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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

ALFREDO GUILLERMO SANCHEZ and DAVID CHRISTOPHER "CHRIS" BALL, Plaintiffs, v. BRIDGET HILL, Wyoming Attorney General in her official capacity, MARK GORDON, Governor of Wyoming in his official capacity, MATT CARR, Sheriff of Teton County, Wyoming, in his individual and official capacity, SARA KING, Director – Teton County 24/7 Program, in her individual and official capacity, BILL WEST, Acting Director – Teton County 24/7 Program in his individual and official capacity, DOUG RAFFELSON, CODY HADERLIE, MATT HEIDEL, and HEIDEE MCKENZIE, Teton County Deputy Sheriffs in their individual and official capacities, TETON COUNTY SHERIFF'S DEPARTMENT and BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF TETON, Defendants.	Civil Action No. 22-CV-00047-SWS

MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

COME NOW the Defendants, Matt Carr, Sara King n/k/a Sara West, Bill West, Doug Raffelson, Cody Haderlie, and Heidee McKenzie, in their official capacities, and, the Teton

County Sheriff's Office, the Board of County Commissioners of Teton County (collectively, "Defendants"), by and through their counsel, and hereby submit the following Memorandum of Law in Opposition to the Plaintiffs' Motion for Preliminary Injunction.

I. INTRODUCTION

The frequent and certain testing prescribed by the 24/7 Sobriety Program (herein the "24/7 Program") provide: (a) accountability and support for addicted individuals; (b) assurance for appearance at future court hearings, and; (c) a way to help ensure Wyoming roads do not have impaired drivers. The 24/7 Program is not an impermissible infringement on Constitutional rights. Instead, it is an invaluable arrow in the quiver of judges and law enforcement to help drug and alcohol dependent defendants minimize their involvement in the criminal justice system.

The 24/7 Program provides judges with a uniform, and effective, testing program to ensure compliance with bond conditions. The 24/7Program compliments Wyo. R. Crim. P. 46.1(c)(ix), which specifically allow judges to order pretrial defendants to "[r]efrain from the use of alcohol, or controlled substances[.]" Without a program like the 24/7 Program, those suffering from addiction are on the honor system while awaiting trial.

The 24/7 Program does not call for unreasonable searches or seizures under the Fourth Amendment. It does not impose a testing program that shocks the conscience or destroys the presumption of innocence. It is not an excessive bond condition. It is a program that helps addicted offenders stay sober to avoid getting their second, third, and fourth (felony) DUI following an arrest on their first DUI. Therefore, the injunction should be denied.

II. FACTS

Insofar as the Plaintiffs challenge the validity of the 24/7 Program on its face, the facts concerning what the statutes say and allow are generally undisputed. In 2014, the Wyoming Legislature joined several other states in adopting the 24/7 Program. 2014 Wyo. Sess. Laws Ch. 47. The Program provides for "frequent and certain testing for drug or alcohol use." Wyo. Stat. Ann. § 7-13-1703(b). For purposes of the Plaintiffs' lawsuit, that regime consists of twice daily breath tests- once in the morning and once in the evening. [*See* Declaration of Sheriff Matt Carr at ¶¶ 15-18].

None of these Defendants required the Plaintiffs to participate in the 24/7 Program. Participation is included as condition of pretrial release by a judge. Wyo. Stat. Ann. § 7-13-1708(a). In this case, the trial court told the Plaintiffs they could get out of jail on an unsecured bond if they chose to enroll in the 24/7 Program as a bond, or pretrial release, condition pursuant to Wyo. R. Crim. P. 46.1 [ECF No. 3-1 at 7-8]. The Plaintiffs were free to decline enrollment in the program and ask the circuit court for a bond modification. In fact, Plaintiff Sanchez was successful in getting his pretrial release conditions changed to eliminate participation in the 24/7 Program. [ECF No. 3-2 at 5 (¶15)].

Although the Attorney General's program rules and the participation agreement require strict compliance with the testing requirements, the Teton County Sheriff's Office (TCSO) created a "grace period" within the administration of the Program. In short, even though a defendant would be in violation of the 24/7 Program requirement if he was one minute late, the TCSO created a "tardy" system. Under the tardy system, so long as the defendant made it to testing within 30 minutes of the test time, he/she was considered tardy, not failing to test. [Decl. of M. Carr at ¶¶

31-33]. It was only after a third tardy (which is really a third failure to test) that the TCSO would arrest a defendant as required by the statute. [*Id.* at 34].

