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**Motions for admission pro hac vice forthcoming*

**IN THE FEDERAL DISTRICT COURT
DISTRICT OF WYOMING**

**ALFREDO SANCHEZ and DAVID
CHRISTOPHER BALL,**

Plaintiffs,

v.

**BRIDGET HILL, WYOMING
ATTORNEY GENERAL, et al.,**

Defendants.

Civil Case Number:

22-CV-47

**PLAINTIFFS' LEGAL MEMORANDUM IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

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INTRODUCTION

Under the Wyoming 24/7 Sobriety Program's (24/7 Program or the Program) statutes and regulations, persons arrested for any offense committed while under the influence of drugs or alcohol can be compelled to participate in the Program as a bond condition, and can be required to give warrantless breath, urine, saliva or patch tests for the duration of their pretrial release to determine drug or alcohol use. For suspected DUI offenses, in Teton County, Wyoming, a participant is required to provide twice daily breath tests administered by the sheriff's department once early in the morning and once at night. The Program also authorizes the immediate, warrantless arrest and jailing of participants who fail to appear to take a test or who have a positive test.

Plaintiffs were required to enroll in the 24/7 Program before being released from jail on bond following an arrest for a suspected DUI in Teton County, Wyoming. Plaintiffs were required to submit to almost 300 warrantless breath tests over several weeks and months at their own expense. While on the Program, Plaintiffs were each arrested on two separate occasions without an arrest warrant by Teton County Deputy Sheriffs (Deputies) for failing to appear for a breath test or because they were late to testing by 30 minutes or more. Plaintiffs were cited with contempt of court under Wyoming Rule of Criminal Procedure 42 (Rule 42) at the time of each arrest, but deputies failed entirely to comply with any of the requirements of Rule 42.

Deputies failed to submit the required affidavit, failed to obtain the required order to show cause and failed to obtain the required order for arrest based upon reasonable grounds the Plaintiffs would not appear for a show cause order. Instead,

Deputies prepared an un-sworn statement that in their (subjective) judgment, Plaintiffs violated their conditions of release. Plaintiffs, after arrest, were jailed for hours or days before a hearing was held, which was their only opportunity to contest the allegations that had previously resulted in their arrest.¹

The 24/7 Program imposes substantial financial obligations because it requires participants to pay for testing and enrollment fees, which for someone like Sanchez, who was required to give hundreds of tests over the course of several months, becomes incredibly burdensome.² Indigent persons who qualify for public defenders spend a longer amount of time on the 24/7 Program and pay more money in testing fees because they cannot afford to obtain a substance abuse evaluation, which also costs hundreds of dollars and is required before one can be removed from the Program.

Plaintiffs and pretrial participants will suffer irreparable harm if the defendants are not enjoined from enforcing the Program against them. They will be repeatedly searched and arrested without a warrant and will be required to pay excessive enrollment and testing fees as a bond condition. Defendants, and those working in concert with them, should be preliminarily enjoined from enforcing the 24/7 Program statutes and regulations against the Plaintiffs and all other pretrial

¹ Sanchez's criminal case has not concluded nor has he been sentenced yet. Sanchez Decl. ¶ 20. Ball is still on un-supervised probation following his sentencing. Ball Decl. ¶ 20. Even though each of the Plaintiffs was terminated from the 24/7 Program after completing a substance abuse assessment, they could be placed back on the Program at any time under Wyoming Statute § 7-13-1708 ("a court may order participation in the program as a condition of pretrial release, bond, suspension of sentence, probation or other conditional release.").

² Ball was required to provide fewer tests than Sanchez, but still gave 38 breath tests over the span of three weeks. Ball Decl. ¶ 7.

participants due to the Fourth, Eighth and Fourteenth Amendment violations occurring under the U.S. Constitution.³

FACTUAL BACKGROUND

1. The 24/7 Program.

The 24/7 Program, codified at Wyoming Statutes § 7-13-1703 through § 7-13-09,⁴ operates in five counties in Wyoming: Teton, Sheridan, Campbell, Fremont and Sweetwater counties.⁵ The Program’s statutes, however, do not mandate participation by sheriff’s departments, making it strictly voluntary.⁶ In Teton County, the Sheriff’s Department voluntarily began implementing the 24/7 Program in 2020.⁷

The Teton County Sheriff’s Department (Sheriff’s Department) tests participants by using breath, urinalysis or skin patch tests. Pretrial participants, including Plaintiffs, were required to sign an Agreement to Participate in testing and to other terms of the Program.⁸ Likewise, pretrial participants, including the

³ See, Guzzo v. Mead, Civ. No. 14-200-SWS, 2014 WL 5317797 at *5 (D. Wyo., Oct. 17, 2014) (“When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”) (quoting Kikumura v. Hurley, 242 F.3d 950, 963 (10th Cir. 2001)) (quoting 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.1 (2d ed. 1995)).

⁴ On July 1, 2014, the Wyoming Legislature passed the 24/7 Program which authorized judges to order a person charged with a second or subsequent alcohol or drug offense to participate in the Program as a condition of bond; or to order participation in the Program as a condition of parole or probation. In 2019, however, the Wyoming Legislature expanded the Program to first time offenses, also, by amending Wyoming Statute § 7-13-1708 to apply to “any” drug and alcohol offense.

⁵ <https://wyomingtruth.org/blog-criminal-justice/sobrietyprogram> (August 19, 2021 at p. 5).

⁶ W.S. § 7-13-1704 reads, “Each county, through its sheriff, may take part in the program. A sheriff may designate an entity to provide the testing services or to take any other action authorized to be taken by the sheriff under this article with the exception of action taken to apprehend a violator under W.S. 7-13-1709.”

