391, 394 n.3 (4th Cir. 2013) (applying voluntary cessation exception where defendant town maintained that cottage resided in a public trust area and town manager conveyed that he could still

declare the cottage a nuisance); *Wall*, 741 F.3d at 497 ("Nothing in the memo suggests that [defendant] is actually barred—or even considers itself barred—from reinstating the [challenged] policy should it so choose.").

The Fourth Circuit has further held that even when government officials rescind a challenged policy and testify that they do not intend to reinstate it, this gesture is insufficient to moot a plaintiff's claims if there is a "cognizable danger" that the violations will recur. *See Porter*, 923 F.3d at 365. This is especially true where the policy was rescinded or changed in response to litigation. *See id.*

Here, the administrative orders of a single judicial official have no guarantee of permanence. Judge Lambeth or his successor retains authority to unilaterally reassess or rescind the administrative orders regarding pretrial release at any time. North Carolina law vests the Senior Resident Superior Court Judge, in consultation with the Chief District Judge, with exclusive authority to devise and issue recommended policies to be followed by judicial officials in the district in determining conditions of pretrial release. N.C.G.S. § 15A-535(a). Nothing in North Carolina law bars Judge Lambeth from reinstating the challenged policy, nor does it impose any requirement that he consult any party other than the Chief District Judge or convene any sort of public deliberative process.

Moreover, Defendants' assurances that Judge Lambeth will maintain the bond policy's "key features" is woefully insufficient to meet their heavy burden to show that the previous practices are not likely to recur. Although Defendants note the "nearly six months of meetings, negotiations, and email exchanges with Plaintiffs' counsel about the

contents of a revised pretrial release policy," Judicial Defs.' Br. in Support of Mot. Summ. J. 11, ECF No. 100, those negotiations happened only under threat of litigation. And Judge Lambeth's summary judgment declaration conspicuously avoids any commitment to maintaining the policy negotiated by the parties. Rather, he states that he intends to retain certain *features* of the bond policy as well as "some mechanism" for judicial officials to make findings that secured bond is required. Lambeth Aff. ¶ 37, ECF No. 99-2.

Judge Lambeth specifically excludes the written findings form that was negotiated by the parties from his commitment to the current policies. *See id.* (committing to retain the features set out in paragraphs 33 and 34, but *not* paragraph 35, which describes the written findings form). Judge Lambeth also makes no commitment to maintain the notice requirements of the First Appearance Administrative Order. *See id.* ¶¶ 38–41. The oral and written notices regarding the nature of the proceeding and the significance of the ability-to-pay inquiry—again the result of extensive negotiations by the parties—are key procedures required by procedural due process. *See* Compl. ¶ 109, ECF No. 1; Pls.' Br. in Support of Prelim. Inj. Mot. 16–17, ECF No. 17.

Further evidence of Judge Lambeth's lack of commitment to the current bail policies is the fact that he has *already* attempted to change his administrative orders required by the preliminary injunction. In response to IDS terminating funding for counsel at first appearances, Judge Lambeth drafted a new administrative order rescinding the guarantee of counsel for indigent arrestees at First Appearance. Lambeth Email and Attachment Ex. 1 at 1, 10. That rescission would have gone into effect on

December 17, 2021, had the Court not admonished Defendants, "I anticipate there will be no violation of the Court's order. There certainly has been no order from the Court excusing nonperformance." Hr'g Tr. Ex. 2 at 54:10–12. The Court further indicated that Plaintiffs should file a motion for contempt if Defendants acted otherwise. *Id.* at 51:6–8. Thus, Judge Lambeth has the authority and inclination to reassess the pretrial release administrative orders at any time, even knowing that doing so would violate a court order that he had consented to. *See id.* Ex. 2 at 56:23–24 ("We are certainly aware of the Court's order. We're aware of the continuing obligation."). A permanent injunction is necessary to prevent this from happening.

In sum, Judge Lambeth's tepid commitment to retaining certain features of the bond policy while excluding other key features, some of which are central to Plaintiffs' claims, do not represent the irrevocable change of heart required to demonstrate that the constitutional deprivations could not recur. Moreover, Judge Lambeth's previous attempt to rescind the guarantee of right to counsel at first appearance demonstrates his willingness to change the administrative orders at any time. Therefore, Judicial Defendants have not carried their "formidable burden" to make it "absolutely clear" that the violations Plaintiffs suffered will not recur. Therefore, Plaintiffs' claims are not moot.

B. Judge Lambeth Faces Considerable Pushback Against the New Bail Policy

Another reason to believe that Judge Lambeth will change or rescind the bail administrative orders is that other Alamance County officials, whose input Judge Lambeth has characterized as "vital," have been highly critical of key features of the new policy.

During his deposition, Judge Lambeth repeatedly expressed displeasure with how the current administrative orders were enacted; in his view, the negotiations with Plaintiffs' counsel did not allow for a "collaborative process." *See, e.g.*, Lambeth Dep. Ex. 3 at 100:6–7 ("And then when the lawsuit happened, it got removed from that collaborative process."). Judge Lambeth reiterated this sentiment in his affidavit in support of this motion. Lambeth Aff. ¶ 11, ECF No. 99-2 ("I shared Judge Roberson's preference for working collaboratively…"); *id.* ¶ 12 ("I strongly believed then, as I do now, that the stakeholders in our criminal justice system – which included the District Court Judges, the Magistrates, the Clerk of Court, local law enforcement, the District Attorney's Office, and the defense bar – can provide valuable input from their various perspectives."); *id.* ¶ 26 (describing the stakeholders as "vital").