When the TCSO arrests a defendant for failing to comply with the 24/7 Program, no new charges are filed. [*Id.* at ¶ 43]. All arrestees are processed according to the jail's policies and procedures. [*Id.* at ¶ 37]. However, the arresting officer does not fingerprint the defendant so that the arrest does not show up on his/her criminal history. [*Id.* at ¶ 38]. The software used by the TCSO has an incident code for arrests due to a violation of release orders, but it does not have a similar code in the "offense" section. Therefore, the arresting officer lists "Contempt" as it is the appropriate offense code, even though the defendants are not prosecuted for a separate offense of contempt. [*Id.* at ¶¶ 42-43].

The TCSO notifies the circuit court and the County Attorney's Office of the arrest. [*Id.* at ¶ 45]. The circuit court usually has a hearing scheduled within 24 hours, well within the 72 hours allotted for a bond hearing after arrest under Wyo. R. Crim. P. 46.1. [*Id.* at ¶ 46]. Mr. Ball only spent a total of 23 hours in custody following his two arrests for violation of the 24/7 Program while Mr. Sanchez spent a total of 32 hours in jail following his two arrests. [*Id.* at ¶¶ 48 & 49]

III. APPLICABLE LAW

(A) Standard of Review for Preliminary Injunctions

"A preliminary injunction has the limited purpose of preserving the relative positions of the parties until a trial on the merits can be held." *Downer v. Bureau of Land Mgmt.*, No. 20-CV-191-SWS, 2020 WL 13049422, at *4 (D. Wyo. Nov. 2, 2020) (internal quotation marks and citations omitted). As this Court put it, "[a] temporary restraining order (and, by extension, a preliminary injunction) is meant to preserve the status quo before a final decision on the merits." *Speight v. Gordon*, No. 22-CV-0016-SWS, 2022 WL 255395, at *4 (D. Wyo. Jan. 27, 2022).

In determining whether to grant the extraordinary relief, courts must look at the familiar four factor test developed to address Fed. R. Civ. P. 65:

> Under Rule 65 of the Federal Rules of Civil Procedure, a party seeking a preliminary injunction must show: (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is denied; (3) the movant's threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.

DTC Energy Grp., Inc. v. Hirschfeld, 912 F.3d 1263, 1269–70 (10th Cir. 2018) (internal citations and quotation marks omitted).

Plaintiffs make claims that Wyoming's 24/ Sobriety Program is facially, and as applied to them, unconstitutional. "Outside of the First–Amendment context, for a party to succeed in facially challenging a statute, 'the challenger must establish that no set of circumstances exists under which the Act would be valid.'" *Griffin v. Bryant*, 30 F. Supp. 3d 1139, 1156 (D.N.M. 2014) (*quoting United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). "In contrast, an as-applied challenge concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case." *United States v. Carel*, 668 F.3d 1211, 1217 (10th Cir. 2011) (internal quotation marks and citations omitted). "The nature of a challenge depends on how the plaintiffs elect to proceed—whether they seek to vindicate their own rights based on their own circumstances (as-applied) or whether they seek to invalidate a statute based on how it affects them as well as other conceivable parties (facial)." *Id.* (internal quotation marks and citations omitted).

(B) <u>Fourth Amendment (Unreasonable Search)</u>

The Fourth Amendment generally requires that law enforcement only search a person pursuant to a warrant. However, the Supreme Court has recognized two exceptions to the warrant requirement that apply in this case.

(1) Special Law Enforcement Needs

"In some circumstances, such as when faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Maryland v. King*, 569 U.S. 435, 447, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013) (internal quotation marks and citations omitted). "The need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the interpolation of a neutral magistrate between the citizen and the law enforcement officer." *Id.* (internal quotation marks and citations omitted).

In *Maryland v. King,* the United States Supreme Court upheld a Maryland law that called for police to take a buccal swab of every person charged with a crime of violence. The High Court reasoned that the suspicionless "search effected by the buccal swab of respondent falls within the category of cases this Court has analyzed by reference to the proposition that the touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." *Id.* (internal quotation marks and citation omitted).