⁷ https://www.jhnewsandguide.com/news/cops_courts/wyomings-court-ordered-sobriety-program-may-promote-public-safety-but-is-it-constitutional/article_7fd9c2c5-7ccb-5c2a-9c11-9527f153aac6.html (Aug. 4, 2021).

⁸ Plaintiffs were required to sign the Participation Agreements. Ball Decl. ¶ 4. Sanchez Decl. ¶ 4/

Plaintiffs, could not refuse to enroll in the Program if they wanted to be released from jail.⁹

Plaintiffs were administered breath tests twice daily at the Teton County jail by Deputies between the hours of 6:00 a.m. and 7:00 a.m. and again between the hours of 9:00 p.m. and 10:00 p.m.¹⁰ The Sheriff's Department, Sheriff Matt Carr (Carr), Director of the 24/7 Program Sarah King (King), and the Acting Director of the 24/7 Program Bill West (West) implemented a policy or unofficial custom that if a participant is 30 minutes late to testing, or is late to testing on three (3) occasions, Deputies are authorized to arrest and incarcerate the participant immediately as a violation of release conditions or a failure to test, even if a test result was negative.¹¹

When Plaintiffs were arrested for a violation of the Program, deputies cited them with contempt of court under Rule 42.¹² However, Plaintiffs only failed to appear for a test after being told they would be arrested if they came for testing because Plaintiffs were late and they wanted to avoid detention in jail for extended periods of time.¹³ While each of the Plaintiffs was released from jail following the hearing, and were never convicted of contempt of court by a judge, Plaintiffs were placed back on the 24/7 Program until they took a substance abuse assessment.¹⁴

2. Alfredo Sanchez.

⁹ Ball Decl. ¶5; Sanchez Decl. ¶5.

¹⁰ The testing hours were established by the Sheriff's Department.

¹¹ https://www.jhnewsandguide.com/news/cops_courts/wyomings-court-ordered-sobriety-program-may-promote-public-safety-but-is-it-constitutional/article_7fd9c2c5-7ccb-5c2a-9c11-9527f153aac6.html

¹² Sanchez Decl., Exhibit 5. Ball Decl., Exhibit 5.

¹³ Sanchez Decl. ¶¶ 12 – 16. Ball Decl. ¶¶ 12 – 16.

¹⁴ Sanchez Decl. ¶ 19.

Sanchez was arrested May 8, 2021, for a suspected DUI 2nd, (later charged as a DUI 3rd), and was granted a \$5,000 unsecured cash bond on May 10, 2021. He was ordered to enroll in the 24/7 Program prior to his release from jail. Sanchez was ordered to give twice daily breath tests at the Teton County Sheriff's Department but no specific times were included in the release order.¹⁵ He paid \$30 enrollment fee and \$2 per breath test, for a total of \$514 to participate in the 24/7 Program. No hearing was held to determine if Sanchez was able to pay the enrollment or testing fees but he qualified for public defender representation. Sanchez was compelled to give 242 warrantless breath tests between the dates of May 10, 2021 and October 11, 2021.¹⁶

Sanchez was arrested twice, on May 16, 2021 and August 30, 2021, for failing to submit to testing and being late to testing by 30 minutes or more. The arresting deputy alleged violations of the 24/7 Program conditions of release and cited Sanchez with contempt of court under Rule 42.¹⁷

The arrest on Sunday May 16, 2021, occurred because Sanchez overslept by one hour the night before, Saturday, May 15, 2021.¹⁸ When Sanchez awoke and realized he was one hour late for testing, he called the sheriff's department to see if he could take the test that night.¹⁹ Sanchez was informed on the phone by an unknown deputy that if he came in to take the test he would be immediately arrested.²⁰ Instead of staying in jail all weekend, Sanchez went to the jail the next day, Sunday morning,

¹⁵ Sanchez Decl. ¶ ¶ 1-3.

¹⁶ Id. at ¶ ¶ 7-10.

¹⁷ Id. at ¶¶ 12-13, Exhibit 4 at Plaintiffs' 9, Exhibit 5 at Plaintiffs' 13.

¹⁸ Id. ¶ 14

¹⁹ Id.

²⁰ Id.

around 11:30 a.m., to give a test which was negative. Sanchez was immediately arrested because he was late to the Sunday morning test by 4 ½ hours and missed testing Saturday night out of fear of being arrested.²¹ After his arrest, Sanchez spent approximately 2 ½ days in jail and was released following a hearing on May 18, 2021.²²

Sanchez's second arrest on August 30, 2021, occurred because the clerk of courts failed to provide the Sheriff's Department the court order relieving him from testing to attend a funeral in Texas the prior week. After Sanchez returned, he went to the jail for his morning breath test at 6:45 a.m.²³ At the jail, Sanchez was tested for alcohol, which was again negative, and was immediately arrested even though he explained he had a furlough excusing him from testing the previous week. After four hours Sanchez was released from jail when the deputies received a copy of the order.²⁴

3. David Christopher Ball.

Ball was arrested on February 25, 2021, for a suspected DUI 1st and was granted a \$2,500 unsecured cash bond on February 26, 2021. Ball was ordered to enroll in the 24/7 Program prior to his release from jail which he could not refuse if he wanted to be released. Ball's release order stated he was to give twice daily breath tests, though no specific times were indicated for testing, and to call the Director of the Program.²⁵

²¹ Sanchez Decl. ¶14.

²² Id. ¶¶ 14-15.

²³ Id. ¶ 16.