In his deposition, Judge Allen, with whom Judge Lambeth must consult about changes to the bond policy, also expressed unhappiness with certain aspects of the bond policy. In particular, he repeatedly noted the lack of flexibility for scheduling first appearances because of the required presence of counsel at first appearances. *See* Allen Dep. Ex. 4 at 153:17–154:4 (explaining that they can no longer do in-custody first appearances ahead of time and that, under the previous policy, they were "utilizing court time and not wasting time so the cases can be resolved").

Some unfounded criticism of the new policy has been made publicly: Alamance County District Attorney Sean Boone has spoken out repeatedly against the new bond policy. In a post on his official Facebook page from 2021, DA Boone made a baseless claim that "the increase in repeat felony offender cases has spiked since the introduction

of the new bond policy." Boone Post Ex. 5. In June 2022, District Attorney Boone announced a "Community Threat Offender Case Plan" targeting 64 individuals considered "Community Threat Offenders" for "greater scrutiny" in their cases. Boone Press Release Ex. 6. In his statement announcing the new policy, District Attorney Boone claims that it is necessary in part because "[s]ince May 2020, the problem [of repeat offending] has been exacerbated by the county's new pretrial release policy, which favors low or unsecured bonds." *Id*. DA Boone claims that the policy's "biggest impact on the court system is the increase in offenses committed while on pretrial release." *Id*.

In the face of public criticism of the new bond policy from local officials whom Judge Lambeth considers "vital," it is even more likely that Judge Lambeth will reassess his administrative orders. Although there need only be a "mere possibility" that the defendant will not sustain the changed behavior, *Porter*, 852 F.3d at 365 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953), Judge Lambeth's intent to institute a policy that includes the input of other officials increases the likelihood that Defendants will return to their former practices.

C. Unlike the Cases Cited by Judicial Defendants, Judge Lambeth Retains the Authority and Capacity to Reinstate Unconstitutional Bail Practices

As discussed above, Judge Lambeth retains authority and capacity to change or rescind his administrative orders at any time. The inherent impermanence of the administrative orders in this case makes them easily distinguishable from cases cited by Defendants in which a legislative body formally enacts or repeals a law. *See, e.g.*, *Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006) (intervening legislation from Virginia

General Assembly rendered claims moot); *Reyes v. City of Lynchburg*, 300 F.3d 449, 453 (4th Cir. 2002) (claim moot where city had repealed challenged ordinance and promised not to reenact a similar one); *Am. Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601, 606 (4th Cir. 2001) (claim moot where process for amending ordinance had begun months seven months prior to lawsuit and was revised long before court ruling). Here, the administrative orders leave Defendants free to return to their former policies and procedures without any legislative or public deliberative process.

The situation here is also easily distinguishable from *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157 (4th Cir. 2021), in which the Fourth Circuit considered the legality of executive orders the governor had issued to combat the spread of COVID-19. When the district court dismissed the case, the challenged orders had expired and the state of emergency on which they were predicated had ended, terminating all outstanding COVID-19-related executive orders. *Id.* at 162. The Fourth Circuit found the case moot because the executive orders had expired and "[w]ith the new termination of the state of emergency, the Governor's power to issue new executive orders involving COVID-19-related restrictions was extinguished." *Id.* at 163–64. Unlike that case, where the defendant no longer had authority to issue the type of policy plaintiffs challenged, Judge Lambeth maintains the authority to issue a new administrative order establishing a new bond policy at any time.

Dixon v. City of St. Louis, No. 4:19-cv-0112-AGF, 2021 WL 4709749 (E.D. Mo. Oct. 8, 2021),[1] is similarly unpersuasive. There, the defendants' actions "were not voluntary but rather required by the new rules, imposed by order of the Missouri Supreme Court." *Id.* at *7. "Defendants' cessation of past practices and implementation of new ones designed to comply with the revised Rule 33.01 was compulsory here." *Id.* Here, Judge Lambeth's cessation of the previous bond policy was not compelled by an intervening change in law or court rules. The new administrative procedures were the result of this litigation, and nothing outside of this litigation requires that they be kept in place.

Because Judge Lambeth retains full authority to reassess or rescind the administrative orders concerning pretrial release at any time, and because such amendment or rescission is likely given Judge Lambeth's tepid commitment to the new policies and the pushback from other stakeholders, Plaintiffs' claims are not moot.

