APPENDIX

APPENDIX
TABLE OF CONTENTS

Page

APPENDIX A: Opinion of the United States Court of Appeals for the Fifth Circuit, dated June 21, 2023 .... 1a

APPENDIX B: Opinion of the United States District Court for the Western District of Louisiana, dated February 7, 2020 .... 15a

APPENDIX C: Memorandum Ruling of the United States District Court for the Western District of Louisiana, dated March 8, 2018 .... 53a

APPENDIX D: Order of the United States District Court for the Western District of Louisiana, dated March 6, 2018 .... 67a

APPENDIX E: Report and Recommendation of the Magistrate in the United States District Court for the Western District of Louisiana, dated December 11, 2017 .... 69a

APPENDIX F: Report and Recommendation of the Magistrate in the United States District Court for the Western District of Louisiana, dated December 11, 2017 .... 87a

APPENDIX G: Opinion of the United States Court of Appeals for the Fifth Circuit in *Daves* v. *Dallas County*, *Texas*, No. 18-11368, dated March 31, 2023 .... 117a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-30159

EDWARD LITTLE, *on behalf of himself and all others similarly situated*,
Plaintiff–Appellant,

SHELIA ANN MURPHY,
Intervenor Plaintiff–Appellant,

v.

ANDRE' DOGUET; LAURIE HULIN; MARK GARBER,
Defendants–Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:17-CV-724

Filed June 21, 2023

Before HIGGINBOTHAM, SOUTHWICK, and HIGGINSON, *Circuit Judges*.

LESLIE H. SOUTHWICK, *Circuit Judge*:

This litigation challenges the bail practices of one Louisiana parish. The claim is that money bail is required for pretrial detainees without consideration of alternatives, violating the rights of indigents to substantive due process and equal protection. The district court denied all relief.

While the appeal was pending, this court *en banc* held that district courts must abstain from suits contesting a local jurisdiction's bail practices when there is an opportunity in state court to present constitutional challenges to bail. *See Daves v. Dallas Cnty.*, 64 F.4th 616, 631 (5th Cir. 2023) (*en banc*). The parties agree there exists an opportunity here. Therefore, we REMAND for the district court to dismiss the case.

FACTUAL AND PROCEDURAL BACKGROUND

In 2017, Edward Little was arrested on a felony-theft charge. Bail was set at $3,000, which Little could not pay. After spending several days in jail, Little had his first appearance before a judicial officer. There was no inquiry as to whether Little could afford the prior amount, and it was not reduced. No finding was made that pretrial detention was necessary. Little, who had no counsel, had no opportunity to present or contest evidence.

Little filed this action while in jail awaiting his first appearance.[1] The Defendants, who were sued in their official capacities only, were the Sheriff, Mark Garber; the then-Parish Commissioner, Thomas Frederick;[2] and the former Chief Judge of the 15th Judicial District Court, Kristian Earles.[3] Little filed the suit as a class

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[1] Sheila Murphy intervened as a plaintiff, but she died in June 2020 while this appeal was pending. In that situation, "the decedent's personal representative may be substituted as a party." FED. R. APP. PROC. 43(a)(1). No such motion has been filed. In light of our decision in the case, we see no reason to require a substitution.

[2] The current Parish Commissioner is Andre' Doguet.

[3] The current Chief Judge of the 15th Judicial District Court is Laurie Hulin. That judicial district covers three governmental parishes: Lafayette, Vermilion, and Acadia. As we understand the

action, and the district court granted Little's motion to certify the class. Alleging substantive and procedural constitutional violations, Little sought equitable relief to prevent the Defendants from using secured-money-bail to detain anyone unless a court provides various procedural protections.

The Defendants argued the district court should abstain under *Younger v. Harris*, 401 U.S. 37 (1971). In March 2018, the district court accepted the Magistrate Judge's recommendation that the court reject abstention. Only the sheriff was dismissed before trial. The parties stipulated to most of the facts, including that the commissioner generally sets bond amounts during daily calls to the jail and never reduces those amounts at first-appearance hearings. The commissioner also testified in a deposition that he routinely set secured-money-bail (of at least $500) without considering individuals' ability to pay.

The district court held a one-day bench trial in August 2019. The Defendants introduced into evidence the form labeled "Release Order in Lieu of/as Modification to Money Bond." That form allows the commissioner to order release on personal surety, to reduce the secured-money bail required for a person's release, or to have people evaluated for a work-release program in lieu of paying bail.

After trial, the district court entered judgment for the Defendants. Relying on the modification form, the court found that the commissioner was taking a detainee's ability to pay into account in some circumstances. That change, the court concluded, rendered moot the Plaintiffs' claims regarding the Defendants'

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complaint, this suit concerns the practices only in Lafayette Parish, where defendant Garber is the sheriff.

pre-litigation bail practices. The court also concluded that the Defendants' current practices, such as considering ability to pay and alternatives to detention, satisfy equal protection and due process requirements.

The Plaintiffs timely appealed. In April 2020, we granted the Plaintiffs' unopposed motion to stay the appeal pending resolution of a case with similar issues. It would be three years before that similar case was concluded. We will explain those rulings in due course.

DISCUSSION

We start by providing more detail about the relevant bail procedures. Arrestees are brought to the Lafayette Parish Correctional Center. Each day, the commissioner for the 15th Judicial District in Louisiana calls the correctional center to set secured-bail amounts for recent arrestees based on the charges and, in some circumstances, criminal-history information. The commissioner does not hear from arrestees before setting bail and has historically asked for no other information, including about individuals' ability to pay cash bail.

Before the Plaintiffs filed this lawsuit, the commissioner set cash-bail amounts for many misdemeanor offenses according to a schedule set by the 15th Judicial District Court. After this case was filed, the court rescinded the schedule and replaced it with "an order requiring the Sheriff to automatically release with a summons all persons arrested on certain misdemeanor charges—unless it was their third arrest within six months—while requiring all other misdemeanor arrestees to have bonds set in the same manner as felony arrestees." For those individuals who do not qualify for automatic release, the commissioner sets secured bond at the amount specified on the warrant or, where no warrant exists, determines an amount.

Those under arrest who cannot pay the amount imposed during the commissioner's calls to the jail (that occur without arrestees' presence or participation) are detained until their first appearance, which typically occurs within 72 hours of arrest. First-appearance hearings, which are conducted by video, provide no opportunity to provide or contest evidence, dispute the amount of secured-money bail imposed, or argue for alternative conditions. Rather, the commissioner reads the charges, informs people of the bail previously set, and refers them to the public defender's office if they cannot afford an attorney. Arrestees are not provided counsel, and the commissioner "makes no written or oral findings on the record of any kind" during the hearings, and no transcript or other recording of them is kept. The commissioner also does not explain his determination of bail amounts or why alternatives to secured-money bail could not serve the government's interests. The commissioner also never modifies the bail amounts previously set.

Starting in May 2019, if the commissioner discovered during an initial appearance that an individual could not pay the bond previously set, he referred to a form entitled "Release Order in Lieu of/as Modification to Money Bond." Although the form provides alternatives to money bail that the commissioner may consider, the district court found that in practice he either retains the established bond amount or refers the arrestee to possible alternatives. The commissioner's secretary—who processes personal-bond applications using unknown criteria—does not notify the commissioner when she denies applications, nor can her denials be appealed.

The Lafayette Parish sheriff enforces pretrial detention orders. He also operates the Sheriff's Tracking Offenders Program ("STOP"), a local program that

allows certain people to apply for release without having to pay upfront cash bail. The sheriff charges a $25 application fee plus a daily $7 participation fee. Although the commissioner must approve STOP orders, in practice he accepts the decisions made by the sheriff. For people unable to pay secured bail, therefore, the sheriff decides whether they remain in jail (by denying a STOP application) or are released (by granting it).

After this lawsuit was filed, the sheriff created a Pretrial Indigency Determination Affidavit ("PIDA"). PIDAs allow the commissioner to consider people's ability to pay when he calls the jail to set secured-bail amounts without the participation of those detained. Detainees must complete and submit PIDAs between the time of arrest and when the commissioner calls to have it considered. The record does not show whether arrestees are informed of the PIDA or the timeline.

The Plaintiffs have argued on appeal that (1) the Defendants' bail practices violate equal protection, substantive due process, procedural due process, and the Sixth Amendment; and (2) the district court erred in dismissing the Plaintiffs' claims against the Lafayette Parish sheriff.

As mentioned earlier, the district court rejected the Defendants' argument that the court should abstain under *Younger v. Harris*. After a bench trial, the court entered judgment for the Defendants on the merits. On appeal, and before any briefs were filed, we stayed further proceedings until a decision was reached in the appeal of a case challenging bail practices in Dallas County, Texas.

The first of three opinions in that related case was by a panel of this court in December 2020. *See Daves v. Dallas Cnty.*, 984 F.3d 381 (5th Cir. 2020), *vacated upon*

grant reh'g en banc, 988 F.3d 834 (5th Cir. 2021). The appeal was reheard *en banc*. The full court's initial opinion in January 2022 resolved several issues but remanded on the issues of mootness and abstention. *See Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022) (*en banc*). After the district court issued its new rulings and the case returned to this court, we held in March 2023 that the case was moot and that abstention applied to bail challenges if there were remedies available under state law to address bail. *See Daves v. Dallas Cnty.*, 64 F.4th 616 (5th Cir. 2023) (*en banc*).

At our request, the parties in this case provided supplemental briefing on the effect of that final *en banc* opinion. The Plaintiffs concede, and the Defendants insist, that it is necessary for the court to abstain and dismiss the suit. Of course, we must determine if we agree.

The abstention doctrine applied in *Daves* requires that federal courts decline to exercise jurisdiction over a state criminal defendant's claims when three conditions are met: "(1) the federal proceeding would interfere with an 'ongoing state judicial proceeding'; (2) the state has an important interest in regulating the subject matter of the claim; and (3) the plaintiff has 'an adequate opportunity in the state proceedings to raise constitutional challenges.'" *Id.* at 625 (quoting *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 716 (5th Cir. 2012)). Those conditions were taken from *Middlesex County Ethics Commission v. Garden State Bar Association*, 457 U.S. 423, 432 (1982). The *Middlesex* Court set out that list when explaining how to apply the abstention doctrine identified in *Younger v. Harris*.

In this case, the only analysis of abstention in the district court record is by the Magistrate Judge. In December 2017, he issued a Report and Recommendation

on Sheriff Garber's Rule 12(b)(1) motion to dismiss for reasons that included abstention. One of the conclusions was that abstention was inapplicable because the challenge "was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of their criminal prosecutions," quoting *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975). Categorically, the Magistrate Judge seemed to conclude, *Younger* does not apply to a challenge to pretrial detention. Further, "the plaintiff does not have an adequate opportunity to raise his constitutional challenges in state court." The district judge accepted the recommendation to deny the Sheriff's Rule 12(b)(1) motion to dismiss.

Our factual review has already summarized changes in Lafayette Parish procedures regarding bail since this lawsuit was filed. We discover no analysis by the district court of whether the new procedures provide an "adequate opportunity" to present constitutional challenges. We agree with the implication in the post-*Daves v. Dallas* filings by the parties that we can make the needed determination here.

We now review the three conditions for applying *Younger* abstention.

I. Condition 1: interference with ongoing state proceedings

Our *Daves en banc* court held that federal adjudication of the claims there regarding bail for pretrial detainees would unduly interfere with state proceedings. *Daves*, 64 F.4th at 631. We determined the requested injunction "would permit a pre-trial detainee who claimed that the order was not complied with to proceed to the federal court." *Id.* (quotation marks and citation omitted). "Such extensive federal oversight constitutes

'an ongoing federal audit of state criminal proceedings … indirectly accomplish[ing] the kind of interference that *Younger v. Harris* … and related cases sought to prevent.'" *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974)) (alternations in original).

The Plaintiffs here acknowledge that the claims in *Daves* "are substantively identical to the claims here." Specifically, the Plaintiffs here seek "[a]n order and judgment preliminarily and permanently enjoining the Defendants from using money bail" without specific procedural and substantive safeguards. Additionally, the Plaintiffs seek, among other things, a substantive guarantee that arrestees will not be detained absent "a finding that detention is necessary to serve a compelling government interest." The *Daves* plaintiffs made virtually identical requests. *See Daves v. Dallas Cnty.*, 341 F. Supp. 3d 688, 697 (N.D. Tex. 2018).

Our *en banc* holding that the *Daves* plaintiffs' requested relief would interfere with ongoing state criminal proceedings controls here. The relief requested by the Plaintiffs in this case is identical to the relief requested by the *Daves* plaintiffs. The first *Younger* condition is satisfied.

II. Condition 2: important state interest

Daves held, "states have a vital interest in regulating their pretrial criminal procedures including assessment of bail bonds." *Daves*, 64 F.4th at 627 n.21. As in *Daves*, the second *Younger* condition is satisfied in this case.

III. Condition 3: adequate opportunity to raise constitutional challenges in state proceedings

This final condition requires that there be a state proceeding available to a pretrial detainee to present

constitutional challenges about his detention. *Daves*, 64 F.4th at 625. The Magistrate Judge held in December 2017 that the procedures available were not adequate because they were too slow:

> The defendants contend that the plaintiff has an adequate state court remedy because he can file a motion to reduce bail. However, the plaintiff does not allege that he is unable to file a motion to reduce his bail amount. Rather, he asserts that the time period it takes for the defendants to consider his ability to pay a certain monetary bail amount is a violation of his constitutional rights because he remains detained solely due to his inability to pay the bail amount. Even though the plaintiff can file a motion to reduce bail to challenge the bail set by the defendants, a ruling on the motion to reduce bail would not address the constitutional challenges that the plaintiff asserts in this lawsuit. Accordingly, *Younger* abstention does not apply to this case.

The district court accepted the recommendation not to dismiss on the basis of abstention or on any other jurisdictional argument.

According to the Plaintiffs, by the time the suit was tried in August 2019, the procedures available for challenging bail were as follows:

> Louisiana law [] provides that bail must be fixed based on multiple factors, including "[t]he ability of the defendant to give bail." La. Code Crim. Proc. Ann. art. 316. And after bail is set, a Louisiana trial court can then (either on a motion for bail modification or *sua sponte*) "reduce the amount of bail, or require new or additional security" for good cause. *Id.* art. 319. Finally,

> Louisiana law formally allows constitutional claims to a pretrial-detention regime to be brought in a separate habeas proceeding, *see id.* art. 362(7), though … such a proceeding could provide a ruling on such claims only long after the allegedly unconstitutional detention and the irreparable harm it inflicts have begun.

Those procedures are adequate if they provide "an opportunity to raise federal claims in the course of state proceedings." *Daves*, 64 F.4th at 629. What having "an opportunity" means is explained in part by what we held in *Daves* was *not* required.

First, the *en banc* court rejected the plaintiffs' argument that an opportunity to litigate constitutional claims is inadequate unless it is provided "in" the state proceedings—as opposed to a separate proceeding like habeas. *Id.* at n.27. "This is refuted by *O'Shea*, which specifically referenced the availability of state postconviction collateral review as constituting an adequate opportunity." *Id.*

Second, we rejected "that *timeliness* of state remedies is required to prevent *Younger* abstention." *Id.* at 632 (emphasis in original). The *Daves* plaintiffs relied on "the incorrect assumption that each moment in erroneous pretrial detention is a constitutional violation." *Id.* at 633. We reasoned that "arguments about delay and timeliness pertain not to the adequacy of a state proceeding, but rather to 'conventional claims of bad faith.'" *Id.* (quoting *Moore v. Sims*, 442 U.S. 415, 432 (1979)). We held that injury to a pretrial detainee resulting from delay in assessing a constitutional challenge to bail was analogous to "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution,"

which are not irreparable injuries. *Id.* at 632 (quoting *Younger*, 401 U.S. at 46).

The "gist of *Younger*'s test for availability" is whether "errors can be rectified according to state law, not that they must be rectified virtually immediately." *Id.* at 633. Further, "state remedies are inadequate only where 'state law *clearly bars* the interposition of the constitutional claims.'" *Id.* at 632 (quoting *Sims*, 442 U.S. at 425–26) (emphasis in original).

In *Daves*, the plaintiffs had the requisite opportunity to raise their federal constitutional claims in state court because "Texas state court procedures do not clearly bar the raising of" federal constitutional challenges to a state system. *Id.* at 633. After listing certain procedural protections, we stated "there appears to be no procedural bar to filing a motion for reconsideration of any of these rulings." *Id.* at 629. Further, "[a] petition for habeas corpus is also available." *Id.* (referencing TEX. CODE CRIM. P. art. 11.24)).

We summarized: "Texas courts are neither unable nor unwilling to reconsider bail determinations under the proper circumstances, thus providing state court detainees the chance to raise federal claims without the need to come to federal court." *Id.* at 631. Similarly, the Plaintiffs here have failed to show that Louisiana is unable or unwilling to reconsider bail determinations. How quickly those can be reconsidered is irrelevant because "arguments about delay and timeliness pertain not to the adequacy of a state proceeding, but rather to 'conventional claims of bad faith.'" *Id.* at 633 (quoting *Sims*, 442 U.S. at 432).

We close with what the Plaintiffs concede:

> Given the analogous remedies technically available in Louisiana and Texas and the breadth of *Daves*'s *Younger* reasoning (including the irrelevance under *Daves* of the actual availability in practice of state-law remedies), *Daves* requires a remand of this case for dismissal.

All three *Younger* conditions are satisfied. Abstention is mandated. We REMAND in order that the district court may DISMISS the suit.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 6:17-0724

EDWARD LITTLE, ET AL.,

versus

THOMAS FREDERICK, ET AL.,

Judge Terry A. Doughty
Mag. Judge Patrick J. Hanna
Filed February 7, 2020

OPINION

This is a civil rights action brought by Plaintiffs Edward Little and Shelia Ann Murphy against Defendants Thomas Frederick, Commissioner of the Fifteenth Judicial District Court, and Judge Kristian Earles, former Chief Judge of the Fifteenth Judicial District Court.

A bench trial was held in this matter on August 6, 2019. The Court took the matter under advisement and instructed both parties to submit post-trial supplemental briefs. After the transcript was complete, on September 20, 2019, Plaintiffs filed their post-trial brief [Doc. No. 196]. On December 3, 2019, after an extension of time, Defendants filed their post-trial brief [Doc. No. 201]. On December 16, 2019, Plaintiffs filed a reply brief [Doc. No. 202].

The Court hereby enters the following findings of fact and conclusions of law. To the extent that any finding of fact constitutes a conclusion of law, the Court hereby adopts it as such, and to the extent that any conclusion of law constitutes a finding of fact, the Court hereby adopts it as such.

I. FINDINGS OF FACT

Parties

This matter has been certified as a class action. Plaintiffs Edward Little ("Little") and Shelia Ann Murphy ("Murphy") have been designated as joint lead Plaintiffs. They brought this action on behalf of themselves and members of the class of" [a]ll people who are or will be detained in the Lafayette Parish [Correctional Center][1] because they are unable to pay a sum of money required by post-arrest secured money bail setting procedures." [Doc. No. 181].

Little was arrested on June 3, 2017, on a charge of felony theft and detained at the Lafayette Parish Correctional Center ("LPCC"). On the following day, Defendant Commissioner Thomas Frederick ("Commissioner Frederick") determined probable cause for his arrest and set his bail as a $3,000 secured bond. Little could not afford to pay that amount and remained incarcerated until June 10, 2017.

Murphy was arrested on February 3, 2018, on a charge of felony possession of narcotics and two related misdemeanors. She was detained at the LPCC. Commissioner Frederick determined probable cause for Murphy's arrest and set her bail as a $2,500 secured

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[1] Plaintiffs refer to Lafayette Parish Jail, but the Court uses the correct name of the facility.

bond. She then appeared via closed-circuit television at a 72-hour hearing before Commissioner Frederick, in which he affirmed the bond amount. Murphy could not afford that amount of bond and remained incarcerated until February 10, 2018.

Commissioner Frederick is the Commissioner for Louisiana's Fifteenth Judicial District. In that role he makes the initial bail determinations for all arrestees in Lafayette, Vermillion, and Acadia Parishes.

Defendant Judge Kristian Earles, former Chief Judge of the Fifteenth Judicial District Court, promulgated the bail schedule previously used by the District.[2]

Claims

Plaintiffs contend that Defendants violated the Fourteenth Amendment's Due Process and Equal Protection clauses by the application of policies that result in the jailing of persons because of their inability to make a monetary payment.[3] Plaintiffs further contend that Defendants violated Plaintiffs' fundamental rights to pretrial liberty by placing and keeping them in jail because they cannot afford to pay the monetary bail amount set, without inquiry into and findings concerning ability to pay or non-financial alternative conditions. Plaintiffs request that the Court issue the following relief:

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[2] Although Judge Earles remains a Defendant in this action, he was not identified as such in the parties' pretrial order.

[3] Plaintiffs do not contend that any policy is unconstitutional on its face, but only as applied.

(1) An order and judgment permanently enjoining[4] the Defendants from using money bail to detain any person without procedures that ensure an inquiry into and findings concerning the person's ability to pay any monetary amount set and without an inquiry into and findings concerning non-financial alternative conditions of release;

and

(2) A declaratory judgment that the Defendants violated Plaintiffs' constitutional rights by setting secured financial conditions of release without inquiring into or making findings as to whether arrestees can pay the amounts set, and without considering non-financial alternative conditions of release.[5]

Commissioner Frederick's Standard Procedures in Setting Conditions of Pretrial Release Before the Initial Appearance

Commissioner Frederick estimates that he determines bail for at least 6,500 arrestees per year. Prior to February 2018, a bail schedule governed the release of certain misdemeanor offenses, meaning that Lafayette Parish Sheriff's deputies would refer to a predetermined list of bond amounts, organized by offense, to determine the conditions of an arrestee' s pretrial release. The

[4] Plaintiffs sought a preliminary injunction, but that request is now moot as a trial on the merits has been held.

[5] During the pre-trial conference, Plaintiffs' counsel confirmed that they have abandoned their claim for attorneys' fees and costs pursuant to 42 U.S.C. § 1988. [Doc. No. 181].

most recent bail schedule was ordered by then-Chief Judge Earles in 2013.

In February 2018, the judges of the Fifteenth Judicial District issued an en banc order rescinding the previous schedule and replacing it with an order requiring the Sheriff to automatically release with a summons all persons arrested on certain misdemeanor charges—unless it was their third arrest within six months—while requiring all other misdemeanor arrestees to have bonds set in the same manner as felony arrestees.

As a result, a written schedule of predetermined bond amounts is no longer in use for misdemeanor and felony arrestees in the Fifteenth Judicial District. The en banc order was revised in August 2018 to list all misdemeanor charges for which there would not be an automatic release with a summons, directing the Sheriff to release all others unless it was their third arrest within six months.[6] All persons arrested for the misdemeanors

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[6] The Order lists the following offenses for there is no automatic release:

Battery on a Police Officer
Battery on a Correctional Facility Employee
Battery on a Dating Partner
Battery on the Infirmed or Aged
Domestic Abuse Battery
Vehicular Negligent Injuring
Stalking
Cyber stalking
Cyber bullying
Sexual Battery
Interference with Child Custody
False Imprisonment
Unauthorized removal of a motor vehicle
Online impersonation
Violation of Protective Order
Criminal Abandonment

listed on the order would have their bonds set in the same manner as felony arrestees.

Although the wording of the orders differed, the substance of the August 2018 order remained the same as its predecessor. For a person arrested on a warrant, Commissioner Frederick sets a secured bond amount at the time he approves the warrant. When an arrest warrant has been signed by another magistrate or judicial officer who did not specify a bond amount on the face of the warrant, Commissioner Frederick will set that person's bond after arrest.

For those warrantless arrestees who have not been automatically released on a summons or who were arrested on warrants without specified bond amounts, Commissioner Frederick calls the jail three to six times per day (365 days per year) to set their bonds. [Doc. No. 195, p. 9]. Upon calling the jail, Commissioner Frederick speaks to an employee of the Lafayette Parish Sheriff's Office who reads him the affidavit of probable cause for

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Carnal Knowledge of Juvenile
Sexting
Prohibited sexual conduct between educator and student
Illegal Discharge of a Firearm
Carrying a Concealed Weapon
Illegally Supplying a felon with a firearm
Possession of a firearm on premises of alcoholic beverage outlet
Possession of a firearm in a firearm free zone
OWI
Driving Under Suspension
Hit and Run
Sexual Acts in Public
Simple Escape
Possession of Marijuana (2nd or subsequent offense)
Possession of Drug Paraphernalia (2nd or subsequent offense)

[Doc. No. 133-2, Exh. A.].

arrest. For some crimes—those involving a firearm, a sex offense, or a crime of violence—Commissioner Frederick will also inquire into the arrestee's criminal history. He asks for no other information before setting a secured bond amount for each arrestee.

Prior to May 24, 2018, Commissioner Frederick never received financial information from any arrestees prior to their initial appearance.

Sheriff Garber created an electronic "Pretrial Indigency Determination Affidavit" ("PIDA") that arrestees may complete using the Telmate kiosks in the jail. This PIDA first became available on May 24, 2018. When an arrestee completes the PIDA and "sends" it, an email goes to Commissioner Frederick. [Doc. No. 195, p. 9]. He receives PIDAs for two or three arrestees per day. The PIDA form asks arrestees about their monthly income, number of dependents, receipt of public assistance, employment status, and the "amount you could reasonabl[y] pay, from any source, including the contributions of family and friends." An arrestee's expenses are not included in the PIDA. Commissioner Frederick takes the PIDA into consideration only if the arrestees submit their information to him between their arrest and the time Commissioner Frederick calls the jail to set bonds. If an arrestee submits the PIDA, Commissioner Frederick receives the PIDA on his phone and his computer. Commissioner Frederick is unaware of whether arrestees are informed either of the availability of the PIDA upon arrest or that it must be submitted to him before he sets a bond amount.

Even without the PIDA, Commissioner Frederick considers the fact that the person is incarcerated and his personal knowledge of the local economy based on his 60 years of residency and his experiences as a public

defender for over a decade. [Doc. Nos. 133-2, ¶ 3; 195, pp. 10-11].

Commissioner Frederick holds First Appearance hearings,[7] also referred to as "jail call," [Doc. No. 195, pp. 8-9], every Tuesday and Friday for each of the three parishes in the judicial district. He conducts these hearings by video connection with each of the parish's jails. The arrestees are brought to a room in the jail with an audiovisual connection to the courthouse, where Commissioner Frederick conducts the hearing. Public defenders are generally not present in the jail with arrestees during the hearing. While Commissioner Frederick may refer arrestees to the services of the public defenders' office in the course of a first appearance, the public defenders' office does not represent arrestees in the hearing itself. Each arrestee is brought before the video camera, and Commissioner Frederick describes the typical hearing as follows:

> I verify with them their name and their address. And, then I ask them for their date of birth just to make sure that they're not just telling me "yes, yes, yes" because sometimes they tell me that and when I ask them for their date of birth they—that's when I find out that they really can't speak English. And, then, once we get through that, I tell them what is listed on their inmate card, what they're being held for, what the charge—if there's a charge, what the charge is, what the bond is, if they're being held on a warrant, like a bench warrant, not an arrest warrant, a bench warrant, and they have an

[7] Arrestees must make their first appearance within 72 hours of their arrest, so the Tuesdays and Fridays jail call schedule is designed to comply with that deadline. See LA. C. CRIM. P. ART. 230.1

> attorney. I give them their attorney[']s name and number so they can contact them. We serve them with a new court date. If it's the ones that are just, you know, there's no warrants, no bench warrants or failure to appear warrants and it's just bond, I will ask them if they can afford an attorney and refer them to the public defenders office. And, then, they're given a sheet that has all kinds of information from the public defenders office including their phone number. It has what they need to do to get—for a bond reduction. I think it may explain like what's the process, you know, arraignments and that kind of stuff. It may—I don't know if it does or not, you know, like the time limits and stuff like that. If they're being detained for another facility or another jurisdiction or anything, I tell them that or if they have like a parole warrant, I'll tell them that.[8]

Commissioner Frederick believes that he does not have authority under state law to reduce a bond amount

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[8] The parties stipulated to the majority of the facts contained in the Court's Findings of Fact. The stipulations are contained in the pre-trial order [Doc. No. 178], which was approved by the Court. [Doc. No. 182]. The Court has edited some of the stipulated facts for clarity, consistency, and/or style, but did not make substantive changes. For example, the parties sometimes refer to "First Appearance" hearings and sometimes refer to "Initial Appearance" hearings. The Court uses First Appearance hearings throughout this Opinion.

For those Findings of Fact not based on the stipulations, but on Commissioner Frederick's testimony or other record evidence, the Court has provided citations.

set prior to the First Appearance hearing.[9] If an arrestee at the First Appearance hearing informs Commissioner Frederick that he cannot afford the bond that has been set, prior to May 2019, he gave "them a phone number. They can apply through the STOP[10] program or they can contact their public defender to discuss their case and see about getting them a bond reduction."

Personal surety bonds or "signature bonds" were and are available as an alternative to a secured money bond, but, prior to May 2019, Commissioner Frederick did not inform arrestees of their availability. To apply for a personal surety bond, an arrestee must have a family member who calls or visits Commissioner Frederick's office. The requirements for a personal surety are that the surety be employed, be a close family member or friend, "have sufficient income to cover the bond," and that the arrestee not be a previously convicted felon or arrested on certain violent crimes. None of these requirements are memorialized in a written policy. Commissioner Frederick's secretary administers the screening and applications for personal surety bonds. Commissioner Frederick is unaware of how many people apply

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[9] Commissioner Frederick's belief is based on a decision of Louisiana's Third Circuit Court of Appeals. In State v. Broussard, No. KW-09-00343 (La. 3d App. 3/20/09), the Third Circuit held that "La. R.S. 13:716(b)(2) limits [the authority of the commissioner] in **felony** cases, specifically providing, in part, that 'the commissioner shall not try and adjudicate preliminary hearings.'" [Trial Exhibit 20 (emphasis added)]. The Third Circuit then found that the commissioner in Broussard "was without authority to try and adjudicate the hearing conducted on the motion to reduce bond." Id. The Broussard decision does not apply to misdemeanor cases because a commissioner otherwise has authority to conduct "preliminary hearings." Id.

[10] STOP is an acronym for the Sheriff's Tracking Offenders Program.

for such bonds per year. Commissioner Frederick is not made aware of applications for personal surety release that are denied by his secretary. "I would only be made aware of the ones who qualify." Arrestees have no means to appeal the denial of personal surety release by Commissioner Frederick's secretary.

Beginning in May 2019, Commissioner Frederick began using a form entitled, "Release Order in Lieu of/as Modification to Money Bond" ("Modification Form") [Doc. No. 195, p. 12; Defendants' Trial Exhibit 4; Doc. No. 191]. The Modification Form lists options to any secured bond set during his daily calls. Commissioner Frederick uses the Modification Form for both felonies and those misdemeanors for which release is not automatic. [Doc. No. 195, p. 57]. The Modification Form provides in pertinent part:

> Considering the factors set forth in CCrP. Article 316 and inquiry conducted by the Court, it is hereby ordered that the bond obligation of the arrestee, ________________________ is fixed/modified as follows (all initialed items apply):

_______ Release on his/her personal surety is authorized

_______ Post bond in the **adjusted** amount of _______

____

_______ Release on Court-approved home monitoring via GPS system

- _______ Curfew imposed from 7 P.M. to 6 A.M.
- _______ No contact with victim: __________
- _______ Random weekly drug screens
- _______ No alcohol possession or consumption
- _______ Arrestee shall not operate a motor vehicle that is not equipped with a functioning ignition interlock device

_______ Recommended for LPSO-STOP assessment; with release based on LPSO-STOP recommendation and conditioned upon satisfactory participation in LPSO Programs

_______ Other ______________________________

____

THE ARRESTEE RELEASED ON THESE CONDITION[S] IS SUBJECT TO IMMEDIATE ARREST AND RE-INCARCERATION UPON ANY VIOLATION OF THESE CONDITIONS.

