Stephanie Amiotte*
Andrew Malone*
American Civil Liberties Union of Wyoming
P.O. Box 1023
Jackson, Wyoming 83001
Tel: 605-370-4313
samiotte@aclu.org
amalone@aclu.org

Darold W. Killmer
Wyoming Bar N. 8-6643
Killmer, Lane & Newman, LLP
1543 Champa Street – Suite 400
Denver, CO 80202
Tel: 303-571-1000
dkillmer@kln-law.com

Admitted pro hac vice.

IN THE FEDERAL DISTRICT COURT
DISTRICT OF WYOMING

ALFREDO SANCHEZ, DAVID CHRISTROPHER ("CHRIS") BALL, and SEAN MARX, **Plaintiffs,** **v.** **BRIDGET HILL, WYOMING ATTORNEY GENERAL, et al.,** **Defendants.**	**Civil Case Number:** **22-cv-47-SWS**

PLAINTIFFS' REPLY TO DEFENDANTS HILL, GORDON and COUNTY OFFICIALS' RESPONSE (DOC. 20) OPPOSING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

INTRODUCTION

Defendants' response brief argues a variety of topics that are not relevant to the plaintiffs' claims of excessive bail conditions, due process violations and Fourth Amendment violations. Instead, defendants attack plaintiffs' standing and provide statistics that are neither reliable nor relevant to the Wyoming 24/7 Program. At the outset, plaintiffs put the Article III issues to rest because plaintiffs added Marx to the First Amended Complaint, who is a current 24/7 Program participant and presently subjected to ongoing, twice daily testing at the Teton County jail.[1]

And, while defendants recite statistics on DUI's, highway safety and recidivism, they simultaneously fail to provide peer reviewed, reliable evidence of any connection to the program's stated purpose of reducing repeat crime due to substance abuse. Likewise, defendants fail to prove how the program's twice daily tests, fees, and arbitrary arrest rules serve the purpose of bail, which is to ensure a person's appearance in court without imposing excessive conditions before trial.

Further, defendants have seemingly confused "seizure" analysis with "privacy rights" analysis in an effort to meet the reasonableness standard under the Fourth Amendment. But this argument contradicts the continuum of privacy rights recognized by decades of Supreme Court and Tenth Circuit precedents giving un-convicted persons strong privacy rights and restored liberty rights when bond is set.[2]

---

[1] Marx Declaration p. 2 ¶ 7.

[2] See, Missouri v. McNeely, 569 U.S. 141 (2013); United States v. Knights, 534 U.S. 112 (2001); Griffin v. Wisconsin, 483 U.S. 868 (1987), Banks v. U.S., 490 F.3d 1178, 1187 (10th Cir. 2007).

Plaintiffs are likely to succeed on the merits and the constitutional harm to the plaintiffs substantially outweighs any perceived harm to the public. The program has not been proven to reduce re-arrests[3] for DUI as claimed by defendants.[4] Claims that the courts would be "disabled" from monitoring compliance with release conditions for sobriety are also unfounded. No legislative history or evidence submitted by defendants shows courts had any difficulty monitoring pretrial sobriety or that traditional investigatory methods of law enforcement that comply with the constitution were not effective. There is no evidence persons on pretrial release are not already following bond conditions imposed absent the program's intensive twice daily monitoring over a prolonged period of time.

ARGUMENT

1. Plaintiffs have standing for a preliminary injunction.

Defendants argue that plaintiffs Ball and Sanchez do not have standing to seek a preliminary injunction because they do not face a "real and immediate" threat that their rights will be violated.[5] Plaintiffs have cured any standing issues by filing the First Amended Complaint to add Plaintiff Marx, who is a *current* pre-trial participant in the Teton County 24/7 Program.[6] Marx clearly has standing to seek injunctive relief. Because Marx has standing to seek injunctive relief, the Court does not need

[3] Hill Brief Doc. 20 p. 17.
[4] McLane Declaration ¶ ¶ 17-34.
[5] Hill Brief Doc. 20 p.p. 8-9.
[6] Marx Decl. p. 2 ¶ 7.

to consider whether Ball and Sanchez also have standing for injunctive relief.[7] Additionally, the Court should consider the constitutional violation claims[8] of all plaintiffs because the harms complained of are capable of repetition yet evading review.[9] Ball was on the program 3 weeks and Sanchez was on the program for almost 5 months.[10] As such, the 24/7 Program involves the type of order that is short enough in duration that it would expire before appellate review could occur.[11]

2. Plaintiffs demonstrate substantial likelihood of success for their facial and as applied challenges to the program's application to pretrial participants.

