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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.	)	Civil Action No. 22-CV-00047-SWS
BRIDGET HILL, Wyoming Attorney General in her official capacity, et al.,	)	
Defendants.	)	

STATE DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

The State Defendants[1] submit the following memorandum in opposition to plaintiffs' motion for preliminary injunction.

I. PRELIMINARY STATEMENT

After analyzing statewide statistics for calendar year 2020, the Wyoming Association of Sheriffs and Chiefs of Police concluded that:

> Although Wyoming is relatively "safe" from what is generally considered to be serious crime (felonies), the high percentage of alcohol-involved arrests, the inordinate number of arrests for public intoxication and driving under the influence,

[1] Defendants Bridget Hill and Mark Gordon, in their official capacities, and Matt Carr, Sara King, Bill West, Doug Raffelson, Cody Haderlie and Heidee McKenzie, in their individual capacities.

> and the high levels of blood alcohol content for drivers arrested for being impaired represent real and significant threats to public safety.

(*Alcohol and Crime and Wyoming – 2020*, App. Ex. "A" at 4).[2]

According to the cited report, "[a]lcohol was involved in 52.22% of all custodial arrests" and "driving under the influence ["DUI"] arrests accounted for 33.35% of all arrests," with an average blood alcohol content ("BAC") of 0.1656, in 2020.[3] (*See* App. Ex. "A" at 5). "In addition, 34% percent of persons arrested for DUI in 2020 had been arrested for DUI previously." (*Id.* at 6).

Plaintiffs Alberto Sanchez and David Christopher Ball will be part of those statistics for 2021. Plaintiffs were arrested for driving while under the influence ("DWUI") in Teton County in 2021.[4] The Teton County Circuit Court required plaintiffs to refrain from consuming alcohol as a condition of their releases from jail. (ECF No. 3-1 at 7; ECF No. 3-2 at 8-9).

The court also conditioned their releases on participation in the 24/7 Sobriety Program ("Program"), pursuant to which they underwent breathalyzer tests twice per day at the Teton County Sheriff's Department. (ECF No. 3-1 at 1-2; ECF No. 3-2 at 3). Plaintiffs failed to submit to testing on certain occasions, were arrested as a result and spent a short time in jail. (ECF No. 3-1 at 3-4; ECF No. 3-2 at 3-4). Both plaintiffs have been released from the Program.

Plaintiffs have now filed suit and moved for a preliminary injunction barring enforcement of the Wyoming 24/7 Sobriety Program Act (the "Act") and the implementing administrative regulations. (ECF Nos. 1 and 2). Plaintiffs allege the Program violates the Fourth, Eighth and Fourteenth Amendments to the United States Constitution. While plaintiffs purportedly want to

[2] Citations to "App." are to the appendix filed herewith.
[3] In Teton County, alcohol was involved in 80.42% of all custodial arrests in 2020. (*See* App. Ex. "A" at 16). DUI arrests accounted for 40% of all arrests in Teton County in 2020. (*Id.* at 10).
[4] Ball ultimately pled guilty to the crime. (*See* Ball Judgment and Sentence, App. Ex. "E").

invalidate the Program *in toto*, they focus entirely on its application to pre-trial releasees in their brief. (ECF No. 3).

For the reasons that follow, plaintiffs' motion should be denied. To begin with, plaintiffs do not have standing to seek injunctive relief. Plaintiffs are not in the Program, as noted, and they have neither shown nor alleged that there is a "real and immediate" threat they will return to the Program. Plaintiffs cannot show probable (or even possible) irreparable harm for the same reason.

Further, plaintiffs have not shown a reasonable likelihood of success on the merits. The Excessive Bail Clause of the Eighth Amendment is not violated when a DWUI defendant submits to breathalyzer tests as a condition of his pretrial release. The tests also constitute reasonable searches under the Fourth Amendment, considering plaintiffs' diminished privacy interests, the negligible intrusiveness of the tests and the importance of the governmental interests at stake. Arresting participants in the Program who test positive or fail to submit to tests is likewise reasonable under the Fourth Amendment. And contrary to plaintiffs' claims, the Act does not violate due process.