²⁴ Id. Sanchez' DUI case is pending although he was removed from the 24/7 Program after he completed a substance abuse assessment. However, Sanchez can be placed on the 24/7 Program again at any time before sentencing and conclusion of his case. Id. ¶¶ 25-26.

²⁵ Ball Decl. ¶¶ 1-3, Exhibit 2 at Plaintiffs' 18.

Ball was compelled to give 38 warrantless breath tests between the dates of February 25, 2021 and March 19, 2021 at a cost of \$2 per breath test and \$30 enrollment fee. No hearing was held to determine if Ball was able to pay the initial enrollment fee or the subsequent testing fees.²⁶

Ball was arrested twice, first on February 28, 2021 and again on March 19, 2021 for missing tests to avoid being arrested and lengthy detention for merely being late to testing. Ball was cited with contempt of court under Rule 42 both times for a violation of the 24/7 Program.²⁷

The arrest on February 28, 2021 occurred because Ball overslept until 7:15 a.m. because he worked late the night before. Ball called the Sheriff's Department to see if he could take the test even though he would be 15 minutes late and was informed by an unknown deputy that if he came in to take the test he would be immediately arrested. Ball, who believed he would be arrested and jailed for being late, went to the jail that night around 9:45 p.m. Ball took a breath a test, which was negative, and was immediately arrested. Because Ball missed one test, he spent 1 night and 1 day in jail before being released after a hearing on March 20, 2021.²⁸

Ball's second arrest on March 8, 2021, occurred because Ball's cell phone battery died and he woke up after 7:30 a.m. on Saturday, March 6, 2021. Ball knew if he went to the jail for testing after 7:30 a.m. he would be immediately arrested. Rather than spend the weekend in jail, Ball waited until Monday morning, March 8, 2021, around

²⁶ Ball Decl. ¶¶ 6-10.

²⁷ *Id.* at ¶¶ 12-13, Exhibit 5 at Plaintiffs' 24, Exhibit 6 at Plaintiffs' 26.

²⁸ *Id.* at ¶¶ 14-15.

10:00 a.m. to give a breath test and was immediately arrested.²⁹ As a result of not taking breath tests on Saturday March 6 and Sunday March 7, 2021, Ball spent a day in jail on March 8, 2021. He was released on March 8, 2021 in the late afternoon near 4:00 p.m. following a hearing.³⁰ During Ball's participation in the 24/7 Program he had no positive test results.³¹

ARGUMENT

1. Standard for a Preliminary Injunction

A district court may enter a preliminary injunction if:

(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.³²

Plaintiffs easily prove these factors due to the ongoing, pervasive constitutional violations under the 24/7 Program.

2. Plaintiffs are Substantially Likely to Succeed on the Merits

The 24/7 Program's authorization of sometimes hundreds of warrantless searches of pretrial participants over several weeks or months, clearly implicates the Fourth Amendment to the U. S. Constitution's guarantee of "[t]he right of the people to be secure in their persons"³³ Further, the twice daily breath tests of Plaintiffs,

²⁹ Id. at ¶ 16.

³⁰ Ball Decl. ¶ 17.

³¹ Ball's DUI case was resolved and Ball was sentenced on May 21, 2021 to unsupervised probation and 4 days in jail with credit for the time he spent in jail for 24/7 Program violations and his original DUI arrest. Id. ¶¶ 25-26. Ball can be ordered to enroll back into the Program at any time during his term of 2 years of unsupervised probation under Wyoming Statute § 7-13-1708.

³² Fish v. Kobach, 840 F.3d 710, 723 (10th Cir. 2016) (cleaned up).

³³ U.S. Const. amend. IV.

were “searches conducted outside the judicial process,” insofar as they were not approved contemporaneously at the time of each search by issuance of a search warrant. As such, they “[we]re per se unreasonable ... subject only to a few specifically established and well-delineated exceptions.”³⁴

A. No Recognized Well Delineated Exceptions Relieve Deputies from Obtaining Search Warrants for Each Test.

The methods of testing breath, urine, saliva and sweat under the Program are undeniably searches of persons.³⁵ And, it cannot be reasonably disputed that no search warrants were obtained or statutorily required to be obtained, prior to each test. This is especially true for Plaintiffs who are presumed innocent under Wyoming’s bail statute found at Rule 46.1.³⁶ In order for the multitude of warrantless searches conducted under the Program to be constitutional, they must fall within a recognized, well-delineated exception like special needs, totality of the circumstances, exigent circumstance, or consent, none of which apply in this case.

i. The 24/7 Program’s Purpose is not a Special Need Beyond the Normal Need for Law Enforcement.

Here, the State cannot identify a special need “beyond the normal need for law enforcement,” which makes the “warrant and probable-cause requirement impracticable,”³⁷ or that is “sufficiently ‘divorced from the State’s general interest in

³⁴ Katz v. United States, 389 U.S. 347, 357 (1967); See also, Jones v. U.S., 357 U.S. 493, 499 (1958) (noting that the few exceptions to the warrant requirement have been “jealously and carefully drawn”).

³⁵ Birchfield v. North Dakota, 136 S.Ct. 2160, 2173 (2016) (“[O]ur cases establish that the ... administration of a breath test is a search.”); Chandler v. Miller, 520 U.S. 305, 313 (1997) (finding it to be settled law that government-ordered collecting and testing of urine is a search).

³⁶ Rule 46.1. Pretrial Release, Wyoming Rule of Criminal Procedure 46.1 reads, “[f] Presumption of innocence. Nothing in this rule shall be construed as modifying or limiting the presumption of innocence.”