The defendants' claim that plaintiffs must demonstrate "substantial likelihood" they will prevail on the merits,[12] while simultaneously ignoring the applicable standard of review. Strict scrutiny applies to this Court's review of legislative enactment of the challenged statutes which involve fundamental liberty interests.[13] Under strict scrutiny, defendants must show the statutes are "narrowly tailored to serve a compelling government interest."[14] Defendants fail to meet this

---

[7] Bowsher v. Synar, 478 U.S. 714, 721 (1986) (finding that when one plaintiff clearly has standing to seek declaratory and injunctive relief, the Court need not address the standing of other plaintiffs); Secretary of the Interior v. California, 464 U.S. 312, 319 n. 3 (1984).

[8] Hill Brief Doc. 19 at p.p. 9-10.

[9] Turner v. Rogers, 564 U.S. 431, 439-440 (2011) quoting Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

[10] Ball Decl. Doc. 3-1. Sanchez Declaration Doc. 3-2.

[11] Disability Law Center v. Millcreek Health Center, 428 F.3d 992, 997 (10th Cir. 2005) (explaining that a controversy is not moot if the challenged action is, "in its duration too short to be fully litigated prior to its … expiration and there is a reasonable expectation that the same complaining party will be subjected to the same action again.").

[12] Hill Brief Doc. 20 p. 11.

[13] Dias v. City & Cty. of Denver, 567 F.3d 1169, 1182 (10th Cir. 2009).

[14] Washington v. Glucksberg, 521 U.S. 702, 721 (1997). See also, Gaylor v. Does, 105 F.3d 572, 574–75 (10th Cir. 1997).

heightened standard because the statutes are broad, having been expanded in 2019 to include all offenses rather just second or subsequent offenses; the statistical evidence is not specific to the arguments made; and the Court may not rely upon assumptions in evaluating the state's evidence.[15]

A. The program's combination of conditions do not serve the purpose of bail or the 24/7 Program.

Defendants claim that because the courts "are empowered to set conditions on pretrial release," including "prohibiting the use of alcohol,"[16] and, because the 24/7 Program permits imposition of alcohol testing, it is not a violation of the Eighth Amendment.[17] This argument fails because it does not explain how the program's conditions serve the purpose of bail or even the purpose of the program itself. Defendants mis-state the test as whether the testing procedure is "reasonably calculated to assure compliance with that condition."[18] In order for the program to survive Eighth Amendment scrutiny, the program must both serve the "interests bail is intended to serve" and not be "excessive in relation to the valid interests it seeks to achieve."[19]

Wyoming's primary bail purpose is intended to "insure the defendant's presence" in court "without excessively restricting his liberty pending trial."[20]

---

[15] Wisconsin v. Yoder, 406 U.S. 205, 225 (1972) ("Absent…evidence supporting the state's position, we are unwilling to assume. . . ," the state's arguments meet a compelling government interest.).

[16] Hill Brief Doc. 20 p. 11.

[17] Id.

[18] Id. at p. 12.

[19] Galen v. County of Los Angeles, 477 F.3d 652, 660 (9th Cir. 2007).

[20] Miller v. State, 560 P.2d 739, 742 (Wyo. 1977).

Therefore, the program must "ensure the presence of the defendant at trial" and not be "excessive in relation to the valid interests it seeks to achieve." But, the 24/7 Program's requirements excessively restrict one's liberty pretrial and go far beyond ensuring a person's presence at trial. The program mandates a person's presence at the county jail or sheriff's department, twice daily for some participants, during early morning and late evening hours. It compels face to face contact with law enforcement to produce saliva, urine or breath. And, the program places persons under the threat of arrest each time if a participant is late due to circumstances beyond their control, purposefully, or for other valid reason. All this occurs at the expense of participants who pay hundreds of dollars which is significant for indigent persons.

No evidence has been offered that in Wyoming, a problem exists that pretrial releasees are failing to appear in court as ordered to a degree that it necessitated legislation to address it beyond the methods available already in Wyoming Rule of Criminal Procedure 46.4. And, no evidence has been offered that failure to appear in court was especially a problem for those who have either a substance abuse issue or have an alcohol or drug related charge, which does not just include DUI's. The assumption that, categorically, the program was enacted to address a bail condition for this class of pretrial releasees is fictional.