Id. The form also has a signature line for either Commissioner Frederick or one of the judges of the Fifteenth Judicial District.

Although there is an option for a bond reduction, Commissioner Frederick explained that this option is for

the use of the district judges. [Doc. No. 195, p. 16]. If an arrestee tells Commissioner Frederick that he cannot afford a bond, he refers the arrestee to one of the other options, including release on personal surety. [Doc. No. 195, pp. 13, 49-52]. If an arrestee has a history of failing to appear in court, he will not recommend that arrestee for the STOP program.[11] With regard to the "other" option, Commissioner Frederick may, for example, refer the arrestee to an inpatient drug treatment program. Id. at p. 52.

No video or audio recording is kept of the First Appearance hearings, and no transcript is made. Commissioner Frederick makes no written or oral finding on the record of any kind.

Commissioner Frederick does not see arrestees again between their First Appearances and their arraignments. He has no knowledge of whether the secured bond amounts he sets are later reduced.

Commissioner Frederick's First Appearances Hearings, in Practice

Little appeared before Commissioner Frederick via video on June 6, 2017, for his First Appearance hearing. He was not represented by counsel. Commissioner Frederick asked him no questions about his financial circumstances or his ability to afford the $3,000 bond imposed by Commissioner Frederick.

Murphy appeared before Commissioner Frederick via video on February 6, 2018, for her First Appearance hearing. During her hearing, Commissioner Frederick informed Murphy of her charges, informed her that she

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[11] The arrestee still has the option of apply directly with the Sheriff for STOP.

had a secured bond of $2,500, asked if she could afford a lawyer, and, when she responded "no," referred Murphy to the public defender.

Richard Robertson appeared before Commissioner Frederick via video on February 6, 2018, for his First Appearance hearing. Commissioner Frederick asked Robertson his name, date of birth, and address before informing him that his bond was set at $2,500. Robertson asked, "Is there any way we can do an ROR? I'm on probation, and I attended all of the court dates for my felony charge." Commissioner Frederick told Robertson to apply for the STOP program, would not explain what the program was, asked Robertson if he could afford a lawyer, and, upon being told that he could not afford a lawyer, referred Robertson to the public defender's office before moving on to the next arrestee.

Charles Fontenot was arrested and detained in LPCC on March 20, 2018. When Fontenot was brought to his First Appearance hearing, Commissioner Frederick asked his name, date of birth, and address. He then informed Fontenot that his bond would be set at $15,000, an amount that Fontenot could not afford. Fontenot asked for a release on recognizance. Frederick responded that Fontenot should talk the Sheriff's office about STOP. Fontenot said of STOP,

> I saw signs in the holding cells of the first floor of [LPCC] advertising the S.T.O.P. There is a $25 fee for applying for the program as well as a $7 daily fee. These are not fees that I can afford as I am currently [un]employed.[12] I also do not

[12] The stipulated facts state that Fontenot was "employed," but that statement is nonsensical in context.

> have a permanent residence so I suspect that I would not be eligible for the program.

At the time he swore out his declaration, Fontenot had been detained for eleven days.

Diondre Williams was arrested on March 19, 2018, and detained in the LPCC on a $50,000 secured bond, an amount that he could not afford. At his first appearance before Commissioner Frederick, then-17-year-old Williams asked Commissioner Frederick, "How can I get out of here? Is there any way?" Commissioner Frederick responded by referring Williams to STOP. He applied for STOP numerous times, and each application was denied by the Sheriff without explanation. At the time of his declaration, Williams had been incarcerated for eleven days.

The Sheriff's Tracking Offender Program

Sheriff Mark Garber enforces the money-bail orders issued by Commissioner Frederick. Commissioner Frederick, when told by arrestees that they cannot afford a secured bond amount, refers arrestees to the STOP program. The program is open only to those whose bonds are $200,000 or lower. But beyond this qualification, Commissioner Frederick has no knowledge of the criteria used to qualify a person for the program. Commissioner Frederick's process for approving a STOP application is as follows: "Just sign my name to it. That's pretty much it. They [the Sheriff's Office] do all the paperwork. They do everything, kind of like the personal surety. They run the record, they do all their research, gather up all their stuff. If the guy qualifies, they come to either myself or one of the judges and say, "Will you sign this?" He remembers only ever having denied a single STOP application. He has never

reviewed the Sheriff's decision not to approve an applicant for STOP.

Experts

Plaintiffs also relied on testimony from two experts, to which the parties stipulated.

A. Hon. Truman A. Morrison, III

The Honorable Truman A. Morrison, III ("Morrison"), a retired judge, qualifies as an expert on issues relating to pretrial release and detention. The parties stipulated to his testimony about how the system in Washington, D.C., is run. He believes that secured money bail is neither useful nor necessary to ensure safety and court appearance.

In 1994, the Washington, D.C. Code was amended to state that financial conditions could be utilized to reasonably assure appearance only if they do not result in pretrial detention. In other words, if money is used, defendants are entitled to a bond they can meet. It has always been D.C. law that money may never be used to attempt to assure community safety. In practice today, financial conditions of release are almost never used for any purpose.

The overall post-arrest process for arrestees in Washington, D.C. is as follows: After an arrest, law enforcement agencies process arrestees at one of the city's local police districts. Many arrestees charged with nonviolent misdemeanors may receive a citation release from the police station, with a future court date provided. Otherwise, after processing, and depending on the time of day, arrestees are either transferred to court or to a holding facility to await an appearance in court the next day, save Sunday. Arrestees' first court appearance is either an arraignment (for misdemeanors) or

presentment (for felonies). At this initial appearance, the judge considers whether the defendant should be released or briefly detained pending a formal detention hearing within three to five days. After a formal hearing, the judge can order a person detained pretrial if he or she concludes that a defendant presents an unmanageable risk of flight or harm to the community.

Washington, D.C.'s pretrial system makes release and detention decisions based on the best estimate of the defendant's likelihood of returning to court and avoiding re-arrest without the use of money bail. The District[13] has high rates of court appearance and low rates of pretrial misconduct. In Washington, D.C., if money bail were to be imposed on a defendant, it would have to be set in an amount that the defendant has the present ability to pay. In practice, financial conditions are almost never used. In Washington, D.C., there are no people in the jail who are there pretrial solely because they cannot afford to pay a secured financial condition of release.

In Washington, D.C. in 2017, 94% of arrestees were released, and once again 98% of released arrestees remained free from violent crime re-arrest during the pretrial release period. 86% of released defendants remained arrest-free from all crimes. 88% of arrestees released pretrial made all scheduled appearances during the pretrial period. The District accomplishes these high

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[13] While the parties have stipulated to Judge Morrison's testimony, the "facts" contain language as if Judge Morrison were speaking. For example, this sentence has been modified from "We have ..." to "The District" has "high rates of court appearance and low rates of pretrial misconduct." The Court finds this language to be confusing to the reader and therefore modifies it. Additionally, the Court has clarified Judge Morrison's current status. It is not the Court's intent to modify the substantive meaning of any stipulated facts, only to provide a clear opinion for the reader to follow.

rates of non-arrest and court appearances, again, without using secured money bonds. The relatively small number of accused persons presenting levels of pretrial risk that cannot be mitigated and managed in the community, after due process appropriate hearings, are preventively detained until trial with no bond. Rich or poor, they await an expedited trial in the D.C. Jail. Last year D.C. preventively detained only 6% of all arrestees.

Many people require few, if any, conditions on their pretrial release in order to be successful—25% of people released in Washington, D.C. are released on no conditions whatsoever. D.C. judges have numerous tools at their disposal to maximize court appearance and public safety for the vast majority of defendants without resorting to detention. Those tools include stay-away orders (for example, in shoplifting, assault, or domestic violence cases); counseling; drug, mental health, and alcohol treatment programs; reporting to pretrial services; mail, phone and text message reminders of court dates; drug testing; and very limited electronic and GPS monitoring can all be employed to reasonably assure high rates of court appearance and public safety.

B. Michael R. Jones, Ph.D.[14]

Michael R. Jones, Ph.D. ("Jones"), qualifies as an expert on issues relating to pretrial release and detention. Dr. Jones believes that, based on studies and empirical research on pretrial release and detention and pretrial risk management, local governments can more

[14] The parties also stipulated to Dr. Jones' testimony. The Court has been presented with this testimony as factual and has considered it. The Court is not bound to include the entire testimony "as is" in its Opinion. Dr. Jones' testimony/report was lengthy, and the Court has summarized that report.

effectively manage arrestees' pretrial risk without resorting to secured money bail.

Dr. Jones opines that several studies have shown that secured money bail contributes to unnecessary pretrial detention. Arrestees who are required to pay secured money bail to be released wait in jail longer than arrestees who are released without being required to make a money payment.

Dr. Jones and his staff conducted an investigation for county-level decisionmakers in Jefferson County, Colorado. The investigation found that approximately 75% of arrestees who had not posted bail within 48 hours said that they or their family members were not able to the bond's financial conditions. Dr. Jones believes that secured money bail either denies release to or delays release for many arrestees who would otherwise be released on non-monetary conditions. Because Lafayette Parish used money bail for nearly all misdemeanor and felony arrestees, it was likely that these arrestees remained in jail.

Dr. Jones also testified that he believed pretrial detention for periods longer than 24 hours lead to negative outcomes for the justice system, the community, and defendants. He believes that Lafayette Parish's secured money bail system likely contributes to these defendants exhibiting more failures to appear in court and more criminal behavior, the defendants were more likely to plead guilty than other defendants, and the defendants have a greater likelihood of being sentenced to jail and with a longer sentence.

Dr. Jones further testified that pretrial detention for three days or fewer has been shown to negatively influence the arrestee's employment, financial situation, and

residential stability, as well as the well-being of the arrestee's children.

Dr. Jones' study further revealed that releasing an arrestee on unsecured bond is as effective as secured money bail in achieving public safety and court appearances.

Based on these results, Dr. Jones concluded that jurisdictions can make data-guided changes to local pretrial case processing that would achieve their desired public safety and court appearance results.

Dr. Jones further believed that the secured money bail system in Lafayette Parish is insufficient for managing pretrial risk. Studies have shown that court date reminders are the single most effective pretrial risk management intervention for reducing failures to appear.

II. CONCLUSIONS OF LAW

A. Consideration of Modification Form

As an initial matter, Plaintiffs objected at trial to the Court's consideration of the Modification Form in use by Commissioner Frederick since May 2019. They argued that the Modification Form should be excluded from the Court's consideration because it was created after his deposition (so they could not examine him on its contents), it was contradictory to the stipulated facts, and it was not listed as one of Defendants' exhibits.

Defendants responded that a copy of the Modification Form was provided to Plaintiffs during settlement discussions. Their counsel admitted that he failed to list the Modification Form as an exhibit because he did not know about the form. However, Defendants' counsel argued that the Modification Form should be considered as

an actual assessment of Commissioner Frederick's current practices.

The Court "has broad discretion in deciding whether to admit into evidence exhibits not listed in the pre-trial order." *Gilbert v. Tulane Univ. (The Administrators of the Tulane Educ.* Fund), 909 F.2d 124, 127 (5th Cir. 1990) (citing Robert v. Conti Carriers & Terminals, Inc., 692 F.2d 22, 24 (5th Cir. 1982)). Given the significance of the form, its current use by Commissioner Frederick, and the fact that Plaintiff's counsel had previously been provided a copy of the form, the Court finds it appropriate to allow the form into evidence and to consider it. The Court does not condone or take lightly counsel's failure to identify the document as an exhibit, but finds no malicious intent on counsel's part. The Modification Form is an important part of Defendants' defense that they have voluntary ceased the actions giving rise to this lawsuit. Finally, while Plaintiffs' counsel were unaware that Defendants intended to rely on the exhibit at trial, they had previously received and reviewed a copy of the exhibit, and the Court granted Plaintiffs' counsel breaks prior to cross-examination to allow them to discuss how to address the Modification Form with Commissioner Frederick. Plaintiffs' counsel was then able to cross-examine Commissioner Frederick about the form. Finally, counsel was permitted to brief this issue before the Court made a final decision. After review of the facts and arguments, the Court has allowed the Modification Form into evidence and will consider its use by Commissioner Frederick since May 2019.

B. Constitutional Considerations of Equal Protection and Due Process

Plaintiffs challenge Commissioner Frederick's practices as unconstitutional on three related grounds: equal

protection, substantive due process, and procedural due process.

First, "[t]he incarceration of those who cannot [pay money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978). A person may not be "subjected to imprisonment solely because of his indigency." Tate v. Short, 401 U.S. 395, 397-98 (1971). That principle applies with greater force in the pretrial context, where the detainee is presumed innocent. See Pugh, 572 F.2d at 1056 (holding that the Constitution's prohibition on post-conviction wealth-based detention has "broader ... implications" for those "accused but not convicted of crimes").

Substantive due process protects a right to pretrial liberty that is "fundamental." United States v. Salerno, 481 U.S. 739, 750 (1987); see also Foucha v. Louisiana, 504 U.S. 71, 80 (1992)("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.") (quoting Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).

The Constitution also requires the government to provide procedural safeguards to protect against the erroneous deprivation of substantive rights. Washington v. Harper, 494 U.S. 210, 228 (1990). To determine whether those procedural safeguards are adequate, a court must first determine whether a liberty interest has been deprived and then ask whether the procedures accompanying the deprivation were sufficient. See Caliste v. Cantrell, 329 F. Supp. 3d 296, 312-13 (E.D. La. 2018).

The Fifth Circuit recently applied Pugh and again recognized the right against wealth-based detention without consideration of reasonable alternatives. In *O'Donnell* v. Harris Cnty., 882 F.3d 147 (5~Cir. 2018) ("*O'Donnell I*"),[15] arrestees brought a civil rights action under 42 U.S.C. § 1983 against, among others, the county judges, alleging that the Harris County bail system resulted in the detention of indigent arrestees solely because of their inability to pay, thus violating Texas statutory and constitutional law and Due Process and Equal Protection Clauses of the United States Constitution. The district court determined that the plaintiffs had shown a substantial likelihood of success on the merits of their constitutional claims and granted a preliminary injunction. On appeal, the Fifth Circuit affirmed the district court's determination, but modified the basis for that determination under due process considerations and also modified the scope of the injunction.

The decision did not address substantive due process, instead addressing the same issues set forth in this case under procedural due process and equal protection analyses. The *O'Donnell* I Court first addressed procedural due process. The court found a liberty interest under Texas state law, which "creates a right to bail that appropriately weighs the detainees' interest in pretrial release and the court's interest in securing the detainee's attendance[,]" while also forbidding "the setting of bail as an 'instrument of oppression." Id. at 158

[15] Fifth Circuit panel originally issued a decision in this matter, *O'Donnell v. Harris Cnty.*, 882 F.3d 528 (5th Cir. 2018), but after the petition for rehearing, the Fifth Circuit withdrew that panel opinion and substituted this opinion in its place. The Court, therefore, refers to the decision after rehearing as *O'Donnell I*.

(quoting Taylor v. State, 667 S.W.2d 149, 151 (Tex. Crim. App. 1984)).

Based on this liberty interest, the Fifth Circuit then reviewed the system in place at the time, guided by "a three-part balancing test that looks to 'the private interest … affected by the official action'; 'the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards'; and 'the Government's interest, including the function involved and the fiscal and administrative burdens' that new procedures would impose." Id. at 158-59 (quoting Meza v. Livingston, 607 F.3d 392, 402 (5th Cir. 2010) (other citations omitted). The *O'Donnel*l I Court cautioned that "the quality of the procedural protections owed a defendant is evaluated on a 'spectrum' based on a case-by-case evaluation of the liberty interests and government burdens at stake." Id. at 159 (quoting Meza, 607 F.3d at 408-09). The Fifth Circuit agreed with the district court that the procedures in place were "inadequate" because "secured bail orders are imposed almost automatically on indigent arrestees" and thus arrestees are not protected from the setting of bail as an "instrument of oppression." Id.; see also id. ("... the constitutional defect in the process afforded was the automatic imposition of pretrial detention on indigent misdemeanor arrestees ...") (emphasis in original).

The *O'Donnell I* Court then addressed the procedures necessary to protect the "particularly important … right to pretrial liberty of those accused (that is, presumed innocent) of misdemeanor crimes upon the court's receipt of reasonable assurance of their return." Id. That interest was balanced against the particularly important government "interest in efficiency," which benefits the criminal defendant who may receive expedited

release. Id. Fifth Circuit also took note of the sheer number of bail hearings in Harris County each year with over 50,000 misdemeanor arrests in one year. Under the facts, the *O'D*onnell I Court agreed with the district court that due process required "(1) notice that the financial and other resource information Pretrial Services officers collect is for the purpose of determining a misdemeanor arrestee' s eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; [and] (3) an impartial decisionmaker." Id. However, the Fifth Circuit modified two remaining requirements to find that "magistrates ... must specifically enunciate their individualized, case-specific reasons"; and that arrestees must be afforded a hearing within 48 hours. Id. While providing guidance, the Fifth Circuit left the specific drafting of the injunctive relief to the district court.

The *O'Donnell I* Court also considered whether plaintiffs had shown a likelihood of success on the merits that Harris County's misdemeanor bail system violated arrestees' equal protection rights. The Court found that plaintiffs had met their burden. The bail system "resulted in detainment solely due to a person's indigency because the financial conditions for release are based on predetermined amounts beyond a person's ability to pay and without any 'meaningful consideration of other possible alternatives." Id. at 162. The district court correctly applied intermediate scrutiny to the system because "heightened scrutiny is required when criminal laws detain poor defendants because of their indigency." Id. Although the county "had a compelling interest in the assurance of a misdemeanor detainee's future appearance and lawful behavior," its policy "was not narrowly tailored to meet that interest." Id. The *O'Donnell*

I Court "boiled" down the equal protection analysis as follows:

> take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

Id. at 163.

On remand, the district court imposed a new injunction and denied a stay of that order. In O'Donnell v. Goodhart, 900 F.3d 220 (5th Cir. 2018) ("*O'Donnell* II"), 14 of the 16 Harris County judges sought an emergency stay concerning the portion of the injunction which required the release of arrestees for the 48-hour period prior to their individualized bail hearing if the misdemeanor arrestee was "not subject to a formal hold," had "executed an affidavit of financial condition showing inability to pay," and have not been "granted release on an unsecured bond." Id. at 222. The injunction "direct[ed] the County to release [these arrestees] if they would

have been released had they posted bond." Id. The *O'Donnell II* Court reversed the district court, finding that it had violated the mandate and exceeded constitutional requirements.

In so ruling, the Fifth Circuit explained that such "relief would be warranted under due process only were a substantive right to release at issue." Id. at 225. However, "[t]he identified violation was the automatic imposition of bail. Individualized hearings fix that problem, so immediate release is more relief than required." Id. While "[r]elease might be warranted were 'one [to] assume[] a fundamental substantive due process right to be free from any form of wealth-based detention," there is no such right. Id.

Moreover, the *O*'Donnell II Court found that such release was not required by the Equal Protection clause. The Court noted that "[a] Equal Protection claim that an indigent 'person spends more time incarcerated than a wealthier person' is reviewed for a rational basis." Id. at 226. In its original review, the Fifth Circuit recognized that "some arrestees would continue to afford and pay bail while others would [not and would] avail themselves of the new hearing within 48 hours." Id. at 227. That is, the individualized hearing was an "inherent part of the calculus" to remedy the procedural violation. Id. Indeed, "[d]etetention of indigent arrestees and release of wealthier ones is not constitutionally infirm purely because of the length of detention," but because of the potential "consequences of such detention: likelihood of pleading guilty, the ultimate sentence given, and the social cost of a potentially lengthy pretrial incarceration." Id. at 227-28.

With these precepts in mind, the Court now turns to a review of the practices of the Fifteenth Judicial District.

A. Mootness

Prior to any other analysis, the Court must consider Defendants' contention that Plaintiffs' claims are moot as a result of the changes in practice since this lawsuit was initiated in 2017.

Article III of the United States Constitution is limited to live cases or controversies. Even when a plaintiff has standing at the outset, "[t]here must be a case or controversy through all stages of a case[.]" Fontenot v. McCraw, 777 F.3d 741, 747 (5th Cir. 2015) (citing K.P. v. LeBlanc, 729 F.3d 427, 438 (5th Cir. 2013). Voluntary cessation of potentially infirm practices do not ordinarily render a case moot, and a heavy burden is generally placed on the defendant to make "it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Sossamon v. Lone Star State of Tex., 560 F.3d 316, 324-25 (5th Cir. 2009) (citing Friend of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc, 528 U.S. 167 (2000)).

However, a court is justified to treat a voluntary governmental cessation of possibly wrongful conduct with solicitude. Id. at 325. In fact, "[w]ithout evidence to the contrary, [the Court assumes] that formally announced changes to official governmental policy are not mere litigation posturing." Id. This results in a "lighter burden" on the governmental actors in their sovereign capacity, "to make 'absolutely clear' that the [unconstitutional] condition cannot 'reasonably be expected to recur." Id. (quoting Friend of the Earth, 528 U.S. at 189). This is so because governmental actors "are accorded a

presumption of good faith due to their role as public servants and not self-interested private parties." Id.

The stipulated facts and Commissioner Frederick's testimony at trial, which the Court finds credible, establish that the Fifteenth Judicial District Court and Commissioner Frederick have adopted practices that render Plaintiffs' initial claims moot. At the time that Plaintiffs filed suit, a 2013 bail schedule governed the release of certain misdemeanor offenses. However, in February 2018, the judges of the Fifteenth Judicial District issued an en banc order rescinding the previous schedule. Since that time, Defendants have not used a bail schedule, and there is no evidence to suggest that they would return to its use after two years.[16] Likewise, at the time Plaintiffs filed suit, Commissioner Frederick did not obtain or consider the financial information provided by the PIDA or at the First Appearance hearing or consider alternative options. While it is undisputed that changes took place after this lawsuit was initiated, the evidence shows that the judges further modified the first order, and Defendants have continued to make additional changes to address any remaining constitutional issues since February 2018. Therefore, the Court finds that, to the extent that Plaintiffs seeks a declaratory judgment and injunctive relief based on the bail schedule and Defendants' prior practices, their claim is MOOT.

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[16] Given the directives of the *O'Donnell* cases, supra, the Court finds it highly unlikely that judges and an appointed commissioner, who are duty-bound to apply the law, would ignore those directives and return to the use of a bail schedule or would fail to consider alternatives to secured bail.

B. Application of Law to Current Practices

1. Substantive Due Process

> The Due Process Clause of the Fifth Amendment provides that "No person shall be deprived of life, liberty, or property, without due process of law. ... "So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952), or interferes with rights "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325-326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937).

United States v. Salerno, 481 U.S. 739, 746 (1987). The "[Supreme] Court [has] acknowledged that there is a "general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial," id. at 749, but this general rule has a "significant number of exceptions." Id. Indeed, "[t]he government's interest in preventing crime by arrestees is both legitimate and compelling." Id. (citing De Veau v. Braisted, 363 U.S. 144, 155 (1960)). While an individual has a "strong interest in liberty[,]" this "right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." Id. at 750-51.

Likewise, an individual may not be "subjected to imprisonment solely because of his indigency," Tate v. Short, 401 U.S. 395, 397-98 (1971) (emphasis added), but there is no "fundamental substantive due process right to be free from any form of wealth-based detention." *O'Donnell I*I, 900 F.3d at 225.

In this case, Plaintiffs' claims, like those in the *O'Donnell* decisions, do not invoke substantive due process concerns. Plaintiffs do not contend that Defendants cannot use "money bail to detain a person," [Doc. No. 1, p. 15], but, rather, that Defendants violated Plaintiffs' constitutional rights by failing "to inquire into and consider the Plaintiff class's ability to pay the secured money bail amounts that he sets" and without considering non-financial alternative conditions of release." [Doc. No. 140 pp. 13-14]; see also [Doc. No 1, p. 16].

However, the Court has concluded that Plaintiffs' prior claims based on the automatic imposition of bail under the prior bail schedule and under Commissioner Frederick's prior practices are moot. Plaintiffs' remaining claims do not raise substantive, but procedural due process concerns. Therefore, the Court will enter Judgment in favor of Defendants and against Plaintiffs as to their substantive due process claim.

2. Procedural Due Process

Plaintiffs have also asserted procedural due process claims pursuant to 42 U.S.C. § 1983. "Liberty interests protected by the Fourteenth Amendment 'may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." Jordan v. Fisher, 823 F.3d 805, 810 (5th Cir. 2016), as revised (June 27, 2016) (quoting Wilkinson v. Austin, 545 U.S. 209, 221 (2005) (citations omitted)).

In contrast to *O'Donnell*, Plaintiffs do not assert that their liberty interests arise under state law. Rather, they rely on an arrestee's pretrial liberty interest, as a person who has been accused, but not convicted, of a crime and the right against wealth-based detention.

See Salerno, 481 U.S. at 750; Caliste, 329 F. Supp. 3d at 313 ("Plaintiffs successfully assert that they have been deprived of a liberty interest based on 'the well-established principle that an indigent criminal defendant may not be imprisoned solely because of her indigence.' … Additionally, Plaintiffs have been deprived of their fundamental right to pretrial liberty." (citation omitted)).

Nevertheless, under the second step of the analysis, the procedural safeguards discussed in *O'Donnell* apply here. As always, the Court must consider whether the procedures in place "adequately protect" Plaintiffs' interests. 892 F.3d at 158. In this endeavor, the Court is guided by the three-part balancing test: (1) "the private interest" at issue, (2) "the risk of an erroneous deprivation" absent the sought-after procedural protection, and (3) the state's interest in not providing the additional procedure. Mathews v. Eldrige, 424 U.S. 319, 334-35 (1976); see also *O'Donnell*, 892 F.3d at 159.

In Louisiana, "the amount of bail shall be fixed in an amount that will ensure the presence of the defendant and the safety of any other person and the community. LA. CODE CR. P. ART. 316. Ten factors are considered into fixing the amount of bail:

(1) The seriousness of the offense charged, including but not limited to whether the offense is a crime of violence or involves a controlled dangerous substance.

(2) The weight of the evidence against the defendant.

(3) The previous criminal record of the defendant.

(4) The ability of the defendant to give bail.

(5) The nature and seriousness of the danger to any other person or the community that would be posed by the defendant's release.

(6) The defendant's voluntary participation in a pretrial drug testing program.

(7) The absence or presence in the defendant of any controlled dangerous substance.

(8) Whether the defendant is currently out on a bail undertaking on a previous felony arrest for which he is awaiting institution of prosecution, arraignment, trial, or sentencing.

(9) Any other circumstances affecting the probability of defendant's appearance.

(10) The type or form of bail.

LA. CODE CR. P. ART. 316. Plaintiffs do not challenge article 316 or any other policy or order of Defendants on their face, but only as applied.

In application, the Court has found that Defendants have made significant changes in their bail procedures since this lawsuit was initiated. Since February 2018 the bail schedule was abolished. Since August 2018, it is clear that for most misdemeanors an arrestee will be "booked and released." For persons who have been arrested for a third time within six months, for more serious misdemeanors and for felony offenses, Commissioner Frederick uses the same procedures.

Commissioner Frederick calls the jail three to six times per day (365 days per year) to set their bonds. He is read the probable cause for arrest, he may inquire into the arrestee's criminal history (depending on the type of crime), and, since May 24, 2018, he reviews a PIDA if the arrestee has filled it out. That form contains information

about income, dependents, receipt of public assistance, employment status, and the amount the arrestee could reasonably pay. While Plaintiffs point out that Commissioner Frederick did not know if or how arrestees are made aware that they can fill out the PIDA, he also testified that he receives PIDAs for two or three arrestees per day.

Even without the PIDA, Commissioner Frederick has consistently testified that he is aware that the person is incarcerated, that he has personal knowledge of the local economy, and that he has over a decade of experience as a public defender.

These are not the only protections offered. After the initial call Commissioner Frederick makes to the jail, he holds First Appearance hearings (also referred to as "jail call") by video conference every Tuesday and Friday for each of the three parishes in the judicial district. During the First Appearance hearing, Commissioner Frederick will ask if the arrestee can afford a lawyer, and, if warranted, will ask if the arrestee can afford bail. If the arrestee indicates that he cannot afford bail, Commissioner Frederick refers to his Modification Form, which provides alternatives to arrestees after determining the underlying background of the arrestee and the offense. The changes in practice described by Commissioner Frederick are not "cosmetic," but true possible alternatives to money bail, including recommendation to the Sheriff's STOP program, release on personal surety, ankle monitoring, home monitoring, or other options, including, for example, an inpatient drug treatment program.

Defendants have stipulated that Commissioner Frederick makes no findings on the record, but it is clear that he now considers an arrestee's indigency or

financial condition if the arrestee raises it. He also expressly considers on a case-by-case basis whether these alternatives are appropriate, taking into account criminal history, background, and the arrestee's ability to pay where applicable. In fact, Commissioner Frederick testified that, in some cases, he will not ask if the arrestee can make bail at the 72-hour hearing if he determines that arrestee has a higher risk of missing Court.

Plaintiffs presented expert testimony of the pretrial procedures and systems in place in D.C. and the efficacy of secured bail versus alternative conditions. The experts, Dr. Jones and Judge Morrison, believe that secured money bail systems should be replaced with systems that do not use secured money bail, and cite data and studies to support those opinions. However, it is not the job of this Court to dictate to the Fifteenth Judicial District Court what type of bail system it should have, but to determine whether the system in place is constitutional. As the Fifth Circuit instructed in *O'Donnell I*, "the quality of procedural protections owed a defendant" is on a "spectrum" based on a "case-by-case evaluation" of the competing liberty and government interests.[17] 892 F.3d at 159. The current procedures now result in the automatic release of most misdemeanor arrestees, which is more than the Constitution requires. For the remaining more serious misdemeanor and for felonies, contrary to Plaintiffs' assertions, the Court finds that there is a greater government interest in ensuring their future appearance and lawful behavior. Even so, the

[17] To this extent, expert testimony about pre-trial release systems and procedures in other locations, particularly a large city like Washington, D.C., which is not comparable to the parishes in the Fifteenth Judicial District, has limited usefulness. There is no evidence to suggest that there is comparable funding or programs in the District to what is available in D.C.

Court finds that Defendants have provided adequate procedural protection to these arrestees to ensure that their liberty interests are being protected, and they are not being held solely because of their indigency. Therefore, no declaratory or injunctive relief is warranted. Judgment is entered in favor of Defendants and against Plaintiffs on the procedural due process claims.

3. Equal Protection

Finally, Plaintiffs have asserted equal protection claims under 42 U.S.C. § 1983. Arrestees cannot be incarcerated solely because they cannot afford to pay a secured bond when their wealthy arrestees would have been allowed to go free.

The Court has considered whether Defendants' orders, policies, and practices are "narrowly tailored" to address their compelling interest in assuring the "future appearance and lawful behavior" of the more serious misdemeanor and felony arrestees. See *O'Donnell I*, 892 F.3d at 162. For the reasons identified, the Court finds that they are so narrowly tailored. Most misdemeanor arrestees go free, regardless of wealth (or lack thereof) under current practices. As to the remaining arrestees, there are two opportunity s for Commissioner Frederick to consider their financial condition. If they have provided the PIDA, Commissioner Frederick considers that information during his call to the jail, along with his personal knowledge of the economics of most criminal defendants in the Fifteenth Judicial District. That is not all, however, because within 72 hours he provides the arrestees a second opportunity to inform him they cannot afford bail at the First Appearance hearing. If they inform him that they cannot afford bail, he turns to the Modification Form to see if there are alternatives he can offer to each particular arrestee. This individualized

consideration, along with the other facts set forth above, are sufficiently narrowly tailored to address Defendants' lawful concerns. Judgment is also entered in favor of Defendants and against Plaintiffs on their equal protection claim.