³⁷ Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (cleaned up).

law enforcement.”³⁸ Nor, can the State demonstrate it has a “substantial special need important enough to override the individual's acknowledged privacy interest”³⁹

There is no question that the Program fails to meet this threshold requirement. The stated purpose of the 24/7 Program “is to reduce the number of repeat crimes that are related to substance abuse[.]”⁴⁰ Reducing crime is inherently within the “normal need for law enforcement” and cannot qualify as a special need.⁴¹

Additionally, the 24/7 Program’s purpose of reducing crime distinguishes it from special needs that have been found in other contexts like probation, parole, or sobriety checkpoints.⁴² The use of 24/7 Program for Plaintiffs was as a pretrial bond condition rather than a sentencing feature which is part of the punishment following conviction.⁴³ The Program only serves general crime prevention purposes to “reduce alcohol and drug related repeat crime.”⁴⁴ Because the searches of the Plaintiffs were “undertaken by law enforcement officials to discover evidence of criminal wrongdoing, the reasonableness inquiry [] require[d] obtaining a search warrant.”⁴⁵

ii. The Totality of the Circumstances Exception Does Not Apply Because Pretrial Program Participants’ Privacy Rights Outweigh the State’s Interests.

³⁸ Doe v. Woodard, 912 F.3d 1278, 1291 (10th Cir. 2019) citing Ferguson v. City of Charleston, 532 U.S. 67, 79 (2001).

³⁹ Chandler v. Miller, 520 U.S. 305, 318 (1997).

⁴⁰ W.S. § 7-13-1703.

⁴¹ United States v. Scott, 450 F.3d 863, 870 (9th Cir. 2006) (“Crime prevention is a quintessential general law enforcement purpose and therefore is the exact opposite of a special need.”).

⁴² Griffin v. Wisconsin, 483 U.S. 868 (1987), Samson v. California, 547 U.S. 843 (2006), City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

⁴³ Id.

⁴⁴ W.S. § 7-13-1703.

⁴⁵ Vernonia School Dist. v. Acton, 515 U.S. 646, 654 (1995).

Under the totality of the circumstances test, “the 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.”⁴⁶ The totality of the circumstances may justify warrantless searches in limited circumstances “without probable cause (or even reasonable suspicion) by police officers,”⁴⁷ but not in this case.

Again, only in the context of post-conviction setting like probation⁴⁸ or parole does diminished privacy rights come into play.⁴⁹ Plaintiffs and pretrial participants in the 24/7 Program have substantially greater privacy rights because they are presumed innocent before trial. The excessive frequency of testing, twice daily over weeks and months, combined with the twice daily appearance at the jail in the early morning and late evening hours is a substantial, unreasonable invasion of their privacy rights.

The State’s interest is minimal in comparison. The purpose of the 24/7 Program “is to reduce the number of repeat crimes that are related to substance abuse[.]”⁵⁰ This interest pales in comparison to the ongoing violation of participants’ privacy rights.

iii. Exigent Circumstances Do Not Exist Where the Purpose of the Warrantless Searches is to Obtain Evidence for Crime Prevention.

⁴⁶ United States v. Knights, 534 U.S. 112, 119–20 (2001) (cleaned up). Banks v. United States, 490 F.3d 1178, 1184 (10th Cir. 2007)

⁴⁷ United States v. Warren, 566 F.3d 1211, 1216 (10th Cir. 2009).

⁴⁸ Knights, at 118-119 (2001).

⁴⁹ Samson, 547 U.S. 843 (2006).

⁵⁰ W. S. § 7-13-1703.

Warrantless searches, like those of Plaintiffs, are presumptively unreasonable.⁵¹ The Tenth Circuit has recognized that exigent circumstances may excuse the warrant requirement when officers:

(1) [] have reasonable grounds to believe that there is immediate need to protect their lives or others or their property or that of others, (2) the search [is not] motivated by an intent to arrest and seize evidence, and (3) there [is] some reasonable basis, approaching probable cause, to associate an emergency with the area or place to be searched.⁵²

The government bears the burden of proving exigency for a warrantless search,⁵³ which is examined under the eye of “[a] prudent, cautious, []trained officer[],”⁵⁴ and only applied in narrow circumstances,⁵⁵ that are “jealously and carefully drawn.”⁵⁶

The exigent circumstances exception does not permit the type of categorical warrantless searches authorized by the 24/7 Program because it does not present the type of situation where “a law enforcement officer faced an emergency that justified acting without a warrant[],”⁵⁷ under the totality of the circumstances.⁵⁸ The State’s use of the Program to impose categorical warrantless searches for collection of evidence of crime is like that which was rejected in McNeely which sought warrantless testing

⁵¹ Payton v. New York, 445 U.S. 573, 585–86 (1980).

⁵² United States v. Anderson, 981 F.2d 1560, 1567 (10th Cir.1992) (alterations in original).

⁵³ United States v. Wicks, 995 F.2d 964, 970 (10th Cir.1993).

⁵⁴ United States v. Anderson, 154 F.3d 1225, 1233 (10th Cir.1998).

⁵⁵ See, Minnesota v. Olson, 495 U.S. 91, 100 (1990) (Exigent circumstances exist where real immediate and serious consequences will certainly occur if a police officer postpones action to obtain a warrant such as imminent destruction of evidence, or a risk of danger to police or others.)

⁵⁶ United States v. Anderson, 154 F.3d 1225, 1233 (10th Cir.1998); see also, Roska ex rel. Roska v. Peterson, 328 F.3d 1230, 1240 (10th Cir. 2003).

⁵⁷ Id. at 149.