And, the state has offered no evidence to prove the program's requirements as a pretrial condition are needed to reasonably assure the appearance of persons in court. The broad, categorical imposition of the program for *all* drug and alcohol

related offenses, not just DUI's[21], contradicts the individualized assessment that is required for bail. Bail is set based on a person's unique personal history, the nature of the offense, and their record concerning appearance at court proceedings.[22]

Defendants' reliance on cases like Ullring, which challenged the Maine bail statutes directly, or Oliver, which challenged the D.C. bail statute, is not helpful to the defendants, either.[23] First, Ullring involved facts not present here: a challenge to the random drug screens authorized by Maine's bail code.[24] Wyoming does not expressly authorize random drug screens in its bail code.[25] The Oliver case involved a challenge to random weekly testing, which its code did not expressly authorize, but its parameters were found to be reasonable by the court.[26] Neither Oliver nor Ullring operated under an unconstitutional scheme of statutes, administrative rules, and sheriff created rules which were vague, broad, and permitted a search of participants twice daily over weeks and months that did not meet the statute's stated purpose. The state offers no rational argument to explain how the program ensures the appearance of persons in Wyoming courts, under the least restrictive pre-trial means, in light of the program's purpose to reduce repeat crime.

B. The program creates a categorical exception to the probable cause and warrant requirements which is unreasonable.

---

[21] Hill Brief Doc. 20 p. 14.

[22] Wy.R.Cr.Pro. 46.1.

[23] Hill Brief Doc. 20 p. 12, citing State v. Ullring, 741 A.2d 1065 (Me. 1999) and Oliver v. United States, 682 A.2d 186, 189 (D.C. 1996).

[24] Ullring, 741 A.2d 1065 (Me. 1999).

[25] Id.

[26] Oliver, 682 A.2d at 189.

Defendants assert that pretrial participants have diminished privacy interests equal to those of someone imprisoned—namely, none[27]— but ignore the long line of Supreme Court cases recognizing the significance of a conviction in the privacy rights analysis. Further, under Wyoming law, even probationers cannot be searched without reasonable suspicion to believe a violation of their agreement occurred, and it must be based on reliable information.[28] Prior to a conviction, when no assumption that the person is more likely to commit a crime attaches,[29] however, there is no justification for such reduced privacy.

C. Plaintiffs and pretrial participants do not have privacy rights that are so diminished they must be subject to searches twice daily or other frequencies without a warrant or probable cause.

A seizure is not synonymous with privacy in a constitutional analysis. Defendant's reliance upon Justice Ginsburg's concurrence in Albright is taken entirely out of context and mistakes the "seizure" analysis as a "privacy" analysis.[30] The same is true for defendants' reliance on Hensley.[31] The defendant in Hensley was already convicted and challenging his post-conviction habeas release.[32] Neither case is applicable to the case at bar. The correct analysis for privacy rights is under the Fourth Amendment precedents addressing the continuum of privacy rights with the

---

[27] Hall Brief Doc. 20 p. 13.

[28] Jones v. State, 41 P.3d 1247, 1258 (Wyo. 2002) citing Nixon v. State, 18 P.3d 631, 635 (Wyo. 2001) and Pena v. State, 792 P.2d 1352, 1357 (Wyo. 1990).

[29] Griffin v. Wisconsin, 483 U.S. 868, 880 (1987).

[30] Hill Brief Doc. 20 p. 13 citing Albright v. Oliver, 510 U.S. 266, 279 (1994). Albright was required to file a Fourth Amendment claim rather than due process claim for malicious prosecution and the seizure analysis ensued.

[31] Id. citing Hensley v. Mun. Ct., 411 U.S. 345, 349 (1973).

[32] Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., Santa Clara Cty, Ca, 411 U.S. 345, 346 (1973).

focus on pretrial participants status as either convicted or un-convicted before the warrantless search condition is placed upon them, rather than the location of an individual's search at the jail. Defendants' claims that the fact that the searches occur at the jail reduces plaintiffs' privacy rights[33] ignores the fact entirely that the participants are not at the jail of their own volition.

It also ignores the fact that pretrial participants have more privacy rights than those on probation, whose rights have been diminished by a conviction which assumes they are more likely to commit a crime,[34] or parolees, whose privacy rights are extinguished.[35] Even if the testing under the Program is minimally intrusive, Defendants have failed to prove pretrial participants have less privacy rights than probationers, whose searches must be supported by reasonable suspicion based on specific and articulable facts.[36] Defendants fail the totality of the circumstances test which requires Defendants prove both diminished privacy rights *and* minimal intrusion upon those rights.[37]

3. Due process is violated because Wyoming § 7-13-1708 is not narrowly tailored to achieve a compelling government interest.

---

[33] Hill Brief Doc. 20 p. 13.

[34] Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) ("[]It is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law….").

[35] Banks v. U.S., 490 F.3d 1178, 1187 (10th Cir. 2007), citing Green v. Berge, 354 F.3d 675, 679-81 (7th Cir. 2004).