III. CONCLUSION

For the foregoing reasons, judgment is entered in favor of Defendants and against Plaintiffs.

Monroe, Louisiana, this 7th day of February, 2020.

[Signature]
TERRY A. DOUGHTY, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 6:17-CV-00724

EDWARD LITTLE

versus

THOMAS FREDERICK, ET AL.,

Judge Foote
Magistrate Judge Hanna
Filed March 8, 2018

MEMORANDUM RULING

Pending before the Court is Defendants', Judge Kristian Earles ("Judge Earles") and Commissioner Thomas Frederick ("Commissioner Frederick") (collectively, "Defendants"), Motion to Dismiss [Record Document 26], which seeks complete dismissal of Plaintiff's action against them.[1] The Magistrate Judge held oral argument on the motion and issued a Report and Recommendation [Record Document 58], which recommends that Plaintiff's equal protection claim be dismissed and that Plaintiff's due process claim be dismissed as to

[1] The Sheriff of Lafayette Parish, Mark Garber, is also a defendant in this suit. He has filed his own Motion to Dismiss [Record Document 18], which is the subject of a separate Report and Recommendation [Record Document 59].

Judge Earles. The Report and Recommendation is **ADOPTED IN PART** and **REJECTED IN PART**. The Court adopts the Report and Recommendation only to the extent that it recommends that Defendants' motion be denied as to Plaintiff's due process claim against Commissioner Frederick. For the reasons announced below, this Court finds that Defendant's motion should be **DENIED** in its entirety.

BACKGROUND

In his complaint, Plaintiff alleges that the 15th Judicial District Court of Louisiana ("15th JDC"), which covers Lafayette, Vermilion, and Acadia Parishes, utilizes a bail system that fails to consider an individual's financial condition or ability to pay a bail amount. The 15th JDC utilizes a money bail schedule created by Judge Earles that considers only the crime with which the arrestee is charged. Generally, when an individual is arrested with a warrant for an offense covered in the schedule, the Sheriff will release him only if he can pay the amount of money required by the schedule. When an arrestee is arrested on a warrant for an offense not covered by the schedule, bail is set by Commissioner Frederick when he approves the warrant. Record Document 1, p. 6. When a person is arrested without a warrant for an offense not covered by the schedule, bail is set by Commissioner Frederick during a telephone call after he determines whether there is probable cause to support the arrest. Commissioner Frederick makes the bail determination without any inquiry into the arrestee's financial condition and with no consideration of alternative non-financial conditions of release.

Plaintiff alleges that if an arrestee is not released, he appears before Commissioner Frederick for his initial appearance, which is commonly referred to as a 72-hour

hearing. These hearings are conducted by video-link between the courthouse and the jail and are held on Tuesdays and Fridays. At the hearing, an arrestee will be called to stand in front of a camera and address Commissioner Frederick. Commissioner Frederick will ask the arrestee to confirm that his name, address, and date of birth are correctly listed on the arrest paperwork, advise the arrestee of the charges against him, inform the arrestee of his conditions of release, and appoint an attorney if the arrestee cannot afford one. According to the complaint, although state law allows Commissioner Frederick to review a prior bail determination at the 72-hour hearing, it is his policy and practice to refuse to address conditions of release at the hearing. Instead, when arrestees attempt to explain that they cannot afford their secured financial conditions of release, they are told to "read the sheet," "take it up with your lawyer," or are simply ignored altogether. Record Document 1, p. 9. If an arrestee wishes to modify his conditions of release, he must file a motion seeking bail reduction. This motion will be heard either by the assigned district judge if the arrestee has been formally charged by the district attorney, or by the judge on duty if the arrestee has not been formally charged. *Id.* at 9-10. In either case, having the motion heard by the court "can typically take a week or more." *Id.* at 10. During that waiting period, the arrestee remains confined.

During oral argument, the Policy of the Fifteenth Judicial District Court Regarding Bail Bonds ("15th JDC Policy") [Record Document 56-1] was introduced as an exhibit and the parties agreed that the policy could be considered in ruling on the motions to dismiss. Record Document 57, pp. 14-15. Defendants represented that the policy was not new, but had previously been the policy of the 15th JDC; it was simply put into writing. *Id.*

at 14. Plaintiff's position was that the 15th JDC Policy does nothing to resolve the constitutional claims because the policy document reflects the same concerns alleged in his Complaint, at least with regard to setting of bail for persons arrested for felonies.

The 15th JDC Policy states that, with few exceptions, all arrestees charged with a misdemeanor will be released on a summons without posting bond if charged with a traffic offense or one of the other thirty-eight listed misdemeanors. For the misdemeanors not listed, bond is set in the same manner as for felony arrests. The policy further provides that felony bonds are "set initially based on facts set forth in the probable cause for arrest affidavit, including [the] arrestee's age, local vs no local address, circumstances of the offense and the information on an arrestee's rap sheet including prior warrants for failure to appear." Record Document 56-1, p. 2. Bonds are set two to three times each day via phone or email. If the arrestee does not bond out and is charged with a non-violent offense, he may qualify for the Sheriff Offender Tracking Program ("STOP"). If an arrestee is released by court authority through STOP, his release is conditioned on satisfactory participation in the program. A felony arrestee may also be released on a signature bond (personal surety). If an arrestee is not released through one of these methods, he "will be provided an individualized bail determination within twenty-four (24) hours of arrest, if practical, but in no event later than the next available seventy-two (72) hour hearing after arrest."[2] After the 72-hour hearing, an arrestee's

[2] Plaintiff alleges that, as a practical matter, an individualized bail determination does not occur at the 72-hour hearing, and at no time prior to or at the 72-hour hearing is consideration given to an

counsel "may put them on a weekly bond reduction duty docket" where counsel for the arrestee and the State will attempt to reach an agreement on a reduced bond amount. If no agreement is reached, "the arrestee may be placed on a bond reduction docket with the judge assigned to their case for the presentation of evidence and argument." *Id.* at 3.

Plaintiff alleges that this system as implemented by the 15th JDC results in the jailing of individuals who are otherwise eligible for release for no other reason than their poverty. Accordingly, Plaintiff filed this suit seeking: (1) "[a]n order and judgment preliminarily and permanently enjoining the Defendants from using money bail to detain any person without procedures that ensure an inquiry into and findings concerning the person's ability to pay any monetary amount set and without an inquiry into and findings concerning non-financial alternative conditions of release"; (2) a "declaratory judgment that the Defendants violate Plaintiff's constitutional rights by setting secured financial conditions of release without inquiring into or making findings as to whether arrestees can pay the amounts set, and without considering non-financial alternative conditions of release"; and (3) an order granting attorneys' fees and costs pursuant to 42 U.S.C. § 1988. Record Document 1, pp. 15-16.

As noted in the Report and Recommendation, Defendants style their motion as a Rule 12(b)(1) motion to dismiss based on lack of subject matter jurisdiction, but the motion itself does not explain its grounds, and the memorandum in support contains arguments attacking the merits of Plaintiff's claims. Specifically, Defendants

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arrestee's ability to afford bail or non-financial alternative conditions of release.

argue that there is no absolute right to bail and no constitutional right to speedy bail. Defendants further claim that bond schedules are not inherently unconstitutional. Accordingly, this Court agrees with the Report and Recommendation that Defendants' motion is more appropriately considered as one under Rule 12(b)(6) for failure to state a claim.

STANDARD

In order to survive a motion to dismiss brought under Rule 12(b)(6), a plaintiff must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The court must accept as true all of the factual allegations in the complaint in determining whether plaintiff has stated a plausible claim. *See Twombly*, 550 U.S. 544, 555 (2007); *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007). However, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944, 92 L. Ed. 2d 209 (1986).

LAW & ANALYSIS

In order to successfully state a claim under 42 U.S.C. § 1983, a plaintiff must: "(1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013) (quoting *James v. Tex. Collin Cty.*, 535 F.3d 365, 373 (5th

Cir. 2008)). Here, Plaintiff alleges that Defendants infringe his fundamental right to pretrial liberty in violation of the Fourteenth Amendment due process and equal protection clauses by keeping him in jail because he cannot afford to pay a monetary bail amount set without inquiry into and findings concerning ability to pay or non-financial alternative conditions. Record Document 1, p. 15.

1. ODonnell v. Harris County, Texas

Since the filing of Defendants' motion and the Report and Recommendation of the Magistrate Judge, the Fifth Circuit decided the case of *ODonnell v. Harris Cty., Texas*, No. 17-20333, 2018 WL 851776 (5th Cir. Feb. 14, 2018), which, as the parties are certainly aware, dealt with similar issues. In *ODonnell*, ODonnell and other plaintiffs (collectively, "ODonnell") brought a class action under 42 U.S.C. § 1983 against Harris County, Texas, and a number of its officials (collectively, the "county"). ODonnell alleged the county's system for setting bail for indigent misdemeanor arrestees violated Texas statutory and constitutional law, as well as the equal protection and due process clauses of the Fourteenth Amendment. The district court entered a preliminary injunction against the county and its officials, and they, in turn, appealed. The Fifth Circuit affirmed a majority of the district court's rulings, including its conclusion that the county's bail system violates both equal protection and due process.

By law, in Harris County, when a misdemeanor defendant is arrested, the prosecutor submits a secured bail amount according to a bond schedule. Bonds are then formally set in the first instance by hearing officers, usually at an initial probable cause hearing within 24 hours. County judges then review the hearing officers'

determinations and can adjust bail amounts at a "Next Business Day" hearing. *Id.* at *2. The *ODonnell* district court found that, in practice, the county's procedures did not achieve any individualized assessment in setting bail. Instead, the probable cause hearing was often not conducted within 24 hours, sometimes lasted only seconds, and arrestees were not given an opportunity to submit evidence related to their ability to post bond. Overall, county officials imposed the scheduled bail amounts on a secured basis approximately ninety percent of the time. Similarly, the district court found that the "Next Business Day" hearing before the county judge failed to provide meaningful review of the hearing officer's bail determination. Arrestees were routinely required to wait days for their "Next Business Day" hearing, and bail was rarely adjusted. *Id.*

The district court found that the county's bail-setting procedures violated the equal protection clause because "they treat otherwise similarly-situated misdemeanor arrestees differently based solely on their relative wealth," and the Fifth Circuit agreed. *Id.* at *8. In doing so, the Fifth Circuit found that the county's customs and practices "resulted in detainment solely due to a person's indigency because the financial conditions for release are based on predetermined amounts beyond a person's ability to pay and without any 'meaningful consideration of other possible alternatives.'" *Id.* at *9 (citing *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978)). Applying intermediate scrutiny, the Fifth Circuit found no error in the district court's conclusion that the county's policy was not sufficiently tailored to meet its compelling interest in assuring a detainee's future appearance and lawful behavior.

As to the due process claim, the Fifth Circuit found a state-created interest in that Texas law "creates a

right to bail that appropriately weighs the detainees' interest in pretrial release and the court's interest in securing the detainee's attendance." *Id.* at *6. The court noted that "when the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order. Accordingly, such decisions must reflect a careful weighing of the individualized factors set forth by both the state Code of Criminal Procedure and Local Rules." *Id.* It went on to agree that the county's procedures were inadequate, but modified the district court's findings regarding the specific procedures necessary to satisfy constitutional due process when setting bail. The district court previously found that due process required:

> (1) notice that the financial and other resource information Pretrial Services officers collect is for the purpose of determining a misdemeanor arrestee's eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; (4) a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial; and (5) timely proceedings within 24 hours of arrest.

Id. at *7. The Fifth Circuit made two alterations to these conclusions: (1) it rejected the requirement that a factfinder issue a written statement of reasons for imposing secured financial conditions of release and instead found that requiring the factfinder to specifically enunciate "individualized, case-specific reasons" is sufficient; and (2) it rejected the 24-hour requirement as too strict and instead found that federal due process entitles detainees

to a hearing within 48 hours. *Id.* at *8. Nevertheless, the court affirmed that the county's procedures violate due process.

2. Equal Protection

In this case, Plaintiff argues that the Defendants' bail-setting policies violate the equal protection clause because they act to detain arrestees based solely on indigence. Plaintiff alleges that bail is set in the 15th JDC without consideration of an individual's ability to pay or non-financial alternative conditions of release and, as a result, two arrestees who have been arrested for the same conduct and who are identical in every way except for financial means would find themselves in two different situations: the arrestee with money would be free by virtue of his ability to pay the money bail, while the arrestee without would remain in jail. In *ODonnell*, the Fifth Circuit found that Harris County's system, which operated to have the same effect, violated the equal protection clause. *See ODonnell*, 2018 WL 851776, at *10. Furthermore, the Fifth Circuit has previously found that "[t]he incarceration of those who cannot [afford money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Rainwater*, 572 F.2d at 1057. Accordingly, Plaintiff has sufficiently stated a claim based on a violation of his equal protection rights and Defendants' Motion to Dismiss is **DENIED** as to this claim.

3. Due Process

A procedural due process claim requires a two-step analysis: "first a court must determine whether the plaintiff has a protected liberty or property interest and then the court must determine whether the state has provided adequate procedures for the vindication of that

interest." *Jordan v. Fisher*, 823 F.3d 805, 810 (5th Cir. 2016), as revised (June 27, 2016) (citing *Wilkinson v. Austin*, 545 U.S. 209, 213, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005)). A liberty interest protected by the due process clause can arise from either the due process clause itself or from state law. *ODonnell*, 2018 WL 851776, at *6 (citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)).

Plaintiff asserts the right to pretrial liberty and claims that Defendants violate this right by keeping an arrestee in jail simply because he cannot afford a particular monetary bail amount. Plaintiff further alleges that an arrestee is not provided with an individualized bail determination that takes into account his ability to pay and alternative non-financial conditions of release until a motion is heard before a judge of the 15th JDC, and this typically takes a week or more. He argues that both the Constitution and state law create a liberty interest in pretrial release that is not sufficiently protected by Defendants' policies and procedures.

In support of his contention that the Constitution creates such an interest, Plaintiff cites *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), which involved a challenge to a provision of the Bail Reform Act of 1984 that allowed pretrial detention under certain circumstances. The Supreme Court ultimately rejected the challenge and found that the Act provided sufficient procedural safeguards, including a hearing with counsel at which the arrestee can present witnesses and proffer evidence, after which a judicial officer must find, by clear and convincing evidence, that no condition of pretrial release would reasonably assure the appearance of the arrestee and the safety of the community, and where such findings must be in writing. In making its decision, the Court was careful to clarify that

it was not minimizing the "importance and fundamental nature" of the right to liberty. *Salerno*, 481 U.S. at 750. The Court concluded, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception." *Id.* at 755.

As for a state-created liberty interest, this Court agrees with the Report and Recommendation that the Louisiana Constitution generally creates a right to bail on "sufficient surety." *See* La. Const. Art. 1, § 18. Louisiana Code of Criminal Procedure article 316 further provides that "[t]he amount of bail shall be fixed in an amount that will ensure the presence of the defendant, as required, and the safety of any other person and the community, having regard to," among other factors, "[t]he ability of the defendant to give bail."

Having found a liberty interest, whether pursuant to the Due Process Clause itself or through state law, it must then be determined whether the procedures in place are sufficient to protect the liberty interest. Here, Plaintiff claims that an individualized bail determination that considers an arrestees indigence does not occur until a motion is heard by a judge, and that this process typically takes a week or more. Because, prior to this hearing, an indigent arrestee is subject to a secured bail that he cannot afford, he is effectively under a pretrial order of detention and remains subject to that order without the procedural safeguards found sufficient in *Salerno*.[3] Here, as in *ODonnell*, Plaintiff challenges both

[3] This Court is mindful of the Fifth Circuit's recognition that "when the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order." *ODonnell*, 2018 WL 851776, at *6.

(1) the delay before any judicial officer allows an arrestee the opportunity to raise inability to pay money bail, and (2) the refusal by judicial officers to consider non-financial conditions of release. *See ODonnell v. Harris Cty., Texas*, 227 F. Supp. 3d 706, 732 (S.D. Tex. 2016), *aff'd in part, rev'd in part*, No. 17-20333, 2018 WL 851776 (5th Cir. Feb. 14, 2018). In *ODonnell*, the Fifth Circuit upheld the district court's finding that due process requires an impartial decision-maker and a hearing at which the arrestee has an opportunity to be heard and present evidence. In modifying the requirements for what it characterized as the "procedural floor," the court further concluded that federal due process entitles detainees to a hearing within 48 hours. Based on these findings of the Fifth Circuit and Plaintiff's allegations, this Court finds that Plaintiff has sufficiently stated a claim based on a violation of due process. Accordingly, Defendants' Motion to Dismiss is **DENIED** as to Plaintiff's due process claim.[4]

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[4] While the Report and Recommendation distinguished Judge Earles from Commissioner Frederick in making a recommendation on Plaintiff's due process claim, based on Plaintiff's allegations, this Court does not find such defendant-specific analysis to be necessary. Nonetheless, the Court would make two observations: First, Defendants argued collectively for dismissal of Plaintiff's claims and did not make arguments distinct to either Commissioner Frederick or Judge Earles. Second, the Report and Recommendation recommended dismissing the due process claim against Judge Earles because it found that the 15th JDC Policy contained sufficient procedural safeguards, including an individualized bail determination within 72 hours. However, in *ODonnell*, the Fifth Circuit found that "the federal due process right entitles detainees to a hearing within 48 hours." *ODonnell*, 2018 WL 851776, at *8.

CONCLUSION

For the foregoing reasons, the Court adopts the Report and Recommendation of the Magistrate Judge [Record Document 58] only to the extent that it recommends that Defendants' motion be denied as to Plaintiff's due process claim against Commissioner Frederick. The Court **ORDERS** that Defendants' Motion to Dismiss [Record Document 26] be **DENIED** in its entirety.

THUS DONE AND SIGNED in Shreveport, Louisiana, this 8th day of March, 2018.

[Signature]
ELIZABETH ERNY FOOTE
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 6:17-CV-00724

EDWARD LITTLE

versus

THOMAS FREDERICK, ET AL.,

Judge Foote
Magistrate Judge Hanna
Filed March 6, 2018

ORDER

Pending before the Court is Sheriff Mark Garber's ("the Sheriff") Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) [Record Document 18]. After oral argument, the Magistrate Judge issued a Report and Recommendation [Record Document 59] on the Sheriff's motion. The Report and Recommendation is hereby **ADOPTED IN PART** and **REJECTED IN PART**. This Court adopts the Report and Recommendation to the extent it recommends denying the Sheriff's motion under Rule 12(b)(1). However, after the Sheriff filed his motion and the Magistrate Judge issued the Report and Recommendation, Plaintiff filed a Motion For Leave To File Supplemental Complaint [Record Document 76]. By his motion, Plaintiff seeks to file a supplemental complaint which contains additional allegations

concerning the Sheriff, and these allegations implicate the Sheriff's role as a potential policymaker. If Plaintiff's motion were granted, this Court would necessarily consider the additional allegations in determining whether Plaintiff has stated a claim against the Sheriff. Therefore, the Court will deny Defendant's motion under Rule 12(b)(6) at this time. Defendant may re-urge his motion after the Court rules on Plaintiff's pending Motion For Leave To File Supplemental Complaint [Record Document 76].

Accordingly, for the foregoing reasons, the Court adopts the Report and Recommendation of the Magistrate Judge [Record Document 59] only to the extent it recommends denying the Sheriff's Motion to Dismiss [Record Document 18] under Rule 12(b)(1). The Defendant's motion under Rule 12(b)(1) is **DENIED**. Furthermore, Defendant's Motion to Dismiss [Record Document 18] under Rule 12(b)(6) is **DENIED** at this time, with the right to re-urge after the Court rules on Plaintiff's Motion For Leave To File Supplemental Complaint [Record Document 76].

THUS DONE AND SIGNED in Shreveport, Louisiana, this 6th day of March, 2018.

[Signature]
ELIZABETH ERNY FOOTE
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 6:17-cv-00724

EDWARD LITTLE

versus

THOMAS FREDERICK, ET AL.,

Judge Foote
Magistrate Judge Hanna
Filed December 11, 2017

REPORT AND RECOMMENDATION

Currently pending before this Court is defendant Sheriff Mark Garber's motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim. (Rec. Doc. 18). The motion is opposed. (Rec. Doc. 48). Oral argument was held on October 19, 2017. For the following reasons, the undersigned recommends that the motion be granted in part and denied in part.

FACTUAL BACKGROUND

On June 5, 2017, plaintiff Edward Little filed a class action complaint that alleges, on behalf of himself and all others similarly situated, that Commissioner Thomas Frederick, Chief Judge Kristian Earles, and Sheriff Mark Garber maintain an unconstitutional scheme by

which impoverished people are detained when they are unable to meet a secured financial condition of release that is determined without regard to their ability to pay.[1] Two days prior, on June 3, 2017, the plaintiff was arrested, charged with felony theft, and detained at the Lafayette Parish Correctional Center. The plaintiff's bail was set at $3,000, and he alleges that he did not have the ability to pay a bond agent $375 to secure his release.

According to the complaint, the 15th Judicial District Court ("15th JDC") utilizes a money bail schedule that is promulgated by Judge Earles and implemented through established procedures where an arrestee's bail is set without consideration of the inability to pay a certain monetary bail amount. The plaintiff alleges the manner in which an arrestee's bail is set depends on the charged offense and the circumstances of the arrest. Generally, an arrestee's bail will initially be set based on Judge Earles's bail schedule. However, when a person is arrested pursuant to a warrant for an offense that is not covered by the bail schedule, bail is set by Commissioner Frederick when he signs the arrest warrant, which would be supported by a probable cause affidavit. When a person is arrested without a warrant and the offense is not covered by the bail schedule, bail is set by Commissioner Frederick during a telephone call after he determines whether there is probable cause to support the arrest.

The plaintiff alleges that Sheriff Garber implements a policy at LPCC where an arrestee is only released when his monetary bail amount is paid. As part of the policy, Sheriff Garber's employees demand either the monetary amount required for the offense pursuant to

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[1] The Fifteenth Judicial District is made up of three parishes: Lafayette, Vermilion, and Acadia. Sheriff Garber is the Sheriff of Lafayette Parish.

the bail schedule or the monetary amount that is set by Commissioner Frederick as a condition of release. The plaintiff alleges that Sheriff Garber's employees do not consider an arrestee's inability to pay a certain monetary bail amount.

If an arrestee has not been released from LPCC, the arrestee will appear before Commissioner Frederick for an initial appearance, which is commonly referred to as a 72-hour hearing. During the 72-hour hearing, Commissioner Frederick will ask the arrestee whether the name, address, and date of birth are correctly listed on the arrest paperwork, advise the arrestee of the charges against him and his conditions of release, and appoint counsel if the arrestee is found to be indigent. The plaintiff alleges that Sheriff Garber's employees are present and aware that an arrestee's inability to pay a certain bail amount will not be considered during the 72-hour hearing.

According to the complaint, after the 72-hour hearing, an arrestee can only modify his bail amount by filing a motion to seek a bail reduction, which must be heard by either the assigned judge if the arrestee has been formally charged by the district attorney, or by the judge on duty if the arrestee has not been formally charged by the district attorney. Therefore, the plaintiff alleges that Sheriff Garber detains arrestees solely because they are unable to pay for their release.

Based on these allegations, the plaintiff contends that the bail procedure is a violation of his fundamental right to pretrial liberty because his detention is based solely on his inability to pay his set bail amount and the defendants do not inquire into his ability to pay or nonfinancial alternative conditions until a motion to reduce bail is filed. As a result, the plaintiff seeks the following relief on behalf of himself and all others similarly

situated: (1) an injunction to enjoin the defendants from using money bail to detain any person without procedures that ensure an inquiry into and findings concerning the person's ability to pay any monetary amount set and non-financial alternative conditions of release; (2) a declaratory judgment that the defendants violate the plaintiff's rights by setting secured financial conditions of release without inquiring into or making findings as to whether arrestees can pay the amounts set and without considering non-financial alternative conditions of release; and (3) an order and judgment granting reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

Sheriff Garber contends that the plaintiff's complaint should be dismissed pursuant to Rule 12(b)(1) because: (1) the plaintiff's claims are moot because he was subsequently released from jail after he paid his original bail amount; and (2) the Court should apply the *Younger* abstention doctrine and refrain from exercising jurisdiction. In the alternative, Sheriff Garber contends that the plaintiff's claims against him should be dismissed pursuant to Rule 12(b)(6) because: (1) a sheriff does not have authority under Louisiana law to set an arrestee's bail; and (2) a sheriff does not have the authority to alter an arrestee's bail or release an arrestee contrary to the terms of a court order.

LAW AND ANALYSIS

I. THE STANDARD FOR ANALYZING A RULE 12(b)(1) MOTION TO DISMISS

A motion filed under Fed. R. Civ. P. 12(b)(1) challenges the court's subject matter jurisdiction.[2] "When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule

[2] *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

12(b)(1) jurisdictional attack before addressing any attack on the merits."[3] This requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice.[4]

"[A] motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief."[5] In evaluating a Rule 12(b)(1) motion, the court may examine "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."[6] In response to a Rule 12(b)(1) motion, the party asserting jurisdiction has the burden of proving that jurisdiction is proper.[7] Accordingly, the plaintiff bears the burden of proof that jurisdiction does in fact exist.

a. Mootness

Article III of the Constitution limits the jurisdiction of the judiciary to "cases" or "controversies." In order to have standing to assert federal jurisdiction, a plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision."[8] Mootness is

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[3] *Id.*

[4] *Id.*

[5] *Id.*, at 161.

[6] *Id.*

[7] *Id.*

[8] *Center for Biological Diversity v. BP America Production Co.*, 704 F.3d 413, 424 (5th Cir. 2013) (citing *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)).

"the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)."[9] "Generally, any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot."[10]

The Supreme Court has established an exception to the mootness doctrine for class action lawsuits. In *Sosna v. Iowa*, the court held that claims asserted in a class action are not considered moot when the class representative's claim becomes moot after class certification.[11] However, the Court also recognized that, depending on the circumstances, there may be cases where this exception also applies when a named plaintiff's claim becomes moot before a district court can reasonably be expected to rule on a certification motion.[12] The *Sosna* exception has been interpreted to apply to controversies so transitory that no single named plaintiff can maintain a justifiable claim long enough to reach the class certification stage of the litigation.[13] When the *Sosna* exception applies, a plaintiff will meet the standing requirement under the relation back doctrine if the plaintiff had standing when the suit was filed.[14]

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[9] *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006) (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)).

[10] *Id.*

[11] *Sosna v. Iowa*, 419 U.S. 393 (1975).

[12] *Id.*, at 402, n.11.

[13] *Zeidman v. J. Ray McDermott*, 651 F.2d 1030, 1050 (5th Cir. 1981). See also, *Gerstein v. Pugh*, 420 U.S. 103, 110, n. 11 (1975).

[14] *Sosna*, 419 U.S. at 402, n. 11.

In *Gerstein v. Pugh*, the court addressed whether the *Sosna* exception applied to a class action filed by prisoners challenging the constitutionality of their pretrial detention. The Court recognized that "pretrial detention is by nature temporary and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted… It is by no means certain that any given individual, named as a plaintiff, would be in pretrial custody long enough for a district judge to certify the class."[15] Therefore, the court concluded that suitable circumstances existed to apply the *Sosna* exception so that the claims asserted by the named plaintiffs were not moot even though a class action was not certified at the time their status as pretrial detainees ended.

Sheriff Garber acknowledges the *Sosna* exception, but argues that it should not apply because: (1) the plaintiff was released from jail five days after this lawsuit was filed when he posted his bail at the amount that was originally set; and (2) his own actions kept him in jail when he decided to pay the $400 filing fee to file this lawsuit instead of paying $375 to a bail agent to be released.

The plaintiff was not released from jail until after he filed the complaint in this suit and a motion to certify a class action. Even though the court has not ruled on the plaintiff's pending class certification motion, the nature of pretrial detention, especially in this case where bail was set, is intended to be short term. The plaintiff cannot be expected to maintain his status in jail until this litigation is complete. This case presents the "suitable circumstances" where the "relation back" doctrine should be applied. Furthermore, the factual determination of whether the plaintiff had the ability to pay his

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[15] *Gerstein v. Pugh*, 420 U.S. at 110, n. 11.

monetary bail amount when this suit was filed is an issue directed at the merits of his claim and not an issue of standing. Therefore, this Court finds that the claims asserted in this lawsuit are not moot.

b. The *Younger* Abstention Doctrine

In *Younger v. Harris*, the Supreme Court established that federal courts must refrain from considering requests for injunctive relief based on constitutional challenges to ongoing state criminal proceedings.[16] The *Younger* abstention doctrine requires that federal courts decline to exercise jurisdiction over a state criminal defendant's claims when three conditions are met: "(1) the federal proceeding would interfere with an ongoing state judicial proceeding; (2) the state has an important interest in regulating the subject matter of the claim; and (3) the plaintiff has an adequate opportunity in the state proceedings to raise constitutional challenges."[17]

In *Gerstein v. Pugh*, the Supreme Court also addressed whether the *Younger* abstention doctrine applies. The court held that *Younger* abstention did not apply because the injunction that the plaintiffs sought "was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of their criminal prosecutions. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits."[18]

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[16] *Texas Ass'n of Business v. Earle*, 388 F.3d 515, 518 (5th Cir. 2004) (citing *Younger v. Harris*, 401 U.S. 37, 91 (1971)).

[17] *Bice v. Louisiana Public Defender Bd*. 677 F.3d 712, 717 (5th Cir. 2012).

[18] *Gerstein v. Pugh*, 420 U.S. at 108, n.9.

The plaintiff challenges whether his pretrial detention is a violation of his constitutional rights when the basis for his continued detention is his inability to pay his monetary bail amount and he does not have an adequate opportunity to challenge the amount of bail until a motion to reduce bail is filed and heard. Based on these allegations, the plaintiff seeks an injunction to enjoin the defendants from using monetary bail to detain an arrestee without a procedure that inquires into an arrestee's ability to pay. The plaintiff's allegations, like those in *Gerstein*, do not present an issue directed at the merits of his criminal prosecution in state court. Instead, the plaintiff is challenging whether his pretrial detention is a violation of his constitutional rights. Therefore, the *Younger* abstention does not apply to this case.

Furthermore, even if the holding in *Gerstein* is not controlling over this case, the third requirement for the application of the *Younger* abstention is not met. Specifically, the plaintiff does not have an adequate opportunity to raise his constitutional challenges in state court. "The operation of the *Younger* doctrine is dependent upon the ability of the state court to provide an adequate remedy for the violation of federal rights."[19]

The defendants contend that the plaintiff has an adequate state court remedy because he can file a motion to reduce bail. However, the plaintiff does not allege that he is unable to file a motion to reduce his bail amount. Rather, he asserts that the time period it takes for the defendants to consider his ability to pay a certain monetary bail amount is a violation of his constitutional rights because he remains detained solely due to his inability to pay the bail amount. Even though the plaintiff

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[19] *Bice v. Louisiana Public Defender Bd.* 677 F.3d at 718 (citing *DeSpain v. Johnson*, 731 F.2d 1171, 1178 (5th Cir. 1984)).

can file a motion to reduce bail to challenge the bail set by the defendants, a ruling on the motion to reduce bail would not address the constitutional challenges that the plaintiff asserts in this lawsuit. Accordingly, *Younger* abstention does not apply to this case.

Finding that the claims are not moot and that *Younger* abstention is not applicable, this Court recommends that the motion to dismiss under Rule 12(b)(1) be denied.

2. The Standard for Analyzing a Rule 12(b)(6) Motion to Dismiss

To survive a Rule 12(b)(6) motion, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[20] The allegations must be sufficient "to raise a right to relief above the speculative level,"[21] and the pleading must contain more than a statement of facts that merely creates a suspicion of a legally cognizable right of action.[22] "While a complaint … does not need *detailed* factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[23] If the plaintiff fails to allege facts sufficient to "nudge[]

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[20] *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007).