II. Judicial Defendants Are Not Entitled to Summary Judgment on the Sixth Amendment Right to Counsel Claim

The factual record in this case precludes summary judgment on the application of the Sixth Amendment right to counsel at initial appearance, and supports summary judgment in *Plaintiffs'* favor on the application of the right to counsel at first appearance. The Sixth Amendment requires assistance of counsel at every critical stage of

[1] The Eighth Circuit applies a less onerous voluntary cessation standard for government actors. *Id.* at *8. As discussed, *supra* at 3, the Fourth Circuit does not hold government actors to a less demanding burden of proof than private parties for purposes of voluntary cessation.

prosecution, which is any proceeding where "potential substantial prejudice to a defendant's rights inheres in the particular confrontation," and counsel can "help avoid that prejudice." *Vance v. North Carolina*, 432 F.2d 984, 988 (4th Cir. 1970) (quoting *United States v. Wade*, 388 U.S. 218, 227 (1967)). Judicial Defendants concede the second element: counsel is helpful to an arrestee at bail determinations. Judicial Def.'s Br. in Support of Mot. Summ. J. 19, ECF No. 100. Judicial Defendants contest only the first element, claiming that initial and first appearances have *no* potential to substantially prejudice arrestees' rights.

Of course, this is not the case. Judicial Defendants ignore the factual record on this point, which demonstrates that two types of substantial prejudice are at play. First, initial and first appearances are proceedings "when defenses may be . . . irretrievably lost" through an arrestee's uncounseled bail arguments. *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961). Second, pretrial detention orders imposed at initial and first appearance often "settle the accused's fate," imprisoning them for longer than the penalty imposed for pleading guilty. *Wade*, 388 U.S. at 224.

A. Initial and First Appearances Inherently Risk Substantial Prejudice By Prompting Inculpatory Statements

Arrestees' statements at initial and first appearance can substantially prejudice their rights. A proceeding can substantially prejudice rights when a defendant is "presented with the opportunity" to "irrevocably waive any defenses or make any irreversible admissions of guilt." *United States v. Owen*, 407 F.3d 222, 226–27 (4th Cir. 2005). As Plaintiffs discussed in their opening brief, arrestees' inculpatory statements at a

bail determination can both irrevocably waive defenses and admit guilt. Pls.' Br. in Support of Mot. Summ. J. 20–23, ECF No. 107. Plaintiffs incorporate that briefing by reference.

The record shows that both initial appearance and first appearance inherently risk prompting arrestees to make inculpatory statements.

Initial appearance takes place at the jail, shortly after an officer books in the arrestee. First, the arrestee watches the arresting officer give the magistrate sworn testimony about the allegations and video evidence, with no opportunity for cross-examination. Nance Dep. Ex. 7 at 23:3–24:8, 129:15–130:11. The magistrate then informs the arrestee, for the first time, of the charges they are facing, the amount of money they will have to pay for release, and how long they will likely be detained if they cannot afford to pay. Hollan Dep. Ex. 8 at 74:18–75:8. Magistrate Nance testified that magistrates ask about arrestees' history of failure to appear, which is itself a separate offense. Nance Dep. Ex. 7 at 112:15–25. This proceeding prompts arrestees to argue for their release "[q]uite often," *id.* at 114:5–10, and also prompts arrestees to "argue the facts" and "say numerous things that may or may not be true." Hollan Dep. Ex. 8 at 87:9–17. "[S]ome arrestees would say anything to get out of jail." Nance Dep. Ex. 7 at 126:20–23.

Testimony in this case shows that even the most common examples of arguments arrestees make at initial appearance can inadvertently waive defenses or admit guilt. Arrestees' attempts to explain the incident that led to their arrest commonly commit to versions of the facts, for example, stating "I wasn't there," "I didn't do it," "the cop is

wrong," or "[y]ou got the wrong person." Nance Dep. Ex. 7 at 115:15–22. Arrestees can also implicitly admit guilt, for example, through the common claim that the complainant "hit me first," Hollan Dep. Ex. 8 at 88:5–15, or reveal knowledge indicating guilt, like "I didn't steal the TV from Walmart," Nance Dep. Ex. 7 at 117:6–7. Even if their statements are not outright confessions, arrestees can inadvertently waive defenses or provide impeachment material affecting the strategic decision to take the stand at trial. Arrestees make these statements in front of the arresting officer, before a magistrate can stop them. Hollan Dep. Ex. 8 at 66:9–14, 88:14–15. Magistrates document arrestees' statements on their bail orders. Nance Dep. Ex. 7 at 130:12–131:24.

First Appearance is described in Plaintiffs' opening brief, which explains why there can be no genuine dispute that first appearances in Alamance County inherently risk prompting inculpatory statements. Pls.' Br. in Support of Mot. Summ. J. 24–29, ECF No. 107. Plaintiffs incorporate that briefing by reference.

For both initial appearance and first appearance, the record precludes summary judgment in favor of the Judicial Defendants. The evidence shows that the "uncounseled choice" inherent in Alamance first appearances—the choice between waiving one's right to a bail hearing and waiving one's right to silence—has the potential to substantially prejudice the defendant's rights through waiver of defenses and irreversible admissions of guilt.

B. Initial and First Appearances Inherently Risk Substantial Prejudice by Ordering Coercive Pretrial Detention

Pretrial detention orders issued at first appearance in Alamance County can substantially prejudice an arrestee's rights. "Substantial prejudice" under the Sixth Amendment is prejudice to the outcome of the criminal case, including plea bargaining, which "is almost always the critical point for a defendant." *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (observing that 94% of state criminal prosecutions end in guilty pleas: "[P]lea bargaining is … not some adjunct to the criminal justice system; it is the criminal justice system."). As Plaintiffs discussed in their opening brief, pretrial detention can prejudice plea bargaining by coercing arrestees into pleading guilty in exchange for their release. Pls.' Br. in Support of Mot. Summ. J. 24–29, ECF No. 107. Plaintiffs incorporate that briefing by reference.