⁵⁸ Missouri v. McNeely, 569 U.S. 141, 148-49 (2013).

of drivers based only upon probable cause⁵⁹ because it departed from “careful case-by-case assessment of exigency.”⁶⁰

Here, the 24/7 Program goes far beyond what the McNeely Court rejected. Unlike the categorical exception sought⁶¹ to allow a single warrantless search when an officer has probable cause to believe a driver was impaired, the 24/7 Program allows twice daily warrantless tests for months at a time without **any** individualized suspicion. The State cannot prove that one who is charged with an alcohol or drug offense, who is presumed innocent, creates a danger to officers, themselves or others, such that they must give twice daily or other frequent bodily testing without a warrant.

iv. The Consent Exception Does Not Apply Because Plaintiffs did not Voluntarily Agree to Participate in the 24/7 Program.

Consent to search, while a recognized exception to the Fourth Amendment’s warrant requirement in some circumstances,⁶² is wholly inapplicable here. The State bears the burden⁶³ to “present clear and positive testimony that consent was unequivocal and specific and freely and intelligently given,” and must “show that the police did not coerce the defendant into granting his consent.”⁶⁴ Plaintiffs were ordered to sign an Agreement to Participate in the 24/7 Program as a condition of being

⁵⁹ Id. at 147.

⁶⁰ Id. at 152.

⁶¹ See also, Richards v. Wisconsin, 520 U.S. 385, 392–94 (1997) (rejecting categorical exception to allow no knock warrants in all felony drug cases because creating exceptions to Fourth Amendment requirements based on the ‘culture’ surrounding a general category of criminal behavior presents serious concerns due to considerable overgeneralization about risks which would evade adequate judicial review. Further, adopting a per se exception eliminates judicial inquiry required under the Fourth Amendment as to the reasonableness of officer action on a case by case basis.).

⁶² Schneekloth v. Bustamonte, 412 U.S. 218, 219 (1973).

⁶³ United States v. Cody, 7 F.3d 1523, 1526 (10th Cir.1993).

⁶⁴ United States v. Pena-Sarabia, 297 F.3d 983, 986 (10th Cir. 2002).

released from jail and were also ordered to give twice daily breath tests.⁶⁵ Plaintiffs were told by the Hon. Judge Radda or the jail officers they would not be released from jail if they did not sign the Agreement to Participate. Further, Plaintiffs' signature on the Participation Agreement was coerced "consent [] not fairly bargained for," which amounted to an unconstitutional condition that extracted an unconstitutional waiver from the Plaintiffs.⁶⁶ The Plaintiffs appeared for testing twice daily not because they freely consented to the breath tests, but because they were under the threat of continued incarceration in jail.

No exceptions to the warrant requirement justified the searches of Plaintiffs and pretrial participants through breath or other testing under the 24/7 Program.

B. Wyoming Statutes §§ 7-13-1703 and 7-13-08 and Administrative Rule 015.0017 Chapter 2 are Facially and As Applied Unconstitutional.

The facts "establish that no set of circumstances exist[] under which the [24/7 Program] [] would be valid."⁶⁷ Wyoming Statute § 7-13-1703 creates the 24/7 Program and allows for "frequent and certain testing for drug or alcohol use" without the need for a search warrant. Similarly, Wyoming Statute § 7-13-1708 authorizes a judge to order someone to participate in the Program as a condition of pretrial release. Finally, Admin. Rule 015.0017, Chap. 2, elaborates that testing will be done twice a day and does not require a search warrant. Collectively, these laws and regulations force Wyoming residents to give repeated warrantless searches without stating a recognized

⁶⁵ Sanchez Declaration ¶ 4, Exhibit 3 – Appearance Bond/Performance Bond. Ball Declaration ¶ 4, Exhibit 3 – Appearance Bond/Performance Bond.

⁶⁶ United States v. Scott, 450 F.3d 863, 872–74 (9th Cir. 2006).

⁶⁷ U.S. v. Salerno, 481 U.S. 739, 745 (1987).

exception to the warrant requirement or other constitutional standard like probable cause to guide law enforcement. There are no circumstances under which the twice-daily warrantless searches of Plaintiffs or pretrial participants satisfy the Fourth Amendment.

Further, as applied to Plaintiffs, Wyoming Statutes §§ 7-13-1703 and 7-13-08 and Administrative Rule 015.0017 Chapter 2 are unconstitutional “in light of the charged conduct.”⁶⁸ Sanchez was arrested on May 10, 2021, for a suspected DUI, was placed on the 24/7 Program as a condition of bond, and remained on the Program for approximately 4 ½ months. As a pretrial participant he was subjected to 242 breath tests and was never presented with a search warrant, nor did any recognized exceptions apply to the searches as described above.

Ball was arrested on March 18, 2021, for a suspected DUI, was placed on the 24/7 Program as a condition of bond, and remained on the Program for approximately three weeks during which time he gave 38 breath tests. Ball was never presented with a search warrant and no recognized exceptions applied to his searches, either.

As such, Wyoming Statutes §§7-13-1703 and 7-13-1708, along with Admin. Rule 015. Chapter 2 are unconstitutional both facially and as applied to Plaintiffs.

C. Wyoming Statute § 7-13-1709 Unconstitutionally Authorizes Warrantless Arrests of Pretrial Participants.

The Tenth Circuit has regularly emphasized that a warrantless arrest violates the Fourth Amendment if the arresting officer lacks probable cause that the detained

⁶⁸ Martin v. City of Oklahoma City, 180 F. Supp. 3d 978, 996 (W.D. Okla. 2016) (cleaned up).

person has committed a crime.⁶⁹ And, Wyoming's laws require an officer have probable cause that a misdemeanor or felony has been committed before arresting a suspect.⁷⁰ Likewise, Rule 42 for Contempt of Court requires an affidavit and a show cause order unless the judge directly witnesses the contempt.⁷¹ A judge can only issue an arrest warrant for contempt of court if reasonable cause exists to believe the person will not appear for a show cause order though.⁷² Yet, Wyoming Statute § 7-13-1709 is directly at odds with the Fourth Amendment protections afforded under these laws.