[21] *Bell Atlantic v. Twombly*, 550 U.S. at 555.

[22] *Id.*, quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004).

[23] *Id.* (citations, quotation marks, and brackets omitted; emphasis added). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[his] claims across the line from conceivable to plausible, [his] complaint must be dismissed."[24]

When considering a Rule 12(b)(6) motion, a district court is generally required to limit itself to the contents of the pleadings, including any attachments thereto.[25] The court must accept all well-pleaded facts as true, and it must view them in the light most favorable to the plaintiff.[26] Conclusory allegations and unwarranted deductions of fact are not accepted as true,[27] and courts "are not bound to accept as true a legal conclusion couched as a factual allegation."[28]

When considering a Rule 12(b)(6) motion, a court has complete discretion to consider documents other than the complaint[29] if those documents are attached to the motion, referenced in the complaint, and central to the plaintiff's claims.[30] If a court considers materials outside of the pleadings, the motion to dismiss must be treated

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[24] *Bell Atlantic v. Twombly*, 550 U.S. at 570.

[25] *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000).

[26] *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007).

[27] *Kaiser Aluminum & Chemical Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982).

[28] *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

[29] *Isquith for and on behalf of Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 193 n. 3 (5th Cir. 1988); *Ware v. Associated Milk Producers, Inc.*, 614 F.2d 413, 414-15 (5th Cir. 1980).

[30] *In re Katrina Canal Breaches Litig.*, 495 F.3d at 205; *Collins v. Morgan Stanley*, 224 F.3d at 498–99.

as a motion for summary judgment,[31] and the nonmovant must be afforded the procedural safeguards of Fed. R. Civ. P. 56.[32] However, the parties' submission of extraneous materials does not automatically convert a Rule 12(b)(6) motion for summary judgment.[33]

During oral argument, the policy of the Fifteenth Judicial District Court regarding bail bonds ("15th JDC Policy") was introduced as an exhibit,and the parties agreed that the court could consider the policy in the context of the present motion.[34] Since the 15th JDC Policy is central to the plaintiff's claims, this Court finds that consideration of the exhibit setting forth the policy in writing, which was agreed to by the parties, does not convert the motion to dismiss into one for summary judgment.

According to the 15th JDC Policy, all arrestees charged with a misdemeanor will be released on a summons without the requirement of posting bond if they are charged with a traffic offense or one of the other thirty-eight misdemeanors that are listed in the policy. However, the 15th JDC Policy provides that an arrestee charged with domestic abuse battery will not be released on a summons because it is prohibited by statute, and an arrestee charged with driving under the influence will be released if the arrestee meets the qualifications for the Sheriff Offender Tracking Program

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[31] Fed. R. Civ. P. 12(d).

[32] *Fernandez–Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 283 (5th Cir. 1993); *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1284 (5th Cir. 1990).

[33] *United States ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 275 (5th Cir. 2015); *Davis v. Bayless*, 70 F.3d 367, 372, n. 3 (5th Cir. 1995).

[34] Rec. Docs. 56, 57 pp.14-15.

("STOP"). Further, "non-summons misdemeanors may also qualify for release on the signature (personal surety) of a qualified friend or family member who can establish residential stability and employment."[35]

The 15th JDC Policy further states that the bond for an arrestee charged with a felony "will be set *initially* based on the facts set forth in the probable cause for arrest affidavit, including the arrestee's age, local vs. no local address, the circumstances of the offense, and the information on the arrestee's rap sheet including prior warrants for failure to appear."[36] Bonds are set two to three times each day via phone or email. However, if the arrestee does not bond out, is charged with a non-violent felony, and qualifies for STOP, he can be released without paying the set bail amount. If an arrestee meets the STOP requirements, the arrestee will be released pursuant to a court order that conditions his release upon satisfactory participation in the program. A felony arrestee may also be released on a signature (personal surety) bond. If an arrestee has not been released, then "an arrestee will be provided an individualized bail determination within 24 hours of arrest, if practical, but in no event later than the next available 72-hour hearing after arrest."[37]

Indigent defendants are assigned counsel at the 72-hour hearing. Thereafter, if bond has not been reduced, counsel may put the individual on a weekly bond reduction duty docket, during which counsel for both parties will try to reach an agreement on a reduced bond

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[35] Rec. Doc. 56-1, p. 2.

[36] *Id.* (Emphasis added).

[37] Rec. Doc. 56-1, p. 3.

amount. If no agreement can be reached, the case will be placed on the bond reduction docket of the judge assigned to the case who will hold a bond reduction hearing with evidence and argument.[38]

III. SECTION 1983 CLAIM AGAINST SHERIFF GARBER

In *Monell v. Department of Social Services*, the United States Supreme Court held that municipalities are not vicariously liable for constitutional violations committed by their employees, but they are liable when their official policies cause their employees to violate another person's constitutional rights.[39] The Sheriff contends that the plaintiff's complaint fails to state a claim against him because he does not have the authority to set or reduce bail, which is the moving force for the plaintiff's alleged constitutional violation. In opposition, the plaintiff asserts that Sheriff Garber is a proper party regardless of his authority to set or reduce bail because: (1) Sheriff Garber is a state actor to whom *Monell* does not apply when he enforces judicial orders that he has no authority to modify or decline, and he is subject to prospective relief in that capacity; or (2) Sheriff Garber can be enjoined under *Monell* because he knowingly enforces invalid orders of detention and has some discretion under state law to decline to enforce them.

In the plaintiff's complaint, Sheriff Garber is named only in his official capacity as the sheriff of Lafayette Parish. A Section 1983 claim against a Louisiana sheriff in his official capacity or against a Sheriff's Office "is 'in

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[38] Rec. Doc. 56-1, p. 3.

[39] *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 692 (1978). See, also, *Jones v. Lowndes County, Miss.*, 678 F.3d 344, 349 (5th Cir. 2012).

essence' a suit against a municipality."[40] Accordingly, the plaintiff's claims against Sheriff Garber are claims against the Lafayette Parish Sheriff's Office and claims against a municipality.[41] Although the plaintiff argues that *Monell* does not apply when the sheriff enforces a judicial order over which he has no discretion, there is no claim in the plaintiff's complaint separate and apart from the claim against the sheriff in his official capacity and, therefore, as a municipality. Thus, *Monell* applies to the plaintiff's claims.

"To establish municipal liability under 1983, a plaintiff must show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right."[42] An official policy is (1) a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the government entity or by an official to whom the entity has delegated policy-making authority, or (2) a persistent, widespread practice of officials or employees which although not authorized by officially adopted and promulgated policy is so common and well settled as to constitute a custom that fairly represents the entity's policy.[43] If the plaintiff shows that the policy was

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[40] *Brown v. Strain*, 663 F.3d 245, 251 (5th Cir. 2011) (citing *Woodard v. Andrus*, 419 F.3d 348, 352 (5th Cir. 2005)); *Williams v. Gusman*, No. 15-64, 2015 WL 4509762, at *2 (E.D. La. July 24, 2015).

[41] A similar issue was addressed in *Cain v. City of New Orleans*, 2016 WL 2849498 (E.D. La. 2016), where the court held that a Louisiana sheriff was a municipal actor and subject to *Monell's* standard of liability.

[42] *Trammell v. Fruge*, 868 F.3d 332, 344 (5th Cir. 2017).

[43] *Cozzo v. Tangipahoa Parish Council*, 279 F.3d 273, 289 (5th Cir. 2002).

promulgated by the municipality's policymaker, then the plaintiff must establish that the policy was the moving force behind the violation which "means there must be a direct causal link between the policy and the violation."[44]

Title VIII of the Louisiana Code of Criminal Procedure governs the issue of bail. In the context of this case, Article 313 specifically vests only district courts and their commissioners having criminal jurisdiction to fix bail "in all cases." The law does not authorize a sheriff to fix bail in any case at all. Secondly, Article 315 specifically authorizes a bail schedule such as that employed by the 15th JDC in this case. Paragraph B of that article states, in pertinent part:

> The court order setting the bail schedule shall fix the amount of bail for each offense listed, designate the officer or officers authorized to accept the bail, and order that bail be taken in conformity with the schedule. … A copy of the schedule shall be sent to all jails, sheriff's offices, and police stations within the judicial district, parish, or city.

If the schedule is the manner in which bail is set for a particular arrestee, or if bail is set on an individualized basis as set forth in the 15th JDC Policy, the sheriff is obliged to follow that court order under Article 328, which states the following, in pertinent part:

> A. The bail undertaking shall:
> (1) Be in writing;
> (2) State the court before which the defendant is bound to appear.

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[44] *Peterson v. City of Fort Worth*, 588 F.3d 838, 848 (5th Cir. 2009).

(3) Be entered into before an officer who is authorized to take it.
(4) State a single amount of bail for each charge.
B. The bail undertaking **shall be enforceable** if the above requirements are met ...[45]

Given these statements of the law, the plaintiff's allegations do not establish that Sheriff Garber's policy is the moving force for the alleged constitutional violations. The plaintiff does not allege that Sheriff Garber has the authority to release an arrestee when his bail obligations are not satisfied. Nor does the plaintiff allege that Sheriff Garber has the authority to set or modify bail. Under Louisiana law, a sheriff is the keeper of the jail in his parish and shall "preserve the peace and apprehend public offenders."[46] Sheriff Garber, as the keeper of the jail, enforces the monetary bail amounts that are set by court orders. Under state law, Sheriff Garber has no authority to modify or decline to enforce court orders as the plaintiff would have this Court authorize. Therefore, Sheriff Garber's policy is not the moving force for the plaintiff's alleged constitutional violations.

This Court finds that the plaintiff has failed to state a claim against Sheriff Garber and recommends that the plaintiff's claims against Sheriff Garber be dismissed.

CONCLUSION

Based on the foregoing reasons, it is recommended that Sheriff Garber's motion to dismiss (Rec. Doc. 18) should be granted in part and denied in part. The motion should be denied to the extent that Sheriff Garber seeks dismissal pursuant to Rule 12(b)(1). The motion should

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[45] See also La. C. Cr. Pro. 314 (B).

[46] La. R.S. 13:5539.

granted to the extent that Sheriff Garber seeks dismissal pursuant to Rule 12(b)(6).

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen days from service of this report and recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within fourteen days after being served with of a copy of any objections or responses to the district judge at the time of filing.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in the report and recommendation within fourteen days following the date of its service, or within the time frame authorized by Fed. R. Civ. P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the district court, except upon grounds of plain error. See *Douglas v. United Services Automobile Association,* 79 F.3d 1415 (5th Cir. 1996).

Signed at Lafayette, Louisiana, this 11th day of December 2017.

[Signature]

PATRICK J. HANNA
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 6:17-cv-00724

EDWARD LITTLE

versus

THOMAS FREDERICK, ET AL.,

Judge Foote
Magistrate Judge Hanna
Filed December 6, 2017

REPORT AND RECOMMENDATION

Currently pending before this Court is the motion of defendants Judge Kristian Earles and Commissioner Thomas Frederick seeking to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. (Rec. Doc. 26). The motion is opposed. (Rec. Doc. 48). Oral argument was held on October 19, 2017. For the following reasons, the undersigned recommends that the motion be granted in part and denied in part.

FACTUAL BACKGROUND

On June 5, 2017, the plaintiff Edward Little filed a class action complaint that alleges, on behalf of himself and all others similarly situated, that Commissioner Thomas Frederick, Chief Judge Kristian Earles, and Sheriff Mark Garber maintain an unconstitutional

scheme where impoverished people are detained when they are unable to meet a secured financial condition of release that is determined without regard to their ability to pay.[1] Two days prior, on June 3, 2017, the plaintiff was arrested and charged with **felony** theft and was detained at the Lafayette Parish Correctional Center. The plaintiff's bail was set at $3,000 and he alleges that he did not have the ability to pay a bond agent $375 to secure his release.

According to the complaint, the 15th Judicial District Court ("15th JDC") utilizes a money bail schedule that is promulgated by Judge Earles and implemented through established procedures where an arrestee's bail is set without consideration of his inability to pay a certain monetary bail amount. The plaintiff alleges that the manner in which an arrestee's bail is set depends on the charged offense and the circumstances of the arrest. Generally, an arrestee's bail will initially be set based on Judge Earles's bail schedule. However, when an arrestee is arrested pursuant to a warrant for an offense that is not covered by the bail schedule, bail is set by Commissioner Frederick when he signs the arrest warrant which would be supported by a probable cause affidavit. When a person is arrested without a warrant and the offense is not covered by the bail schedule, bail is set by Commissioner Frederick during a telephone call after he determines whether there is probable cause to support the arrest.

The plaintiff alleges that if an arrestee is not released, he appears before Commissioner Frederick for

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[1] The Fifteenth Judicial District is made up of three parishes: Lafayette, Vermilion, and Acadia. Based on the allegations, this suit appears to apply only to the procedures and personnel in Lafayette Parish.

his initial appearance, which is commonly referred to as a 72-hour hearing. The 72-hour hearings are conducted by video-link and are held on Tuesdays and Fridays. During the 72-hour hearing, Commissioner Frederick will ask the arrestee whether his name, address, and date of birth are correctly listed on the arrest paperwork, advise the arrestee of the charges against him, the conditions of release, and he will appoint counsel if the arrestee is found to be indigent. According to the complaint, after the 72-hour hearing, an arrestee can only modify his bail amount by filing a motion to seek a bail reduction, which must be heard by either the assigned district judge if he has been formally charged by the district attorney or the district judge on duty if he has not been formally charged by the district attorney.

During oral argument, the Policy of the Fifteenth Judicial District Court ("15th JDC Policy") regarding bail bonds was introduced as an exhibit and the parties agreed that the Court could consider the policy in the context of the present motion.[2] According to the 15th JDC Policy, all arrestees charged with a **misdemeanor** will be released on a summons without the requirement of posting bond if they are charged with a traffic offense or one of the other thirty-eight misdemeanors that are listed in the policy. However, the 15th JDC Policy provides that an arrestee charged with domestic abuse battery will not be released on a summons because it is prohibited by statute, and an arrestee charged with driving under the influence will be released if the arrestee meets the qualifications for the Sheriff Offender Tracking Program ("STOP"). Further, "non-summons misdemeanors may also qualify for release on the signature (personal

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[2] Rec. Docs. 56, 57 pp.14-15.

surety) of a qualified friend or family member who can establish residential stability and employment."[3]

The 15th JDC Policy further provides that the bonds for an arrestee charged with a **felony** "will be set *initially* based on the facts set forth in the probable cause for arrest affidavit, including the arrestee's age, local vs. no local address, the circumstances of the offense, and the information on the arrestee's rap sheet including prior warrants for failure to appear."[4] Bonds are set two to three times each day via phone or email. However, if the arrestee does not bond out, is charged with a nonviolent felony, and qualifies for STOP, he can be released without paying the set bail amount. If an arrestee meets the STOP requirements, the arrestee will be released pursuant to a court order that conditions his release upon satisfactory participation in the program. A felony arrestee may also be released on a signature (personal surety) bond. If an arrestee has not been released, then "an arrestee will be provided an individualized bail determination within 24 hours of arrest, if practical, but in no event later than the next available 72-hour hearing after arrest."[5]

Indigent defendants are assigned counsel at the 72-hour hearing. Thereafter, if bond has not been reduced, counsel may put the individual on a weekly bond reduction duty docket where counsel for both parties will try to reach an agreement on a reduced bond amount. If no agreement can be reached, the case will be placed on the bond reduction docket of the judge assigned to the case

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[3] Rec. Doc. 56-1, p. 2.

[4] Id. (Emphasis added).

[5] Rec. Doc. 56-1, p. 3.

who will hold a bond reduction hearing with evidence and argument.[6]

The plaintiff argues that the 15th JDC Policy is unconstitutional because the defendants set monetary bail as a condition of release without consideration of an arrestee's ability to pay a certain monetary amount. The plaintiff further argues that Commissioner Frederick's implementation of the 15th JDC Policy is unconstitutional because he has a policy and practice where he refuses to reconsider prior determinations of bail during an arrestee's 72-hour hearing. In the plaintiff's complaint, it is alleged that two recent arrestees informed Commissioner Frederick that they could not afford their bail amount during their 72-hour hearings, but Commissioner Frederick refused to address the issue and told them to "read the sheet" and "take it up with your lawyer." Therefore, the plaintiff alleges that the defendants' bail procedure is a violation of his fundamental right to pretrial liberty because his detention is based solely on his inability to pay his set bail amount and the defendants do not inquire into his ability to pay or non-financial alternative conditions until a motion to reduce bail is filed.

The plaintiff seeks the following relief on behalf of himself and all others similarly situated: (1) an injunction to enjoin the defendants from using money bail to detain any person without procedures that ensure an inquiry into findings concerning the person's ability to pay any monetary amount set and without an inquiry into and findings concerning non-financial alternative conditions of release; (2) a declaratory judgment that the defendants violate the plaintiff's rights by setting secured

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[6] Rec. Doc. 56-1, p. 3.

financial conditions of release without inquiring into or making findings as to whether arrestees can pay the amounts set and without considering non-financial alternative conditions of release; and (3) an order and judgment granting reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

LAW AND ANALYSIS

The defendants styled their motion as a Rule 12(b)(1) motion to dismiss based on the lack of subject matter jurisdiction. However, their briefs contain arguments that are not related to subject matter jurisdiction. The defendants contend that the plaintiff's allegations do not set forth a constitutional violation because an arrestee does not have a constitutional right: (1) to be free from detention and post bail if he is a flight risk or danger to the community; or (2) to instant release from pretrial detention. Based on the defendants' arguments that address the merits of the case, this Court construes the defendants' 12(b)(1) motion to dismiss for lack of subject matter jurisdiction as a 12(b)(6) motion to dismiss for failure to state a claim.[7]

I. The Applicable Standard

To survive a Rule 12(b)(6) motion, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[8] The allegations must be sufficient "to

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[7] The Court notes that counsel for the movants adopted arguments made in the motion to dismiss filed by Sheriff Garber. (See Rec. Doc. 18). Particularly as they apply to standing/mootness and applicability of the *Younger* abstention, those arguments are addressed in the report and recommendation issued by this Court in response to Sheriff Garber's motion and are adopted herein as well.

[8] *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007).

raise a right to relief above the speculative level,"[9] and the pleading must contain more than a statement of facts that merely creates a suspicion of a legally cognizable right of action.[10] "While a complaint ... does not need *detailed* factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[11] If the plaintiff fails to allege facts sufficient to "nudge[] [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed."[12]

When considering a Rule 12(b)(6) motion, a district court is generally required to limit itself to the contents of the pleadings, including any attachments thereto.[13] The court must accept all well-pleaded facts as true, and it must view them in the light most favorable to the plaintiff.[14] Conclusory allegations and unwarranted deductions of fact are not accepted as true,[15] and courts

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[9] *Bell Atlantic v. Twombly*, 550 U.S. at 555.

[10] *Id.*, quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004).

[11] *Id.* (citations, quotation marks, and brackets omitted; emphasis added). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[12] *Bell Atlantic v. Twombly*, 550 U.S. at 570.

[13] *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000).

[14] *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007).

[15] *Kaiser Aluminum & Chemical Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982).

"are not bound to accept as true a legal conclusion couched as a factual allegation."[16]

II. <u>CONVERSION OF THE MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT IS NOT WARRANTED</u>

When considering a Rule 12(b)(6) motion, a court has complete discretion to consider documents other than the complaint[17] if those documents are attached to the motion, referenced in the complaint, and central to the plaintiff's claims.[18] If a court considers materials outside of the pleadings, the motion to dismiss must be treated as a motion for summary judgment,[19] and the nonmovant must be afforded the procedural safeguards of Fed. R. Civ. P. 56.[20] However, the parties' submission of extraneous materials does not automatically convert a Rule 12(b)(6) motion for summary judgment.[21]

Although not attached to the motion, since the 15th JDC Policy is at the very heart of the complaint and central to the plaintiff's claims, this Court finds that

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[16] *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

[17] *Isquith for and on behalf of Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 193 n. 3 (5th Cir. 1988); *Ware v. Associated Milk Producers, Inc.*, 614 F.2d 413, 414-15 (5th Cir. 1980).

[18] *In re Katrina Canal Breaches Litig.*, 495 F.3d at 205; *Collins v. Morgan Stanley*, 224 F.3d at 498–99.

[19] Fed. R. Civ. P. 12(d).

[20] *Fernandez–Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 283 (5th Cir. 1993); *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1284 (5th Cir. 1990).

[21] *United States ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 275 (5th Cir. 2015); *Davis v. Bayless*, 70 F.3d 367, 372 n. 3 (5th Cir. 1995).

consideration of the exhibit setting forth the policy in writing, which was agreed to by the parties, does not convert the motion to dismiss into one for summary judgment.

III. SECTION 1983 CLAIMS

Section 1983 provides a cause of action against anyone who "under color of any statute, ordinance, regulation, custom, or usage, of any State" violates another person's Constitutional rights. Section 1983 is not itself a source of substantive rights; it merely provides a method for vindicating federal rights conferred elsewhere.[22] To state a section 1983 claim, a plaintiff must: (1) allege a violation of a right secured by the Constitution or laws of the United States, and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law.[23]

In this case, the plaintiff asserts a claim under Section 1983, alleging that his fundamental right to pretrial liberty is being infringed in violation of the Fourteenth Amendment's Due Process Clause and Equal Protection Clause because the defendants set bail without consideration of the inability to pay a certain monetary amount such that arrestees remain in detention solely because they are unable to pay their set bail amount.

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[22] *Graham v. Connor*, 490 U.S. 386, 393-94 (1989); *Baker v. McCollan*, 443 U.S. 137,144, n. 3 (1979); *Hernandez ex rel. Hernandez v. Texas Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 879 (5th Cir. 2004).

[23] *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013); *Moore v. Willis Independent School Dist.*, 233 F.3d 871, 874 (5th Cir. 2000).

(1) The State Law Framework

Title VIII of the Louisiana Code of Criminal Procedure governs the issue of bail. Article 313 specifically vests district courts and their commissioners having criminal jurisdiction to fix bail "in all cases." Article 315 specifically authorizes a bail schedule such as that employed by the 15th JDC in this case. That statute provides in pertinent part:

> A. Unless the bail is fixed by a schedule in accordance with this Article, the amount of bail shall be specifically fixed in each case. In non-capital felony cases, a bail schedule according to the offense charged may be fixed by the district court.
>
> B. The court order setting the bail schedule shall fix the amount of bail for each offense listed, designate the officer or officers authorized to accept the bail, and order that bail be taken in conformity with the schedule.
>
> C. A person charged with commission of an offense for which bail is fixed by a schedule may give bail according to the schedule or demand a special order fixing bail. The bail amount fixed by schedule may be modified by the court in accordance with Article 319.

As set forth in more detail below, one of the factors specifically identified by the Legislature to consider in fixing bail is "the ability of the defendant to give bail."[24] Article 319 allows the court, on its own motion or on the motion of either the prosecution or the defendant, to either increase or reduce the amount of bail. Finally,

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[24] La. C. Cr. Pro. Art. 316.

Article 313 provides for a contradictory bail hearing in certain instances prior to setting bail with temporary detention authorized for no more than five days exclusive of weekends and legal holidays.[25]

This Court finds that the 15th JDC Policy is in accord with these provisions of state law as a threshold matter and the plaintiff has made no allegation that the law of Louisiana is unconstitutional either on its face or as applied.

(2) Equal Protection

To prevail under the Equal Protection Clause, a Section 1983 plaintiff must prove either: (1) a state actor intentionally discriminated against the plaintiff because of membership in a protected class; or (2) the plaintiff has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment.[26] The plaintiff does not allege that the defendants intentionally discriminate against an arrestee based on financial status. Instead, the plaintiff contends that the defendants "employ a post-arrest wealth-based detention scheme that jails impoverished people when they are unable to meet a secured financial condition of release determined without regard for their ability to pay."[27] However, even assuming that the plaintiff's allegations are true, the Equal Protection Clause would only require that the classification rationally further a legitimate state interest because

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[25] These five articles were revised from their prior form as part of Acts 2016, No. 613, § 1, eff. January 1, 2017.

[26] *Gibson v. Texas Dep't of Ins.*, 700 F.3d 227, 238 (5th Cir. 2012).

[27] Rec. Doc. 1 p.1 ¶ 1

classifications based on wealth or financial status are not protected classes.[28]

"Generally speaking, an individual's indigence does not make that individual a member of a suspect class for equal protection purposes."[29] In *Pugh v. Rainwater*, the Fifth Circuit recognized that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible."[30] However, the court held that there is no presumption that an indigent defendant shall be released without a monetary bail because the "ultimate inquiry in each instance is what is necessary to reasonably assure defendant's presence at trial."[31] This Court is not persuaded that *Pugh* establishes a protected class for indigent arrestees because an arrestee's ability to pay a bail amount is not the only consideration when bail is set. Therefore, the plaintiff will only prevail under the Equal Protection Clause if the defendants do not have a rational basis to intentionally treat the plaintiff differently from others similarly situated.

It is well settled that the defendants have "a compelling interest in assuring the presence at trial of persons charged with a crime."[32] The 15th JDC Policy, on its face, does not discriminate against arrestees based on

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[28] *Carson v. Johnson*, 112 F.3d 818, 821-822 (5th Cir. 1997) ("Neither prisoners nor indigents constitute a suspect class.").

[29] *Driggers v. Cruz*, 740 F.3d 333, 337 (5th Cir. 2014) (citing *Maher v. Roe*, 432 U.S. 464, 471 (1977).

[30] *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc) (citing *Williams v. Illinois*, 399 U.S. 235 (1970)).

[31] *Pugh v. Rainwater*, 572 F.2d at 1057-58.

[32] *Pugh v. Rainwater*, 572 F.2d at 1056 (citing *Stack v. Boyle* , 342 U.S. 1, 4 (1951))

their financial status. First of all, the bail amount, if set under the schedule, is set in the same manner based on the nature of the offense charged regardless of financial status in compliance with Article 315. For individualized bail that is initially set within hours of a felony arrest, the defendants consider "the facts set forth in the probable cause for arrest affidavit, including arrestee's age, local vs. no local address, circumstances of the offense and the information on an arrestee's rap sheet including prior warrants for failure to appear."[33] While the financial condition of the arrestee is not specifically identified in this *initial individualized setting*, the information that is listed in the policy may well be the only information available to the defendants during this short time period and takes into consideration other factors listed under Article 316 in order to set a sufficient bail to assure the arrestee's presence at trial and the safety of any other person and the community.

However, pursuant to the 15th JDC Policy, an arrestee's initial bail amount is not final and will potentially be reviewed two additional times within seventy-two hours of arrest. If the defendant wishes to pursue the argument that the monetary bail is set too high, and the other factors under Article 316 justify reduction, then bail can be adjusted based on the applicable state law implemented through the 15th JDC Policy. If the arrestee still does not get relief, there are two more opportunities for bail review including a contradictory hearing by the district judge assigned to the case. Therefore, on its face, this procedure illustrates that the defendants do not intend to detain an arrestee longer than the time required to assure the arrestee's appearance at trial and the safety of any other person and the

[33] Rec. Doc. 56-1, p.2.

community. While the application of this procedure might lead to a conclusion where an arrestee with the ability to pay is released, while an arrestee with the inability to pay is detained, the defendants' procedure is rationally related to these two compelling interests.

The 15th JDC Policy also illustrates that the defendants do not have a discriminatory purpose toward indigents when bail is initially set because there are non-financial alternatives available if an arrestee is unable to pay the monetary bail amount. The 15th JDC Policy provides that an arrestee may be released without paying a monetary bail if the requirements for the STOP program or the requirements to be released on a signature bond are met. These non-financial alternatives are available for consideration when the defendants review an arrestee's bail, but cannot be automatically applied for **all** felony arrestees that are unable to pay a monetary bail amount because that procedure would thwart the more compelling interests of assuring the arrestee's appearance at trial as well as ensuring the safety of any other person and the community.

With regard to misdemeanors, the 15th JDC Policy illustrates that the defendants provide more than what is constitutionally required because nearly all arrestees charged with a misdemeanor listed in the policy are released on a summons without any further considerations. Exceptions are for those who cannot be released on a summons as a matter of law, and those who have been arrested for the third time within the previous six months. In addition, non-summons misdemeanors may also qualify for release on the signature of a personal surety or release through the STOP program. There is no indication in the 15th JDC Policy that indigent defendants charged with a misdemeanor are held solely

because they cannot afford to meet the financial conditions of their bond.

This Court finds that the 15th JDC Policy does not violate the Fourteenth Amendment's Equal Protection Clause. Therefore, this Court recommends that the plaintiff's Section 1983 claim based on the alleged violation of the Fourteenth Amendment's Equal Protection clause should be dismissed.

(3) Due Process Clause

The Due Process Clause of the Fourteenth Amendment has two components: (1) "A guarantee of procedural protections when a state seeks to deprive an individual of protected liberty or property interests, and (2) a substantive protection against conduct that 'shocks the conscience.'"[34] The first component, which establishes procedural due process, requires the plaintiff to "identify a protected life, liberty, or property interest and then prove that government action resulted in a deprivation of that interest."[35] Stated differently in the context of this case, the two-part analysis of the procedural due process component requires identification of the protected liberty interest, and then a determination of whether the state has provided adequate procedures for the vindication of that interest.[36] "The liberty interests protected by the Fourteenth Amendment may arise from "the Constitution itself, by reason of guarantees

[34] *Jordan v. Fisher*, 823 F.3d 805, 810 (5th Cir. 2016).

[35] *Baldwin v. Daniels*, 250 F.3d 943, 946 (5th Cir. 2001).

[36] *Jordan v. Fisher*, 823 F.3d at 810 (citing *Wilkinson v. Austin*, 545 U.S. 209, 213 (2005)).

implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies."[37]

"The second component of the due process analysis does not rest on state law ... and comes into play ... when 'the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience' regardless of whether the behavior in question fails to conform to state laws."[38] The second component dealing with substantive due process is not at issue in this lawsuit.

The plaintiff contends that the defendants violate an arrestee's fundamental right to pretrial liberty by placing and keeping an arrestee in jail simply because he cannot afford to pay the monetary bail amount. However, it is unclear whether the plaintiff is asserting that an arrestee's right to pretrial liberty is a protected interest created by the Constitution or state law. Therefore, the threshold issue before the Court is whether the right to pretrial release is a liberty interest that is created by the Constitution or a liberty interest created by a state law or policy.

In *Pugh*, the Fifth Circuit essentially denied that the right to pretrial liberty is a fundamental right because the right is conditioned on "what is necessary to reasonably assure the defendant's presence at trial."[39] In *U.S. v. Salerno*, the Supreme Court recognized the importance and fundamental nature of the right to pretrial release, but ultimately held that the right to

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[37] *Id.* (quoting *Wilkinson v. Austin*, 545 U.S. at 221).

[38] *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 862 n.8 (1996)).

[39] *Pugh v. Rainwater*, 572 F.2d at 1057.

pretrial release is not a fundamental right.[40] Based on the applicable jurisprudence, this Court is not persuaded that the right to pretrial release is a fundamental right created by the Constitution. However, the right to pretrial liberty is a protected interest created by Louisiana law.

State law can create federal liberty interests "by placing substantive limitations on official discretion," typically through "establishing substantive predicates to govern official decision-making" and by "mandating the outcome to be reached upon a finding that the relevant criteria have been met."[41] The Louisiana Constitution provides "before and during a trial, a person **shall be bailable by sufficient surety**, except when he is charged with a capital offense and the proof is evident and the presumption of guilt is great."[42] The right to bail is also provided under Article 312 of the Louisiana Code of Criminal Procedure, which states that, "except as provided in this article and article 313, a person in custody

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[40] *United States v. Salerno*, 481 U.S. 739, 750-51 (1987) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

[41] *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 462 (1989).