The record shows that both initial appearance and first appearance inherently risk prompting arrestees to make inculpatory statements.

Initial appearance. Detention ordered at initial appearance prompts arrestees to plead guilty at first appearance in exchange for speedier release. Multiple witnesses testified to this common practice. The court clerk Amanda Crabbe testified that arrestees who are detained at initial appearance attempt to plead guilty at first appearance, for both misdemeanor and felony charges. Crabbe Dep. Ex. 9 at 78:4–6, 79:8–80:2, 81:18–83:6, 158:5–159:13. Judge Allen testified that he had accepted so many pleas in exchange for release at first appearance that they were too numerous to estimate. Allen Dep. Ex. 4 at 50:3–51:4. Judge Lambeth testified that this process is "a heck of a lot informal than you

might have in your mind," and arrestees would ask for release by making a "short argument, which is, I did it and I've been in jail for the weekend." Lambeth Dep. Ex. 3 at 246:24–247:2. This testimony establishes that the jail time between initial appearance and first appearance is sufficient to coerce arrestees into pleading guilty to get out of jail.

First appearance. Plaintiffs' opening brief explains why there can be no genuine dispute that detention ordered at first appearance coerces arrestees into pleading guilty. Pls.' Br. in Support of Mot. Summ. J. 24–29, ECF No. 107. Plaintiffs incorporate that briefing by reference.

For both initial appearance and first appearance, the record precludes summary judgment in favor of the Judicial Defendants. The evidence shows that pretrial detention orders issued in both proceedings significantly prejudice the outcome of plea bargaining by coercing people into pleading guilty in exchange for their release.

C. Judicial Defendants Fail to Engage with the Factual Record or Controlling Precedent

1. Judicial Defendants Ignore the Factual Record

Judicial Defendants' arguments largely ignore the factual record described above. With respect to initial appearance, Judicial Defendants falsely claim that the proceeding "does not involve . . . testimony," and "does not provide the arrestee an opportunity . . . to enter a plea." Judicial Def.'s Br. in Support of Mot. Summ. J. 22, ECF No. 100. Initial appearance entails testimony from arresting officers, which happens in front of arrestees *without* an opportunity for cross-examination—precisely the imbalance that prompts arrestees to speak up and attempt to explain their side of the story. Nance Dep. Ex. 7 at

23:23–24 (arrestees overheard the officer); 130:7–11 (agreeing she would "typically rely on the officer's word over the arrestee's" because "[t]he officer had been sworn in.").

Judicial Defendants imply that the absence of a prosecutor and cross-examination is determinative, but critical stages do not require the presence of a prosecutor or any legal formalities remotely resembling a trial: law enforcement's recording of a defendant's conversation with an informant, witness identification at a lineup, and a formal plea offer are all critical stages of prosecution. *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (formal plea offer); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (recording a conversation); *Wade*, 388 U.S. at 231 (in-person lineup). These are "trial-like confrontations," not because they look like a mini trial, but because denying counsel at this stage can have permanent consequences for the defendant by irreparably prejudicing the defense. *United States v. Ash*, 413 U.S. 300, 311 (1973) (describing historical expansion of right to counsel "when new contexts appear presenting the same dangers that gave birth initially to the right itself.").

What matters is that Alamance County's initial appearances inherently risk prompting arrestees to make uncounseled admissions that prejudice the outcome of their cases, even if the admission is not a formal plea. It is the inherent *potential* to prompt admissions of guilt or prejudice defense strategies—not the formal requirement to enter a plea—that makes a proceeding a critical stage. The record contains robust evidence of this potential in Alamance County. The record also shows that detention imposed at initial appearance is enough to coerce arrestees to plead guilty the first time they appear

before a judge. Judicial Defendants do not even attempt to address these risks of substantial prejudice.

With respect to first appearance, Judicial Defendants simply gesture at requirements under state law, without explaining what those requirements mean under the critical-stage analysis. Judicial Defs.' Br. in Support of Mot. Summ. J. 23, ECF No. 100. Again, Judicial Defendants ignore evidence in the record demonstrating the risks of substantial prejudice at first appearance in Alamance County.

2. Judicial Defendants Fail to Apply Binding Precedent

Judicial Defendants' legal argument largely boils down to an assertion that this is a matter of first impression. They do not meaningfully engage with or apply controlling precedent to the facts of this case. Specifically, Judicial Defendants observe that the Supreme Court has never held that *all* bail hearings are critical stages, and so it is a question of first impression whether initial and first appearances are critical stages. Judicial Defs.' Br. in Support of Mot. Summ. J. 20–21, ECF No. 100.

But questions of first impression are not automatic losses—far from it. Such questions call for application of controlling precedent based on reasoned arguments and the factual record. Judicial Defendants do not refute that, under the controlling critical stage analysis, the record of risks posed by initial and first appearances in Alamance County demonstrates that these proceedings are a critical stage.