Wyoming Statute § 7-13-1709 is facially unconstitutional because it authorizes warrantless arrests of participants who test positive or fail to submit to a test without requiring probable cause, or setting forth any other exception to the arrest warrant requirement. Instead, a written statement that the participant, in the judgment of the officer, violated the terms of their release conditions is all that is required to deprive a participant of their liberty. This sets out an impermissible subjective license for officers to substitute personal judgment for a constitutionally recognized standard, like probable cause, or other recognized exception to the arrest warrant requirement. Under no set of circumstances is Wyoming Statute § 7-13-1709 constitutional.

Further, as applied to Plaintiffs, Wyoming Statute § 7-13-1709 is unconstitutional because Deputies exercised their subjective authority to make

⁶⁹ U.S. v. Tafuna, 5 F.4th 1197, 1200 (10th Cir. 2021) (“[C]ustodial arrests, the most intrusive of Fourth Amendment seizures, require probable cause.”); U.S. v. Sanchez, 983 F.3d 1151, 1160-61 (10th Cir. 2020) (“A warrantless arrest violates the Fourth Amendment unless it was supported by probable cause.”) (cleaned up).

⁷⁰ W.S. § 7-2-102.

⁷¹ Wy. R. Crim. Pro. § 42.

⁷² Id.

warrantless arrests without a recognized exception to the warrant requirement. Sanchez overslept by an hour on one occasion and had a furlough from testing for a week but was nevertheless arrested twice for a violation of the Program without a warrant or probable cause that a criminal statute was violated. Similarly, Ball was arrested twice without a warrant for being late to testing also or missing testing without probable cause that a criminal statute was violated.

Even if the State relies on the contempt citations issued to Plaintiffs under Rule 42 to justify the arrests, the warrant requirement was not adhered to, nor were any of the other requirements complied with by Deputies. Rule 42 requires an affidavit, an order to show cause, and an order for arrest upon reasonable cause to believe the Plaintiffs would not appear for a show cause order. None of these requirements were met under Rule 42. As such, as applied to Plaintiffs, Wyoming Statute § 7-13-1709 unconstitutionally authorized the warrantless arrests of the Plaintiffs.

D. Wyoming Statute § 7-13-1709 Violated Plaintiffs' Substantive and Procedural Due Process Rights.

Substantive and procedural Due Process guarantees under the Fourteenth Amendment are offended by the 24/7 Program in how the program is implemented and in its punishment of Plaintiffs and pretrial participants before conviction.⁷³ Procedurally, Plaintiffs were unjustly deprived of “life, liberty, or property” when

⁷³ “No state shall ... deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV.

Deputies arrested and jailed them, and because the arrests themselves were not implemented in a fair or reasonable manner.⁷⁴

Substantively, Plaintiffs were deprived due process when Deputies arrested Plaintiffs for merely being late to testing and jailing them for hours or days without a legal basis. These arrests are conduct that “shocks the conscience.”⁷⁵ Being deprived of freedom merely for being late to testing is not a criminal act under Wyoming law.

Equally egregious is the punishment of Plaintiffs and pretrial participants the detention inflicted before conviction while on the Program. Plaintiffs and pretrial participants may not be punished prior to an adjudication of guilt⁷⁶ which is one of the most fundamental concepts in the U.S. criminal justice system in the U.S. People are innocent until proven guilty.⁷⁷

The 24/7 Program’s legislative history demonstrates the arrests of pretrial participants are intended to punish them for a violation of the Program rather than serve a regulatory purpose, and thus, violates due process.⁷⁸ Even if there is an alternative purpose to the Program which is rationally connected to it, it must not appear excessive in relation to the alternative purpose assigned to it.⁷⁹ Deterrence of criminal conduct, like here, is traditionally viewed as the goal of punishment.⁸⁰

⁷⁴ See, Mathews v. Eldridge, 424 U.S. 319, 335 (1976)(“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”).

⁷⁵ Rochin v. California, 342 U.S. 165, 172 (1952).

⁷⁶ Bell v. Wolfish, 441 U.S. 520, 535–36 (1979).

⁷⁷ Coffin v. United States, 156 U.S. 432, 453 (1895).

⁷⁸ Schall v. Martin, 467 U.S. 253, 269 (1984).

⁷⁹ Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–169 (1963).

⁸⁰ United States v. Bajakajian, 524 U.S. 321, 329 (1998).

Further, the Program’s statutes fail to comply with procedural due process which requires “[] a legislature establish minimal guidelines to govern law enforcement,”⁸¹ in crafting statutes. The statutory language cannot “necessarily entrust[] lawmaking to the moment-to-moment judgment of the policeman on his beat.”⁸² If a statute confers vast discretion on the police to define a “violation” of the statute, then it fails facially under a due process analysis.⁸³

i. Wyoming Statute § 7-13-1709 is Facially and As Applied Unconstitutional Because it is Vague and Imposes Punishment Before Conviction.