[42] La. Const. Art. 1, § 18 (emphasis added). The article further states: "a person charged with a crime of violence as defined by law or with production, manufacture, distribution, or dispensing or possession with intent to produce, manufacture, distribute, or dispense a controlled dangerous substance as defined by the Louisiana Controlled Dangerous Substance Law, and the proof is evident and the presumption of guilt is great, shall not be bailable if, after a contradictory hearing, the judge or magistrate finds by clear and convincing evidence that there is a substantial risk that the person may flee or poses an imminent danger to any other person or the community."

who is charged with the commission of an offense is entitled to bail before conviction."[43]

Louisiana's right to bail provision places limitations on an official's discretion because it provides that an arrestee is entitled to bail unless the arrestee is charged with a certain offense and/or specific procedures are followed. However, an arrestee's right to bail remains conditional on the arrestee's ability to provide "sufficient surety" and the court setting an arrestee's bail maintains its discretion to determine what is considered "sufficient surety" in each case. Therefore, Louisiana law creates a federal liberty interest that arrestees have the right to be released from pretrial detention, but this interest remains conditioned on an arrestee's ability to provide "sufficient surety."

To determine whether a liberty interest is sufficiently protected under the Due Process Clause, the Fifth Circuit applies the balancing test that was established in *Mathews v. Eldridge*, which requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such an interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[44]

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[43] La. C. Cr. Pro. Art. 312.

[44] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

In this case, the private interest that is affected by the defendants' alleged conduct is an arrestee's interest in release from custody prior to trial. However, an arrestee's interest is not automatically erroneously deprived when a monetary bail amount is set because not only is the interest conditional, but the procedures used mandate that the ability to pay the bail amount is already one factor to consider.

The Louisiana legislature specifically provided that "[t]he amount of bail **shall** be fixed in an amount that will ensure the presence of the defendant, as required, and the safety of any other person and the community, having regard to" ten factors.[45] While a felony arrestee's ability to pay bail is a factor to consider (see factor 4), it cannot be the sole factor used to determine the appropriate conditions of release. For example, when an arrestee with a prior criminal record is charged with a violent offense, backed by evidence of sufficient weight (factors 1, 2 & 3), the main consideration before the court is whether the arrestee will be a danger to any other person or the community if released (factor 5). When an

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[45] La. C. Cr. Pro. Art. 316 (emphasis added). These factors include: (1) the seriousness of the offense charged, including but not limited to whether the offense is a crime of violence or involves a controlled dangerous substance; (2) the weight of the evidence against the defendant; (3) the previous criminal record of the defendant; (4) the ability of the defendant to give bail; (5) the nature and seriousness of the danger to any other person or the community that would be posed by the defendant's release; (6) the defendant's voluntary participation in a pretrial drug testing program; (7) the absence or presence in the defendant of any controlled dangerous substance; (8) whether the defendant is currently out on a bail undertaking on a previous felony arrest for which he is awaiting institution of prosecution, arraignment, trial, or sentencing; (9) any other circumstances affecting the probability of defendant's appearance; (10) the type or form of bail.

arrestee has failed to appear on numerous occasions, the main consideration before the court is whether the arrestee will appear for trial (factor 9). In these situations, an arrestee's ability to pay a certain bail amount, while a factor to be considered, is not necessarily in and of itself dispositive of the issue before the court when weighed against the compelling interests of assuring the safety of any other person and the community and the arrestee's appearance as required.

However, even if the initial setting results in a bail amount that is too high for the arrestee to meet, the procedural safeguards that are in place in the 15th JDC Policy allow the arrestee multiple opportunities to have the bond reduced (potentially two times within seventy-two hours), and non-financial alternatives are available if an arrestee is unable to pay a monetary bail amount. After the 72-hour hearing, if an arrestee remains in custody, there are two more remedies available: being placed on the *weekly* bond reduction duty docket with a duty judge, and if no agreement can be reached with the prosecution, by being placed on the bond reduction docket with an evidentiary hearing before the judge assigned to the case.

While there is no applicable jurisprudence to address the appropriate time period for bail to be set, there is jurisprudence that establishes a time period to determine probable cause. In *Gerstein v. Pugh*, the Supreme Court held that a judicial officer shall make a prompt determination of whether there is probable cause to support an arrest and the determination can be made informally without an adversarial hearing.[46] The Supreme Court recognized that the determination of probable cause should be flexible and incorporated into the

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[46] *Gerstein v. Pugh*, 420 U.S. 103, 123 (1974).

procedure for setting bail or fixing other conditions of pretrial release.[47]

In *County of Riverside v. McLaughlin*, the Supreme Court addressed the appropriate time period to satisfy the promptness requirement of *Gerstein* and held that the judicial determination of probable cause shall be made within 48 hours of an arrest.[48] The Supreme Court also restated that certain proceedings, including bail hearings, may be combined with the informal procedure of determining probable cause.[49]

The 15th JDC policy illustrates that the defendants follow the intended structure set forth in *County of Riverside* and *Gerstein*, because an arrestee's *individualized* bail may be initially set at the same time that a judicial officer determines whether there is probable cause for the arrest, whether by warrant or not, i.e. within hours of the actual arrest. There is no constitutional requirement that the plaintiff is entitled to an adversarial hearing at that time.

Louisiana law mandates that an arrestee shall be brought before a judge within seventy-two hours of arrest for the purpose of appointment of counsel and "if the defendant has the right to have the court appoint counsel to defend him, the court shall assign counsel to the defendant. The court may also, *in its discretion*, determine or review a prior determination of the amount of bail."[50] Thus, Louisiana law does not *mandate* that an arrestee

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[47] *Gerstein v. Pugh*, 420 U.S. at 104.

[48] *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

[49] *Id.*, at 58.

[50] La. C. Cr. Pro. Art. 230.1 (emphasis added).

is entitled to an adversarial hearing to challenge the bail amount during the 72-hour hearing.

However, the 15th JDC Policy *does* mandate that an *individualized* bail determination is to be made "within twenty-four hours of arrest, if practical, but in no event later than the next available seventy-two (72) hour hearing after arrest."[51] Louisiana law does not specifically require that an adversarial hearing occur at an arrestee's 72-hour hearing, nor does it mandate that a prior determination of bail be reviewed. However, due process does require some justification at some point that an arrestee's right to pretrial release based on a sufficient surety is not being violated. The 15th JDC Policy provides the opportunity for that justification if amount of bail is questioned by the arrestee. This 72-hour time period is closely tailored to the appropriate time period for setting conditions of release established in the federal Bail Reform Act.[52]

Under Fed. R. Cr. P. 5(a), an arrestee's initial appearance before a magistrate judge shall occur without "unnecessary delay." A specific time period for what constitutes an unnecessary delay is not defined and is determined on a case-by-case basis. However, if an arrestee is arrested *without* a warrant, a 48-hour delay between arrest and a probable cause determination has been considered reasonable by the Supreme Court.[53] If an arrestee is arrested pursuant to a warrant based on a complaint, which must be supported by a probable cause affidavit, the arrestee is entitled to a preliminary

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[51] Rec. Doc. 56-1, p. 3.

[52] 18 U.S.C.A. § 3141 *et seq.*

[53] *County of Riverside v. McLaughlin*, 500 U.S. at 57.

hearing with evidence and witnesses presented to the court to determine the existence of probable cause within no later than fourteen days if he is incarcerated.[54] It is not uncommon for preliminary hearings to be combined with detention hearings during this time frame.

Under the Bail Reform Act, a federal court is allowed to detain an arrestee pending trial if the court finds after an adversary hearing that no release conditions "will reasonably assure the appearance of the person as required and the safety of any other person and the community."[55] The adversarial hearing "shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance."[56] Except for good cause, the continuance is limited to no more than five working days if sought by the defendant or three working days if sought by the Government.[57] The continuance is a matter of right and the computation of time does not include legal holidays or weekends. Thus, under the federal system, a defendant charged with a felony could possibly be held without any type of bond consideration for more than five days if the defendant is presented to the magistrate judge within 48 hours of arrest and the Government seeks a continuance.

Therefore, in the context of setting bail, under the 15th JDC Policy, bail can be set based on the offense charged, i.e. under the schedule, when probable cause is

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[54] Fed. R .Cr. P. 5.1(c). An arrestee is not entitled to a preliminary hearing if he is indicted by the Grand Jury.

[55] 18 U.S.C.A. § 3142(e).

[56] 18 U.S.C.A. §3142(f)

[57] *Id.*

determined, and individualized bail is set within 24 hours of arrest but in no event no later than the next available 72-hour hearing. In the federal system, bond conditions can also possibly be set within twenty-four hours of arrest, but on the motion of the Government, bond may not be determined until up to three days, i.e seventy-two hours, later excluding weekends or holidays.

The plaintiff argues that all arrestees are entitled to the same due process procedures established by the Supreme Court in *United States v. Salerno*. In *Salerno*, the Supreme Court reviewed the Bail Reform Act's authorization of pretrial detention and held that the procedures required are sufficient to satisfy procedural due process requirements. The requirements include: (1) a detention hearing where the arrestee is represented by counsel; (2) the arrestee may testify on their own behalf, present information, and cross-examine witnesses; (3) the judicial officer that determines the appropriateness of detention is guided by enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community; (4) the government must prove its case by clear and convincing evidence; and (5) the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain.[58]

The 72-hour hearing under state law does not contemplate the same procedures for setting conditions of bond as a detention hearing under the Bail Reform Act. However, the 15th JDC Policy provides two additional opportunities to have bail addressed, up to and including an evidentiary hearing with the district judge assigned to the case. Therefore, this Court concludes that the bail

[58] *U.S. v. Salerno*, 481 U.S. 739, 751-752 (1987).

procedures employed under Louisiana law, as implemented by the 15th JDC Policy, do meet the procedural safeguards required to satisfy the plaintiff's due process rights.

The plaintiff's argument in this case follows the holding in *Odonnell v. Harris County* where the plaintiff alleged that Harris County maintains a "systematic custom of setting secured financial conditions of release on the bail schedule without any inquiry into or findings concerning an arrestee's present ability to pay the amount set."[59] The Court recognized that under Texas law an arrestee charged with a **misdemeanor** should not be detained over 24 hours **solely based** on their inability to pay. The court used federal case law to conclude that arrestees charged with a misdemeanor can only be detained based on their inability to pay a monetary bail amount after the following is provided: "(1) notice that the financial and other resource information its officers collect is for the purpose of determining the misdemeanor arrestee's eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; and (4) a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law abiding behavior before trial."[60]

Similarly, in *Wheat v. Craig*, the plaintiffs filed a class action complaint and alleged that indigent

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[59] *Odonnell v. Harris County*, 227 F.Supp.3d. 706, 718 (S.D. Tex. 2017). This case is on appeal to the Fifth Circuit and as of this writing has not been decided.

[60] *Odonnell v. Harris County*, 251 F.Supp.3d at 1145.

misdemeanor arrestees in Bossier Parish are detained up to forty-five days **solely** because they are unable to pay their monetary bail amount.[61] The parties reached a settlement, which included that: (1) all misdemeanor arrestees except those expressly listed will be released on their own recognizance; (2) misdemeanor arrestees charged with an offense that is not listed will be provided an individualized bail determination within twenty-four hours of arrest whenever practicable but in no event later than seventy-two hours after their arrest; (3) these bail review hearings meet the requirements of due process and equal protection, and no misdemeanor arrestee will be kept in jail on the basis of a secured money bond that they cannot afford.[62]

After reviewing these similar cases, this Court recognizes that the 15th JDC Policy essentially mirrors the constitutional standards that are illustrated in these cases for arrestees charged with **misdemeanor** offenses. An arrestee charged with a misdemeanor is released without bail when the charged offense is an offense listed in the policy and release without a monetary bail is not otherwise prohibited by law. Furthermore, the 15th JDC policy provides non-financial alternatives when a monetary bail is set in a misdemeanor case and the arrestee is unable to pay the monetary bail amount, i.e. a personal surety or by qualifying for STOP. Finally, it is presumed a misdemeanor arrestee who is otherwise required to post bail and doesn't qualify for the non-financial alternatives (whether due to voluntariness on the arrestee's part or not) would have the same procedures available to address bail as a felony arrestee in any

[61] *Wheat v. Craig*, 5:17-cv-00424, Rec. Doc. 1

[62] *Wheat v. Craig*, 5:17-cv-00424, Rec. Doc. 27

other case, i.e. individualized bail determination within 24 hours of arrest if practicable, but in no event no later than the next 72-hour hearing.

However, there is one major factor that distinguishes these cases from the present case. Because the plaintiff in this case is charged with a **felony**, far more compelling interests are at stake. Nonetheless, this Court agrees with the 15th JDC Policy that an arrestee's *individualized* bail amount should be reviewed or addressed no later than their initial appearance before a judicial officer. However, the plaintiff alleges that Commissioner Frederick has a policy and practice where he refuses to address an arrestee's bail amount during the 72-hour hearing. The plaintiff further alleges that two recent arrestees told Commissioner Frederick that they could not afford to pay their monetary bail amount and Commissioner Frederick told them to "read the sheet" and "take it up with your lawyer."[63] This allegation suggests "the sheet" is the bail schedule rather than an individualized bail determination. Even though the plaintiff did not appear before Commissioner Frederick when this lawsuit was filed, these allegations, accepted as true, present a plausible claim regarding whether Commissioner Frederick's actions are a violation of an arrestee's due process rights.

This Court finds that the 15th JDC Policy, on its face, does not create a violation of an arrestee's due process rights because the policy follows appropriate procedures and provides that an arrestee shall have an individualized bail determination within 24 hours if practical, but in no event not later than the next available 72-hour hearing following his or her arrest. The policy

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[63] Rec. Doc. 1 P. 9 ¶31

further provides that arrestees can challenge their bail condition two more times, including at a contradictory hearing before the district judge assigned to the case if they are still unable to secure their release after the 72-hour hearing. While the plaintiff alleges that the hearing before a district judge may occur a week or more after an arrest, this time period is not unconstitutional if Commissioner Frederick makes an individualized bail determination no later than the 72-hour hearing and provides a record as to why the bail conditions are justified under Article 316 as a sufficient surety to assure their presence at trial and the safety of any other person and the community.

Whether Commissioner Frederick's alleged refusal to address an arrestee's conditions of bail during a 72-hour hearing is a violation of an arrestee's due process rights is a question that must be resolved with evidence. However, since the 15th JDC Policy does contain sufficient procedural safeguards, this Court recommends that the plaintiff's due process claims against Judge Earles should be dismissed.

CONCLUSION

Based on the foregoing reasons, it is recommended that the defendants' motion to dismiss (Rec. Doc. 26) should be granted in part and denied in part. The defendants' motion should be granted to the extent it seeks dismissal of all of the plaintiff's equal protection claims as well as the plaintiff's due process claims against Judge Earles. The defendants' motion should be denied to the extent that it seeks dismissal of the plaintiff's due process claims against Commissioner Frederick.

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen days from service of this

report and recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within fourteen days after being served with of a copy of any objections or responses to the district judge at the time of filing.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in the report and recommendation within fourteen days following the date of its service, or within the time frame authorized by Fed. R. Civ. P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the district court, except upon grounds of plain error. See Douglass v. United Services Automobile Association, 79 F.3d 1415 (5th Cir. 1996).

Signed at Lafayette, Louisiana, this 6th day of December 2017.

[Signature]
PATRICK J. HANNA
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11368

SHANNON DAVES; SHAKENA WALSTON; ERRIYAH BANKS; DESTINEE TOVAR; PATROBA MICHIEKA; JAMES THOMPSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; FAITH IN TEXAS; TEXAS ORGANIZING PROJECT EDUCATION FUND,
Plaintiffs—Appellants Cross-Appellees,

versus

DALLAS COUNTY, TEXAS; ERNEST WHITE, 194TH; HECTOR GARZA, 195TH; RAQUEL JONES, 203RD; TAMMY KEMP, 204TH; JENNIFER BENNETT, 265TH; AMBER GIVENS-DAVIS, 282ND; LELA MAYS, 283RD; STEPHANIE MITCHELL, 291ST; BRANDON BIRMINGHAM, 292ND; TRACY HOLMES, 363RD; TINA YOO CLINTON, NUMBER 1; NANCY KENNEDY, NUMBER 2; GRACIE LEWIS, NUMBER 3; DOMINIQUE COLLINS, NUMBER 4; CARTER THOMPSON, NUMBER 5; JEANINE HOWARD, NUMBER 6; CHIKA ANYIAM, NUMBER 7 JUDGES OF DALLAS COUNTY, CRIMINAL DISTRICT COURTS,
Defendants—Appellees Cross-Appellants,

MARIAN BROWN; TERRIE MCVEA; LISA BRONCHETTI; STEVEN AUTRY; ANTHONY RANDALL; JANET LUSK; HAL TURLEY, DALLAS COUNTY MAGISTRATES; DAN PATTERSON, NUMBER 1; JULIA HAYES, NUMBER 2; DOUG SKEMP, NUMBER 3; NANCY MULDER, NUMBER 4; LISA GREEN, NUMBER 5; ANGELA KING, NUMBER 6; ELIZABETH CROWDER, NUMBER 7; CARMEN WHITE, NUMBER 8; PEGGY HOFFMAN, NUMBER 9; ROBERTO

CANAS, JR., NUMBER 10; SHEQUITTA KELLY, NUMBER 11 JUDGES OF DALLAS COUNTY, CRIMINAL COURTS AT LAW,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CV-154

Filed March 31, 2023

Before RICHMAN, *Chief Judge*, and JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILLETT, HO, DUNCAN, ENGELHARDT, and WILSON, *Circuit Judges.*[*]

EDITH H. JONES, *Circuit Judge*:

In a second round of en banc review, we conclude that this case, whose aim was to revise by federal decree the Texas state court procedures for felony and misdemeanor pretrial bail, should never have been brought in federal court. We hold that a string of consistent Supreme Court authority commencing with *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971), requires federal courts to abstain from revising state bail bond procedures on behalf of those being criminally prosecuted, when state procedures allow the accused adequate opportunities to raise their federal claims.

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[*] Judge Ho concurs in the court's ruling on abstention only, and not in the court's ruling on mootness. Judge Oldham is recused and did not participate. Judge Douglas was not a member of the court when this case was submitted to the court en banc and did not participate in this decision.

Recent years saw a surge of interest in criminal procedure reform. Lawsuits have been filed nationwide seeking to mitigate state and local bail bonding requirements.[1] One such suit resulted in a decision by this court that approved broad changes to misdemeanor bail bond procedures in Harris County, Texas. *Compare ODonnell v. Harris Cnty.*, 882 F.3d 528 (5th Cir. 2018), *withdrawn and superseded on panel reh'g*, 892 F.3d 147 (5th Cir. 2018) (*ODonnell I*), *with ODonnell v. Goodhart*, 900 F.3d 220 (5th Cir. 2018) (*ODonnell II*) (trimming terms of original remedial order). This case followed in its wake. But *ODonnell*'s analysis was debatable, though it bound the district court and our initial three-judge appellate panel in regard to Dallas County procedures. *See Daves v. Dallas Cnty.*, 984 F.3d 381 (5th Cir. 2020), *vacated*, 988 F.3d 834 (5th Cir. 2021). The panel decision here affirmed in part preliminary injunctive relief mirroring that in *ODonnell* and remanded for further proceedings. *Id.* at 388, 414.

In due course, our court voted to reconsider this case en banc. *Daves v. Dallas Cnty.*, 988 F.3d 834 (5th Cir. 2021). While the en banc case was pending, the Texas legislature passed a new law (Act of August 31, 2021, 87th Tex. Leg. 2d C.S., S.B. 6) ("S.B. 6") that adopted some of *ODonnell*'s innovations while tightening other bonding requirements. With this complex backdrop, the en banc court resolved several issues raised by

[1] *See, e.g.*, *H.C. v. Chudzik*, No. 5:22-cv-1588 (E.D. Pa. Apr. 25, 2022), ECF No. 1; *The Bail Project, Inc. v. Comm'r, Ind. Dep't of Ins.*, No. 1:22-cv-862 (S.D. Ind. May 4, 2022), ECF No. 1; *Allison v. Allen*, No. 1:19-cv-01126 (M.D.N.C. Nov. 12, 2019), ECF No. 1; *Ross v. Blount*, No. 2:19-cv-11076 (E.D. Mich. Apr. 14, 2019), ECF No. 1.

ODonnell,[2] deferred deciding others,[3] and remanded for the district court to consider two issues: whether the case has been mooted by the new law's taking effect, and whether the federal courts should have abstained pursuant to the body of caselaw rooted in *Younger v. Harris*.[4] The district court then declared moot the plaintiffs' challenge to Dallas County bail procedures, but it concluded the federal court should not have abstained.

This opinion completes our en banc review by addressing the district court's decisions on the remanded questions. Although the parties' dispute has become moot in light of S.B. 6, the antecedent question of federal jurisdiction remains.

BACKGROUND

A complete factual and procedural background appears in the initial en banc decision in this case. *Daves v. Dallas Cnty.*, 22 F.4th 522, 529-31 (5th Cir. 2022). A few relevant highlights may be recapitulated. The plaintiffs, proceeding as a class, comprised people who had been charged with misdemeanor and felony crimes in Dallas County and who were allegedly unconstitutionally

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[2] We held that district and county court at law judges are protected by state sovereign immunity in promulgating bail bond schedules and that plaintiffs lacked standing to sue them on that basis. *ODonnell I*'s contrary conclusions regarding county court at law judges were overruled. *Daves v. Dallas Cnty.*, 22 F.4th 522, 540, 544 (5th Cir. 2022) (en banc).

[3] The en banc decision did not resolve whether the Dallas County Sheriff and Dallas County are proper defendants, and it clarified that because only declaratory relief was issued by the district court against the magistrate judges, they did not appeal, and we issued no decision as to them. *Id.* at 545.

[4] The defendants have preserved the issue of abstention throughout this litigation.

incarcerated pretrial solely because they were financially unable to post required bail. Bail decisions, they claimed, were made via an offense-based schedule promulgated by the district and county court at law judges.[5] The schedule allegedly prevented consideration of the defendants' ability to pay, and it was rigidly enforced by the magistrate judges who initially make these decisions. The County Sheriff correspondingly violated arrestees' constitutional rights by jailing them for failure to make bail. Thus, the plaintiffs were all subject to ongoing state criminal proceedings.

Were the federal court to agree that pretrial incarceration despite inability to pay for bail is unconstitutional, the plaintiffs proposed a variety of fundamental alterations in the pretrial decisional process, including but not limited to obtaining detailed financial assessments from each arrestee, strict time limits for decisionmaking, and the possibility of immediate appeal. As had happened in the *ODonnell* case, the plaintiffs sought the appointment of a federal monitor over the Dallas County criminal justice system. Among other things, the monitor would receive periodic reports and be empowered to respond to any individual defendant or his counsel or family member who believed at any time that the federally installed bail procedures were not being followed. The district court held a hearing, found the local processes unconstitutional on the above-stated

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[5] It bears noting that Texas law at the time this suit was filed plainly required bail decisions to rest on a number of factors, including, *inter alia*, the nature of the offense, the "future safety of a victim," the detainee's "ability to make bail," and a proscription against using bail "to make it an instrument of oppression." TEX. CODE CRIM. P. art. 17.15 (1993).

basis,[6] and ordered a preliminary injunction essentially in accord with plaintiffs' prescription.

After this court's en banc decision winnowed nonjusticiable claims and remanded, there remained potential liability of the Dallas magistrates (for declaratory relief only pursuant to Section 1983(e)), the Sheriff, and the County. The district court thoroughly considered the two issues we remanded. The district court now declared that the controversy had become moot by the passage and December 2, 2021, effective date of S.B. 6. Substantial changes to statewide bail bond procedures had been wrought, which directly affected the plaintiffs' claims.[7] Overall, the court found, it could not assess the impact of the statutory changes based on a superseded legal regime and proceedings that had occurred years earlier. S.B. 6 had mooted the controversy.

With respect to *Younger* abstention, the court focused on the doctrine's requirement that a plaintiff must

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[6] The court upheld plaintiffs' procedural due process and equal protection claims but denied claims sounding in substantive due process.

[7] Among other things, S.B. 6 requires "individualized consideration of all circumstances" and all statutory factors within 48 hours of arrest. TEX. CODE CRIM. P. art. 17.028(a). The magistrate must "impose the least restrictive conditions" necessary to "reasonably ensure the defendant's appearance in court" considering the safety of "the community, law enforcement, and the victim of the alleged offense." *Id.* art. 17.028(b). A financial affidavit is required to be provided for each arrestee charged with an offense punishable as a Class B misdemeanor or higher and who is unable to provide the amount of bail required by a schedule or judicial order. *Id.* art. 17.028(f). Any defendant who completes a financial affidavit and cannot pay the amount of bail is entitled to a "prompt review … on the bail amount." *Id.* art. 17.028(h). If the magistrate does not lower the bail for that defendant, the magistrate must make written fact-findings. *Id.*

have an "adequate opportunity" in the state proceedings to raise his constitutional challenges. The court relied on a statement in *Gibson v. Berryhill* that "[*Younger*] naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." 411 U.S. 564, 577, 93 S. Ct. 1689, 1697 (1973). The district court deduced, "for an alternative mechanism to press federal claims in state court to qualify as adequate, it must be *timely*." (emphasis original). But state habeas proceedings to challenge bail amounts would be "inadequate, i.e., too slow." The court therefore declined to abstain based on *Younger* and its progeny.

Having retained jurisdiction, the en banc court obtained supplemental briefing from the parties before reevaluating the remanded issues. Plaintiffs continue to contend that Dallas bail bond hearings fall short under the Constitution because there is no requirement of adversary procedures to determine bail, no requirement of factfindings on the record that pretrial detention is necessary to satisfy a compelling state interest, and no presumption against cash bail. The district court's decision on abstention is discretionary, but we review *de novo* whether the prerequisites of abstention have been satisfied. *See Tex. Ass'n of Bus. v. Earle*, 388 F.3d 515, 518 (5th Cir. 2004). A ruling on mootness is reviewed de novo.

DISCUSSION

1. *Abstention*

Despite the possibility of mootness, this court has discretion to determine whether a federal court should have proceeded to the merits of plaintiffs' bail "reform" lawsuit in the first place. Justice Ginsburg succinctly restated the applicable principles in *Sinochem*

International v. Malaysia International Shipping, 549 U.S. 422, 430-31, 127 S. Ct. 1184, 1191 (2007). To paraphrase her writing, a federal court may not rule on the merits of a case without first determining its jurisdiction,[8] but there is no mandatory "sequencing of jurisdictional issues,"[9] and a federal court has leeway "to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 431, 127 S. Ct. at 1191 (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585, 119 S. Ct. 1563, 1570 (1999)). As *Sinochem* further illustrated, "a federal court [need not] decide whether the parties present an Article III case or controversy before abstaining under *Younger v. Harris*." *Id.*

The imperative of reconsidering abstention here is clear. A number of cases in this circuit and others are asking federal courts to judicially order and enforce state court bail reforms. Several federal courts, including the *ODonnell I* court, have rejected abstention without exhaustive consideration. But if abstention is mandated by *Younger*'s rationale, much time and money, as well as judicial resources, will be saved on litigation in federal court. The complexity of handling claims for institutional state bail reform in federal court is well demonstrated by the justiciability issues we confronted, and avoided, in the initial en banc proceeding. Friction exists with state criminal courts where, overlooking or misinterpreting abstention, federal courts have forced

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[8] *See Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 93-95, 118 S. Ct. 1003, 1012-13 (1998).

[9] *Sinochem Int'l v. Malaysia Int'l Shipping*, 549 U.S. 422, 431, 127 S. Ct. 1184, 1191 (2007) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 119 S. Ct. 1563, 1570 (1999)).

bail bond changes.[10] Finally, the ultimate impact of abstention does not deprive plaintiffs of a remedy. If required by *Younger*, abstention means they must pursue their claims, or whatever remains of them after S.B. 6, in state courts, with the possibility of final oversight by the U.S. Supreme Court. Our Federalism, the guiding light behind *Younger*, seems to have been forgotten, especially in regard to this species of direct federal intervention into ongoing state criminal proceedings that already provide an opportunity to raise constitutional challenges.

To counteract judicial amnesia, it is necessary to recall the origin of the *Younger* abstention doctrine. By the early 1970s, federal courts were awash (by the standards of that day)[11] in adjudicating a heady mix of newly created constitutional rights. Naming just a few subjects of litigation, courts were reviewing collateral attacks on state criminal convictions, adjudicating the constitutionality of state jail and prison conditions, and addressing due process questions that arose in every public setting from elementary school discipline and welfare termination to employee disputes. Ideas of deference to state governmental systems or state courts seemed to have been overshadowed by the Supreme Court's

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[10] In the *ODonnell* case, for instance, the federal monitor for Harris County has determined "errors" made by judicial officers in setting bail and identified "violations" of the federal consent decree. *See, e.g.*, Fourth Six-Month Monitor Report, *ODonnell v. Harris County*, 4:16-cv-1414 (S.D. Tex. Mar. 3, 2022), ECF No. 732-1 at 15-18.

[11] *See, e.g.*, Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970); HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 15-54 (1973).

enthusiasm for effectuating novel notions of social justice and personal rights.

Most pertinent here, federal courts had begun hearing a variety of First Amendment challenges to various state criminal laws. Their direct incursions into state criminal proceedings were spurred by the Supreme Court's decision in *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116 (1965), where the Court held that an injunction could properly be issued against enforcement of certain state criminal statutes in the face of ongoing prosecutorial actions.

Six years later, however, the Court signaled a major retreat from *Dombrowski* in *Younger v. Harris*, an 8-1 decision with the principal opinion by Justice Black.[12] *Younger* rejected two notions: that adverse impacts on First Amendment rights alone could justify federal intervention, and that the ordinary pains of undertaking a defense against criminal charges could constitute sufficiently irreparable injury for equitable relief. 410 U.S. at 49, 53, 91 S. Ct. at 753, 755. Thus, as succinctly stated in a companion case, *Younger* held that "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury." *Samuels v. Mackell*, 401 U.S. 66, 69, 91 S. Ct. 764, 766 (1971).

Justice Black's opinion traces a "longstanding public policy against federal interference with state court proceedings," based in part on "the basic doctrine of equity

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[12] Technically, *Younger* was decided along with five companion cases: *Samuels v. Mackell*, 401 U.S. 66, 91 S. Ct. 764 (1971); *Boyle v. Landry*, 401 U.S. 77, 91 S. Ct. 758 (1971); *Perez v. Ledesma*, 401 U.S. 82, 91 S. Ct. 674 (1971); *Dyson v. Stein*, 401 U.S. 200, 91 S. Ct. 769 (1971); *Byrne v. Karalexis*, 401 U.S. 216, 91 S. Ct. 777 (1971).

jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger*, 401 U.S. at 43-44, 91 S. Ct. at 750.[13] The Court's opinion relied heavily for this proposition on *Fenner v. Boykin*, 271 U.S. 240, 244, 46 S. Ct. 492, 493 (1926) ("The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection."). Citing *Fenner* in an earlier case, Justice Frankfurter emphasized that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies … [relating to] … the enforcement of the criminal law." *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500, 61 S. Ct. 643, 645 (1941) (citations omitted). The legacy of federal court noninterference in equity with state proceedings is over a century old.

But there is also a deeper reason for restraining federal courts acting in equity from getting involved in state criminal prosecutions. Justice Black explained

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of

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[13] The Court distinguished cases filed under the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), because, "when absolutely necessary for the protection of constitutional rights," "under extraordinary circumstances, where the danger of irreparable loss is both great and immediate," federal courts may enjoin *potential* state prosecutions. *Younger*, 401 U.S. at 45, 91 S. Ct. at 751 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243-44, 46 S. Ct. 492, 493 (1926)).