Finally, the balance of harms (nonexistent in plaintiffs' case) and the public interest strongly favor denial of the requested preliminary injunction. The Court should therefore decline to issue it.

II. BACKGROUND

24-7 Sobriety Program

The 24-7 Sobriety Program was developed in South Dakota in 2005. (*See* B. Kilmer and G. Midgette, *Criminal Deterrence: Evidence from an Individual Level Analysis of 24-7 Sobriety,* Vol. 39, No. 3, p. 807, Journal of Policy Analysis and Management (2020), App. Ex. "B"). The South Dakota Program requires "those arrested for or convicted of an alcohol-related offense to

abstain from alcohol and submit to alcohol tests multiple times daily. Those testing positive or missing a test receive a swift, certain, and moderate sanction; typically, a night or two in jail." (*Id.* at p. 801). In that regard, "[w]ithin the clinical literature on alcohol treatment, individuals with alcohol use disorder have been found to be responsive to predictable, immediate consequences for behavior[.]" (*Id.* at p. 807). A recent comprehensive study determined that the South Dakota Program has reduced rearrests and probation revocations by 49%. (*Id.* at p. 801).

The Wyoming Legislature enacted the 24/7 Sobriety Program Act in 2014. (*See* Wyo. Stat. Ann. §§ 7-13-1701 through 7-13-1710). Under Wyoming Statutes § 7-13-1703(a), "[t]he purpose of the program is to reduce the number of repeat crimes that are related to substance abuse by monitoring an offender's sobriety through intensive alcohol and drug testing and immediate and appropriate enforcement of violations." Nine states, including Wyoming, have enacted statewide 24/7 Sobriety Programs and four others have pilot projects underway. (*See* Adriaens Aff., App. Ex. "C" at ¶ 6).

The Wyoming Program applies "upon a charge or offense for conduct committed while intoxicated or under the influence of a controlled substance." Wyo. Stat. Ann. §§ 7-13-1704(b) and 7-13-1708(a); 24/7 Sobriety Program Rules, ch. 2 § 1(a). A court "may" order participation in the Program in conjunction with conferring a benefit on the defendant – granting a pretrial release, suspending a sentence or placing the defendant on probation.[5] Wyo. Stat. Ann. § 7-13-1708(a) and (b). The Program provides for twice-daily breathalyzer tests at a single designated location. Wyo. Stat. Ann. § 7-13-1704(b); Admin. Rule 0015.0017 ch. 2, § 2(a). A participant

[5] Since Section 7-13-1704 (a) and (b) use the word "may", conditioning pretrial release (and other relief) on participation in the Program is not mandatory, but within the court's discretion. *See In re Est. of George*, 2003 WY 129, ¶ 10, 77 P.3d 1219, 1222 (Wyo. 2003).

who tests positive for alcohol or fails to submit to a test is immediately arrested. Wyo. Stat. Ann. § 7-13-1709(a).

The Program is currently operating in four counties – Campbell, Sheridan, Teton and Fremont. (*See* App. Ex. "C" at ¶ 7). In 2021, the rate of negative tests was 99.85% and the overall compliance rate was 99.37%. (*Id.* at ¶ 7). In Teton County, those rates were 99.83% and 99.79%, respectively. (*Id.*). The Program is helpful to offenders by enabling them to get out of jail and maintain their sobriety. (*Id.* at ¶ 8). The Program also helps to identify high-risk offenders and keep the community safe. (*Id.*).

Plaintiffs' Participation in the Program

Plaintiff Ball was arrested for DWUI on February 25, 2021. (ECF No. 3-1 at 1). His DWUI charge arose from a traffic accident. (*Id.* at 6). Plaintiff Sanchez was arrested for DWUI on May 9, 2021. (ECF No. 3-2 at 1). It was Sanchez's third DWUI offense. (*Id.*).

Both plaintiffs were released on an unsecured bond and thus did not have to make a bail payment. (ECF No. 3-1 at 1; ECF No. 3-2 at 1). Plaintiffs' bond and release conditions included refraining from alcohol consumption and enrolling in the Program. (ECF No. 3-1 at 7; ECF No. 3-2 at 8-9). The charge to enroll in the Program was $30.00. (ECF No. 3-2 at 2). The charge per test was $2.00. (*Id.*).

