IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION

ROBERT FRAZIER, *et al.*, individually and on behalf of a class of similarly situated persons, Plaintiffs, v. PRINCE GEORGE'S COUNTY, MARYLAND, *et al.*, Defendants.	Case No. 8:22-cv-1768 PJM

PLAINTIFFS' RESPONSE TO DEFENDANT PRINCE GEORGE'S COUNTY, MARYLAND'S STATUS REPORT (DOC. 124)

Two months after promising this Court that it was on the verge of promulgating new policies that would address the concerns Plaintiffs raised in this lawsuit, the County has drafted a policy that leaves the status quo largely untouched. The "new" policy does not address the constitutional deficiency at the crux of this lawsuit: that County Pretrial Division officials, not judicial officers, decide whether, when, and on what conditions persons who are arrested in Prince George's County will be released to await trial. The "new" policy does not change the fact that the Pretrial Division applies release eligibility criteria developed not by the courts, but by the Division itself. Under the "new" policy, the Pretrial Division will continue to employ constitutionality unsound procedures—including delaying two full weeks to even render a decision. The "new" policy is rife with internal inconsistencies and lacks an effective date or any information about its implementation or dissemination to County officials. And the "new" policy appears to apply only to persons given pretrial referrals at "Level IV"—that is, home detention—putting many members of the putative class outside of its scope.

As such, the County's "new" pretrial policy does not materially affect this lawsuit. Defendants' practices remain unconstitutional. Judge Defendants will continue to "refer" arrested persons to the Defendant County, whose officials will continue to make pretrial release and detention decisions, with a process and on a timeline that violate constitutional rules. Due process does not permit this. And even if the updated policy were constitutionally compliant, the County's mid-litigation policy shift does not moot this case under Rule 12(b)(1) because the County retains the authority and capacity to re-engage in the challenged practices. Indeed, it has vigorously defended the constitutionality of its existing practices throughout this litigation. Plaintiffs respectfully request that this Court deny the County's attempt to dismiss this case on mootness grounds and allow the case to proceed to discovery as planned.

BACKGROUND

At its core, this lawsuit challenges the widespread practice in Prince George's County of deferring pretrial release and detention decisions to the County Pretrial Division via "pretrial options" and "pretrial orders" (collectively, "pretrial referrals"). Complaint, Doc. 1, ¶¶ 60-65. At a March 2, 2023, scheduling conference, the County informed Plaintiffs and this Court that it would be changing its policies regarding pretrial referrals "in very short order." Transcript, Doc. 105, at 26:21. The County averred that its new policies would "get to the heart of the matter[s]" Plaintiffs are challenging. *Id.* at 26:23. The Court ordered the County to "stick to a very vigorous preparation of its policy" and produce the new policy by the end of March. *Id.* at 34:23.

On March 31, however, without conferring with Plaintiffs, the County filed a motion seeking more time, citing a need "to coordinate with the effected court personnel." Doc. 113 at 1. Plaintiffs objected in light of the ongoing irreparable harm to illegally detained individuals, including at least one person who has died during the pendency of this lawsuit while awaiting the

Pretrial Division's processing. *See* Doc. 114. The Court granted the County an additional month to produce its policy, but also stated that discovery in this matter would commence as soon as the pending motions to reconsider are decided. *See* Doc. 117.

The County filed its updated policy on April 28. *See* Doc. 124. The County's filing consists of three documents: (1) a Standard Operating Procedures Manual for the County's Home Monitoring Program for Pretrial Defendants and Sentenced Offenders, Doc. 124-1; (2) a "handout" the County purportedly intends to disseminate to the public regarding its pretrial system, Doc. 124-2; and (3) the County's nonbinding answers to "suggest[ed]"questions that the Court posed in an appendix to its opinion granting in part and denying in part Defendants' Motions to Dismiss, Doc. 124-3. The County's filing states in conclusory terms that because Plaintiffs' "remaining claim centers on transparency . . . , there is no longer a live case and controversy against the County" and requests, without any legal support, that this Court "issue an Order dismissing the Complaint in its entirety for lack of subject-matter jurisdiction under Rule 12(b)(1)." Doc. 124 at 2.