> the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id. at 44, 91 S. Ct. at 750. This arrangement he deemed "Our Federalism," with roots in the profound debates and compromises that shaped the Constitution. *Id.*

Controversial as *Younger* has seemed to those steeped in the judicial activism of the last half century,[14] the Supreme Court, far from disavowing or materially narrowing the doctrine, repeatedly expanded its reach in the succeeding cases.[15] The doctrine remains

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[14] "There is no more controversial, or more quickly changing, doctrine in the federal courts today than the doctrine of 'Our Federalism,' which teaches that federal courts must refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its laws in its own courts." 17B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & VIKRAM D. AMAR, FEDERAL PRACTICE & PROCEDURE § 4251 (3d ed.) (April 2022 Update) (footnotes omitted).

[15] *See*, *e.g.*, *Samuels*, 401 U.S. 66, 91 S. Ct. 764 (extending *Younger*, in the state criminal prosecution context, to actions seeking declaratory relief); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S. Ct. 1200 (1975) (extending *Younger* to civil proceedings in which important state interests are involved); *Kugler v. Helfant*, 421 U.S. 117, 95 S. Ct. 1524 (1975) (prohibiting federal court intervention in state criminal proceedings to suppress illegally obtained evidence); *Juidice v. Vail*, 430 U.S. 327, 97 S. Ct. 1211 (1977) (extending *Younger* to state civil contempt procedures); *Trainor v. Hernandez*, 431 U.S. 434, 97 S. Ct. 1911 (1977) (extending *Younger* to state civil enforcement proceedings); *Moore v. Sims*, 442 U.S. 415, 99 S. Ct. 2371 (1979) (extending *Younger* to state child welfare proceedings); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S. Ct. 2515 (1982) (*Younger* applied to attorney discipline proceeding); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S. Ct. 1519

controlling today, with particular application to interventions into state criminal procedures. *Younger* requires federal court abstention when three criteria are met: "(1) the federal proceeding would interfere with an 'ongoing state judicial proceeding'; (2) the state has an important interest in regulating the subject matter of the claim; and (3) the plaintiff has 'an adequate opportunity in the state proceedings to raise constitutional challenges.'" *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 716 (5th Cir. 2012) (quoting *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S. Ct. 2515, 2521 (1982)).[16]

Rather than expound on unrelated nuances of *Younger*, we principally rely on the Supreme Court's decision in *O'Shea v. Littleton*, 414 U.S. 488, 94 S. Ct. 669 (1974), which is closely on point.[17] In *O'Shea*, the Court

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(1987) (extending *Younger* to prevent federal court interference with the posting of bond pending appeal).

[16] Further, although none is applicable here, there are three exceptions to *Younger*: "(1) the state court proceeding was brought in bad faith or with the purpose of harassing the federal plaintiff, (2) the state statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it,' or (3) application of the doctrine was waived." *Tex. Ass'n of Bus.*, 388 F.3d at 519 (quoting *Younger*, 401 U.S. at 53-54, 91 S. Ct. at 755).

[17] Judge Southwick's solo opinion purports to be agnostic on whether *Younger* abstention ought to apply to constitutional challenges to bail bond procedures, which he considers somehow severable from a state's overall criminal process. In light of that threshold ambiguity, it seems unnecessary to discuss his lengthy *arguendo* reasoning as to why *Younger* should not apply in this case. Suffice it to say, first, that categorically excluding from the ambit of *Younger* abstention (other abstention prerequisites being present) constitutional claims involving bits and pieces of the criminal

held that a group of plaintiffs had no standing to challenge various Cairo, Illinois criminal practices, notably including the imposition of excessive bail, which were alleged to be racially discriminatory and discriminatory against indigents. *Id.* at 498, 94 S. Ct. at 677. The Court alternatively held that even if some plaintiffs had standing, the principles of *Younger* mandated that no federal equitable relief could be granted in the absence of irreparable injury "both great and immediate." *Id.* at 499, 94 S. Ct. at 678 (quoting *Younger*, 401 U.S. at 46, 91 S. Ct. at 751).[18]

In *O'Shea*, "[t]he Court of Appeals disclaimed any intention of requiring the District Court to sit in constant day-to-day supervision of these judicial officers, but the 'periodic reporting' system it thought might be warranted would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity." *Id.* at 501, 94 S. Ct. at 679 (footnote omitted). The Supreme Court also pointed out that any person charged with crime, who became dissatisfied with the officials' compliance with a federal injunction, would have recourse to federal court seeking compliance or even contempt. Enforcement of the injunction would mark "a major continuing intrusion …

process, e.g., bail bonding or public defenders appointments, is fundamentally at odds with comity and federalism. In addition, the remainder of this opinion explains why Judge Southwick's *arguendo* assertions denying application of *Younger* here are in error: A federal equitable remedy for allegedly unconstitutional bail bond procedures would seriously interfere with ongoing criminal proceedings. And requiring "timeliness" of bail bond review to forestall abstention is not supported by any *Younger* precedent, is contradicted by *O'Shea* and other precedent, and is contraindicated by a multitude of available, adequate Texas procedures.

[18] Note the procedural similarity between *O'Shea* and this case: standing was at issue as well as *Younger* abstention.

into the daily conduct of state criminal proceedings." *Id.* at 502. Such extensive federal oversight would constitute "an ongoing federal audit of state criminal proceedings … indirectly accomplish[ing] the kind of interference that *Younger v. Harris* … and related cases sought to prevent." *Id.* at 500, 94 S. Ct. at 678.[19]

The Supreme Court coupled its concerns about the interference with ongoing criminal proceedings with its description of various adequate legal remedies available to the plaintiff class members in the course of criminal defense. *Id.* at 502, 94 S. Ct. at 679. These included, *inter alia*, direct or postconviction collateral review; disciplinary proceedings against judges; and federal habeas relief. The Court did not engage in extensive factbound review of the "adequacy" or "timeliness" of state procedures in practice.

Only a few years after *O'Shea*, this court found it controlling when faced with a Galveston County, Texas prisoner's complaint on behalf of himself and others against a bevy of local pretrial practices, including allegedly excessive bail determinations made against indigent defendants. *See Tarter v. Hury*, 646 F.2d 1010, 1013 (5th Cir. Unit A June 1981) (discussing *O'Shea*). This court affirmed the dismissal of the plaintiff's complaint. The court held that "[b]ecause *O'Shea* involved a challenge to the imposition of excessive bail, it is conclusive as to Tarter's claim for equitable relief based on that ground." *Id.* (footnote omitted). Just before stating this

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[19] Judge Southwick avers that the proposed injunction in *O'Shea* seems far broader than whatever relief might be ordered in this case. His surmise is contradicted by the actual injunction ordered in *ODonnell I* and copied by the district court here, and by the plaintiffs' continued insistence on monitoring the details of bail bond procedures, i.e., adversary hearings, written factfindings, and the enforcement of a presumption against cash bail.

conclusion, the panel had recapitulated that the Supreme Court refused to consider declaratory or injunctive relief in *O'Shea* that would "require excessive federal interference in the operation of state criminal courts." *Id.*[20]

Together, *O'Shea* and *Tarter* supply compelling precedent for withholding federal adjudication of the bail complaint in both *ODonnell I* and *Daves*. Yet *ODonnell I* held these decisions inapposite for two reasons. First, after listing the three prerequisites for *Younger* abstention,[21] the court held the third prong—adequate opportunity to raise constitutional questions in the state proceedings—was unsatisfied due to the Supreme Court's decision in *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854 (1975). Second, dispatching *Younger*'s first prong, *ODonnell I* held that the abstention principles of comity and federalism were not implicated because "[t]he injunction sought by ODonnell seeks to impose

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[20] In Judge Southwick's view, the en banc decision in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc), is our court's "last word" on *Younger* although it does not mention *Younger*. Besides the obvious paradox, which probably arises from the litigation relationship between *Gerstein* and *Pugh*, that view is counterintuitive because two of the judges who sat on the *Pugh* en banc court joined in *Tarter*. It is also irrelevant, because *Pugh*, if it represented a *decision* not to abstain, was superseded by *O'Shea*, which bound the *Tarter* panel.

[21] The plaintiffs in *ODonnell I* conceded that the second prong of *Younger* is met. Indeed, states have a vital interest in regulating their pretrial criminal procedures including assessment of bail bonds. *See Pugh*, 572 F.2d at 1056 (holding that a state has "a compelling interest in assuring the presence at trial of persons charged with crime"); *see also Stack v. Boyle*, 342 U.S. 1,4, 72 S. Ct. 1, 3 (1951) ("The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty.").

'nondiscretionary procedural safeguard[s],' … [and] will not require federal intrusion into pre-trial decisions on a case-by-case basis." *ODonnell I*, 892 F.3d at 156 (citing *Tarter*, 646 F.2d at 1013-14; *O'Shea*, 414 U.S. at 499-502, 94 S Ct. at 677–79). Both of these reasons are incorrect.

Gerstein at first blush appears inconsistent with *Younger* abstention because the Supreme Court there upheld a federal court injunction requiring a judicial hearing in Florida courts on probable cause for pretrial detention. *Gerstein*, 420 U.S. at 125, 95 S. Ct. 868-69. And in footnote nine, the Court's opinion states that abstention was inappropriate.[22] The *ODonnell I* panel relied on this footnote almost exclusively. *ODonnell I* interpreted this footnote to find *Younger* inapt because "the Supreme Court has already concluded, the relief sought by ODonnell—i.e., the improvement of pretrial procedures and practice—is *not properly reviewed* by criminal proceedings in state court." *ODonnell I*, 892 F.3d at 156 (emphasis added).

But *Gerstein* is distinguishable on a number of grounds. As the Second Circuit noted, "it is elementary that what the Court said must be viewed in the light of the factual and legal setting the Court encountered." *Wallace v. Kern*, 520 F.2d 400, 406 (2d Cir. 1975). The

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[22] *Gerstein*'s footnote nine states, "The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits." *Gerstein*, 420 U.S. at 108 n.9, 95 S. Ct. at 860 n.9 (citing *Conover v. Montemuro*, 477 F.2d 1073, 1082 (3d Cir. 1972); *Perez*, 401 U.S. 82, 91 S. Ct. 674; *Stefanelli v. Minard*, 342 U.S. 117, 72 S. Ct. 118 (1951)).

Wallace court explained in detail why, under principles established in *Younger* and its progeny, *Gerstein* did not authorize a New York federal district court to require an evidentiary hearing on bail determinations within a certain period of time. *See id.* at 404-08. *Wallace* accordingly reversed the lower court's injunction. Like *Tarter*, *Wallace* is directly on point.

To explain *Younger*, the *Wallace* court regarded as insupportable "[t]he proposition that the principles underlying *Younger* are applicable only where the federal court is seeking to enjoin a pending state criminal prosecution." *Id.* at 405. Observing that the Supreme Court had extended *Younger* to civil cases in which the state has a "particular interest," *Wallace* reasoned that it would be anomalous to require abstention in such civil cases "but not [in] a bail application proceeding in which the people of the State of New York have a most profound interest." *Id.*[23] The court moved on to discuss *O'Shea*'s rebuke to the lower courts against conducting an "ongoing federal audit of state criminal proceedings." *Id.* at 406 (quoting *O'Shea*, 414 U.S. at 500, 94 S. Ct. at 678). The *Wallace* court commented:

> This is precisely the mischief created by the order below. Having provided for new bail hearing procedures which fix the time of, the nature of and even the burden of proof in the evidentiary hearings, the order would permit a pretrial detainee who claimed that the order was not complied with to proceed to the federal court for interpretations thereof. This would constitute not only an interference in state bail

[23] Further, "[t]he assurance that a defendant who has been indicted for a crime be present to stand his state trial and be sentenced if convicted is patently of prime concern to the state." *Id.*

> hearing procedures, but also the kind of continuing surveillance found to be objectionable in *O'Shea*.[24]

The *Wallace* court further distinguished *Gerstein* legally and factually. *Gerstein*, the court noted, is literally surrounded by other Supreme Court decisions extending the principles of *Younger* abstention, two of which were decided within a few months of *Gerstein*.[25] Accordingly, the *Wallace* court found *Gerstein* "clearly not decisive" due to the Supreme Court's explanation that in Florida, "the federal plaintiffs there had *no right* to institute state habeas corpus proceedings … and that their only other state remedies were a preliminary hearing which could take place only after 30 days or an application at an arraignment, which was often delayed a month or more after arrest." *Id.* (emphasis added). The *Wallace* court stated, "[w]e do not consider this discussion feckless." *Id.* New York law, in contrast, was not bereft of remedies allowing defendants timely to challenge bail determinations. *Id.* at 407. Thus, *Younger* controlled, and the *Wallace* court reversed injunctive relief that would have compelled federal oversight of New York state bail procedures. *Wallace* remains good law in the Second Circuit. See *Kaufman v. Kaye*, 466 F.3d 83, 86 (2d Cir. 2006).

Not only did *ODonnell I* misperceive the context and limited implications of *Gerstein*, but the court also strayed far off the mark in asserting *Younger* abstention is avoidable if the state court review procedures are not "properly" addressing certain constitutional claims. As

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[24] *Id.* at 406.

[25] *See Huffman*, 420 U.S. 592, 95 S. Ct. 1200; *Schlesinger v. Councilman*, 420 U.S. 738, 95 S. Ct. 1300 (1975).

the Supreme Court later explained, "the teaching of *Gerstein* was that the federal plaintiff must have an opportunity to press his claim in the state courts." *Moore v. Sims*, 442 U.S. 415, 432, 99 S. Ct. 2371, 2381 (1979) (citing *Juidice v. Vail*, 430 U.S. 327, 336-37, 97 S. Ct. 1211, 1217–18 (1977)). *Juidice* had applied *Younger* where "it is abundantly clear that appellees had *an opportunity* to present their federal claims in the state proceedings. *No more is required* to invoke *Younger* abstention. … [F]ailure to avail themselves of such opportunities does not mean that the state procedures were inadequate." *Juidice*, 430 U.S. at 337, 97 S. Ct. at 1218 (emphases added).

As noted, *Gerstein* addressed detention without a probable cause finding and without any avenue for judicial review.[26] All that *Younger* and its progeny mandate, however, is an opportunity to raise federal claims in the course of state proceedings. Texas law expressly provides mechanisms for challenging excessive bail. A person may move for bond reduction, as one of the named plaintiffs in this case successfully did. *See* TEX. CODE CRIM. P. art. 17.09(3). Further, "[t]he accused may at any time after being confined request a magistrate to review the written statements of the witnesses for the State as well as all other evidence available at that time in determining the amount of bail." *Id.* art. 17.33. In addition, "[t]he accused in any felony case shall have the right to an examining trial before indictment in the county having jurisdiction of the offense … at which time the magistrate at the hearing shall determine the amount or sufficiency of bail, if a bailable case." *Id.* art.

[26] In *Middlesex County*, the Court stated that in *Gerstein*, "the issue of the legality of a pretrial detention *could not be raised* in defense of a criminal prosecution." 457 U.S. at 436 n.14, 102 S. Ct. at 2523 n. 14 (emphasis added).

16.01. And there appears to be no procedural bar to filing a motion for reconsideration of any of these rulings.

A petition for habeas corpus is also available. "Where a person has been committed to custody for failing to enter into bond, he is entitled to the writ of habeas corpus, if it be stated in the petition that there was no sufficient cause for requiring bail, or that the bail required is excessive." *Id.* art. 11.24. The remedy is release or reduction in bail. *Id.* This provision is no dead letter.[27] Texas courts have shown themselves capable of reviewing bail determinations. *See, e.g.*, *Ex parte Gomez*, 2022 WL 2720459 (Tex. App. July 14, 2022);[28] *Ex parte McManus*, 618 S.W.3d 404, 406-09 (Tex. App. 2021) (performing a holistic analysis of an excessive bail claim, including the ability to make bail); *Ex parte Robles*, 612 S.W.3d 142, 146-49 (Tex. App. 2020) (same); *Ex parte Castille*, No. 01-20-00639-CR, 2021 WL 126272, at *2-6 (Tex. App. Jan. 14, 2021) (same).

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[27] Plaintiffs argue that because *Younger*'s third prong requires that there be an adequate opportunity *in* the state proceedings to raise constitutional challenges, collateral proceedings like habeas cannot, by definition, qualify as adequate. This is refuted by *O'Shea*, which specifically referenced the availability of state postconviction collateral review as constituting an adequate opportunity. 414 U.S. at 502, 94 S. Ct. at 679; *see also Tex. Ass'n of Bus.*, 388 F.3d at 521 (referencing mandamus as an adequate opportunity to raise constitutional challenges).

[28] *Ex parte Gomez* is cited by plaintiffs for the proposition that Texas habeas courts will not review "procedural issues" related to bail. 2022 WL 2720459, at *5-6 (considering the procedural issue of the appointment of counsel at a bail hearing). But in that habeas case, the court adjudicated a defendant's challenge to his bail, which entailed review of the relevant factors, including ability to pay. That constitutes an adequate opportunity. *See O'Shea*, 414 U.S. at 502, 94 S. Ct. at 679.

Summing up why the *ODonnell I* court went wrong on the third *Younger* prong—adequacy of state remedies—is the response offered by the Supreme Court in *Middlesex County Ethics Committee*: "Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights." 457 U.S. at 431, 102 S. Ct. at 2521. That presumption was violated in *ODonnell I*'s rejection of adequate state remedies because Texas detainees have opportunities, beyond those deemed adequate in *O'Shea*, to raise their federal claims.

Moving to the first *Younger* factor—whether equitable relief by a federal court would interfere with ongoing state proceedings—the *ODonnell I* court concluded that the supervisory bail injunction at issue did not implicate concerns about comity and federalism because it "will not require federal intrusion into pre-trial decisions on a case-by-case basis." *ODonnell I*, 892 F.3d at 156 (comparing with *O'Shea*, 414 U.S. at 499-502, 94 S. Ct. at 678-79). But the injunction issued in *ODonnell I*, and mirrored by *Daves*, flatly contradicts the very language in *O'Shea*. The *ODonnell I* "model injunction" expressly mandated the type of "periodic reporting" scheme the Supreme Court precluded. *Compare id.* at 164-66 ("To enforce the 48-hour timeline, the County must make a weekly report to the district court of misdemeanor defendants identified above for whom a timely individual assessment has not been held."), *with O'Shea*, 414 U.S. at 501, 94 S. Ct. at 679 ("'periodic reporting' … would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity").[29] And it opens the federal courts any

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[29] The district court in *Daves* implemented the same reporting requirement authorized in *ODonnell I*.

time an arrestee cries foul. *ODonnell I*, 892 F.3d at 165-66. Even before this court reconsidered *ODonnell I*'s rulings en banc, we found it necessary to disapprove several of that decision's overreaching injunctive provisions. *See ODonnell II*, 900 F.3d at 224-28 (overruling provisions that would have freed defendants for technical noncompliance with federal orders).

In addition to these requirements, considerable mischief remains.[30] To paraphrase *Wallace*, "[t]his is precisely the mischief created by the order below … . [T]he order would permit a pre-trial detainee who claimed that the order was not complied with to proceed to the federal court for interpretations thereof." 520 F.2d at 406. Such extensive federal oversight constitutes "an ongoing federal audit of state criminal proceedings … indirectly accomplish[ing] the kind of interference that *Younger v. Harris* … and related cases sought to prevent." *O'Shea*, 414 U.S. at 500, 94 S. Ct. at 678.

For all of these reasons, we hold that pursuant to *Younger*, *O'Shea*, *Tarter*, and *Wallace*, neither *ODonnell I* nor this case should have been adjudicated in federal court. We overrule *ODonnell I*'s holding against abstention.[31] The injunctions issued in Houston and Dallas plainly show federal court involvement to the point of ongoing interference and "audit" of state criminal procedures. Further, in stark contrast to *Gerstein*, Texas courts are neither unable nor unwilling to reconsider bail determinations under the proper circumstances, thus

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[30] In fact, in their supplemental briefing, plaintiffs' claims for relief including on-the-record hearings and detailed factual opinions concerning bail determinations reify how far federal courts would have to intrude into daily magistrate practices.

[31] In line with Judge Southwick's agnosticism about abstention, he does not seem to disagree with overruling *ODonnell I*.

providing state court detainees the chance to raise federal claims without the need to come to federal court. The availability of state court remedies counsels that federal courts may not intervene under equity jurisprudence to decide these disputes.[32]

Plaintiffs and the district court raise objections to the requirement of *Younger* abstention. We address them in turn.

First, plaintiffs rely on decisions from other courts. The most significant appellate court decision that stands in tension with our conclusion is the Eleventh Circuit opinion in *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), which brushed away *Younger* because "[a]bstention … has become disfavored in recent Supreme Court decisions." *Id.* at 1254. This is very strange. The case cited for that proposition involves state administrative litigation, not interference in criminal proceedings. *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72, 134 S. Ct. 584, 588 (2013). The Court in *Sprint* detracted not a whit from *Younger*'s ongoing force in respect of criminal adjudication. *See Sprint*, 571 U.S. at 78, 134 S. Ct. at 591 (reaffirming that *Younger* continues to preclude "federal intrusion into ongoing state criminal prosecutions").[33] Additionally, the

[32] For those concerned that no final federal remedy is available, please recall that the relevant Supreme Court decisions prohibiting incarceration of indigent defendants for their inability to pay post-conviction fines arose, respectively, from direct appeal (*Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018 (1970)) and state habeas (*Tate v. Short*, 401 U.S. 395, 91 S. Ct. 668 (1971)). Indeed, *Tate*'s ruling issued only a week after *Younger* itself.

[33] *Pace* the *Walker* court, WRIGHT & MILLER's long and detailed section on *Younger* abstention nowhere implies that the

Walker court distinguished *O'Shea* on the basis, contrary to this case, that the injunction sought by the *Walker* plaintiffs did not contemplate ongoing interference with the prosecutorial process. *Walker*, 901 F.3d at 1255. Finally, because the *Walker* court ended up vacating a "modest" remedial injunction ("modest" in comparison with those imposed in *ODonnell I* and *II* and in *Daves*),[34] it may not have viewed *Younger* abstention as a decisive threshold issue.[35]

We disagree with some or all of the reasoning in other appellate court cases where *Younger* abstention was rejected, but in any event, they are factually far afield from this one. *Arevalo v. Hennessy*, for example, is factually distinguishable because the plaintiff challenging a bail determination had fully exhausted his state remedies without success, so there remained no state remedies available in which to raise his individual constitutional claims. *See* 882 F.3d 763, 767 (9th Cir. 2018). Two other cases found *Younger* inapplicable where plaintiffs challenged law enforcement practices that, in parallel with *Gerstein*, essentially prescribed pretrial detention without probable cause. *See Stewart*

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doctrine has become "disfavored," and the paper supplements continue to cite cases applying *Younger*. *See generally* §§ 4251-55.

[34] *See Walker*, 901 F.3d at 1255 ("Walker does not ask for the sort of pervasive federal court supervision of State criminal proceedings that was at issue in *O'Shea*."). Notably, the district court injunction contained no ongoing reporting or supervisory components. *See Walker v. City of Calhoun*, No. 4:15-CV-0170, 2017 WL 2794064, at *4-5 (N.D. Ga. June 16, 2017), *vacated*, 901 F.3d 1245 (11th Cir. 2018).

[35] A recent Eleventh Circuit decision also rejected a challenge to bail bond procedures but of course followed *Walker* on *Younger* abstention. *See Schultz v. Alabama*, 42 F.4th 1298, 1312 (11th Cir. 2022).

v. Abraham, 275 F.3d 220, 225-26 (3d Cir. 2001) (no abstention for "rearrest" policy implemented despite magistrates' denials of probable cause); *Fernandez v. Trias Monge*, 586 F.2d 848, 851-53 (1st Cir. 1978) (rejecting abstention in the face of a law requiring juvenile detentions without probable cause). The Sixth Circuit's decision in *Habich v. City of Dearborn* is inapposite because, as the defendant city conceded, the plaintiff there could not assert any of her constitutional claims in the course of a wholly distinct local administrative matter. 331 F.3d 524, 530-32 (6th Cir. 2003). Without any available state law remedy, *Younger* did not apply. *Id.*[36]

Second, the plaintiffs, the district court, and Judge Southwick fix talismanic significance on one line in one Supreme Court case: "[*Younger*] materially presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson*, 411 U.S. at 577, 93 S. Ct. at 1697. They would infer that *timeliness* of state remedies is required to prevent *Younger* abstention. But *Gibson* did not find an exception to *Younger because of* untimely state remedies. Instead, the case represents an exception to abstention predicated on the bias of a state administrative tribunal. In context, the quoted sentence reiterated that *Younger* contemplated alternative mechanisms for raising federal claims in ongoing state proceedings before a *competent* state tribunal. *See id.*; *see also Juidice*, 430 U.S. at 337, 97 S. Ct. at 1218 ("Appellees need be

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[36] Plaintiffs' citation to *DeSario v. Thomas* is misleading because, despite the court's apparently belittling *Wallace* (on which we rely), the court also made clear that *Younger* abstention is required where a plaintiff may avail himself of remedies in an ongoing state criminal proceeding. 139 F.3d 80, 85, 86 n.3 (2d Cir. 1998). *See also* the Second Circuit's subsequent express approval of *Wallace* in *Kaufman*, 466 F.3d at 86.

accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings." (citing *Gibson*)).

More to the point, neither the plaintiffs nor the district court nor Judge Southwick cite a single case in which the alleged untimeliness of state remedies rendered *Younger* abstention inapplicable. The reason for this seems plain: *Younger* holds that "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution" cannot amount to irreparable injury. 401 U.S. at 46, 91 S. Ct. at 751. A few years after *Gibson*, the Supreme Court clarified that state remedies are inadequate only where "state law *clearly bars* the interposition of the constitutional claims." *Moore*, 442 U.S. at 425-26, 99 S. Ct. 2379 (emphasis added); *see also Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14, 107 S. Ct. 1519, 1528 (1987); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1292 (10th Cir. 1999). Even more specifically, the Court holds that arguments about delay and timeliness pertain not to the adequacy of a state proceeding, but rather to "conventional claims of bad faith," a well-established exception to *Younger* abstention. *Moore*, 442 U.S. at 432, 99 S. Ct. at 2382. Here, plaintiffs do not allege bad faith. And it bears repeating that Texas state court procedures do not clearly bar the raising of federal claims regarding bail because Texas requires that bail be set individually in each case rather than on a mechanical, unalterable basis. TEX. CODE CRIM. P. art. 17.15(a).

Plaintiffs' broadside against all the available state remedies ultimately rests on the incorrect assumption that each moment in erroneous pretrial detention is a constitutional violation. But this case does not present the situation that arose in *Gerstein*, where preliminary detention could occur without any judicial finding of probable cause and without legal recourse. An order for

cash bail accompanies a judicial determination of probable cause, which means that the defendant has presumably violated the criminal law. At that point, the question becomes how to balance the interests of the defendant in being released pending trial against society's need to enforce the law, protect innocent citizens, and secure attendance at court proceedings. *See, e.g.*, TEX. CODE CRIM. P. art. 17.15(a). Certainly, any kind of error in assessing excessive bail is lamentable, whether it pertains to the defendant's criminal history, the nature of the instant charge, the protection of potential victims, or his ability to pay cash bail. Even more unfortunate is the plight of a person unconstitutionally convicted who remains incarcerated pending the outcome of appeal or postconviction remedies; yet that is precisely what *Younger* held despite the "untimeliness" of the state criminal process. The gist of *Younger*'s test for availability, however, lies in the fact that errors can be rectified according to state law, not that they must be rectified virtually immediately.

2. *Mootness*

The preceding discussion suffices to explain why federal courts must abstain from invoking equity to interfere with ongoing state criminal proceedings where plaintiffs have adequate opportunities to raise constitutional issues. A coequal ground for dismissing this case is mootness. The substantial changes made by the Texas legislature to procedures for assessing bail have been outlined above. S.B. 6 was enacted after the initial panel decision in this case and pending our en banc review. Referencing these changes on remand from the en banc court, the district court analyzed mootness as follows:

> There is more than one way to ensure that a bail system upholds due process rights. Texas has

> chosen its way, and Plaintiffs are not entitled to have this Court immediately intervene to tinker with the rules that the Legislature has just recently enacted. Accordingly, the Court holds that Plaintiffs' request for injunctive relief should be dismissed as moot. *Accord* [13C WRIGHT & MILLER], FEDERAL PRACTICE AND PROCEDURE [§ 3533.6], at Supp. 73 ("A challenge to the validity of a new enactment, however, may be deferred to later litigation when the new enactment is amended while an appeal is pending and the record does not support adjudication as to the new enactment.") (citing *Am. Charities for Reas. Fund. Reg., Inc. v. O'Bannon*, 909 F.3d 329, 332–34 (10th Cir. 2018)).[37]

We substantially agree with the district court's analysis and add in support our previous en banc decision in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc). Like this case, *Pugh* addressed new bail legislation in Florida enacted during the pendency of the case on appeal. A panel of the Fifth Circuit held the new bail rules unconstitutional as "wealth-based" "discrimination." *Pugh v. Rainwater*, 557 F.2d 1189, 1198, 1201-02 (5th Cir. 1977), *reversed en banc*, 572 F.2d 1053 (5th Cir. 1978). The en banc court found the new law not facially unconstitutional and dismissed the case for mootness. The court considered plaintiffs' arguments against the operation of state bail procedures to be an as-applied challenge. But the evidence supporting that claim predated the new law. Consequently, "[a]s an attack on the Florida procedures which existed as of the time of trial,

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[37] The Tenth Circuit opinion states: "The law materially changed, fundamentally altering the issues that had been presented in district court. This change in the law renders the appeal moot." *O'Bannon*, 909 F.3d at 332-34.

the case has lost its character as a present, live controversy and is therefore moot." *Pugh*, 572 F.2d at 1058.

We are not bound by *Pugh*, but the resolution of that identical dispute is compelling. To rule on the status of S.B. 6 and its procedures at this point, based on evidence largely generated during proceedings that occurred pre-amendment, would constitute no more than an advisory opinion. Under Article III of the Constitution, federal courts may adjudicate only "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317, 108 S. Ct. 592, 601 (1988). That the named plaintiffs have not been subject to bail proceedings since years before the advent of S.B. 6 calls into question their ability to pursue this litigation for ongoing injunctive relief as injured parties, much less class representatives. And although the plaintiffs submitted some kind of video evidence purporting to demonstrate deficient proceedings in the immediate wake of the new law, we agree with the district court's statement that "there is minimal evidence in the record reflecting what actually happens in Dallas County after the effective date of S.B. 6." In sum, the case is moot because "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 726 (2013) (internal quotation omitted). Thus, even if federal courts were not compelled by *Younger* and *O'Shea* to abstain, the present controversy must be considered moot.