Plaintiffs executed 24/7 Sobriety Participation Agreements in which they agreed, in part, to the following:

> I shall strictly comply with program rules, including reporting timely for all tests and paying all fees associated with the program.
>
> * * *
>
> All testing shall occur at the Teton County Jail between the times of 6am-7am and 9pm-10pm, unless otherwise ordered. If I am ordered to submit to alcohol breath tests, tests shall occur twice per day . . . I also understand that arriving 30 minutes

> past either deadline will be considered a missed test. [Plaintiffs initialed this provision.]
>
> * * *
>
> **I understand that a positive test, a failure to report or 3rd tardy will result in my immediate arrest.** [Plaintiffs initialed this provision.]

(Ball Participation Agreement, ECF No. 3-1 at 11; Sanchez Participation Agreement, App. Ex. "D" at 1).

In violation of his Participation Agreement and Release Order, Ball admittedly failed to submit to his morning breathalyzer test on February 28, 2021. (ECF No. 3-1 at 3). Accordingly, Ball was arrested when he appeared for his evening test on February 28, 2021. (*Id.*). Ball evidently appeared before a judge the following afternoon and was released from jail. (*Id.* at 3). Ball admits he then failed to submit to four consecutive tests on March 26-27, 2021. (*Id.* at 4). Ball was arrested when he showed up for his morning test on March 28, 2021. (*Id.*). Ball appeared before a judge later that day and was released from jail. (*Id.*).

The Circuit Court discharged Ball from the Program on March 19, 2021. (ECF No. 3-1 at 4). Ball subsequently pled guilty to DWUI. (*See* Judgment and Sentence, App. Ex. "E"). Ball was sentenced to a fine and 180 days in jail, with all but four days suspended. (*Id.*). Ball received credit for the time he spent in jail due to his violations of his Participation Agreement and Release Order. (ECF No. 3-1 at 4-5). Ball was also placed on unsupervised probation. (*Id.* at 5). Ball's probation conditions do not include participation in the Program. (*See* Probation Order, App. Ex. "F").

In violation of his Participation Agreement and Appearance Bond, Sanchez admittedly failed to submit to his evening breathalyzer test on May 15, 2021. (ECF No. 3-2 at 3). Sanchez was arrested when he arrived (late) for his morning test the following day. (*Id.* at 4). Sanchez

appeared before a judge about a day later and was released from jail.[6] (*Id.*). The Circuit Court discharged Sanchez from the Program on October 11, 2021. (*Id.* at 5). Sanchez is on release awaiting completion of his criminal case. (*Id.*)

III. LEGAL STANDARD

As this Court has stated:

> "A preliminary injunction has the limited purpose of preserving the relative positions of the parties until a trial on the merits can be held. It is an extraordinary remedy never awarded as of right. A party may be granted a preliminary injunction only when monetary or other traditional legal remedies are inadequate, and the right to relief is clear and unequivocal.
>
> 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."

Downer v. Bureau of Land Mgmt., No. 20-CV-191-SWS, 2020 WL 13049422, at *4–5 (D. Wyo. Nov. 2, 2020) (quoting *DTC Energy Grp., Inc. v. Hirschfeld*, 912 F.3d 1263, 1269–70 (10th Cir. 2018)).

The United States Supreme Court has held that "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) (emphasis in original) (quotation omitted). In addition, a preliminary injunction that alters the status quo is specifically disfavored. *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*,

[6] Sanchez subsequently did not appear for tests on August 23-29, 2021 and, as a result, was arrested when he appeared for his morning test on August 30, 2021. (ECF No. 3-2 at 4). The Circuit Court evidently had granted Sanchez a furlough from the Program, but had failed to enter an order to that effect. (*See* Order Temporarily Relieving Defendant from Participation in the 24/7 Program (Nunc Pro Tunc), App. Ex. "G"). The Circuit Court entered an order nunc pro and ordered Sanchez's immediate release. (*Id.*). Sanchez was released after spending four hours in jail. (ECF No. 3-2 at 5).