(2) Consent

It is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *United States v. Latorre*, 893 F.3d 744, 756 (10th Cir. 2018). "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Latorre*, 893 F.3d at 756 (*quoting Schneckloth*, 412 U.S. at 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854). "The government must present clear and positive testimony that consent was unequivocal and specific and freely and intelligently

given" and must also show that "the police did not coerce the defendant into granting his consent." *United States v. Pena-Sarabia*, 297 F.3d 983, 986 (10th Cir. 2002) (internal quotation marks and citations omitted). Under the totality of the circumstances, the courts consider:

> physical mistreatment, use of violence, threats, promises, inducements, deception, trickery, or an aggressive tone, the physical and mental condition and capacity of the defendant, the number of officers on the scene, and the display of police weapons. Whether an officer reads a defendant his Miranda rights, obtains consent pursuant to a claim of lawful authority, or informs a defendant of his or her right to refuse consent also are factors to consider in determining whether consent given was voluntary under the totality of the circumstances.

Latorre, 893 F.3d at 756 (internal quotation marks and citation omitted)

The government may condition pretrial release. *See* Wyo. R. Crim. P. 46.1. The conditions can include the surrender of certain constitutional rights. *See* Wyo. R. Crim. P. 46.1(c)(xiii). The government can limit a pretrial detainee's liberty. Wyo. R. Crim. P. 46.1(c)(xiii). Under the doctrine of "unconstitutional conditions," what the government may ***not*** do is "require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship" to the situation. *Dolan v. City of Tigard*, 512 U.S. 374, 385, 114 S. Ct. 2309, 2317, 129 L. Ed. 2d 304 (1994)

(C) <u>Fourth Amendment (Unreasonable Arrest)</u>

The Fourth Amendment only requires that an arrest be supported by probable cause to believe a criminal offense is being committed. Although "[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law," a warrantless arrest complies with the Fourth Amendment so long as the officer has "probable cause to believe that the suspect has committed or is committing an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 36, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979). Even an arrest under a state law that does not allow for arrests

satisfies the Fourth Amendment if the officer has probable cause. *See Virginia v. Moore*, 553 U.S. 164, 176, 128 S. Ct. 1598, 1607, 170 L. Ed. 2d 559 (2008)

Under Wyo. R. Crim. P. 46.4(a), violation of a release (or bond) order is punishable by contempt. Wyo. R. Crim. P. 42(d)[1] defines the procedures for prosecuting indirect contempt of court which "is a crime in every fundamental respect" and for which a conviction "is indistinguishable from an ordinary criminal conviction." *In re BD*, 2010 WY 18, ¶ 4, 226 P.3d 272, 273 (Wyo. 2010) (internal quotation marks and citations omitted). Under Wyo. R. Crim. P. 42(d), the maximum penalty for violation of a circuit court order is one year in jail. That means contempt of court for violating a circuit court release order is a misdemeanor. Wyo. Stat. Ann. § 6-10-101. In Wyoming, "[a] peace officer may arrest a person without a warrant when . . .[a]ny criminal offense is being committed in the officer's presence by the person to be arrested." Wyo. Stat. Ann. § 7-2-102(b)(i).

(D) Procedural and Substantive Due Process

Under the Fourteenth Amendment, states must provide criminal defendants procedural and substantive due process. "The fundamental requirement of [procedural] due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976). "Due process is flexible and calls for such procedural protections as the particular situation demands." *United States v. Gardner*, 523 F. Supp. 2d 1025, 1032 (N.D. Cal. 2007). In the course of dismissing challenges to New Mexico's bond system, the New Mexico District Court explained that "where conditions of pretrial

[1] Wyo. R. Crim. P. 42(c)(3) addresses when a ***judge*** may issue an arrest warrant, in conjunction with an Order to Show Cause when there is reason to believe an accused will not appear for the Order to Show Cause. However, nothing in the Rule indicates that a peace officer's authority to *arrest* under Wyo. Stat. Ann. § 7-2-102(b)(i) is limited by the court rule.

release in a criminal case restrict freedom of movement and can be regarded to that extent as a seizure of the individual, the safeguard of a judicial determination upon the record protects against unreasonable seizures by examining the totality of the relevant circumstances." *Collins v. Daniels*, No. 1:17-CV-00776-RJ, 2017 WL 11441859, at *15 (D.N.M. Dec. 11, 2017), aff'd, 916 F.3d 1302 (10th Cir. 2019)

"[T]he substantive component of the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *City. of Sacramento v. Lewis*, 523 U.S. 833, 847, 118 S. Ct. 1708, 1717, 140 L. Ed. 2d 1043 (1998) (internal quotation marks and citations omitted). Generally, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872, 60 L. Ed. 2d 447 (1979). Therefore, "[i]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Id.* at 539.