Judicial Defendants cite N.C.G.S. 15A-601(a) and *State v. Detter*, 260 S.E.2d 567, 582 (N.C. 1979), to suggest that the Sixth Amendment claim is foreclosed. They are wrong. Section 15A-601(a) is merely a legislative label applied to first appearance; it

does not account for Alamance County's local practices, and cannot usurp this Court's authority to decide a federal question. U.S. Const. art. VI, para. 2 (Supremacy Clause). "When federal judges exercise their federal-question jurisdiction under the 'judicial Power' of Article III of the Constitution, it is 'emphatically the province and duty' of those judges to 'say what the law is' . . . independent from the separate authority of the several States." *Williams v. Taylor*, 529 U.S. 362, 379 (2000) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

Detter concerned an entirely different issue: whether the defendant was subject to post-attachment interrogation in violation of *Brewer v. Williams*, 430 U.S. 387 (1977), and *Massiah v. United States*, 377 U.S. 201 (1964). 260 S.E.2d at 579. *Detter* is unpersuasive. First and most importantly, none of the parties in *Detter* made the critical stage argument, or presented the record of potential substantial prejudice, that Plaintiffs have assembled here.

Second, the court's critical stage dicta were error because the threshold question for a *Brewer*/*Massiah* violation is whether attachment—not a critical stage—has occurred. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 211 (2008) (describing "the mistake of merging the attachment question (whether formal judicial proceedings have begun) with the distinct 'critical stage' question (whether counsel must be present at a postattachment proceeding . . .)."). *Detter* appears to conflate, or invert, the attachment and critical stage questions. *E.g.*, 260 S.E.2d at 624 (describing a critical stage as "triggering application of the Sixth Amendment").

In any case, the parties in *Detter* could not have made the critical stage argument Plaintiffs make here because *Detter* predates the Supreme Court's holding that the Sixth Amendment protects defendants from prejudice to the outcome of plea bargaining. *Lafler v. Cooper*, 566 U.S. 156 (2012); *Frye*, 566 U.S. at 135. These cases abrogate *Detter's* critical stage dicta, and demonstrate why *Detter* doesn't apply here: Plaintiffs' argument rests on prejudice to the outcome of plea bargaining under *Lafler* and *Frye*.

Other courts have recognized the merits of this argument. Judicial Defendants attempt to distinguish holdings in *Booth v. Galveston County* by arguing that they rest exclusively on a passage from *Bell v. Cone*, 535 U.S. 685, 696 (2002). They do not: Judicial Defendants cherry-picked one phrase, summarizing the standard "[i]n simple terms," from the *Booth* court's two lengthy, well-reasoned opinions applying the correct critical stage test. *Booth v. Galveston Cnty.*, 2019 WL 3714455, *11 (S.D. Tex. Aug. 7, 2019) ("Critical stages occur where the accused required aid in coping with legal problems or assistance in meeting his adversary, and the substantial rights of the accused may be affected." (cleaned up)); *Booth v. Galveston Cnty.*, 352 F.Supp.3d 718, 738 (S.D. Tex. 2019) (same).

The *Booth* court denied motions to dismiss and issued a preliminary injunction on the basis of the same arguments Plaintiffs make here: uncounseled bail hearings carry a "significant potential for inculpatory statements," and "lead[] to unwarranted pretrial detention," which leads to "increased likelihood of conviction and harsher sentences."

Booth, 2019 WL 371445, *17–18.[2] The *Booth* holding follows the reasoning of other appellate courts that have recognized the major significance of bail hearings in a criminal case. *Higazy v. Templeton*, 505 F.3d 161, 172–73 (2d Cir. 2007) (discussing the significance of the initial bail determination in a criminal case); *Ditch v. Grace*, 479 F.3d 249, 253 (3d Cir. 2007) (holding preliminary hearing is a critical stage because the prosecutor may seek pretrial detention, and "a principal function of the hearing . . . is to protect the accused's right against [] unlawful . . . detention."); *United States v. Abuhamra*, 389 F.3d 309, 323–24 (2d Cir. 2004) ("Bail hearings fit comfortably within the sphere of adversarial proceedings closely related to trial. . . . [They] require a court's careful consideration of a host of facts about the defendant and the crimes charged . . . [to] determine whether a defendant will be allowed to retain, or forced to surrender, his liberty . . . ."); *Smith v. Lockhart*, 923 F.2d 1314, 1319–20 (8th Cir. 1991) (holding omnibus hearing including bail reduction motion is a critical stage, especially when opposed by the prosecution and "a competent attorney could have provided meaningful assistance"); *Gonzalez v. Comm'r of Corr.*, 68 A.3d 624, 637 (Conn. 2013) (holding bail hearing is a critical stage where bail determination results in detention: "Indeed, there is nothing more critical than the denial of liberty, even if the liberty interest is one day in jail."); *Hurrell-Harring v. New York*, 930 N.E.2d 217, 223–24 (N.Y. 2010) (holding initial bail hearings are a critical stage because they "encompass matters affecting a defendant's liberty and ability to defend against the charges. The weight of persuasive

[2] Judicial Defendants also cite *Torres v. Collins*, 2020 WL 7706883 (E.D. Tenn. Nov. 30, 2020), a case on which Plaintiffs do not rely.

authority further compels the conclusion that Judicial Defendants' motion should be denied.