Plaintiffs challenge mootness in light of two Supreme Court cases. Neither is helpful to plaintiffs. One of these stated that a change in the law during litigation does not moot a claim unless it "completely and irrevocably eradicated the effects of the alleged violation." *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383 (1979). *Davis* recited the importance of completely eradicating the "effects of the alleged violation" where

the question was mootness owing to the city's voluntary cessation of racially discriminatory practices. As a general rule, voluntary cessation of illegal practices does not render a case moot. *See id.* On the facts before it, the Court held that the case had become moot under the high standard for voluntary cessation. Voluntary cessation is not involved here. More recently, the Supreme Court disclaimed mootness unless the new law affords plaintiffs "the precise relief … requested in the prayer for relief in their complaint." *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam). That case actually favors the defendants, as it held that the controversy before the Supreme Court became moot due to New York City's amendment of its ordinance "[a]fter we granted certiorari." *Id.* This suggests that this court was exactly right in *Pugh*.[38]

According to the plaintiffs, their complaint is not moot because it is essentially unrelated to the changes made by the Texas legislature. Dallas County's bail practices allegedly remain unconstitutional irrespective of S.B. 6 and irrespective of the existence of bail schedules. Plaintiffs argue that they seek relief "*beyond* what *ODonnell* held to be required," such that the legislature's adoption of measures originally required by *ODonnell* fails to assuage their demands for on-the-record hearings and detailed factfindings that prove in each bail proceeding whether pretrial "detention is necessary to further any state interest." This argument is incoherent. The overhaul accomplished by S.B. 6 specifically

[38] Plaintiffs' attempt to shoehorn *Pugh* within these two cases is quite misguided. They assert that the *Pugh* en banc court held that "a new state rule cured the alleged violations and there was no evidence that the challenged conduct persisted." As we explained above, *Pugh* did no such thing in simply holding the new law facially constitutional and declaring any further challenge to be moot.

requires, within 48 hours of arrest, a bail decision reflecting individual consideration of the relevant Article 17.15(a) statutory factors and "impos[ition of] the least restrictive conditions" that will "reasonably ensure the defendant's appearance in court as required and the safety of the community, law enforcement, and the victim of the alleged offense." TEX. CODE CRIM. P. art. 17.028(a), (b).[39] The crux of this case is now whether the new state law, if applied assiduously by Dallas County magistrates, measures up to plaintiffs' proffered constitutional minima.[40] S.B. 6 is heavily procedural in nature, just like the alleged claims of these plaintiffs. Thus, both the provisions of S.B. 6 and their implementation are alleged to raise constitutional issues beyond the scope of this case and the circumstances of the plaintiffs who filed it. The case is moot.[41]

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[39] In setting the amount of bail, the magistrate must consider: (1) the "nature of the offense"; (2) the detainee's "ability to make bail"; (3) the "future safety of a victim of the alleged offense, law enforcement, and the community"; (4) the detainee's "criminal history"; and (5) the detainee's "citizenship status." TEX. CODE CRIM. P. art. 17.15(a).

[40] If the Dallas County magistrates are not in compliance with state law, this raises issues for state courts to resolve. Pursuant to *Pennhurst State Sch. & Hosp. v. Halderman*, federal courts may not grant injunctive relief against the defendants on the basis of state law. 465 U.S. 89, 106, 121, 124, 104 S. Ct. 900, 911, 919, 920 (1984).

[41] Plaintiffs urge the court to vacate our previous en banc decision should the case be deemed moot. In *Daves* (en banc), the court considered only threshold questions of justiciability, rightly recognizing that "there is no mandatory sequencing of jurisdictional issues." *Daves*, 22 F.4th at 532 (quoting *Sinochem*, 549 U.S. at 431, 127 S. Ct. at 1191). Here, we resolve additional threshold questions—those of abstention and mootness—without reaching the merits. Vacatur of the previous en banc decision is unwarranted.

CONCLUSION

Exercising our discretion to review both justiciability issues following remand, we hold that *Younger v. Harris* and its progeny required the district court to abstain; that the *ODonnell I* decision to the contrary is overruled; and that the case is moot by virtue of intervening state law.

We REMAND with instructions to DISMISS.

PRISCILLA RICHMAN, *Chief Judge*, concurring in the judgment:

I concur in the judgment holding that this case is moot in light of new legislation passed by the Texas legislature. I would not reach whether *Younger* abstention[1] applies in the present case since the new statutory regime now governs and there is no live case or controversy before this court that requires us to determine whether pre-trial detainees in Texas had an avenue under the former bail regime to present federal claims in challenges to bail determinations and pre-trial detention.[2]

I cannot say, categorically, that *Younger* abstention will always be required when a defendant brings federal claims challenging bail bond procedures. If there is no adequate avenue under state law to challenge bail procedures or pre-trial detentions on federal grounds, then the *Younger* abstention doctrine would, in all likelihood, be inapplicable.[3]

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[1] *Younger v. Harris*, 401 U.S. 37 (1971).

[2] *See, e.g.*, *Juidice v. Vail*, 430 U.S. 327, 337 (1977) (holding that "it is abundantly clear that appellees had an opportunity to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention." (footnote omitted)).

[3] *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 106, 108 n.9 (1975) (holding that *Younger* abstention did not apply because defendants were detained without a timely judicial determination of probable cause and state courts had also "held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information").

LESLIE H. SOUTHWICK, *Circuit Judge*, concurring in judgment:

I start with expressing admiration for the clarity and erudition of the opinion for the court. Expected qualities for that author's writings, certainly, but worth noting. I differ with that opinion as to abstention, but I am able to join the majority in dismissing the suit.

My agreement with the majority is with the analysis of mootness. The Texas legislature's adoption of new rules for addressing bail in trial courts has entirely changed the relevant factual and legal underpinnings for the dispute. If a federal district court is the proper venue for a challenge to those procedures, it needs to be based on a new complaint in a new lawsuit.

Of course, the majority opinion also determined that challenges to bail practices under the new enactment may not properly be pursued in federal court. Abstention would block any decision. My view, though, is that we cannot decide in the abstract whether abstention would apply to future claims about bail. Specific claims made and facts shown will matter.

Preliminary to discussing abstention itself, I offer a word or two about whether we should even address the issue. Our holding that claims against Dallas County's former bail practices are moot resolves this appeal. An appeal that no longer contains a live controversy is an especially poor vehicle for issuing a significant additional holding. Several members of the court opine that we should leave the analysis of abstention for another day. In the main, I agree. Nonetheless, with a majority of the court reaching the abstention issue, then expressing a view that differs from my own, I hope there is some benefit in offering a contrasting, even if solitary, analysis.

I. Abstention — some background

"Jurisdiction existing," the Supreme Court explained, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). The abstention doctrine identified in *Younger v. Harris*, 401 U.S. 37 (1971), is an "exception to this general rule." *Id.* It provides that in suits requesting injunctive or declaratory interference with certain kinds of state adjudicatory proceedings, federal courts generally must "refus[e] to decide a case in deference to the States." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989).

As the majority opinion explains, *Younger* abstention was a fairly quickly imposed limit on the expansiveness of a right to enjoin state prosecutions that had been recognized just six years earlier in *Dombrowski v. Pfister*, 380 U.S. 479 (1965). *See* 17B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, ET AL., FED. PRAC. & PROC. § 4251, at 3 (3d ed. 2007). The *Dombrowski* Court held that overbroad state statutes that criminalized subversive activity had a chilling effect on the exercise of First Amendment rights, and that an injunction should be granted blocking pending and future prosecutions under the statutes. *Dombrowski*, 380 U.S. at 493-97. *Younger* was a "major retreat" from *Dombrowski*. 17B WRIGHT & MILLER, FED. PRAC. & PROC. § 4251, at 7.

The event that was a portent, at least to the discerning, that the Supreme Court would sound retreat was the federal court injunction obtained by John Harris and three other defendants barring Los Angeles County District Attorney Evelle J. Younger from prosecuting them under a statute the district court held was

unconstitutional. *Harris v. Younger*, 281 F. Supp. 507, 509-10, 516-17 (C.D. Cal. 1968) (citing *Dombrowski* and holding the statute violated the First Amendment), *rev'd*, *Younger*, 401 U.S. 37. The Supreme Court reversed, holding that principles of equity and comity prohibited federal judicial interference with the ongoing state-court prosecution. *Younger*, 401 U.S. at 43-44, 53-54. On equity, the Court adhered to "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 43-44. On comity, "an even more vital consideration," the Court emphasized that the need for "proper respect for state functions" counseled against interference "with the legitimate activities of the States." *Id.* at 44.

In time, the Court announced that abstention is appropriate if: (1) the requested judicial relief would unduly interfere with the ongoing state proceeding; (2) the state proceeding implicates an important state interest in the subject-matter of the federal claim; and (3) the federal plaintiff has an adequate opportunity to raise the federal claim in state court. *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

More recently in its unanimous 2013 *Sprint* opinion, the Court summarized *Younger* abstention after 40 years. *See Sprint*, 571 U.S. 69. "The Court made clear that the circumstances fitting within the *Younger* abstention doctrine are exceptional and include: (1) state criminal prosecutions; (2) civil enforcement proceedings; and (3) civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." 17B WRIGHT &

MILLER, FED. PRAC. & PROC. § 4254 (Supp. 2022) (explaining *Sprint*, 571 U.S. at 69, 78). The *Younger* abstention doctrine goes "no further" than those three proceedings. *Sprint*, 571 U.S. at 82. As to the three *Middlesex* factors, they are "not dispositive" but are merely "*additional* factors appropriately considered by the federal court before invoking *Younger*." *Id.* at 81 (emphasis in original).

A gateway question for us is whether the *Sprint* Court's category of "state criminal prosecutions" includes preliminary proceedings such as deciding on bail. One reason to say bail determinations are subject to abstention is the Court's reasoning for applying *Younger* to some state civil proceedings. The Court stated that *Younger* principles apply to state civil proceedings "'akin to a criminal prosecution' in 'important respects.'" *Id.* at 79 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)).

It could be argued that disruptions of state procedures regarding bail are different only in degree from disruptions to the prosecution, and the state interests are of similar weight. As the majority here puts it, the "mischief" arising from detailed equitable relief that "fix[es] the time of, the nature of and even the burden of proof in the evidentiary hearings … would permit a pretrial detainee who claimed that the order was not complied with to proceed to the federal court for interpretations thereof." *Majority op.* at 16-17 (quoting *Wallace v. Kern*, 520 F.2d 400, 406 (2d Cir. 1975)). Supportive of the majority's view is the statement in one of the preeminent federal procedure treatises that a federal court should abstain if relief "would intrude on a *state's administration of justice*, even in the absence of a particular, individual, ongoing state proceeding." 17A JAMES W. MOORE, ET AL., MOORE'S FED. CIV. PRAC.

§ 122.72[1][c], at 122-10 (Rev. 2022) (emphasis added). If that phrasing accurately captures the doctrine, abstention certainly could extend beyond the prosecution itself.

On the other hand, *Dombrowski* and *Younger*, though having much different results, both address whether the unconstitutionality of a criminal statute supporting a state prosecution can be presented in federal court. Constitutional arguments can be presented in a prosecution and have the potential to alter its result. *Dombrowski* held the prosecution could be blocked before it even began if the criminal statute were unconstitutional, while *Younger* said the constitutional arguments needed to be presented in the state criminal proceedings. Certainly, *Younger* has been stretched beyond that, as the majority opinion discusses, and so will I. Those extensions, though, are more similar to criminal prosecutions than is the bail determination. In those extensions, the constitutional claims can be part of the principal proceedings and will thwart those proceedings if accepted. Hence, abstention makes sense at least at the level of not having duplicative forums for the same claims.

Rather differently, the validity of equal protection claims about bail would not affect the validity of or intrude into the criminal prosecution. Even so, depending on the complexity of the relief a court orders as to bail, the courts that handle the prosecutions could be significantly burdened.

I conclude inconclusively. The applicability of *Younger*'s abstention to bail proceedings has no clear answer. One reason I hesitate to agree with the majority that the *Younger* analysis should be applied to bail proceedings is that a clear purpose of *Sprint* was to stop abstention proliferation. "Divorced from their quasi-

criminal context," the Court wrote, "the three *Middlesex* conditions would extend *Younger* to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest." *Sprint*, 571 U.S. at 81. That must not occur, because "abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" *Id*. at 81-82 (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984)). Certainly, *Sprint* did not announce that *Younger* was dying. Instead, the Court was saying *Younger* had gotten older; its reach had fully matured; it should not be given more tasks.

For me, then, whether abstention could apply here turns on whether bail decisions are in *Sprint*'s category of "criminal prosecutions." In order to engage with the majority and show how my analysis differs, I assume for purposes of this case that abstention is not categorically inapplicable to bail proceedings. I start with the assumption that bail proceedings are "exceptional circumstances." Abstention still must be justified by the "*additional* factors appropriately considered by the federal court before invoking *Younger*." *Sprint*, 571 U.S. at 81 (emphasis in original). The *Sprint* Court stated that these factors are not "dispositive," *id*., but absent some significant overriding factual or legal considerations in the case, I treat them as guiding the result.

In the following analysis, whether abstention applies here turns on two of the *Middlesex* factors.[1] First, would injunctive or other relief from the federal court impermissibly interfere with ongoing state-court proceedings? *Middlesex*, 457 U.S. at 431-32, 437. Further,

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[1] I will not discuss whether the proceedings involve important state interests, as the state's interests in its own bail proceedings are certainly substantial.

"is there an adequate opportunity in the state proceedings to raise constitutional challenges"? *Id.* at 432. My separate analysis of each factor follows.

II. Impermissible interference with ongoing state proceedings

"Our Federalism" is the rubric Justice Hugo Black used for *Younger* abstention. *Younger*, 401 U.S. at 44. We must avoid both "blind deference" to states and "centralization of control over every important issue." *Id.* Even though the *Younger* doctrine has expanded since its 1971 origin, federalism remains key.

As I begin, I request forbearance. My effort to explain some of the caselaw requires me to detail what those cases actually involved and, thus, how to interpret their wording. Though I seek to give context without overburdening, the direction I am willing to err will become obvious.

One case that began in the Fifth Circuit, with multiple opinions including one from the Supreme Court and one from our *en banc* court, is a good source for early and still applicable analysis of prohibited interference with state courts. *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (*en banc*).[2] The case led to one of the earliest Supreme

[2] I offer an explanation about shortform case names used in my opinion. In following what I consider to be the proper convention, the usual one-party names for some opinions are spurned. I believe proper practice is *not* to use the name of the governmental official. For example, multiple opinions arose from litigation brought by plaintiff Robert Pugh after he was detained in Dade County jail. *Gerstein v. Pugh*, 420 U.S. at 105-06. Defendant Richard E. Gerstein was the State Attorney for Dade County, Florida, *id.* at 107, while James Rainwater was one of three defendant Small Claims Court judges. *See* Complaint at 2-4, *Pugh v. Rainwater*, No. 71-CV-448 (S.D. Fla. Mar. 22, 1971), in Appendix filed with Petitioner's

Court opinions rejecting *Younger* abstention. The case began as a class-action challenge in the former, six-state Fifth Circuit that had Florida within its boundaries. The named plaintiffs were arrested and detained in Dade County, Florida, based solely on a prosecutor's information[3] charging them with offenses. The lead plaintiff was Robert Pugh, jailed at the time of the complaint on an information charging him with robbery and other offenses. *Gerstein v. Pugh*, 420 U.S. at 105 n.1.

One defendant was Richard Gerstein, the State Attorney (*i.e.*, chief prosecutor) for the judicial circuit containing Miami and Dade County. *Id.* at 107. Gerstein had statutory authority to file an information against those alleged to have committed a crime under state law, leading to a suspect's detention based on Gerstein's own, unreviewed determination about probable cause. *Id.* at 105-06. Plaintiffs asserted that Gerstein's policy was "to refuse to provide a defendant in custody by virtue of a directly filed information an opportunity for a binding preliminary hearing to determine probable cause for his incarceration." Complaint at 28, *Pugh v. Rainwater*, *supra* n.2. The relief sought against Gerstein included a declaratory judgment that a prompt probable-cause hearing was constitutionally necessary, and an

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Brief after grant of Writ of Certiorari, *Gerstein v. Pugh*, 420 U.S. 103 (No. 73-477). Thus, *Pugh* is my shortform. In order to combine the exigencies of reader clarity with the eccentricities of writer preference, I will refer to both parties when rejecting a standard shortform for a case. Yet, I do not wish to be ridiculous. The governmental party was Younger, the private party Harris, but I refer to that case as *Younger*.

[3] "Information. A formal criminal charge made by a prosecutor without a grandjury indictment." BLACK'S LAW DICTIONARY 795 (8th ed. 2004).

injunction requiring such hearings. *Id.* at 11-13.[4] Prosecutor Gerstein's part of the case would be considered by the Supreme Court.

Relief was also sought against eight state-court judges. *Id.* at 4. Three were Small Claims Court judges, James Rainwater being the first named. *Id.* The other five were Justices of the Peace. *Id.* Plaintiffs asserted that the eight judges unconstitutionally set monetary bail for all arrestees, regardless of the arrestee's ability to pay. *Id.* at 10. The plaintiffs alleged that the practice "discriminates against poor persons solely because of their poverty without any rational basis," in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* On that claim, the plaintiffs requested a declaratory judgment that secured money bail for indigent arrestees was discrimination under the Fourteenth Amendment, and an injunction prohibiting the use of monetary bail in this manner. *Id.* at 13. The Supreme Court did not consider the Rainwater bail issues.

The district court ruled for the plaintiffs on the probable-cause issue but for the defendants on the bail issue. *Pugh v. Rainwater*, 332 F. Supp. 1107, 1115 (S.D. Fla. 1971). That decision led to separate appeals to this court. In the probable-cause appeal, we upheld the district court's injunction and declined to abstain. *Pugh v. Rainwater*, 483 F.2d 778 (5th Cir. 1973). State Attorney Gerstein then petitioned the Supreme Court for a writ of certiorari; we held the issue of bail in abeyance. With some modifications to the Fifth Circuit decision, the

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[4] The complaint also alleged that the defendant judges had authority to provide preliminary hearings but would not do so for "persons incarcerated in the Dade County Jail by virtue of a direct information filed by defendant Gerstein." *Id.* at 4, 7-8.

Supreme Court affirmed and remanded for further proceedings. *Gerstein v. Pugh*, 420 U.S. at 126.

The *Gerstein v. Pugh* Court's discussion of *Younger* was relegated to a footnote; there, the Court rejected abstention:

> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits.

Id. at 108 n.9. This language certainly supports that *Younger* is inapplicable to bail. Even so, a legal doctrine can evolve from its original terms.

Because the Supreme Court stated the district court "correctly held" that the claims were not barred by *Younger*, I examine the district court's holding. The district court quoted *Younger* as permitting an injunction when there is "'great and immediate' 'irreparable injury' other than the 'cost, anxiety, and inconvenience of having to defend against a single criminal prosecution,' and the injury must be one that cannot be eliminated by the defense therein." *Pugh v. Rainwater*, 332 F. Supp. at 1111 (quoting *Younger*, 401 U.S. at 46). This is the district court's description of Pugh's injury:

> Plaintiffs at bar are challenging the validity of their imprisonment pending trial with no

> judicial determination of probable cause. These facts present an injury which is both great and immediate and which goes beyond cost, anxiety, and inconvenience. Furthermore, the state has consistently denied the right asserted, so that the injury is irreparable in that it cannot be eliminated either by the defense to the prosecution or by another state proceeding.

Id.

The district court's correct understanding of *Younger* was that injury arising from being detained without a probable cause hearing cannot be dismissed as simply the "cost, anxiety, and inconvenience" of a criminal prosecution. *Id.* Generally, a prosecution does not violate someone's constitutional rights even when the result is an acquittal. Cost, anxiety, and inconvenience are inherent in being prosecuted for a crime. *Gerstein v. Pugh*, though, supports that detention without any judicial determination that there is probable cause causes an injury that is not inherent, and indeed is abhorrent, to our criminal justice system. The Court elaborated in 1979 by stating that "the injunction [in *Gerstein v. Pugh*] was not addressed to a state proceeding and therefore would not interfere with the criminal prosecutions themselves." *Moore v. Sims*, 442 U.S. 415, 431 (1979). More on *Sims* later.

After the Supreme Court's *Pugh* opinion but before this court made its final decision as to the bail portion of the suit, the Florida Supreme Court promulgated a new rule concerning bail. *See Pugh v. Rainwater*, 557 F.2d 1189, 1194, 1200-01 (5th Cir. 1977). After a panel decision, we reheard the bail issue *en banc*. *See Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (*en banc*). The *en banc* court held that the plaintiffs' original bail

challenge was mooted by the new Florida rule. *Id.* at 1058. We then held that the new Florida rule was not facially unconstitutional. *Id.* at 1059. We explained that the automatic detention of indigent arrestees "without meaningful consideration of other possible alternatives" would violate the Fourteenth Amendment, but that the new Florida rule did not facially preclude meaningful consideration. *Id.* at 1057-59. The *en banc* opinion remains valid that indigents' constitutional rights can be violated by bail decisions.

We did not discuss *Younger* in the panel or *en banc Pugh v. Rainwater* opinions as to bail following the Supreme Court's *Gerstein v. Pugh* opinion concerning probable-cause determinations. Reasons for the failures can be proposed now, but I conclude that silence should be accepted as our court's last word in the *Pugh* collection of opinions on *Younger*.

I have discussed the series of *Pugh* decisions first because of the litigation's origins in this circuit and the importance of the decisions to our subsequent jurisprudence. The lodestar precedent for the majority here, though, is a decision three years after *Younger*, namely, *O'Shea v. Littleton*, 414 U.S. 488 (1974).[5] Plaintiffs were 17 black and two white residents of Cairo, Illinois, and its surrounding county; they were not detainees. *Id.* at 491. They brought a class action to challenge alleged racial discrimination in the setting of bail, imposing of fines, and sentencing in a municipal court system. *Id.* at 490-91. The Seventh Circuit gave substantial detail about their claims and categorized them by groups of defendants such as the local prosecutor Berbling,

[5] Yet again, I will apply my convention to this opinion and use plaintiff Littleton's name as the shortform, not the governmental defendant Judge O'Shea's.

magistrate judge O'Shea, trial judge Spomer, and the prosecutor's investigator Shepherd. *Littleton v. Berbling*, 468 F.2d 389, 392-93 (7th Cir. 1972). Claims against the prosecutor included discriminating against black arrestees in multiple ways, while those against the investigator were conspiring with the prosecutor to discriminate. *Id.*

Importantly for us, the claims against the judges were broad, including their use of a bond schedule that did not consider the individual defendant:

> Spomer and O'Shea, as judges, engage in a pattern and practice of discriminatory conduct based on race as follows: They set bond in criminal cases by following an unofficial bond schedule without regard to the facts of a case or circumstances of an individual defendant. They sentence black persons to longer criminal terms and impose harsher conditions than they do for white persons who are charged with the same or equivalent conduct. They require plaintiffs and members of their class, when charged with violations of city ordinances which carry fines and possible jail penalties, if the fine cannot be paid, to pay for a trial by jury.

Id. at 393.

The Seventh Circuit reversed the district court's dismissal of the suit and gave guidance on potential remedies:

> Obviously, since this case is before us on a motion to dismiss, it would be improper for us to attempt to spell out in detail any relief the district court might grant if the plaintiffs can prove what they allege. Nevertheless, as this appears

> to be a case of first impression as to the type of relief approved, we feel obligated to give the district court some guidelines as to what type of remedy might be imposed. *We do not mean to require the district court to sit in constant, day-to-day supervision of either state court judges or the State's attorney*. An initial decree might set out the general tone of rights to be protected and *require only periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of complaints*.

Id. at 414-15 (footnotes omitted; emphasis added). The italicized statement about periodic reports was quoted disapprovingly by the Supreme Court when it reversed. *See Littleton*, 414 U.S. at 493 n.1.

The Seventh Circuit's allowing a federal court to get periodic reports and then to inject itself even further into the operation of local criminal courts was central to the Supreme Court's reversal. The plaintiffs had requested "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials." *Id.* at 500. "An injunction of the type contemplated by respondents and the Court of Appeals would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim *ab initio*." *Id.* at 501. Such an injunction "would require for its enforcement the continuous supervision by the federal court over the conduct of the petitioners in the course of future criminal trial proceedings involving any of the members of the respondents' broadly defined class." *Id.*

My difference with the majority on what to make of the combination in *Littleton* of extravagantly broad

intrusion into state court functions, and the fact that one of the intrusions concerned bail, is mirrored in different views expressed by other circuit courts. The First Circuit distinguished *Littleton* as involving "continuing federal judicial supervision of local criminal procedures" and found no *Younger* barrier in its case because the plaintiff's "challenge to pretrial detention procedures could not be raised as a defense at trial." *Fernandez v. Trias Monge*, 584 F.2d 848, 851 n.2, 853 (1st Cir. 1978). The Ninth Circuit distinguished the broad relief sought in *Littleton* from an exclusive challenge to bail procedures. *See Arevalo v. Hennessy*, 882 F.3d 763, 766 n.2 (9th Cir. 2018). It concluded that abstention would be inappropriate when the claims solely concern bail. *Id.* at 766. The Eleventh Circuit reached a similar conclusion in a decision I will discuss in more detail later. *See Walker v. City of Calhoun*, 901 F.3d 1245, 1254-55 (11th Cir. 2018). For now, I state only that I largely agree with *Walker*.

The Fifth Circuit stated a different view of *Littleton* from that of the just-cited opinions. *See Tarter v. Hury*, 646 F.2d 1010 (5th Cir. Unit A June 1981). After describing abstention in *O'Shea v. Littleton*, we held: "Because *O'Shea* involved a challenge to the imposition of excessive bail, it is conclusive as to Tarter's claim for equitable relief based on that ground." *Id.* at 1013. With trepidation, I am bold to say I disagree with that opinion's author, one of the ablest of judges ever on this court, John Minor Wisdom. Of course, I have already been worrisomely bold by disagreeing with able current colleagues. *Tarter* seems to mean that abstention categorically applies to claims about bail in state court. Even if it does, Judge Wisdom detailed a narrower understanding of *Littleton*:

> The plaintiffs sought declaratory and injunctive relief. The Supreme Court held that dismissal of those claims was appropriate because the granting of such equitable relief would require excessive federal interference in the operation of state criminal courts. The enforcement of any remedial order granting the relief requested would require federal courts to interrupt state proceedings to adjudicate allegations of asserted non-compliance with the order.

Id. at 1013. That quotation supports that the claims were dismissed not simply because they dealt with bail but because of how they dealt with bail.

Though I have acknowledged what is contrary to my views about *Tarter*, I close with what I find quite accurate. After resolving the claim about bail, the court stated that a different request for relief—"an injunction requiring clerks to file all *pro se* motions [—] would not require the same sort of interruption of state criminal processes that an injunction against excessive bail would entail." *Id.* Here, Judge Wisdom made a fact-based analysis and found certain relief would not be improperly intrusive. In my view, that also should have been the form of analysis applied to bail.

Another opinion that the majority here embraces is one in which the Second Circuit abstained. *See Wallace v. Kern*, 520 F.2d 400 (2d Cir. 1975). That court held that abstention was rejected in *Gerstein v. Pugh* because the plaintiffs had no opportunity to raise their federal claims in the state-court system, whether directly or collaterally. *Id.* at 407. Collateral opportunities to present federal claims such as in state *habeas*, the court stated, provide adequate opportunities for abstention purposes. *Id.* at 406-07.

Because of the importance the majority here gives to the *Wallace* opinion, I will analyze it in detail. The claims in that suit by indigent pretrial detainees in a Brooklyn jail were extensive: legal aid attorneys had staggering caseloads they could not possibly handle; plaintiffs' speedy trial rights were denied by lengthy delays; "bail [was] denied where no imposition of money conditions [was] reasonably necessary"; lengthy pretrial detention caused loss of employment and other harms; and several other claims concerning the effects of delay. *Wallace v. McDonald*, 369 F. Supp. 180, 184 (E.D.N.Y. 1973).[6] District Judge Orrin Judd, in a series of decisions, generally accepted each of the plaintiffs' claims. In a slightly later series of decisions, the Second Circuit reversed them all, one by one.[7]

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[6] The lead defendant was Miles F. McDonald; he was dismissed from the case because he had retired as a trial judge before suit was even filed. *Wallace v. McDonald*, No. 72-C-898 (E.D.N.Y. Feb. 27, 1973), at *16, *18-19 (the published opinion cited in the text redacted these details). The full 1973 opinion and a 1975 unpublished opinion I cite later are no longer in the district court records. They were provided by Sarah Wharton of the Harvard Law School Library after being located in Historical & Special Collections; Orrin Grimmell Judd papers; Opinions & Speeches, Sept. 1972-July 1973, and Aug. 1974-Aug. 1975. A Fifth Circuit librarian, Judy McClendon, was the intermediary. My thanks to both. Justice Michael Kern was the lead defendant in subsequent opinions.

[7] Judge Judd's boldness more generally is shown by his order of July 25, 1973, two months after his first *Wallace* injunction, enjoining the Secretary of Defense from conducting combat operations in Cambodia, Vietnam, and Laos. *See Holtzman v. Schlesinger*, 361 F. Supp 553, 565-66 (E.D.N.Y. 1973). On July 27, the Second Circuit stayed the injunction; on August 1, the Second Circuit Justice, Thurgood Marshall, refused to vacate the stay; heedless, on August 3, Justice William Douglas vacated the stay; and on August 4, the full Court stayed the injunction. *See Holtzman v. Schlesinger*, 414 U.S. 1304, 1304-05, 1316, 1321 (1973). On August 8,

The Second Circuit summarized this history in its third opinion:

> In *Wallace I*, Judge Judd had granted an application for a preliminary injunction against the Legal Aid Society's acceptance of any additional felony cases in the Kings County Supreme Court if the average caseload of its attorneys exceeded 40. The district court also had ordered the Clerk of the Criminal Term of the Kings County Supreme Court to place on the calendar all *pro se* motions filed by inmates of the Brooklyn House of Detention.

Wallace v. Kern, 520 F.2d at 401 (summarizing *Wallace v. Kern*, 392 F. Supp. 834 (E.D.N.Y. 1973), *rev'd*, 481 F.2d 621 (2d Cir. 1973)) (*Wallace I*). The circuit court was so insistent about vacating the injunction that its opinion was delivered from the bench after argument. *See Wallace I*, 481 F.2d at 622. The court did not cite *Younger*, indeed, it cited only one precedent, but it did say that "under the principle known as comity a federal district court has no power to intervene in the internal procedures of the state courts." *Id.*

The circuit court in 1975 described the second rejected order this way:

> In *Wallace II*, Judge Judd had granted an application for a preliminary injunction ordering that each detainee held for trial for more than six months be allowed to demand a trial and be

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the Second Circuit reversed and ordered dismissal. *Holtzman v. Schlesinger*, 484 F.2d 1307, 1314-15 (2d Cir. 1973). A lot happened fast, but the Supreme Court's message to all judges (and to Justice Douglas, too) was—stay in your lane. How that obligation applies to bail is the central issue before us.

> released on his own recognizance if not brought to trial within 45 days of his demand. This court reversed on the ground that questions concerning the right to a speedy trial are properly to be determined on a case-by-case basis rather than by a broad and sweeping order.

Wallace, 520 F.2d at 401 (summarizing *Wallace v. Kern*, 371 F. Supp. 1384 (E.D.N.Y. 1974), *rev'd*, 499 F.2d 1345 (2d Cir. 1974)) (*Wallace II*). "Relief from unconstitutional delays in criminal trials is not available in wholesale lots," the court stated. *Wallace II*, 499 F.2d at 1351. *Younger* was not cited.

Finally, *Wallace III* dealt with bail. The relief ordered was extensive, including time limits for bail determinations, granting a right to an evidentiary hearing, and requiring consideration of other forms of release:

> Judge Judd ordered that an evidentiary hearing be had on demand at any time after 72 hours from the original arraignment and whenever new evidence or changes in facts may justify. At the hearing, the People would be required to present evidence of the need for monetary bail and the reasons why alternate forms of release would not assure the defendant's return for trial, and the defendant would be permitted to present evidence showing why monetary bail would be unnecessary. The defendant was also held to be entitled to a written statement of the judge's reasons for denying or fixing bail.

Wallace v. Kern, 520 F.2d at 403 (*Wallace III*) (summarizing and reversing *Wallace v. Kern*, No. 72-C-898 (E.D.N.Y. Feb. 14, 1975)).

The *Wallace III* opinion accurately equated the Wallace injunction to the remedy in *Littleton* of having periodic reporting to the federal court on state court proceedings. The *Wallace* district court had "provided for new bail hearing procedures which fix the time of, the nature of and even the burden of proof in the evidentiary hearings." *Id.* at 406. That "order would permit a pretrial detainee who claimed that the order was not complied with to proceed to the federal court for interpretations thereof." *Id.* The similarities to *Littleton* are highlighted by the fact the *Wallace* district court cited the not-yet-reversed Seventh Circuit *Littleton* opinion four times to justify refusing to dismiss the suit, then the Second Circuit's *Wallace III* opinion cited the Supreme Court's *Littleton* opinion eight times when it reversed the district court. *See Wallace v. McDonald*, 369 F. Supp. at 186-87 (citing *Littleton v. Berbling*, 468 F.2d 389); *Wallace III*, 520 F.2d at 404-08 (citing *O'Shea v. Littleton*, 414 U.S. 488).