However, in *United States v. Salerno,* the United States Supreme Court concluded that pretrial ***detention*** was "regulatory in nature," and did "not constitute punishment before trial in violation of the Due Process Clause." *Salerno*, 481 U.S. 739, 748, 107 S. Ct. 2095, 2102, 95 L. Ed. 2d 697 (1987). Under the Bail Reform Act upheld by the *Salerno* Court, Federal courts routinely require drug testing on persons charged with controlled substance offenses. *See United States v. Kelly*, 419 F. Supp. 3d 610, 611 (W.D.N.Y. 2019) (court refused to eliminate condition that defendant "submit to any method of testing required by the pretrial services office for determining whether he is using a prohibited substance" so defendant could use medical marijuana). As to the interplay between the presumption of innocence and ordering pretrial release conditions, the United States Supreme Court has said that:

> the presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial.... But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.

Bell, 441 U.S. at 533, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (internal citations omitted).

(E) Eighth Amendment (Excessive Bail)

The Eighth Amendment, applicable to the states through the Due Process clause of the Fourteenth Amendment, merely provides that "[e]xcessive bail shall not be required." U.S. Const. amend. VIII; *see also Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008). "To find a violation of the Excessive Bail Clause, a court must find that the release conditions are excessive 'in light of the perceived evil.'" *United States v. Gardner*, 523 F. Supp. 2d 1025, 1029 (N.D. Cal. 2007) (*quoting Salerno*, 481 U.S. at 754, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Therefore, conditions of release "must be reasonably calculated to fulfill the government's purpose" for imposing the condition in the first place. *Gardner,* 523 F.Supp.2d at 1029 (internal quotation marks and citations omitted).

IV. ARGUMENT

(A) The Plaintiffs Have Little Likelihood of Success on the Merits and, Therefore, Their Motion for a Preliminary Injunction Should Be Denied

Although the Court must balance the four factors identified above, the fact that the Plaintiffs have little, to no, likelihood of success on the merits means their request for a preliminary injunction should be denied. The Constitutional validity of the 24/7 Program's testing and enforcement provisions are explained in Parts IV(B)-(D), below.

By their own admissions, neither Mr. Ball nor Mr. Sanchez are currently enrolled in the 24/7 Program. Denying the preliminary injunction would have no impact on either of them. For purposes of standing, "[a]llegations of possible future injury do not satisfy the ['actual or

imminent'] requirement[] of Art. III." *Fontenot v. Hunter*, 378 F. Supp. 3d 1075, 1087 (W.D. Okla. 2019) (*quoting Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). Thus, it is not even clear that the Plaintiffs can prove any injury redressable by the courts.

Conversely, every judge in the State of Wyoming would lose the ability to impose reasonable bond conditions. Although the 24/7 Program is utilized in only three counties, a ruling in favor of the Plaintiffs would call into question the ability to use pretrial drug tests as a reasonable condition bond. Even the Federal courts in Wyoming may be prohibited from including their standard term and condition that the "defendant shall submit to drug and alcohol testing as directed by the Probation Office" if the injunction is granted. Therefore, the harm to the people of Wyoming greatly outweighs any theoretical harm the Plaintiffs may claim on the off chance they are put back into the 24/7 Program.