III. Judicial Defendants Are Not Entitled to Summary Judgment on the Procedural Due Process Right to Counsel Claim

Even when deprivation of a fundamental right "survives substantive due process scrutiny," that deprivation "must still be implemented in a fair manner. [] This requirement has traditionally been referred to as 'procedural' due process." *United States v. Salerno*, 481 U.S. 739, 746 (1987). The *Salerno* Court went on to hold that, for deprivations of the fundamental right to pretrial liberty, the "right to counsel at the detention hearing" was a noteworthy aspect of the "procedures . . . designed to further the accuracy" of the court's determination. *Id.* at 751. The Supreme Court has thus held that the *Mathews* procedural due process framework governs deprivations of the fundamental right to pretrial liberty, as is true for deprivation of any other fundamental right. *E.g.*, *Schall v. Martin*, 467 U.S. 253, 263–64 (1983) (asking whether juvenile detention statute violates substantive due process and, separately, whether the procedural safeguards in the statute are adequate).

Judicial Defendants' argument on this point confuses substantive and procedural due process. They cite two cases holding that *substantive* due process claims do not lie if there is another, explicit textual source of constitutional protection against the same conduct. *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) (quoting *Graham v. Connor*, 490 U.S. 386 (1989)). *Albright* explicitly distinguished between the two, specifying that the petitioner did not raise a procedural due process claim. 510 U.S.

at 271. Plaintiffs here assert procedural due process challenges to deprivation of their fundamental right to pretrial liberty, just as the defendant raised in *Salerno*. As Plaintiffs demonstrate in their opening brief, the Court should grant summary judgment in Plaintiffs' favor on this issue. Pls.' Br. in Support of Mot. Summ. J. 18–19, ECF No. 107.

IV. Plaintiffs' Claims Regarding Representation of Counsel at Bail Hearings Are Not Precluded by Eleventh Amendment Immunity

Judicial Defendants argue that they are entitled to sovereign immunity from Plaintiffs' claims that indigent arrestees must be provided counsel at bail hearings. This argument fails for two reasons. First, Judicial Defendants waived their sovereign immunity by consenting to this Court's jurisdiction. Second, even if they did not waive immunity, Judicial Defendants are directly responsible for implementing the challenged government policy and practice, and have authority to implement the relief sought.

A. Judicial Defendants Waived Eleventh Amendment Immunity

A state waives Eleventh Amendment immunity by consenting to federal court jurisdiction. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76 (1999) ("[W]e will find a waiver either if the State voluntarily invokes our jurisdiction . . . or else if the State makes a 'clear declaration' that it intends to submit itself to our jurisdiction."); *see also Sansotta v. Town of Nags Head*, 724 F.3d 533, 546 (4th Cir. 2013) (finding waiver of Eleventh Amendment immunity where state removed to federal court because "removal is a form of voluntary invocation of a federal court's jurisdiction." (quoting *Lapides v. Board of Regents*, 535 U.S. 613, 624 (2002))); *McCants v. Nat'l Collegiate Athletic Ass'n,* 251 F. Supp. 3d 952, 958 (M.D.N.C. 2017)

("[A] state waives its Eleventh Amendment immunity in federal court when it voluntarily submits itself to federal jurisdiction.").

Here, Judicial Defendants expressly consented to this Court's jurisdiction. *See* Consent Order for Prelim. Inj. ¶ 4, ECF No. 56 ("THE PARTIES AGREE AND THE COURT FINDS THAT: 4. This Court has jurisdiction over the subject matter of this action and the Defendant[s] hereto pursuant to 28 U.S.C. §§ 1331 and 1343."). They did not appeal entry of the consent order, move to dismiss on immunity (or other) grounds, or object to any discovery requests on the basis of immunity. Therefore, Judicial Defendants' voluntary and unequivocal submission to this Court's jurisdiction has waived Eleventh Amendment immunity.

B. Even If Not Waived, Eleventh Amendment Immunity Does Not Preclude Plaintiffs' Sixth and Fourteenth Amendment Claims Because Judicial Defendants Are Directly Responsible for the Alleged Constitutional Violations

Eleventh Amendment immunity does not extend to injunctive claims against state actors who violate individuals' constitutional rights. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (internal quotations omitted).

Ex parte Young requires only that a defendant "have some connection with the enforcement of the act in order to properly be a party to the suit." *S.C. Wildlife Fed'n v.*

Limehouse, 549 F.3d 324, 332 (4th Cir. 2008) (quotations omitted). As the Fourth Circuit has explained, the "connection to the [challenged action] need not be *qualitatively* special; rather, 'special relation' under *Ex parte Young* has served as a measure of *proximity to* and *responsibility for* the challenged state action." *Id*. at 333. The "special relation" requirement bars claims only "where the relationship between the state official sought to be enjoined and the enforcement of the state statute is significantly attenuated. . . ." *Id.*

Here, Plaintiffs challenge the bail policy that Judicial Defendants are statutorily responsible for promulgating. *See* N.C.G.S. § 15A-535 (authorizing superior court judge, in consultation with district court judge, to "devise and issue" pretrial detention policies). Plaintiffs specifically challenge the policy's authorization of District and Superior Court judges to impose secured bail even at hearings where arrestees are unrepresented by counsel. *See* Compl. ¶¶ 109 (Count III) and 114 (Count IV), ECF No. 1.