389 F.3d 973, 975 (10th Cir. 2004), *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 126 S. Ct. 1211 (2006). Where a party requests an injunction that alters the status quo, his claims "must be more closely scrutinized to assure that the exigencies of the case support granting of a remedy that is extraordinary even in the normal course." *Id.*

In this case, plaintiffs are asking the Court to alter the status quo by rendering operable statutes and administrative rules inoperable. (ECF No. 2 at 2). As a result, plaintiffs must make a "strong showing" as to their likelihood of success and the balance of harms. *O Centro,* 389 F.3d at 975. Particularly given that requirement, plaintiffs have not satisfied any of the elements for the issuance of the "extraordinary and drastic remedy" of a preliminary injunction in this case. *Mazurek,* 520 U.S. at 972. The Motion for Preliminary Injunction should therefore be denied.

III. ARGUMENT

A. PLAINTIFFS DO NOT HAVE STANDING TO SEEK A PRELIMINARY INJUNCTION IN THIS CASE.

"Those who seek to invoke the jurisdiction of the federal courts must satisfy the Article III requirement of having an actual case or controversy." *Faustin v. City, Cty. of Denver, Colorado,* 268 F.3d 942, 947 (10th Cir. 2001). "[The] "case-or-controversy requirement is satisfied only where a plaintiff has standing." *Sprint Communications Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008). "Plaintiffs bear the burden of proof to establish standing." *Rio Grande Found. v. City of Santa Fe, New Mexico,* 7 F.4th 956, 959 (10th Cir. 2021).

To have standing to obtain prospective relief, a party must have a continuing injury. *PeTA, People for the Ethical Treatment of Animals v. Rasmussen,* 298 F.3d 1198, 1202 (10th Cir. 2002). "While a plaintiff who has been constitutionally injured can bring a § 1983 action to recover damages, that same plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured in the future." *Facio v. Jones,* 929 F.2d

541, 544 (10th Cir. 1991). In that regard, "a threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983) (internal quotations omitted). Where a criminal statute is involved, a party "must show a real and immediate threat that she will be prosecuted under [the] statute in the future." *Faustin,* 268 F.3d at 948.

Applying those principles, plaintiffs do not have standing to seek injunctive relief in this case. The Circuit Court released Ball from the Program over a year ago. (ECF No. 3-1 at 4). The court released Sanchez from the Program several months ago. (ECF No. 3-2 at 5). Plaintiffs do not allege there is a "real and immediate" threat they will be placed back in the Program, let alone submit any evidence to support such a claim. Plaintiffs do not allege, for example, that they are intent on violating their release and probation orders such that they will be brought back before the court. Instead, plaintiffs merely speculate that they "could be placed back on the Program ...." (ECF No. 3 at 5 n. 1). A hypothesis is insufficient to establish standing. *Lyons,* 461 U.S. at 102. Consequently, the Court should deny plaintiffs' motion for a preliminary injunction and dismiss their claims for declaratory and injunctive relief in this case. *Facio,* 929 F.2d at 544.

B. PLAINTIFFS HAVE NOT SHOWN PROBABLE IRREPARABLE HARM.

"'[B]ecause a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements' will be considered." *Downer,* 2020 WL 13049422, at *5 (quoting *DTC Energy,* 912 F.3d at 1270). "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman v. S. Salt Lake City,* 348 F.3d 1182, 1189 (10th Cir. 2003) (internal quotation and citations omitted). "Irreparable harm is not harm that is merely serious or substantial." *Id.* (internal quotation omitted).

Further, "[t]he party seeking injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Heideman,* 348 F.3d at 1189 (emphasis in original) (internal quotation omitted). "If the harm is not likely to occur before the district court rules on the merits, there is no need for preliminary injunctive relief." *State v. U.S. Env't Prot. Agency,* 989 F.3d 874, 884 (10th Cir. 2021) (internal quotation omitted).