Finally, the harm caused by an injunction would be adverse to an important public interest. The 24/7 Program is the Legislature's response to real and present danger posed by drunk drivers. In 2019, there were 10,142 fatalities on America's roads involving alcohol[2] According to Governor Gordon's Council on Impaired Driving (WGCID), there were 269 crashes in Wyoming resulting in injuries where alcohol played a role. One out three drunk drivers are repeat offenders.[3] In 2013, when the Legislature considered the legislation that created what has become the 24/7 Sobriety Program, 36% of all highway deaths involved alcohol. By 2019, that number was down to 19%, the lowest percentage since NHTSA started keeping statistics in 1982.[4]

These Defendants cannot say that the 24/7 Program is responsible for this trend, but it certainly cannot hurt that people who are charged with drunk driving know that they may be subject

[2] https://www.nhtsa.gov/risky-driving/drunk-driving
[3] https://wygcid.org/wyoming-statistics/.
[4] https://www.nhtsa.gov/risky-driving/drunk-driving

to a testing regiment that will ensure they remain sober why driving in Wyoming. For all of these reasons, the Plaintiffs' Motion for a Preliminary Injunction should be denied.

(B) The Drug Test Searches Performed as Part of the 24/7 Sobriety Program Do Not Violate the Fourth Amendment

(1) Plaintiffs Knowingly and Voluntarily Consented to the Searches and Seizures at Issue by Enrolling in the 24/7 Program

The facts are undisputed that each of the Plaintiffs voluntarily enrolled in the 24/7 Program. (*See* ECF No. 3-1 at 11; ECF No. 3-2 at 2). Neither of the plaintiffs were compelled to enroll in the program. Instead, enrollment in the program was condition that was legitimately related to the state's interest of keeping the roads safe from drunk drivers.

Enrollment in the Program is a choice. In this instance, both Plaintiffs received unsecured bonds (i.e., they did not have to come up with any money to obtain release). Although not "OR" or "own recognizance" bond, the Plaintiffs received a significant benefit by agreeing to the terms and conditions offered by the circuit court. Even the California Supreme Court concluded that a pretrial detainee consents to searches, including ***random*** drug testing, when he agrees to the release conditions imposed by the court:

> A pretrial detainee is not required to agree to such restrictions, but rather is subject to them only if he or she consents to their imposition, in exchange for obtaining OR release. Petitioners contend that an OR releasee's consent to these conditions does not represent a true and 'voluntary' consent, because the consequence of refusing to give such consent is continued incarceration . . . . ***[W]hen one who otherwise would be incarcerated prior to judgment is offered the opportunity to obtain OR release, he or she is not entitled to unconditional, bail-free release, but may obtain OR release only in the discretion of the court or magistrate, and only upon those reasonable conditions attached to the release.*** Although it may be true that a defendant who is faced with the choice of agreeing to the challenged conditions or remaining incarcerated has a considerable incentive to agree to the conditions, that circumstance, alone, does not render the consent coerced or involuntary.

In re York, 9 Cal. 4th 1133, 1150, 892 P.2d 804, 814 (1995) (internal quotation marks and citations omitted); *see also State v. Ullring,* 741 A.2d 1065, 1068 (Me. 1999) (finding that "signature on the bail bond is a sufficient manifestation of his voluntary consent" to the bond conditions).

The general consensus around the nation is to do away with monetary bonds and instead impose conditions reasonably calculated to have the defendant appear and keep him and the community safe.[5] When considering bond in cases involving drugs and alcohol, a condition to help maintain sobriety makes more sense than paying $550 to have someone post a $5,000 bond, which is what these Plaintiffs would have had to do if the circuit court had imposed a $5,000 cash or surety bond with no conditions. Although the Wyoming Constitution guarantees a right to bond, it does not mean a bond that the particular defendant can afford. *Vigil v. State*, 563 P.2d 1344, 1349 (Wyo. 1977). If the Plaintiffs would have been unable to post bond a $5,000 cash or surety bond, then they would have sat in jail pending trial, a far more significant consequence. Under that scenario, the Plaintiffs' cells and persons would have been subject to multiple searches. In light of these possibilities, it is clear that a pretrial defendant (and these Plaintiffs in particular) voluntarily consents to conditions, including searches, when he chooses to take an unsecured bond by enrolling in the 24/7 Program.

There is no evidence that the consent was involuntary. *See LaTorre, supra*. Moreover, the Plaintiffs themselves established that they were able to get the condition removed. The trial court did not make the Plaintiffs an offer they couldn't refuse. Instead, the Plaintiffs accepted an unsecured bond with conditions which take the drug tests outside the purview of the Fourth

[5] "According the American Civil Liberties Union, "[j]ailing people simply due to their inability to afford a sum of money is unconstitutional and poor public policy" when it comes to monetary bonds. https://www.aclu.org/press-releases/civil-rights-groups-demand-shelby-county-end-discriminatory-wealth-based-bail

Amendment. Since the Defendant have demonstrated by clear and positive evidence that the Plaintiffs consented to the searches at issue, there can be no Fourth Amendment violation and Plaintiffs' lawsuit is destined to fail.