Far from being "significantly attenuated," *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d at 333, Judicial Defendants are the policy-makers directly responsible under state law for promulgating the procedures that District and Superior Court judges follow when setting bail. *See* N.C.G.S. § 15A-535. The constitutional violation is the policy of imposing secured bond at hearings without indigent arrestees having attorneys present. *See* Compl. ¶¶ 109 (Count III) and 114 (Count IV), ECF No. 1. Because Judicial Defendants are responsible for setting and overseeing that policy, they are responsible for the constitutional violations it precipitates. *See Verizon Maryland, Inc.*, 535 U.S. 635 at 645.

C. Judicial Defendants Can Furnish Relief

Judicial Defendants also object that they "have no legal or practical ability to furnish Plaintiffs" with relief. Judicial Defs.' Br. in Support of Mot. Summ. J. 25, ECF No. 100. Not so. They have both.

As an initial matter, Judicial Defendants can redress Plaintiffs' injury even if they could not afford complete relief. "[R]emoval of even one obstacle to the exercise of one's rights, even if other barriers remain, is sufficient to show redressability." *Deal v. Mercer Cnty. Bd. of Ed.*, 911 F.3d 183, 187 (4th Cir. 2018)

In any case, Judicial Defendants *can* furnish Plaintiffs with complete relief by issuing a bail policy that prohibits District and Superior Court judges from imposing secured bail absent a hearing at which the arrestee is represented by counsel. Judicial Defendants can implement that relief in several ways, including by continuing the bail policy they have already issued and made effective as of July 1, 2020. As the statutorily empowered bail policy-makers for District and Superior Court, *see* N.C.G.S. § 15A-535, Judicial Defendants can independently furnish that relief themselves.

To the extent implementation of such a policy may entail coordination with other stakeholders like Indigent Defense Services ("IDS"), the local defense bar, the District Attorney's Office, court administrative staff, and others, that does not make it impossible for Judicial Defendants to afford the relief sought. Judicial Defendants must do "everything within [their] power to comply" with an injunction, including using their "wide-ranging powers" under state law to urge other agencies to take action. *Robertson v. Jackson*, 972 F.2d 529, 535 (4th Cir. 1992). Defendants must demonstrate that

"compliance with the [i]njunction [is] actually impossible (rather than merely difficult, inconvenient, or potentially impossible)." *South Carolina v. United States*, 907 F.3d 742, 765 (4th Cir. 2018). Here, at the most basic level, a policy prohibiting judges from imposing secured bail absent a hearing with counsel would suffice. Moreover, Judicial Defendants have already demonstrated their practical and legal ability to secure the presence of counsel through administrative orders that effectively require other agencies to coordinate. The consent preliminary injunction that was developed in collaboration with Judicial Defendants requires them to provide the very relief they now deny the "legal or practical ability to furnish." Judicial Defs.' Br. in Support of Mot. Summ. J. 25, ECF No. 100. As agreed and ordered by the Consent Preliminary Injunction,

> The Judicial Defendants shall put in place administrative orders and provide the necessary training to appropriate staff to ensure that the following procedures are applied and findings made before individuals entitled to those procedures and findings are ordered detained in the Alamance County Detention Center. . . .
>
> j. For the limited purpose of representation at the first appearance, individuals must be provided counsel free of charge.

Consent Order for Prelim. Inj. ¶ 7(j), ECF No. 56.[3] For more than two years, Judicial Defendants have complied with the preliminary injunction and, pursuant to their new policy, judges have no longer imposed secured bond at First Appearances absent a hearing with counsel present.

[3] As counsel for Judicial Defendants correctly observed: "Clearly, the provision of counsel is a fundamental piece of any legitimate fix." Pls.' Reply Br. in support of Mot. To Enforce 3, ECF No. 80 (citing Finarelli Aff. Ex. C at 2, ECF No. 79-3).

Judicial Defendants have coordinated with Indigent Defense Services (IDS) to ensure that counsel have been available at every First Appearance since entry of the preliminary injunction. *See, e.g.* Lambeth Aff. ¶¶ 50–54, ECF No. 99-2. When IDS announced that it intended to cease funding contract attorneys at First Appearance beginning December 1, 2021 and Plaintiffs sought to enforce the preliminary injunction, Judicial Defendants initially made the same argument they now raise here, protesting that they "have no ability to furnish that relief." Judicial Defs.' Br. in Opp'n to Pls.' Mot. To Enforce 14, ECF No. 78. Yet, following a hearing at which Judge Tilley indicated that he expected Judicial Defendants to comply with their obligations under the injunction, Judicial Defendants procured additional funding *that evening* for IDS to continue providing contract counsel at First Appearances the next day. *See* Lambeth Dep. Ex. 3 at 307:3–308:22) (observing that Judicial Defendants and their counsel "had a big hand" in procuring the funding); Lambeth Aff. ¶ 54, ECF No. 99-2 ("In December 2021, IDS received $72,000.00 from the Office of State Budget and Management to fund the cost of maintaining the contract counsel system in place since July 1, 2020, with the expectation that those funds would last twelve months.").