Plaintiffs cannot show any irreparable harm for the same reason they cannot show standing. *Lyons,* 461 U.S. at 103 ("We [have] observed that case or controversy considerations 'obviously shade into those determining whether the complaint states a sound basis for equitable relief[.]'") (quoting *O'Shea v. Littleton,* 414 U.S. 488, 499, 94 S.Ct. 669, 677 (1974)). Plaintiffs have not shown or even alleged that they face an imminent return to the Program.[7] To the contrary, plaintiffs apparently deny they have to make the requisite showing because they allege past violations of their constitutional rights. (Doc. 3 at 6 n. 3). However, the cases they cite both involved *ongoing* violations of the plaintiffs' constitutional rights. *See Guzzo v. Mead,* Civ. No. 14-200-SWS, 2014 WL 5317797 (D. Wyo. 2014) (same-sex couples unable to get a marriage license in Wyoming or obtain legal recognition by Wyoming of their out-of-state marriage); *Kikumura v. Hurley,* 242 F.3d 950 (10th Cir. 2001) (prison denying inmate pastoral visits).

Plaintiffs have not shown irreparable (or any) harm is in prospect unless a preliminary injunction is issued. The motion should be denied.

[7] Plaintiffs' return to the Program would be lawful in any event.

C. PLAINTIFFS HAVE NOT SHOWN A SUBSTANTIAL LIKELIHOOD THAT THEY WILL PREVAIL ON THE MERITS.

Plaintiffs allege that the 24/7 Sobriety Program Act and implementing regulations are unconstitutional on their face. (*See* ECF No. 3 at 17, 19). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987). As demonstrated below, plaintiffs cannot make such a showing in this case.

1. Participation in the Program does not constitute an excessive bail condition under the Eighth Amendment.

Under the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. According to the United States Supreme Court, "[t]he only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil." *United States v. Salerno,* 481 U.S. 739, 754 (1987). To meet that standard, "[b]ail (and perforce conditions of release) must be reasonably calculated to fulfill the government's purpose." *United States v. Gardner*, 523 F. Supp. 2d 1025, 1029 (N.D. Cal. 2007).

Wyoming courts are empowered to set conditions on pretrial release. Wyo.R.Crim.P. 46.1(c). The conditions include a condition prohibiting the use of alcohol, which presumably is always imposed where DWUI offenses are involved. Wyo.R.Crim.P. 46.1(c)(1)(B)(ix). The legislature has also given courts the option of conditioning release on participation in the Program. Wyo. Stat. Ann. § 7-13-1708(b) ("Participation in the program may be imposed as a condition of release under the Wyoming Rules of Criminal Procedure, including rules 46.1 and 46.2.")

Plaintiffs do not allege the condition prohibiting the use of alcohol is unconstitutional. Perhaps the parties agree that persons arrested for DWUI should stay away from alcohol.[8] What plaintiffs object to is a procedure reasonably calculated to assure compliance with that condition – twice daily breathalyzer tests under the Program. *See Oliver v. United States,* 682 A.2d 186, 189 (D.C. 1996) (power to condition pretrial release on abstention from illegal drugs necessarily provides authority to order drug testing to determine compliance). The alternative is incarceration. "It is [also] reasonable to expect that a defendant who maintains sobriety is more likely to appear in court on the appointed dates than a defendant who is under the influence of drugs or alcohol." *State v. Ullring*, 741 A.2d 1065, 1072-73 (Me. 1999). And, as the South Dakota study bears out, participation in the Program is reasonably calculated to reduce repeat arrests.

Plaintiffs also allege the charges for participating in the Program constitute excessive bail. As noted, the enrollment fee is $30.00 and the fee per test is $2.00. (ECF No. 3-2 at 2). The fees are statutorily required to be set as low as possible while covering the costs of the Program. Wyo. Stat. Ann. § 7-13-1705(a)(ii). Sanchez and Ball paid $514.00 and $106.00, respectively, to participate in the Program. (ECF No. 3-2 at 2; ECF No. 3-1 at 2). Plaintiffs cite no authority holding such amounts to be excessive under the Eighth Amendment, and they likely compare favorably to ordinary bail. The Program does not call for excessive bail in violation of the Eighth Amendment.