[36] Jones v. State, 41 P.3d 1247, 1258 (Wyo. 2002) citing Nixon v. State, 18 P.3d 631, 635 (Wyo. 2001) and Pena v. State, 792 P.2d 1352, 1357 (Wyo. 1990). The Tenth Circuit has stated that, "Parolee and probationer searches are ... examples of the rare instance in which the contours of a federal constitutional right are determined, in part, by the content of state law." U.S. v. Matthews, 928 F.3d 968, 976 (10th Cir. 2019) (emphasis added) (cleaned up).

[37] Banks, 490 F.3d at 1184 (10th Cir. 2007).

While defendants' claim that the program assures compliance with a bond condition to refrain from using alcohol,[38] which is not the statute's stated purpose of reducing repeat crime related to drug and alcohol abuse,[39] there is no evidence that the statute is narrowly drawn to achieve a compelling government interest.[40] First the program statute is worded very broadly. It reads, "Upon a charge or offense for conduct committed while intoxicated or under the influence of a controlled substance,"[41] one may be compelled to participate in the 24/7 program in any equally broad number of broad scenarios. A person may be compelled to participate pretrial as a condition of release, or bond, as the plaintiffs were in this case, or post-conviction, as a condition of parole or probation. The statute does not apply narrowly to DUI's like the defendants urge this Court to believe.[42] The statute applies very broadly, to *any crime*, including assaults, weapon and gun violations, shoplifting, indecent exposure, or larceny if the crime involves intoxication or the influence of a controlled substance.[43] Contrary to the defendants' arguments, the challenged statute does not just apply to operating a vehicle in an effort to keep the roads safe, it applies broadly to *all* types of charges without limitation. Further, the defendants have failed to demonstrate the statute serves the purpose for which it was crafted, reducing repeat

[38] Hill Brief Doc. 20 p. 12.

[39] W.S. § 7-13-1703.

[40] The Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Washington v. Glucksberg, 521 U.S. 702, 721 (1997) quoting Reno v. Flores, 507 U.S. 292, 302 (1993).

[41] W.S. § 7-13-1708 (emphasis added).

[42] Hill Brief Doc. 20 p. 14.

[43] McLane Decl. ¶ 16.

crime due to substance abuse, or that it serves the purpose of ensuring compliance with bail conditions as defendants claim.[44]

The Tenth Circuit has likewise recognized that a pretrial releasee has a "liberty interest in being freed of detention once …[a bond amount is set]."[45] As applied to these plaintiffs, the statutes failed to inform them of the conduct they needed to conform their behavior to in order to avoid arrest. The bond orders themselves and participation agreement are also not consistent with the statutes.

The bond order provides for a search under reasonable suspicion in one section, and states that an arrest could occur after issuance of a warrant for a violation of the conditions in another section.[46] The statutes also provide for a search without probable cause or reasonable suspicion and permit arrest without a warrant based solely on the judgment of an officer. This has created un-certainty, confusion and no amount of clarity for plaintiffs.

CONCLUSION

Plaintiffs have standing to seek injunctive relief and have shown the constitutional violations cause irreparable harm. The constitutional infirmities both in the statutes and as applied to plaintiffs weigh in favor of injunctive relief since the existing statutes for bond compliance and DUI investigations adequately meet the state's needs. Plaintiffs' motion for preliminary injunction should be granted.

---

[44] Id. p.p. 15-17.

[45] Gaylor v. Does, 105 F.3d 572, 576 (10th Cir. 1997)(holding that continued five day incarceration of Gaylor following $1,000 bond being set violated due process because Gaylor had a liberty interest once his bond was established.").

[46] Sanchez Appearance Bond Doc. 3-3, Ball Release Order Doc. 3-1, Marx Decl. Ex. 2 Appearance Bond.

Respectfully submitted this 4th day of April, 2022.

KILLMER, LANE & NEWMAN, LLP

/s/ Darold Killmer
Darold Killmer
Wyoming Bar N. 8-6643
Counsel for the Plaintiffs

Killmer, Lane & Newman, LLP
1543 Champa Street - Suite 400
Denver, CO 80202
Tel: 303-571-1000
dkillmer@kln-law.com

CERTIFICATE OF COMPLIANCE

This brief complies with Wyoming Local Civil Rule 7.1(2)(C) because it contains 10 pages, not including the cover page, table of contents, signature block, certificate of service and this certificate.

This 4th day of April 2022.

KILLMER, LANE & NEWMAN, LLP

/s/ Darold Killmer
Darold Killmer
Wyoming Bar N. 8-6643
Counsel for the Plaintiffs

Killmer, Lane & Newman, LLP
1543 Champa Street - Suite 400
Denver, CO 80202
Tel: 303-571-1000
dkillmer@kln-law.com

CERTIFICATE OF SERVICE

I certify that on the 4th day of April, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States District Court for the District of Wyoming by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Darold Killmer
Darold Killmer