Moreover, in the event that IDS refused to continue cooperating with Judicial Defendants to supply attorneys at First Appearances—even after a judicial finding that the Constitution required as much—North Carolina law would permit the judges to appoint attorneys themselves. *See, e.g.*, *In re Small*, 689 S.E.2d 482, 484 (N.C. Ct. App. 2009) ("All courts are vested with inherent authority to do all things that are reasonably necessary for the proper administration of justice.").

Judicial Defendants point to *Ivarsson v. Office of Indigent Defense Services*, 577 S.E.2d 650 (N.C. Ct. App. 2003), for the argument that the creation of IDS divested judges of all appointment power. Judicial Defs.' Br. in Support of Mot. Summ. J. 27–28, ECF No. 100. But it did no such thing. *Ivarsson* rejected a separation of powers challenge to IDS's enabling statute because, even under the statutory scheme, "the judiciary retains the inherent power to supervise and discipline the attorneys before it." 577 S.E.2d at 654. *Ivarsson* only upheld IDS's statutory authority to appoint and compensate counsel because it did not strip the judiciary of its inherent power to "replace" IDS counsel if that counsel "provides inadequate or ineffective counsel or violates court rules." *Id.*

Critically, the court explained that "the complete absence of counsel is the ultimate form of attorney inadequacy," and that, in such a scenario, the judiciary's inherent supervision power can "necessitate[]" that it "step[] into the selection process" and provide counsel "by default as part of its power to ensure a fair trial to criminal defendants." *Id.* at 653–54. *See also In re Alamance Cty. Court Facilities*, 405 S.E.2d 125, 133 (N.C. 1991) ("The very conception of inherent power carries with it the implication that its use is for occasions not provided for by established methods").

Here, if this Court found that the Constitution requires attorneys to be available at First Appearances, the abdication by IDS of its obligation to supply attorneys to First Appearances would entitle Judicial Defendants to exercise their inherent power to "step[] into the selection process" to remedy the "complete absence of counsel in a criminal matter involving an indigent defendant." *Ivarsson* at 653–54.

In such a scenario, Judicial Defendants would also enjoy the power to compel funding to compensate the counsel they select. *See In re Alamance County Court Facilities*, 405 S.E.2d at 132–33 (upholding the inherent power of an Alamance County judge to "reach towards the public purse" if "inaction by those exercising legislative authority threatens fiscally to undermine the integrity of the judiciary."). In *Alamance County Court Facilities*, the judge had found that essential courthouse and jail facilities were "grossly inadequate" or "nonexistent," threatening court administration with delays and impaired assistance of counsel, and ordered county commissioners to provide specific necessary facilities. *Id.* at 127. Observing that "[i]n the realm of appropriations, some overlap of power between the legislative and the judicial branches is inevitable," the court held the Alamance County judge's order was within the judiciary's "inherent power to do what is reasonably necessary for 'the orderly and efficient exercise of the administration of justice.'" *Id.* at 131, 132 (quoting *Beard*, 357 S.E.2d at 696). While the power to compel funds is "a tool to be utilized only where other means to rectify the threat to the judicial branch are unavailable," it is meant for situations where "statutory remedies and constraints . . . stand in the way of obtaining what is reasonably necessary for the proper administration of justice." *Id.* at 133.

Such would be the case here if IDS abandoned its responsibility to supply counsel at bail hearings. If Judicial Defendants truly could not obtain any requisite funding through any other avenue, they would have the inherent power to compel it. IDS has a duty to provide counsel in "[c]ases in which an indigent person is subject to a deprivation of liberty or other constitutionally protected interest and is entitled by law to legal

representation." N.C.G.S. §7A-498.3. IDS's abdication of that duty would empower Judicial Defendants to compel either its compliance or its funding.

In short, Judicial Defendants have waived their Eleventh Amendment immunity argument by consenting to this Court's jurisdiction. Even if they had not waived it, their direct connection to the alleged constitutional violations easily satisfies *Ex Parte Young*. They can independently provide the relief Plaintiffs seek: a policy prohibiting judges from imposing secured bail absent provision of counsel. And while not technically necessary to furnish that relief, they also have—as demonstrated through their implementation of the consent preliminary injunction—the legal and practical ability to ensure counsel at bail hearings as part of such a policy's implementation. Therefore, their Motion for Summary Judgment on the basis of Eleventh Amendment immunity should be denied.

CONCLUSION

For the foregoing reasons, Judicial Defendants' Motion for Summary Judgment should be denied.

Respectfully submitted, this the 8th day of August, 2022.

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CERTIFICATION OF WORD COUNT

I hereby certify that the foregoing memorandum complies with this Court's Order (ECF No. 95) in that, according to the word processing program used to produce this brief, the document does not exceed 8,000 words exclusive of caption, title, signature lines, and certificates.

Dated: August 8, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of electronic filing to all counsel of record who have appeared in this case.

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