(2) The 24/7 Program Presents a Special Law Enforcement Need that Warrants the Searches without an Additional Probable Cause Finding

The 24/7 Program calls for regular, frequent drug tests. There is no discretion on the part of law enforcement as to when they do the tests or where they do the tests or if they do the tests. It is a program much like the buccal swab program at issue in *Maryland v. King.* Like that program, it addresses a law enforcement issue beyond investigating crime, namely ensuring compliance with release conditions designed to keep defendants and the general public safe from impaired driving.

The Plaintiffs have put forth no evidence that anyone has been charged with use of a controlled substance for having a positive drug test. *See* Wyo. Stat. Ann. § 35-7-1059 (criminalizing use of controlled substances). Nor have the Plaintiffs put forth any evidence that they, or anyone else, has been prosecuted for the crime of contempt as a result of a violation of the 24/7 program. Despite the stated purpose of the statute, it is clear that the program is being used to make roads safer, not to get more criminal citations. *See State v. Spady*, 2015 MT 218, ¶ 29, 380 Mont. 179, 189, 354 P.3d 590, 598 (Mont. 2015) (upholding Montana's 24/7 program and noting "[t]he overarching goal of the 24/7 Program is safeguarding the public by reducing the number of intoxicated drivers in Montana).

Moreover, as required under *King,* the 24/7 Program imposes a minimal intrusion into the defendant's right to privacy. It requires the defendant to blow into a tube at the sheriff's office. The more substantial invasions of privacy (strip searches and being jailed) are not the result of the

24/7 Program. Those are the result of violation of a court order in the presence of a peace officer, which results in an arrest for contempt, which supported by probable cause

The Plaintiffs rely on *United States v. Scott,* 450 F.3d 863, 872-74 (9th Cir. 2006). Their reliance is misplaced. (*See* ECF No. 3 at 14, n. 66 citing. First, *Scott* involved a condition for "random drug testing any time of the day or night," not the "frequent and certain" drug testing done at the TCSO as required by the 24/7 Program. *Compare United States v. Scott*, 450 F.3d 863, 865 (9th Cir. 2006) *with* Wyo. Stat. Ann. §§7-13-1703(b), 7-13-1704(b). Second, the search that was suppressed in *Scott* was the search of his home where his expectation of privacy was at its "zenith." *Scott*, 450 F.3d at 871. Here, the drug testing occurs in the lobby of the sheriff's office, not in the Plaintiffs home. (ECF No. 3-1 at 11). Third, as the majority opinion in *Scott* concedes, a pretrial drug testing provision is permissible upon an individualized finding by the judge that the particular defendant needs the testing to remain sober for trial. *Scott*, 450 F.3d at 872. The Plaintiffs have put forth no evidence that the judge did not properly analyze their individual need for particular bond conditions under Rule 46.1. Instead, this Court should presume that the circuit court did its job properly since there are no allegations that the circuit court always imposes the 24/7 Program on first time DUIs.

Finally, the *Scott* decision rejected the special law enforcement needs exception seven years before the United States Supreme Court decision in *Maryland v. King.* Whereas here the search condition is minimally invasive and has the added purpose of ensuring compliance with bond conditions, the special law enforcement needs noted by the five-member majority in *King* apply. Therefore, the Plaintiffs have failed to show that the 24/7 Program is an unreasonable search. Consequently, they cannot succeed on the merits of their claims.

(C) An Arrest for Violation of the 24/7 Program is Not Unreasonable Seizure under the Fourth Amendment

Under the Fourth Amendment, all that is required for a law enforcement officer to make an arrest is probable cause. Plaintiffs argue that the statute is unconstitutional because it leaves the arrest decision up to the "judgment of the officer. However, the statute clearly limits the officer's discretion to arresting only when a defendant (a) fails to test, or (b) tests positive for alcohol, both of which are violations of the defendant's bond conditions.