ARGUMENT

I. The County's Revised Policy Continues to Violate the Constitution.

The County's revised policy does not resolve the due process deficiencies at the core of this lawsuit because it does not eliminate the practice of delegating pretrial release decisions to County officials via "pretrial referrals." The "new" policy continues to give judges "the option[] of . . . authorizing Pretrial Services of [the Pretrial Division] to determine eligibility [for] the Pretrial Release Program . . . ." Doc. 124-2 at 1. "If a defendant is authorized by the Judge under the Pretrial Release Program, then they may be released on a level of pretrial release but only if eligible." *Id.* The Pretrial Division, not judges, determines and applies the criteria for Pretrial Release Program eligibility. *See* Doc. 124-1 at 5 (listing "program eligibility" criteria). If a person

is found eligible for release "following an investigation by the Pretrial Release Program," then the Pretrial Division retains the authority to "release[] and supervise[]" the person without further judicial involvement. Doc. 124-2 at 1. If, on the other hand, the Pretrial Division determines that the person is not eligible for release after applying its own criteria, the County retains the authority to continue to detain the person. *Id.*[1]

As Plaintiffs have explained all along, this referral system offends both substantive and procedural due process. Substantively, a person may not be detained prior to trial unless a court has found, by a standard of clear and convincing evidence, that no alternatives to detention—including release on any conditions—will reasonably protect the community's safety and ensure that the person will return to court. *See United States v. Salerno*, 481 U.S. 739, 751 (1987); *Wheeler v. State*, 864 A.2d 1058, 1065 (Md. Ct. Spec. App. 2005). Pretrial referrals permit the County to release referred persons with no further judicial involvement. As such, by making the referral, the judge has inherently determined that it is not necessary for the person to remain detained while awaiting trial. But under the County's longstanding practices and its revised policy alike, the County will continue to detain referred persons absent a necessity finding—for up to two weeks post-referral while it is processing their case, and for much longer if the Division declines the referral. Furthermore, under its self-developed release eligibility criteria, the Division will decline to release referred persons for reasons untethered to either community safety or flight risk; for example, the updated policy states that the Division will not release a person if it is not satisfied by the "[c]onditions of the residence" at which the person will reside upon release. *See* Doc. 124-

[1] The updated policy insists that persons who remain detained following a pretrial referral are detained at the behest of a judge, rather than the Pretrial Division. *See, e.g.*, Doc. 124-2 at 1 (stating that persons who remain detained post-bail review "are detained because a judicial officer of the courts . . . has ordered the defendant to be committed (held)"). But this insistence is undermined by the County's simultaneous confirmation that it is the Pretrial Division (and therefore not the judges) that unilaterally establishes and administers pretrial release "program eligibility" criteria. *Id.*

1 at 5. This continued detention absent a finding of necessity violates the Constitution. *See* Pls.' Mot. for Preliminary Injunction ("PI Motion"), Doc. 8, at 24-28.

Procedurally, before a person can be deprived of their "fundamental" right to pretrial liberty, *Salerno*, 481 U.S. at 750, they must receive "'strong procedural protections,'" *Wheeler*, 864 A.2d at 1062 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001)). These protections include a "full-blown adversary hearing" in front of a "neutral decisionmaker," consideration of alternative conditions of release, application of a clear-and-convincing-evidence standard of proof, and recorded "findings of fact" and "statement[s] of reasons for a decision to detain." *Salerno*, 481 U.S. at 750–52; *see also* PI Motion at 28-35. But under the County's updated policy, persons referred to the Pretrial Division still receive no such protections. Their eligibility for pretrial release will be determined not by a neutral decisionmaker, but by the Division, an arm of the County Department of Corrections. That eligibility determination will be made not at an adversary hearing, but within the Division's offices, with neither the detained person nor their attorney present. This system of referring arrested persons to pretrial and deferring their release decision to the Pretrial Division remains intact under the updated policy—and, indeed, is fundamentally the same as the process described in the Complaint and which this Court has reviewed in issuing its ruling on the County's Motion to Dismiss. As such, for the same reasons, it does not afford due process.

The policy only minimally modifies the practices challenged in this lawsuit. First and most notably, it limits the timing of the Pretrial Division's release decision from the "weeks or months" that Plaintiffs have alleged to "10 business days"—that is, two weeks. *Compare* Compl. ¶ 7, *with* Doc. 124-1 at 6. The County cites nothing to suggest that a two-week delay in making pretrial release decisions would comply with due process. Nor can it. Two weeks in jail, after a person has been authorized for release—an authorization that, by its very nature, means their detention is not

necessary—cannot be squared with due process. This is especially true because, during these two weeks, the County assumes responsibility for making a release decision, a role it cannot constitutionally undertake. *See supra* at 4-5.[2] While Plaintiffs do not dispute that the Pretrial Division should be afforded a reasonable time after a judge has authorized a person's release at a bail review hearing to *effectuate* the release, courts around the country have found that period to be measurable in hours or days, not weeks. *See, e.g.*, *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018) (48 hours); *ODonnell v.Harris Cty.*, 892 F.3d 147 (5th Cir. 2018), *overruled on other grounds by Daves v. Dallas Cty.*, 64 F.4th 616 (5th Cir. 2023) (same). Even if the Pretrial Division were to notify the referring court of its refusal to release on the 10th business day, and the court were to hold another bail review hearing for the person *on the very same day*—highly unlikely, as subsequent bail review hearings are rarely rapid, *see* PI Motion at 17-18—persons referred to the Division under the updated policy may be unconstitutionally detained for two weeks under the express terms of the policy. The Constitution does not permit this. In any case, timing is only one component of procedural due process. *See Salerno*, 481 U.S. at 750–52.