Facially, Wyoming Statute § 7-13-1709 violates due process rights of Plaintiffs and pretrial participants because it does not “simply regulate[] business behavior” but it also does not “contain[] a scienter requirement,”⁸⁴ but instead, acts as a criminal law with no mens rea element, infringing on constitutionally protected liberty.⁸⁵ The statute’s “vagueness permeates the text” of the law because it does not inform a participant or law enforcement of the specific acts that would result in a violation, leading to the invention of the rule (such as the rule invented by the Teton County Sheriff’s Department) that allows an arrest and incarceration of a participant who is 30 minutes late to testing or late on three occasions to testing, a punishment found nowhere in Wyoming statutes.⁸⁶ The Rule is purely a creation of the Teton County Sheriff’s Department.

⁸¹ Kolender v. Lawson, 461 U.S. 352, 358 (1983).

⁸² Id. at 360, 103 S.Ct. 1855 (cleaned up).

⁸³ City of Chicago v. Morales, 527 U.S. 41, 61 (1999).

⁸⁴ See, Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

⁸⁵ Colautti v. Franklin, 439 U.S. 379, 391, 395 (1979).

⁸⁶ Morales, 527 U.S. at 55.

Wyoming Statute § 7-13-1709 does not “establish minimal guidelines to govern law enforcement,” because it permits the *subjective* judgment of a peace officer to serve as the only guiding determination of whether a violation of release conditions occurred.⁸⁷ The statute permits immediate arrest of a participant who “in the judgment” of the officer has violated release conditions.

Wyoming Statute § 7-13-1709 also contains no mens rea element to inform the participant what specific actions would violate the statute. It does not require intentional violation by the participant. Yet, both Rule 42 for Contempt of Court and Rule 46.4 for Bond Violations give all others on pretrial release the opportunity to present mitigating evidence to show *lack of intent* to rebut an allegation. No such opportunity is allowed to participants in the 24/7 Program before immediate arrest and punishment occurs. Instead, Wyoming Statute § 7-13-1709 sets out an unfair, unclear process to deprive participants of their liberty by immediate arrest based on officer whim.

Wyoming Statute §7-13-1709 also clearly does not have a regulatory purpose. The statute’s stated purpose “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.”⁸⁸ The contemporaneous purpose of crime prevention is to punish a participant by immediately enforcing violations through “immediate arrest.”

⁸⁷ Kolender v. Lawson, 461 U.S. 352, 358 (1983).

⁸⁸ W.S. § 7-13-1703.

The legislative history states the warrantless arrest provision is to provide an immediate consequence through jail time and to coerce behavior.⁸⁹ One of the sponsoring senators, during the legislative hearings, said that the “underlying premise” of the 24/7 program is to effect behavioral change. To do so, a consequence needs to be imposed as soon as possible after a violation.⁹⁰ This demonstrates clearly that Wyoming Statute §7-13-1709 was intended to be punitive and not regulatory.

As applied to Plaintiffs, Wyoming Statute § 7-13-1709 is unconstitutional “because of the way it was applied to the particular facts of [the Plaintiffs’] case.”⁹¹ Deputies twice arrested Plaintiffs without a warrant as swift and immediate punishment for a *suspected* violation of release conditions and cited them for contempt of court under Rule 42. Plaintiffs had no opportunity to defend themselves before arrest and detention. Further, there was no affidavit submitted to initiate the contempt of court process by the Deputies, no order to show cause was issued by a judge and no arrest order was issued before taking Plaintiffs into custody as required by Rule 42.

Unlike others on pretrial release who are entitled to a motion, an arrest warrant, and a right to present mitigating evidence under Rule 46.4 or Rule 42, Plaintiffs were afforded no similar rights. They, and other pretrial participants, were

⁸⁹ Senator Schiffer introduced the 24/7 Program bill and explained its purpose was to impose “consequences [that] are immediate” when violations occurred. Wyoming Senate Second Day Session, 2014 Budget Session, at 02:36:10 (Feb. 11, 2014), <https://pluto.wyo.gov/awweb/awarchive?type=file&item=11116108>. Senator Christenson explained, “to effect behavioral change in the participant, an immediate consequence should be imposed...,” and Rep. Baker stated the program “forced [participants] to ... have .. incentive to stay sober....” Wyoming House of Representatives Fifteenth Day Session, 2014 Budget Session, at 01:04:50 (Feb. 28, 2014), <https://pluto.wyo.gov/awweb/awarchive?type=file&item=11116102>.

⁹⁰ *Id.*

⁹¹ *United States v. Salerno*, 481 U.S. at 745, n. 3.

immediately arrested without a warrant, and were punished through incarceration for hours or days, merely for being late or missing a test.

Wyoming Statute § 7-13-1709 is both facially unconstitutional under the Fourteenth Amendment to the U.S. Constitution and is unconstitutional as applied to Plaintiffs.

E. The 24/7 Program Imposes Excessive Bail Conditions.

Courts have held the excessive bail clause⁹² applies also to conditions of release,⁹³ because the “[r]ight of an accused to freedom pending trial is inherent in the concept of a liberty interest protected by the due process clause of the Fourteenth Amendment.”⁹⁴ The Eighth Amendment, as applied to the states through the Fourteenth Amendment, prevents the imposition of bail conditions that are excessive in light of the interests the state seeks to protect,⁹⁵ and state statutes that conflict with the Eighth Amendment are unconstitutional.⁹⁶ The State cannot use its bail system to achieve invalid interests, which is determined by examining the interests bail is intended to serve for a particular individual and determining whether the conditions set are excessive⁹⁷ for the purpose of achieving those interests.⁹⁸

⁹²The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. Amend. VIII.

⁹³ United States v. Gardner, 523 F. Supp. 2d 1025, 1029 (N.D. Cal. 2007).

⁹⁴ Meechaicum v. Fountain, 696 F.2d 790, 791–92 (10th Cir.1983). See, also, Dodds v. Richardson, 614 F.3d 1185, 1192 (10th Cir. 2010).