Violators of the 24/7 Program are not charged with a separate offense of contempt. They are arrested because of violation of a court order (the release conditions), which is contempt, and that allows for arrest under Wyo. Stat. Ann. § 7-2-102. However, since no one is prosecuted for contempt, the requirements for instituting a contempt prosecution contained in Wyo. R. Crim. P. 42 are inapplicable. When an officer sees someone using drugs on the street he can arrest without a warrant. Even though the prosecutor may not pursue the charge that does not make the arrest impermissible or unconstitutional.

Second, the arresting officers have probable cause to believe a crime (misdemeanor contempt) is being committed (even if it will not be prosecuted). The arresting officer has the court order in the jail file that has the release order and participation agreement. Therefore, when the officer sees the defendant show up late for testing (i.e., refusing to test according to the program rules), the officer knows that a court order has been violated just like an officer who knows a pretrial defendant who has a "no bars or liquor stores" condition is violating that condition if the officer sees him in a bar. Clearly, that constitutes probable cause.

Plaintiffs argue that Section 1709 "is directly at odds with the Fourth Amendment protections afforded under" Wyo. Stat. Ann. § 7-2-102 and Wyo. R. Crim. P. 42. (ECF No. 3 at 19). That is not the question. Whether other statutes or court rules contain additional requirements

is wholly irrelevant. The issue is whether the officers had probable cause to believe a crime was being committed at the time he made the arrest. Under the facts of the Plaintiffs' cases, when one of the Plaintiffs was late (regardless of how late or why they are late), they have not tested according to the Program rules, which constitutes a violation of a court order, which is contempt, which "is a crime in every fundamental respect" and for which a peace officer may arrest. *See In re BD*, *supra*. [6]

The facts are undisputed that the release order required testing according to the program and Messrs. Ball and Sanchez failed to show up on time for their breath tests. Just like when an officer that sees someone using methamphetamine can arrest him without a warrant, the officers administering the 24/7 Program can arrest for failing to comply with the Program requirements. Since the arrests are lawful, and comport with the Fourth Amendment and Wyoming law, the Plaintiffs' claims are doomed to fail.

(D) The 24/7 Program Does Not Shock the Conscience and Provided The Plaintiffs With Timely Judicial Review of Their Alleged Violations of

(1) Procedural Due Process

The 24/7 Program, as written is somewhat problematic. Like with the portion of the statute that purports to have a standard of the officer's "judgment," the statute only requires that the defendant be brought before a judge within a "reasonable time." Wyo. Stat. Ann. § 7-13-1709(b). Although that may be a nebulous standard, in practice, this Court knows from the record that these Plaintiffs were seen by the circuit court within 28 hours of being arrested. [Decl. of M. Carr at ¶

[6] Although the Plaintiffs make much of the "three tardy" rule, the 30-minute grace period to allow for tardies rather than refusals, and not arresting on the first time someone is late, are matters of lenity that are not required by the release orders, the Program rules, or the participation agreement, that TCSO has implemented because of real world concerns.

49]. Even the Plaintiffs' own declarations establish they never spent two days in jail for any single arrest. [ECF No. 3-1 (Ball Decl.) at ¶¶ 17, 20; ECF No. 3-2 (Sanchez Decl.) at ¶ 15).

The United States Supreme Court has said that waiting 48 hours to have a magistrate review a warrantless arrest to determine if there is probable cause for the arrest is presumptively reasonable. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S. Ct. 1661, 1670, 114 L. Ed. 2d 49 (1991). Wyo. R. Crim. P. 5(a) mandates an initial appearance on a warrantless arrest within 72 hours. Similarly, Wyo. R. Crim. P. 46.1, which is probably the most applicable rule, also requires that a defendant receive a bond hearing within 72 hours. In light of these clear rules, the fact that the Plaintiffs were seen in about a day clearly comports with procedural due process.

(2) Substantive Due Process

As to the substantive component, there is nothing conscience shocking about the 24/7 Program. The 24/7 Program merely enforces conditions of pretrial release.

a. The Statute is Not Vague

Plaintiffs argue that the law is vague. They claim Mr. Sanchez overslept by an hour that resulted in one of his arrests. [ECF No. 3 at 20]. From there, they also claim that the arrest authority under the 24/7 Program "acts as a criminal law with no mens rea." [Id. at 23].