The only other shift Plaintiffs can discern is that the updated policy commits to providing written notification to the referring judge if the County refuses to release a person or is unable to confirm a person's eligibility for release at the conclusion of its weeks-long process. Doc. 124-2 at 1. Whether this is in fact a change in practice is disputed; the County maintains that it has "always" provided such notification, *see, e.g.*, Doc. 124-3 at 2, but the record is replete with

[2] The County attempts to blame referred persons and their family members for its delays. *See* Doc. 124-3 at 2 ("It is important to note that the pretrial release program employees do not have any control over when individuals needed to provide necessary information contact them back. Not having critical information from persons who do not return phone calls will delay and at times halt a defendant's ability to be released."). But the County offers no evidence for its assertions. On the other hand, the record is full of evidence that referred persons, their family members, and their attorneys repeatedly contact the Division to try to provide information that will facilitate their release, and Division employees rarely return their messages. *See* PI Motion at 14, 19-20, 22.

evidence to the contrary, *see* PI Motion at 17. Regardless, a notification does not render the County's practices constitutional. In fact, that the Pretrial Division provides notice to the court of the *Division's* release determination only highlights that it is the Division, not the court, making the release decision. That continued delegation is the crux of the constitutional issue.

That the "new" policy will maintain an unconstitutional system in which Pretrial Division officials, not judges, make pretrial release decisions is perhaps best illustrated by the fact that the updated policy states that the Division uses the "factors outlined in Maryland Rule 4-216.1"—the very factors considered by judges at bail review hearings—in determining pretrial release eligibility. *See* Doc. 124-2 at 2. That is, the updated policy admits that the County second-guesses the court's pretrial release decisions by re-evaluating a person's suitability for release under the same Rule 4-216.1 factors that the court applied. Similarly, under the updated policy, the Division will continue to find referred persons ineligible for release for reasons that a court already decided did not preclude their release—for example, "seriousness of current charges," "past criminal history," and "history of failure to appear in court." *See id.*[3] As such, the updated policy does not render the County's practices constitutionally compliant.

II. Even if the County's Updated Policy Complied with the Constitution, This Action Would Not Be Moot Because the County Retains the Authority and Capacity to Resume the Challenged Practices.

Plaintiffs maintain that the County's updated policy does not create a constitutional pretrial release process. But even if it did, "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); *see also Parents Involved v. Seattle Sch. Dist.*, 551 U.S. 701, 719 (2007). Voluntary cessation does not moot litigation unless "subsequent events ma[k]e it *absolutely clear* that the allegedly wrongful

[3] *But see* Doc. 124-3 at 1 (stating that the Pretrial Division "does not . . . consider the nature of the offense in determining pre-trial release eligibility"). The revised policy is rife with internal inconsistencies.

behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 189 (2000) (citation omitted) (emphasis added). "If it did, the courts would be compelled to leave the defendant free to return to [its] old ways." *Id.* (cleaned up); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." (citations omitted)).

When a defendant claims that its voluntary cessation of a challenge policy or practice moots an action, that defendant bears a "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190. A government entity's changed policy does not moot litigation if the "defendant retains the authority and capacity to repeat an alleged harm." *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014). Dismissal on mootness grounds is especially unwarranted where the government entity is "still vigorously contesting" the lawsuit and does not acknowledge the illegality of its prior conduct. *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 192 (4th Cir. 2018); *see also*, *e.g.*, *Porter v. Clarke*, 852 F.3d 358, 365 (4th Cir. 2017) (government entity's change to challenged policy does not moot an action where entity does not promise not to return to previous practices, and will not acknowledge previous actions were unconstitutional); *Pashby v. Delia*, 709 F.3d 307, 316–17 (4th Cir. 2013) (government entity's change to challenged policy does not moot an action when the government retains authority to "reassess . . . at any time" and revert to the challenged policy).[4]

[4] The Fourth Circuit, unlike other circuits, has expressly declined to decide whether a government actor claiming mootness for change of behavior is held to a "less demanding burden of proof" than a private party. *Wall*, 741 F.3d at 497–98.