2. Participation in the Program is a reasonable condition of pretrial release under the Fourth Amendment.

The Fourth Amendment provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

[8] This is particularly true with respect to persons like Sanchez, for whom this is a third DWUI offense, and Ball, who was involved in a traffic accident while he was intoxicated. (ECF No. 3-2 at 1; ECF No. 3-1 at 6).

shall not be violated ....” U.S. Const. amend. IV. “As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’ ” *Maryland v. King,* 569 U.S. 435, 447 (2013). “[W]hat is reasonable depends on the context in which the search takes place.” *King,* 569 U.S. at 461-62 (internal quotation omitted).

The context, here, is breathalyzer tests performed on a DWUI defendant at a sheriff’s office pursuant to a court’s pretrial release order and an agreement signed by the defendant.

“[T]he reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *United States v. Knights,* 534 U.S. 112, 118–19 (2001). “In giving content to the inquiry whether an intrusion is reasonable, the Court has preferred some quantum of individualized suspicion ... [as] a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion.” *King,* 569 U.S. at 447 (holding DNA search effected by buccal swab of cheek did not require individualized suspicion). And “[t]he legitimacy of certain privacy expectations vis-á-vis the State may depend upon the individual's legal relationship with the State.” *Id.* at 462.

Pretrial releasees have diminished privacy interests. *State v. Spady,* 2015 MT 218, ¶ 30, 354 P.3d 590, 598 (2015) (upholding breathalyzer tests for pretrial releasee under 24/7 Sobriety Program). “[A] defendant [released pretrial] is scarcely at liberty; he remains apprehended, arrested in his movements, indeed ‘seized’ for trial, so long as he is bound to appear in court and answer the state’s charges.” *Albright v. Oliver,* 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring); *see also Hensley v. Mun. Ct.,* 411 U.S. 345, 349 (1973) (noting that “a substantial number of courts, perhaps a majority, have concluded that a person released on bail or on his own recognizance may be ‘in custody’ ” and this line of cases “reflects the sounder view”).

Moreover, the breathalyzer tests are performed at the sheriff's office where the releasee can have no expectation of privacy. *See United States v. Cook,* No. 20-CR-84-LJV, 2021 WL 6133280, at *7 (W.D.N.Y. Dec. 27, 2021). And breathalyzer tests constitute "negligible" or "very limited" intrusions and hence "do[] not implicate significant privacy concerns." *Birchfield v. North Dakota,* 579 U.S. 438, 136 S. Ct. 2160, 2178 (2016); *see King,* 569 U.S. at 446 ("The fact than an intrusion is negligible is of central relevance to determining reasonableness[.]").

By contrast, "[t]he government's interest in preventing crime by arrestees is both legitimate and compelling." *Salerno,* 481 U.S. at 749. The government also has a strong interest in assuring compliance with pretrial release conditions, particularly a sobriety condition imposed on a person charged with DWUI. The Program is an effective tool that promotes both interests.

The governmental interest in this case greatly outweighs the diminished privacy interests of pre-trial releasees and the minimal privacy concerns raised by breathalyzer tests. Consequently, participation in the Program is a reasonable condition for pretrial release under the Fourth Amendment.

3. Arrests for testing positive or failing to submit to a breathalyzer test under the Program are lawful under the Fourth Amendment.

The Act provides as follows:

> Upon the failure of a person to submit to a test under the program or upon a positive test for alcohol or controlled substance in violation of the program, a peace officer or a probation and parole agent shall complete a written statement establishing the person, in the judgment of the officer or agent, violated a condition of release by failing to submit to or pass a test. A peace officer shall immediately arrest the person without warrant after completing or receiving the written statement.

Wyo. Stat. Ann. § 7-13-1709(a); *cf.* Wyo. Stat. Ann. § 7-2-102(b)(i) ("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.")

There is no mystery to this. Pretrial release is conditioned on participation in the Program. The times and location of the breathalyzer tests are set forth in a 24/7 Sobriety Participation Agreement signed by the participant. (*See* App. Ex. "D"). The tests happen at the same times every day. (*Id.*). In Teton County, there are in effect 1 ½ hour testing periods each morning and each evening. (*Id.*). The tests are performed at the local sheriff's office. (ECF No. 3-2 at 2). A peace officer administers the tests. (*Id.* at 16).