The Wyoming Supreme Court defined the elements of criminal contempt as: "(1) a reasonably specific order; (2) violation of the terms of the order; and (3) willful intent to violate the order." *Weidt v. State*, 2013 WY 143, ¶ 28, 312 P.3d 1035, 1042 (Wyo. 2013). Thus, if anyone tried to prosecute a contempt charge for a 24/7 violation, Wyoming law provides the allegedly missing "mens rea." If anyone had actually prosecuted a contempt against Mr. Sanchez, perhaps he could have obtained an acquittal on the element of whether he "willfully" violated the court's release order. That in no way vitiates the probable cause the officer had to arrest him for

not testing when ordered to do so in violation of a clear, and unequivocal order. Nor does it make the statute vague in light of clear Wyoming Supreme Court precedent.

b. The Presumption of Innocence

The 24/7 Program clearly does not impose punishment prior to adjudication of guilt. Under *Salerno,* a condition that someone not drink while on bond for a drunk driving charge is reasonably related to legitimate governmental objective, namely keeping drunk drivers off Wyoming roads. *See Spady,* ¶ 29, 354 P.3d at 598. As the United States Supreme Court noted in *Bell,* the presumption of innocence is a trial concept, not a pretrial release concept. To hold that law enforcement cannot arrest a defendant who is obviously violating his release conditions in the officer's presence would not be ignoring the presumption of innocence. It would be instructing law enforcement to turn a blind eye toward court orders.

Moreover, arresting someone for not testing on time is absolutely consistent with the plain language of the statute and due process. If there are no temporal parameters, then defendant can come and test whenever they fell like it, or more accurately, when they have abstained from use long enough to pass the test. As explained above, the TCSO "tardy" system is a matter of lenity, not an arbitrary and capricious application of the plain language of the statute.

c. Excessive bail or bond

The 24/7 Program does not shock the conscience by imposing an excessive bail. [ECF No. 3 at 26]. For the reasons set forth above, the Program simply does not allow for arrests unsupported by probable cause or call for searches violative of the Fourth Amendment. The costs of the program are not excessive. As noted above, if the circuit court would have just ordered a $5,000 cash or surety bond, Plaintiff Sanchez would have paid about the same amount of money

(presuming he could obtain a surety bond), but he would have had to come up with that money up-front. *See Spady*, ¶ 35, 354 P.3d at 599.

Neither the plain language of the statute nor the actual application of the statute, result in defendants "having no opportunity to present mitigating evidence" as to whether they violated their bond conditions nor are the defendants entitled to an opportunity to defend themselves "before arrest and detention" as argued by the Plaintiffs. [ECF No. 3 at 24]. Whether the circuit court proceeds with a proper hearing under either Wyo. R. Crim. P. 42 or Rule 46.4(c) are judicial functions, not aspects of the 24/7 Program. The undisputed facts are that the Plaintiffs did not comply with the 24/7 Program testing requirements. The officers arresting them witnessed the violation, a crime, and arrested them. The TCSO notified the court and the County Attorney that there has been an arrest supported by probable cause that a crime was committed in the officer's presence. The Plaintiffs had their bond hearings within about a day.

This is no different than an officer arresting someone on the street for using methamphetamine. The arrestee can be taken to jail and a judge will determine if there is probable cause within 72 hours. The arrestee will be given the opportunity to explain their side of the story promptly, but not before arrest and detention. Thus, the actual application of the 24/7 Program is not conscience shocking, but instead is no different than a typical, warrantless, misdemeanor arrest made by police everyday throughout the country.

IV. CONCLUSION

Like North and South Dakota, Montana, and Washington, Wyoming has implemented a program to uniformly enforce a bond condition that this Court, as well as every other court in the State, has imposed in at least some of its drug and alcohol-related cases- no drinking or drug use. It is a regulatory program that allows pretrial detainees to agree to conditions that help to keep

themselves safe, as well as keeping the community safe, pending trial. Without the enforcement mechanism complained of by the Plaintiffs, the 24/7 Program would have no way of making sure that people are staying clean and sober. For the reasons set forth above, the Plaintiffs' Motion for Preliminary Injunction (ECF No. 2) should be denied.

DATED this 28th day of March, 2022.

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CERTIFICATE OF SERVICE

I do hereby certify that on this 28th day of March, 2022, a true and correct copy of the foregoing **Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction** was served as indicated below:

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