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. *W.T. Grant Co.*, 345 U.S. at 633. This is especially true where the policy was changed in response to litigation. *Cf. Porter*, 852 F.3d at 364 (explaining that voluntary cessation doctrine "seeks to prevent a manipulative litigant immunizing itself from suit indefinitely" (citation and internal quotation marks omitted)).

The County's updated policy does not moot this case because the County retains the authority to reassess its pretrial policies "at any time." *Deal*, 911 F.3d at 192. This Court has not entered either declaratory or injunctive relief that could hold the County to changes in its policy. The County's filing contains no information about when or how it intends to implement the updated policy, and the County has supplied no evidence that it will not revert to its old ways as soon as this litigation has concluded. *Wall*, 741 F.3d at 497. (Mere "bald assertions" to that effect, even if made, would not suffice. *Id.* at 498.) If this litigation were to end without court-ordered relief, nothing would stop the County from reverting to its prior practices—or finding new but equally unconstitutional ways of administering its pretrial program.

The County's argument about mootness, in its entirely, is as follows: "Plaintiff's remaining claim centers on transparency and the County's submission addresses the claim. Thus, there is no longer a live case and controversy against the County because the revised SOP and Pretrial Release document moot Plaintiff's remaining claim." Doc. 124 ¶ 6. But Plaintiffs have more than one "remaining claim"; all five of Plaintiffs' claims remain against the County in some form. *See* Doc. 90. And none of those claims hinges on "transparency." Instead, they each center on unlawful detention through a process that denies Plaintiffs and putative class members a timely and procedurally compliant bail decision by a neutral judicial decisionmaker. *See supra* section I. The

County's two baffling sentences about mootness do not suffice to carry its "heavy burden" of proof. *Wall*, 741 F.3d at 497.

Furthermore, as a factual matter, the updated policy does not appear to apply to all members of the putative class of persons who are referred to the Pretrial Division, but rather only to those referred for home detention (Level IV supervision). The County's Standard Operating Procedures Manual is titled "*Home Monitoring Program* for Pretrial Defendants and Sentenced Offenders". Doc. 124-1 at 1 (emphasis added). The County's "handout" addendum makes reference to persons released on supervision Levels I, II, and III—levels of supervision that are less restrictive than home monitoring, Doc. 124-2 at 3—but the Manual itself does not mention persons referred to the Division for anything less than Level IV supervision. *See* Doc. 124-1. As such, the updated policy does not moot this case because it does not even purport to apply to the entire putative class.[5]

Finally, and most importantly, the County has "vigorously defend[ed] the constitutionality" of its pretrial program throughout this litigation. This defiant stance precludes mootness. *Parents Involved*, 551 U.S. at 719; *see also West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607 (2022) (same); *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (same); *Ass'n for Educ. Fairness v. Montgomery Cty. Bd. of Educ.*, 560 F. Supp. 3d 929, 949 (D. Md. 2021) (same). As such, this mid-litigation policy update, even if it complied with the Constitution—which it does not—does not moot this case.

CONCLUSION

For the foregoing reasons, the County's "new" policy does not address Plaintiffs' constitutional concerns or materially change the claims at the heart of this litigation. Plaintiffs

[5] Despite Defendants' protestations to the contrary, this did not cease to become a putative class action simply because this Court denied Plaintiffs' Motion for Class Certification "for administrative purposes," Doc. 105, at 38:20-23, and instructed Plaintiffs to re-file the motion after the Court decides the pending motions to reconsider, *see* Doc. 104 at 1. *Cf. U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980).

request that this Court deny the County's attempt to dismiss this lawsuit under Rule 12(b)(1) and, after the Court decides the pending motions to reconsider, allow the parties to begin discovery as planned.

Respectfully submitted this 15th day of May, 2023.

/s/ Ellora Thadaney Israni
Ellora Thadaney Israni*
Ryan Downer*
Jeremy D. Cutting*
CIVIL RIGHTS CORPS
1601 Connecticut Ave. NW, Suite 800
Washington, D.C. 20009
(202) 894-6132
ellora@civilrightscorps.org

/s/ Seth Wayne
Seth Wayne*
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave. NW
Washington, D.C. 20001
(202) 662-9042
sw1098@georgetown.edu

* admitted *pro hac vice*

Counsel for Plaintiffs

Edward Williams (D. Md. Bar 20944)
Matthew Martens*
Thomas Bredar (D. Md. Bar 21635)
Ellen Connell*
Donna Farag*
Ayana Williams*
Sonika Data*
Britany Riley-Swanbeck (D. Md. Bar 21843)
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, D.C. 20006
(202) 663-6487
ed.williams@wilmerhale.com
matthew.martens@wilmerhale.com

Robert Boone*
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
robert.boone@wilmerhale.com

Timothy Perla*
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
timothy.perla@wilmerhale.com