The participant either shows up during the appointed period or he does not do so. The participant either passes the test or he flunks the test. The peace officer knows what has happened because he is there. (ECF No. 3-2 at 16, 21). Probable cause is subsumed in his knowledge. The peace officer fills out the requisite statement "[u]pon the failure of a person to submit to a test under the program or upon a positive test for alcohol or controlled substance in violation of the program . . . ." Wyo. Stat. Ann. § 7-13-1709(a). Section 7-13-1709(a) is straightforward; it does grant a peace officer discretion and does not give a peace officer "impermissible subjective license" to disregard constitutional requirements. (*See* ECF No. 3 at 19). Section 7-13-1709(a) comports with the Fourth Amendment.

4. Wyoming Statutes § 7-13-1709(a) (the arrest provision) does not violate procedural or substantive due process.

Initially, plaintiffs challenge their arrests as violative of procedural and substantive due process under the Fourteenth Amendment. (*See* ECF No. 3 at 20-21). However, the lawfulness of an arrest is governed by the Fourth Amendment, not procedural or substantive due process. *Shimomura v. Carlson,* 811 F.3d 349, 361 (10th Cir. 2015). Plaintiffs were arrested for admittedly failing to submit to breathalyzer tests as required by their release conditions. (ECF No. 3-1 at 3-4; ECF No. 3-2 at 3-4). Their arrests did not violate the Fourth Amendment.

Plaintiffs allege that Section 7-13-1709 contravenes due process because "it does not inform a participant or law enforcement of the specific acts that would result in a violation." (ECF No. 3 at 22). Nonsense. The statute identifies the acts very specifically – a "failure of a person to submit to a test under the program or [] a positive test for alcohol or controlled substance in violation of the program[.]" Wyo. Stat. Ann. § 7-13-1709(a).

Plaintiffs next allege that Section 7-13-1709 imposes punishment on pre-trial releasees before they are convicted, in violation of due process. (*See* Plf. Mem. at 20). However, arrests of Program participants under that provision have nothing to do with their underlying charges. Participants are arrested because they have tested positive for alcohol or drugs or failed to submit to tests as required by the Program and their release conditions. Pre-trial releasees are not free to violate their release conditions without consequence because they have not been convicted of their underlying offense.

Moreover, the prospect of arrest is necessary to ensure compliance with the Program and the participants' release conditions and ultimately to protect the community. As such, the arrests are regulatory, not punitive. *See Salerno,* 481 U.S. at 747 ("The punitive/regulatory distinction turns on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].") (internal quotations omitted) (holding pretrial detention of persons considered dangerous to be regulatory, not punitive).

The Act, the implementing regulations and the 24/7 Sobriety Program do not violate the Fourteenth Amendment or any other constitutional provision. Accordingly, plaintiffs' motion for preliminary injunction should be denied.

D. THE INJURY TO DEFENDANTS GREATLY OUTWEIGHS THE NON-EXISTENT THREATENED INJURY TO PLAINTIFFS.

A preliminary injunction would injure defendants by precluding the use of the 24/7 Sobriety Program, which has proven to be successful in reducing rearrests. An injunction also would disable courts from monitoring compliance with release conditions requiring DWUI suspects to maintain sobriety. Meanwhile, plaintiffs are not even in the Program at this time and the best they can say is maybe someday they will be. There is no threatened injury to plaintiffs. Finally, the injury to defendants from closing the Program grossly outweighs the "injury" to participants therein – their submission to the negligible intrusion of breathalyzer tests twice a day. The Court should deny a preliminary injunction.

E. A PRELIMINARY INJUNCTION WOULD DISSERVE THE PUBLIC INTEREST.

The Program is a means of protecting the community from drunk driving. The public has a very strong interest in reasonable efforts of that kind. No public interest is served by shutting down the Program. The Motion for Preliminary Injunction should be denied.

IV. CONCLUSION

Plaintiffs do not have standing to seek injunctive relief in this case. Plaintiffs also have not shown any threat of irreparable harm. Further, the 24/7 Sobriety Program is constitutional in all respects. Finally, the balance of harms and the public interest both strongly favor denial of a preliminary injunction. Consequently, plaintiffs' motion 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 **State Defendants' Memorandum in Opposition to Motion for Preliminary Injunction** was served as indicated below:

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