⁹⁵ United States v. Salerno, 481 U.S. at 754. Galen v. Cty. of Los Angeles, 477 F.3d 652, 660 (9th Cir. 2007).

⁹⁶ Trop v. Dulles, 356 U.S. 86, 101-04 (1958) (holding that Congressional act authorizing expatriation unconstitutional in violation of the Eighth Amendment).

⁹⁷ Salerno at 754 (1987) (Excessive bail exists when the State imposes conditions that are excessive in relation to the valid interests it seeks to achieve.) Galen at 660 (9th Cir. 2007).

⁹⁸ Stack v. Boyle, 342 U.S. 1, 5 (1951).

Here, imposition of the 24/7 Program as a bond condition includes early morning and late evening twice daily breath testing spanning over several weeks and months; signing an Agreement with a compelled waiver of Fourth Amendment rights for warrantless searches; and requiring participants to pay for their own testing at the cost of \$2 per test and \$30 enrollment. These conditions are excessive to achieve the State's stated interests to reduce repeat crime due to drug and alcohol abuse. Compelling a participant to agree to warrantless twice daily breath testing without probable cause or a warrant to gain one's liberty is excessive to achieve that purpose. Also, arresting someone for being late to testing does not achieve the purpose of preventing repeat crime because being late to testing is not a crime nor is timeliness expressly mandated by the bond or release order. The testing and payment provisions under the 24/7 Program are excessive bail conditions.

3. Plaintiffs Will Suffer Irreparable Injury if the Injunction is Denied.

Plaintiffs have shown that they stand to suffer "an injury" that is "certain, great, actual, and not theoretical."⁹⁹ Privacy and liberty over one's self are fundamental constitutional rights embodied within the Fourth Amendment that, when violated, constitute great irreparable harm.¹⁰⁰ Here, Plaintiffs and other pretrial participants are in danger of being searched and arrested repeatedly without a warrant if they are late or miss testing. They easily meet this prong of the preliminary injunctive test.

4. Plaintiffs' Threatened Injury Outweighs any Potential Injury the State will Suffer Under the Injunction.

⁹⁹ Schrier v. Univ. Of Co., 427 F.3d 1253, 1267 (10th Cir. 2005).

¹⁰⁰ Kikumura v. Hurley, 242 F.3d 950, 963 (10th Cir. 2001).

“[W]hen [a] law ... is likely unconstitutional, the[] interests [of those the government represents, such as voters] do not outweigh [a plaintiff's interest] in having [its] constitutional rights protected.”¹⁰¹ Even though the purpose of the 24/7 Program is to prevent repeat crime from substance abuse, because it is a general crime prevention statute, it does not outweigh the constitutional rights of the Plaintiffs and other pretrial participants to be free from warrantless searches and seizures, which are fundamental liberty interests. The only repercussions to the State would be that those charged with drug or alcohol offenses will *still* be subject to the already existing bond conditions and repercussions for a violation of them imposed upon all others under Wyoming Rules of Criminal Procedure 46.1 and 46.2 and Rule 42. Those statutes are adequate to protect the State's interests. The potential injury to the State is non-existent because it has sufficient other laws it can enforce related to repeat drug and alcohol offenses that require probable cause and a warrant.

5. The Injunction Would Not be Adverse to the Public Interest.

The Tenth Circuit has recognized that “it is always in the public interest to prevent the violation of a party's constitutional rights.”¹⁰² Because the 24/7 Program infringes on multiple constitutional rights guaranteed to Plaintiffs and pretrial participants, enjoining the enforcement of the Program by Defendants would not

¹⁰¹ Awad v. Ziri*ax*, 670 F.3d 1111, 1131–32 (10th Cir.2012).

¹⁰² Id. at 1132. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff'd* sub nom. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

infringe on the public's interests particularly when the methods of enforcement are contrary to its stated purpose and serve punitive measures only.¹⁰³

CONCLUSION

The 24/7 Program goes far beyond the constitutional limits that exist to protect the privacy and freedom of Wyoming citizens. The 24/7 Program imprisons people for the mere act of being late, often under circumstances beyond people's control, or is a result of simple, human error, like over-sleeping due to working late. The presumption of innocence is a fundamental constitutional protection that shields participants at the pre-trial stage of any criminal proceeding. To allow the 24/7 Program to infringe on that right through the invasive, over-reaching bond conditions that require twice daily breath testing or other frequent testing of bodily fluids is to gut the presumption of innocence entirely. And the jailing of pretrial participants as punishment for being late to testing only adds insult to injury.

Plaintiffs respectfully request the Court grant their Motion for Preliminary Injunction to enjoin Defendants and those working in concert with them from enforcing the 24/7 Program Wyoming Statutes §§ 7-13-08 and 7-13-09 and Administrative Rules 0015.0017 Chapters 1 and 2 against Plaintiffs and pretrial participants.

Respectfully submitted this 7th day of March 2022.

¹⁰³ Because Plaintiffs are serving a public interest in acting to protect constitutional rights, this Court should waive the F.R.C.P. 65(c) security requirement because trial courts have "wide discretion under Rule 65(c) in determining whether to require security." RoDa Drilling Co. v. Siegal, 552 F.3d 1203, 1215 (10th Cir. 2009).

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CERTIFICATE OF COMPLIANCE

This brief complies with Wyoming Local Civil Rule 7.1(B) because it contains 25 pages, not including the cover page, table of contents, signature block, certificate of service and this certificate.

This 7th day of March 2022.

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CERTIFICATE OF SERVICE

I certify that on the 7th day of March, 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