The *Wallace III* court interpreted *Littleton* to invalidate the restrictions on state court bail procedures imposed by the district court because they were an "ongoing federal audit of state criminal proceedings." *Id.* at 405-06 (quoting *Littleton*, 414 U.S. at 500). Indeed, the district court's "order created an intrusion upon existing state criminal process which is fissiparous and gratuitous and it further ignored the prior rulings of this court on appeals in this case." *Id.* at 408. My vocabulary is not as extensive as that court's, but the obvious point is that the district court order was overly intrusive. The district court had rejected abstention, though, because "[i]mproper pre-trial confinement would not be an issue on a defendant's trial on the criminal charge." *Wallace*, No. 72-C-898 (Feb. 14, 1975), at *62.

The *Wallace III* opinion distinguished *Gerstein v. Pugh*, which had rejected abstention in the (in)famous footnote 9. *Wallace III*, 520 F.2d at 406-07. To remind, that footnote relied on the absence of a direct challenge to any specific prosecution and the fact the claims were only about "the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution." *Gerstein v. Pugh*, 420 U.S. at 108 n.9. The *Wallace III* court determined that in the context of the Florida procedures at issue, the Supreme Court was implicitly relying on its statement earlier in its opinion that no adequate procedures were available under state law to contest the absence of a judicial determination of probable cause. *Wallace III*, 520 F.2d at 406.

I doubt, though, that the Supreme Court in 1975 was incorporating by reference some implied factual limitation to its statement. Footnote 9 makes no hint of such reliance—to my eyes at least. It is a categorical statement, not qualified by earlier detailed factual background. I will discuss in the final section of this opinion how I would apply the factor of whether adequate procedures exist under Texas law in our case. Taken literally, the footnote means abstention does not apply to pretrial bail. I have conceded for purposes of analyzing *Younger* here that the force of the footnote has waned.

In summary, the three *Wallace* decisions from the Second Circuit are the seriatim equivalent of what the Supreme Court in Littleton dealt with in one decision. The *Wallace* district court entered orders that controlled how Legal Services would operate, including the number of cases individual attorneys could be assigned; controlled the court's *pro se* docket; required detainees to be tried or released on their own recognizance if not timely brought to trial after a demand; and, most

relevantly to us, required prompt evidentiary bail hearings, with the government needing to substantiate imposing bail as opposed to alternative release conditions and the court having to give written reasons for it decision. *Id.* at 401-03. This was a wholesale federal intrusion into the operation of state criminal prosecutions. The fact that some of the intrusion is pretrial, such as regarding bail, did not remove the considerations for abstention.

My key point, after all this discussion of the *Wallace* opinions, is that the intrusion into "the domain of the state," *id.* at 408, was indeed severe, not just as to bail but for the entire range of measures the district court imposed. What I see absent from the Supreme Court decisions and from the *Wallace* opinions is that if bail is involved, the *Middlesex* factor of undue interference with ongoing state proceeding is always satisfied. (Ironically, a fair interpretation of *Gerstein v. Pugh* footnote 9 is that this factor is never satisfied as to bail.) Instead, it is necessary to examine just what the plaintiffs are seeking as to bail. I accept the phrasing of some learned commentary that, under *Littleton*, it is proper to "rely on a fact-intensive evaluation of how state courts conduct their business and whether the federal exercise of jurisdiction would constitute an ongoing intrusion into the state's administration of justice." 17A MOORE'S FED. PRAC., § 122.72[1][c], at 122-107. We must focus on how a federal court is asked to exercise its jurisdiction as a fact-based issue. There is not a categorical answer just because bail is involved.

I give brief attention to the recent decisions from our court regarding injunctive relief governing bail in another large Texas county, the one containing the city of Houston. *See, e.g.*, *ODonnell v. Harris Cnty.*, 892 F.3d 147 (5th Cir. 2018). The majority opinion here overrules

ODonnell. The extent of injunctive relief granted there was arguably too similar to what the Supreme Court rejected in *O'Shea v. Littleton*.

Finally, I review an opinion with which I mostly agree. *See Walker*, 901 F.3d at 1255. Ninth Circuit Judge O'Scannlain, sitting by designation in the Eleventh Circuit, analyzed whether a federal court could enjoin a Georgia city's "policy of using a secured-money bail schedule with bond amounts based on the fine an arrestee could expect to pay if found guilty, plus applicable fees." *Id.* at 1252. I start with a mild disagreement. The court wrote that *Younger* abstention is now "disfavored." *Id.* at 1254 (citing *Sprint*, 571 U.S. at 77-78). It is true that *Sprint* sought to halt the expansion of *Younger*'s reach. *See Sprint*, 571 U.S. at 81 (stating that misapplying the "three *Middlesex* conditions would extend *Younger* to virtually all parallel state and federal proceedings"). Instead of indicating disfavor, I find *Sprint* simply announced that the doctrine was now fully defined.[8]

I return to *Walker*. The court implied that footnote 9 in *Gerstein v. Pugh* should be taken on its own terms: abstention "does not readily apply here because Walker

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[8] The Wright & Miller treatise described *Sprint* as a "clarification":

> The Court clarified the meaning of the *Middlesex* and *Dayton Christian Schools* cases in 2013 in *Sprint Communications, Inc. v. Jacobs*. The Court made clear that the circumstances fitting within the *Younger* abstention doctrine are exceptional and include: (1) state criminal prosecutions; (2) civil enforcement proceedings; and (3) civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.

17B WRIGHT & MILLER § 4254, at 79 & n.21 (Supp. 2022).

is not asking to enjoin any prosecution. Rather, he merely seeks prompt bail determinations for himself and his fellow class members." *Walker*, 901 F.3d at 1254 (citing *Gerstein v. Pugh*, 420 U.S. 103). The *Walker* court concluded that *Littleton* required abstention when broad relief was sought that "amounted to 'an ongoing federal audit of state criminal proceedings." *Id.* at 1254-55 (quoting *Littleton*, 414 U.S. at 500).

Much less was being sought in *Walker*:

> Instead, as in *Gerstein*, Walker merely asks for a prompt pretrial determination of a distinct issue, which will not interfere with subsequent prosecution. At the very least, the district court could reasonably find that the relief Walker seeks is not sufficiently intrusive to implicate *Younger*. Because we review a *Younger* abstention decision for abuse of discretion, we are satisfied that the district court was not required to abstain.

Id. at 1255 (citation omitted).

Charting that analysis, I conclude the *Walker* court found the plaintiffs were not seeking nearly as broad of relief as in *Littleton*, that the resulting potential intrusion on state procedures was not severe, and that without considering adequacy of other remedies or the significance of the state's interest, that the district court did not abuse its discretion by deciding the merits of the claims. *Id.* at 1256-57. The *Walker* court never held that abstention was categorially inapplicable, but the considerations I have highlighted allowed the claims to be resolved in that case.

Though the court addressed only the interference factor, *Sprint* stated that the three *Middlesex* factors

are not dispositive but are "appropriately considered by the federal court before invoking *Younger*." *Sprint*, 571 U.S. at 81. Further, the key justification for *Younger* abstention, *i.e.*, Our Federalism, is to allow state courts to function without federal court oversight absent exceptional circumstances. Once the *Walker* court concluded there was no interference, the federalism concerns were satisfied.

Equally significant is the *Walker* analysis after it refused to abstain. "Under the [City's] Standing Bail Order, arrestees are guaranteed a hearing within 48 hours of arrest to prove their indigency (with court-appointed counsel) or they will be released." *Walker*, 901 F.3d at 1265. The district court insisted that the hearing must be within 24 hours even though "[b]oth procedures agree on the standard for indigency and that those found indigent are to be released on recognizance." *Id.* at 1265-66. The Eleventh Circuit held that the district court's imposing the 24-hour obligation was an abuse of discretion. *Id.* at 1266-67.

The district court also had ordered the City to use an affidavit-based system to determine indigency, while the Standing Bail Order provided for judicial hearings. *Id.* The Eleventh Circuit rejected that judicial alteration to the City's policies. "Whatever limits may exist on a jurisdiction's flexibility to craft procedures for setting bail, it is clear that a judicial hearing with court-appointed counsel is well within the range of constitutionally permissible options. The district court's unjustified contrary conclusion was legal error and hence an abuse of discretion." *Id.* at 1268-69.

The circuit court vacated the preliminary injunction imposed by the district court and allowed the City's Standing Bail Order to stand. *Id.* at 1272.

Judge O'Scannlain has shown us our way. Well, obviously, he has shown only me the way. Abstention requires fact-based analysis on what the plaintiffs seek and how burdensome it would be. We know that injunctive relief cannot "require for its enforcement the continuous supervision by the federal court over the conduct of the [officials involved in setting bail] in the course of future criminal trial proceedings." *Littleton*, 414 U.S. at 501. Neither can the relief be "a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity." *Id.*

One difficulty in my conception is how to deal with the fact that plaintiffs' complaints often are excessive in their demands, anticipating being pared back as the case proceeds. Courts may grant relief that is far less than plaintiffs sought. That reality can be handled by courts' dismissing suits that require abstention unless plaintiffs can revise to curb their claims.

In conclusion on whether resolving claims about bail procedures on the merits automatically leads to an impermissible interference with ongoing state proceedings, I find the answer to be "no." A complaint seeking the kind of relief that was rejected in *Littleton* and *Wallace* should cause the court to abstain. Claims seeking some procedural safeguards, that do not require monitoring by the federal court and otherwise avoid the excessiveness of claims in caselaw discussed here, might not require abstention. That depends on the claims, the existing bail procedures, and other facts. We err to make a categorical ruling that all such claims would impermissibly involve the federal court in state criminal procedures.

III. Adequacy of opportunity to raise the federal claim in state court

A consideration for *Younger* abstention is whether the state provides an *adequate* opportunity to bring the same constitutional claims in state court. *Middlesex*, 457 U.S. at 432. It is not enough to identify a procedure. The procedure must be measured for adequacy. I will examine some of the caselaw already discussed to see how it addressed adequacy of state remedies.

Early in describing *Younger* adequacy is *Gerstein v. Pugh*, 420 U.S. 103. Of course, the opinion concerned determinations of probable cause to detain someone, not bail, but the adequacy of state procedures is equally relevant to both issues. The five-justice majority opinion stated that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Id.* at 114. Requiring judicial action before an "*extended* restraint of liberty" occurs means delay has significance. In addition, the Court reviewed the roadblocks for a detainee in getting judicial review of probable cause: the prosecutor's filing an information meant there would be no preliminary hearing, and *habeas corpus* was only available, if ever, in "exceptional circumstances." *Id.* at 106. "The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing *after 30 days*, and arraignment, which the District Court found was often *delayed a month or more* after arrest." *Id.* (citing *Pugh v. Rainwater*, 332 F. Supp. at 1110) (footnote and statutory citations omitted; emphasis added). The Court closed its summary by stating "a person charged by information could be detained for a substantial period solely on the decision of a prosecutor." *Id.* The Court's emphasis on timeliness is undeniable.

The four concurring justices stated they joined the part of the majority opinion I just detailed "since the

Constitution clearly requires at least a *timely* judicial determination of probable cause as a prerequisite to pretrial detention." *Id.* at 126 (Stewart, J., concurring) (emphasis added). The majority did not take issue with the concurring justice's using the word "timely." The Court had not stated Florida detainees could never obtain judicial determinations of probable cause, only that it "often" would not be made for at least a month. *Id.* at 106. Thus, a lack of a timely determination was at least part of the reason the majority rejected abstention.

There are other Supreme Court opinions indicating the importance of timely remedies. One explicit statement is in an opinion analyzing abstention in the context of a state administrative scheme for disciplining optometrists. *See Gibson v. Berryhill*, 411 U.S. 564 (1973). Proceedings were ongoing against plaintiff Berryhill and others at a state administrative board. Berryhill and other optometrists sued board members in federal court, claiming that board members were biased against them. *Id.* at 570. The Supreme Court stated that dismissing a federal suit based on *Younger* abstention "naturally presupposes the opportunity to raise and have *timely decided* by a *competent* state tribunal the federal issues involved." *Id.* at 577 (emphasis added). The presupposition failed because of the district court's finding that the board members were biased. *Id.*[9] Admittedly, the timeliness portion of the presupposition did not come into play, only the competence factor. Nevertheless, Supreme Court *dicta* "is entitled to great weight." *Hignell-*

[9] In discussing whether state procedures were "adequate," the Court summarized that federal courts have found state agency remedies inadequate "on a variety of grounds. Most often this has been because of delay by the agency." *Id.* at 575 n.14 (emphasis added).

Stark v. City of New Orleans, 46 F.4th 317, 330 n.21 (5th Cir. 2022).

Berryhill is cited in later significant precedents. In *Middlesex*, the Court analyzed abstention in the context of disciplinary proceedings before an attorney-ethics committee. Such proceedings were held to involve "vital state interests." *Middlesex*, 457 U.S. at 432 (citing *Moore v. Sims*, 442 U.S. at 426). The Court then wrote that the "pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims." *Id.* (quoting *Moore v. Sims*, 442 U.S. at 430, then citing *Berryhill*, 411 U.S. 564). The Court found "the state court desired to give Hinds a *swift* judicial resolution of his constitutional claims." *Id.* at 437 n.16 (emphasis added). The Court closed with this:

> Because respondent Hinds had an 'opportunity to raise and have *timely* decided by a competent state tribunal the federal issues involved,' *Gibson v. Berryhill*, 411 U.S., at 577, 93 S.Ct., at 1697, and because no bad faith, harassment, or other exceptional circumstances dictate to the contrary, federal courts should abstain from interfering with the ongoing proceedings.

Id. at 437 (emphasis added).

The *Moore v. Sims* opinion cited in *Middlesex* analyzed abstention in a case involving the Texas Family Code, which allowed the state to take custody of abused children. *Moore v. Sims*, 442 U.S. at 418-19. The parents of children who had been taken into state custody brought suit in federal court; the district court enjoined the state from prosecuting any suit under the relevant statutory provisions pending a final decision on their constitutionality. *Id.* at 422. The Supreme Court disagreed, holding that "the only pertinent inquiry [for

Younger abstention] is whether the state proceedings afford an *adequate opportunity* to raise the constitutional claims." *Id.* at 430 (emphasis added). An earlier, similar statement was supported by the signal of "*see*" for *Berryhill*. *Id.* at 425 (citing *Berryhill*, 411 U.S. 564).

A phrase with a possibly different emphasis in both *Moore v. Sims* and *Middlesex* is that "a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.'" *Middlesex*, 457 U.S. at 432 (quoting *Moore v. Sims*, 442 U.S. at 426). Does that mean that absent a clear prohibition in the state proceedings to raising constitutional claims—regardless of questions about adequacy—abstention is required? That hardly makes sense, as the Court in both opinions included the analysis I have already detailed about adequacy and, in *Middlesex*, timeliness.

To understand the Court's use of "clearly bars," we need its context. In *Sims*, the facts about delay were detailed in the district court opinion. That factual recitation reveals the parents moved for a hearing in state court five days after a March 26 *ex parte* order that had removed their children. *Sims v. State Dept. of Public Welfare*, 438 F. Supp. 1179, 1184 (S.D. Tex. 1977), *rev'd*, *Moore v. Sims*, 442 U.S. 415. The judge was absent. *Id.* A hearing was held on April 5 on a newly filed writ of *habeas corpus*, but the court decided the matter needed to be transferred to another county. *Id.* A hearing was finally conducted there on May 5. *Id.* at 1185.

The federal district court stated that the 42-day delay for a hearing revealed that "in practice the state procedures operate in such a manner as to prevent or, at the very minimum, substantially delay the presentation of constitutional issues," which meant "abstention would be inappropriate." *Id.* at 1189. Obviously, there were

state procedures to hear the constitutional claims almost immediately after the children were taken from their parents, but it took over a month for a hearing finally to be held. The plaintiffs complained about not being "granted a hearing at the time that they thought they were entitled to one." *Moore v. Sims*, 442 U.S. at 430. The Supreme Court rejected that such episodic delays defeated abstention, as there was no indication of bad faith on behalf of anyone. *Id.* at 432. That is the context for the statement that abstention should apply "unless state law clearly bars the interposition of the constitutional claims." *Id.* at 425-26.

The use of that phrase in *Middlesex* had similar purposes. The attorney being disciplined argued there was no opportunity in the ethics proceedings to have constitutional issues considered. *Middlesex*, 457 U.S. at 435. The Supreme Court found no support for such a contention:

> [Attorney] Hinds failed to respond to the complaint filed by the local Ethics Committee and failed even to *attempt* to raise any federal constitutional challenge in the state proceedings. Under New Jersey's procedure, its Ethics Committees constantly are called upon to interpret the state disciplinary rules. Respondent Hinds points to nothing existing at the time the complaint was brought by the local Committee to indicate that the members of the Ethics Committee, the majority of whom are lawyers, would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees.

Id. (emphasis in original). The Court emphasized that a party must "'first set up and rely upon his defense in the

state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford *adequate protection*.'" *Id.* (*quoting Younger*, 401 U.S. at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 244 (1926)) (emphasis added).

There was no evidence in either *Middlesex* or *Moore v. Sims* that *adequate* consideration of constitutional challenges was generally unavailable in state court. Missteps along the way in receiving a hearing or failure even to use the available procedures did not show inadequacy. Each case cited *Berryhill*, which included timeliness as part of adequacy.

The necessity of taking advantage of available state procedures before claiming inadequacy is the point in other opinions. In one case, plaintiffs held in contempt by a state court sued in federal court to have the contempt statute declared unconstitutional; they had not made that claim in state court. *Juidice v. Vail*, 430 U.S. 327, 330 (1977). The Court held they "had an opportunity to present their federal claims in the state proceedings. No more is required" for abstention; the opportunity could not be flouted. *Id.* at 337. The Court discussed the state procedure, which seemingly could have provided effective relief. *Id.* at 337 n.14.

Another Supreme Court decision relying in large part on a party's shunning state procedures is *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). An historically large jury verdict of $10.5 billion was entered against Texaco after a jury trial in state court. *Id.* at 4. In Texas, an appellant had to post a bond in the amount of the judgment, plus interest and costs. *Id.* at 5. Texaco could not afford the bond; instead of seeking relief in the state court itself, it filed suit in federal court and alleged the

application of the requirement of so large a bond violated Texaco's constitutional rights. *Id.* at 6.

Texaco insisted "that *Younger* abstention was inappropriate because no Texas court could have heard Texaco's constitutional claims within the limited time available." *Id.* at 14. The Supreme Court responded: "But the burden on this point rests on the federal plaintiff to show 'that state procedural law barred presentation of [its] claims.'" *Id.* (quoting *Moore v. Sims*, 442 U.S. at 432). "Moreover, denigrations of the procedural protections afforded by Texas law hardly come from Texaco with good grace, as it apparently made no effort under Texas law to secure the relief sought in this case." *Id.* at 15. The Court also quoted the same *Younger* language I earlier quoted: "'The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.'" *Id.* at 14-15 (quoting *Younger*, 401 U.S. at 45).

In sum, the Supreme Court did not say timeliness was irrelevant. It wrote that before arguments about adequacy would be entertained, the party seeking to avoid abstention must be able to prove the inadequacy of the state procedures. Texaco had failed even to try. Yes, the Court also again referred to whether state procedures "barred" the claims. Also, again, the context for the reference includes whether state remedies would "afford *adequate* protection." *Id.* (emphasis added).

Some of the circuit court opinions I discussed earlier are useful here too. In *Wallace III*, the Second Circuit highlighted the *Gerstein v. Pugh* concern about delay in Florida procedures:

> It is significant, therefore, that the Supreme Court's opinion in *Gerstein* emphasizes at the outset that the federal plaintiffs there had no right to institute state *habeas corpus* proceedings except perhaps in exceptional circumstances and that their only other state remedies were a preliminary hearing which could take place only after 30 days or an application at arraignment, which was often delayed a month or more after arrest.

Wallace III, 520 F.2d at 406. The court then stated: "We do not consider this discussion feckless," *i.e.*, the discussion of limited procedures and inherent delays was meaningful; it affected the result. *Id.*

In "sharp contrast" to Florida procedures, the *Wallace III* court explained that New York procedures "provide that a pre-trial detainee may petition for a writ of *habeas corpus* in the [trial-level] Supreme Court, that its denial may be appealed and that an original application for *habeas* may be made in the Appellate Division of the Supreme Court." *Id.* at 407 (statutory citations omitted). The Second Circuit faulted the district court for first making a fact finding "that state *habeas* relief was available to the plaintiff class with provision for appeal to the Appellate Division," but then not discussing "the availability of this remedy in that part of the opinion which rejected" the application of *Younger* abstention. *Id.* at 404-05. In addition, the *Wallace III* opinion stated that the record supported that one remedy—an evidentiary hearing on bail—had never been requested by any prisoner, and had it been, a hearing would have been conducted. *Id.* at 407.

Though the *Wallace III* court identified delay as important in *Gerstein v. Pugh*, the Second Circuit was

silent on how quickly New York procedures could be employed.[10] The explanation in *Middlesex*, 457 U.S. at 435, may apply: inadequacy of state remedies must be *shown*. In *Wallace*, no one had even sought an evidentiary hearing on bail. In other words, available procedures were not tried and found wanting; they were not even tried.

A Second Circuit opinion relying on *Wallace III* held that timeliness mattered. *See Kaufman v. Kaye*, 466 F.3d 83 (2d Cir. 2006). Kaufman brought a federal suit to challenge the manner in which appeals were assigned among panels of judges in state court. *Id.* at 87. Abstention was necessary because "the plaintiff has an 'opportunity to raise and have *timely* decided by a competent state tribunal' the constitutional claims at issue in the federal suit.'" *Id.* (quoting *Spargo v. New York State Comm'n on Judicial Conduct*, 351 F.3d 65, 77 (2d Cir. 2003) (emphasis added).

The quoted *Spargo* case was brought by state judges claiming that judicial ethics rules restricted their First Amendment rights. *Spargo*, 351 F.3d at 69-70. The Second Circuit stated that "to avoid abstention, plaintiffs must demonstrate that state law bars the *effective* consideration of their constitutional claims." *Id.* at 78 (emphasis added). That decision quoted the Supreme Court that plaintiffs, if they have an "opportunity to raise and have *timely* decided by a competent state tribunal" their

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[10] I obtained the unpublished district court opinion reversed by *Wallace III* to see if it had fact-findings about delay. Findings included existence of lengthy pretrial detention, long delay in indicting those arrested for felonies, and substantial delays for trial. *Wallace*, No. 72-C-898 (Feb. 14, 1975), at *7-9. As to *habeas*, though, all the district court stated was that a prisoner could apply to the state trial court, and review of its decision would then be available in that court's appellate division. *Id.* at *9. Nothing useful there.

constitutional claims, the federal courts should abstain. *Id*. at 77 (quoting *Middlesex*, 457 U.S. at 437) (emphasis added). The court summarized by stating that plaintiffs can proceed in federal court if they can "demonstrate that state law bars the effective consideration of their constitutional claims." *Id*. at 78. The *Kaufman* court later quoted this statement in *Spargo* about "effective consideration." *Kaufman*, 466 F.3d at 87. Effectiveness, not just existence, of state procedures for raising constitutional claims is needed. Depending on the issue, effectiveness can turn on timeliness.

This review of the caselaw revealed no precedents that refused to abstain because of untimely state procedures as to bail. Even so, the Supreme Court in *Berryhill* and *Middlesex* and the Second Circuit in *Kaufman* and *Spargo* all explicitly required timely state procedures. The Court also held that the Fourth Amendment required judicial intervention before there was an "*extended* restraint of liberty following arrest." *Gerstein v. Pugh*, 420 U.S. at 114. Adequacy generally of the available state procedures was discussed by the Supreme Court in *Gerstein v. Pugh*, *Moore v. Sims*, and *Middlesex*, and by the Second Circuit in *Wallace III*, *Kaufman*, and *Spargo*. The adequacy, including timeliness, of state procedures did not require measurement in *Middlesex*, *Juidice*, *Texaco*, or in *Wallace III* because they had not been tried.

A distinction is appropriate here. Delays in a criminal prosecution do not allow a defendant to seek federal court relief unless there is bad faith in the proceedings. *Moore v. Sims*, 442 U.S. at 432. "[T]he cost, anxiety, and inconvenience of having to defend against a single criminal prosecution" cannot amount to irreparable injury. *Younger*, 401 U.S. at 46. The prosecution likely violates no rights, so its tribulations must be endured. Quite

differently, unconstitutional pretrial detention leads to injury that is different in kind as well as degree to the cost, anxiety, and inconvenience of being prosecuted. An unconstitutional pretrial detention is an immediate violation of a right. It should not have to be endured any longer than necessary. It is difficult for me to see, when dealing with a potentially unconstitutional "restraint of liberty following arrest," *Gerstein v. Pugh*, 420 U.S. at 114, how adequacy of a remedy can be divorced from its timeliness.

The majority discusses the statutory procedures available in Dallas County and in Texas. *See Majority op*. at 18-19. Of importance, though, the Supreme Court in 1975 stated that procedures available in Dade County and in Florida were too delayed to support abstention. *Gerstein v. Pugh*, 420 U.S. at 106, 123-25. The district court on remand in this case was not given much evidence, but it identified one example (from four decades ago) of quite slow *habeas* procedures. *See Ex parte Keller*, 595 S.W.2d 531 (Tex. Crim. App. 1980). Any future case regarding bail procedures should create a factual record that allows a determination of adequacy—including timeliness.

IV. Conclusion

This appeal is moot. Any future litigation about bail in Dallas County would need to address the new law labeled S.B.6. *See* Act of August 31, 2021, 87th Tex. Leg. 2d C.S., S.B. 6). Those procedures are the ones that now must provide adequate, timely mechanisms for adjudicating constitutional claims.

For purposes of this opinion, I accept that *Younger* analysis should be applied to claims about bail. I do not see that impermissible interference with state courts will always result if a federal court enters orders

regarding state court bail procedures and policies. We know that what some district courts have done, such as the relief granted in *Littleton* or in *Wallace*, is unacceptable. Those actions were impermissibly intrusive, and abstention was invoked. Lesser claims and remedies as in *Walker* might be permissible. There are guardrails for intrusions as to bail but not a locked gate.

As to the adequacy of state court remedies, a significant point of departure for me from the majority is that I believe the timeliness for any review of the constitutional claim is relevant. When dealing with whether someone is unconstitutionally being detained before trial, abstention due to too-slow-to-matter review in state court is an abdication of the federal court's "virtually unflagging obligation" to decide a case for which it has jurisdiction. *See Colorado River Water Conservation Dist.*, 424 U.S. at 817.

In closing, I acknowledge plaintiffs' goal in bail litigation may be to require release of almost all arrestees without money bail. Regardless, our *en banc* statement was correct that "[r]esolution of the problems concerning pretrial bail requires a delicate balancing of the vital interests of the state with those of the individual." *Pugh v. Rainwater*, 572 F.2d at 1056.

Indigents have constitutional rights after an arrest. *See id.* at 1056-59. States must strive to protect those rights. In populous jurisdictions such as Dallas County, individualized determinations of the need for bail for each arrestee may seem all but impossible. The record as to past practices supports that each arrestee was rapidly processed by a magistrate judge as to bail so the judge could then advance to the next arrestee. Even so, not releasing those who are dangerous or likely to

disappear, or at least not releasing without some form of restraint such as bail, are vital state interests.

Whether the constitutional rights of arrestees are protected while the state seeks to uphold its interests in Dallas County must now to be analyzed under the new legislation. Any litigation would need to be in state court if the conditions for abstention are met. We cannot answer now whether those conditions will be satisfied. Therefore, though I concur in judgment, I do not join the portion of the majority's opinion analyzing abstention.

STEPHEN A. HIGGINSON, *Circuit Judge*, joined by STEWART, DENNIS and HAYNES, *Circuit Judges*, concurring in part, dissenting in part:

Fifth Circuit precedent states, "*[I]n some limited instances*, 'a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits.'" *Env't Conservation Org. v. City of Dallas*, 529 F.3d 519, 525 (5th Cir. 2008) (emphasis added) (quoting *Sinochem Int'l v. Malaysia Int'l Shipping*, 549 U.S. 428, 431 (2007)). This is not "one of those instances." *Id.*

With our sister circuits, we have recognized that the leeway granted by *Sinochem* is not boundless, but "carefully circumscribed" to cases "'where subject-matter or personal-jurisdiction is difficult to determine,' and dismissal on another threshold ground is clear." *Snoqualmie Indian Tribe v. Washington*, 8 F.4th 853, 863 (9th Cir. 2021) (quoting *Sinochem*, 549 U.S. at 436), *cert. denied sub nom. Samish Indian Nation v. Washington*, 142 S. Ct. 1371 (2022), *and cert. denied*, 142 S. Ct. 2651 (2022); *accord Env't Conservation Org.*, 529 F.3d at 524-25 (Where a "res judicata analysis is no less burdensome than" an inquiry into mootness—the "doctrine of standing in a time frame"—we may not decide the case on grounds of res judicata.). One danger of the discretion *Sinochem* affords is that courts will "*use* the pretermission of the jurisdictional question *as a device* for reaching a question of law that otherwise would have gone unaddressed." *In re Facebook, Inc., Initial Pub. Offering Derivative Litig.*, 797 F.3d 148, 158-59 (2d Cir. 2015) (emphases added) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98 (1998)).

I would decline the narrow discretion *Sinochem* permits. It is notable that the majority's discussion of *Younger* spans more than *four times* the length of its

discussion of mootness. There is no plausible suggestion the court is motivated by judicial economy. Instead, I fear, our court today uses *Sinochem* as a device to expansively critique Supreme Court, prior Fifth Circuit, and sister circuit case law. *See ante*, at 17 (limiting *Gerstein v. Pugh*, 420 U.S. 103 (1975)); *id*. at 19-21 (criticizing then overruling *ODonnell v. Harris Cnty.*, 892 F.3d 147 (5th Cir. 2018)); *id*. at 21-22 (criticizing *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018)).[11]

I would hold that this case is moot and affirm on that basis alone.

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[11] It is impossible to overlook that the important liberty versus public-safety controversy over pretrial detention and cash bail practices, first confronted in *ODonnell* and then here, did lead to Texas legislative reform. Federal court intervention appears to me to have been less an interference than a catalyst for state reform.

JAMES E. GRAVES, JR., *Circuit Judge*, dissenting:

"Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). "The burden of demonstrating mootness 'is a heavy one.'" *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)). Mootness can occur when "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* In *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525 (2020), the Court held that New York City's amended gun rule mooted the case because it was "the precise relief that petitioners requested in the prayer for relief in their complaint." *Id.* at 1526.

Plaintiffs here, however, are challenging the practices of bail determination in Dallas County. They are not challenging S.B. 6 or any other statute. On limited remand, the district court admitted into the record Plaintiffs' evidence, which showed that the alleged illegal practices continue post-S.B. 6. The case the district court relied on in finding the case moot, *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978), is distinguishable. While *Pugh* also dealt with pretrial bail issues, the court held that "[t]he record before the Court contains only evidence of practices under criminal procedures which predate the adoption of the current Florida rule." *Id.* at 1058. The court concluded that it "determined that on its face [the newly enacted statute] does not suffer such infirmity that its constitutional application is precluded." *Id.* It further expressed that any constitutional challenge to the newly enacted statute should wait until "presentation of a proper record reflecting application by the courts of the State of Florida." *Id.* 1058-59

Here, Plaintiffs provided evidence that the complained about practices persist despite S.B. 6's enactment. Plaintiffs describe post-S.B. 6 video evidence where the alleged unconstitutional practices continue. This case is not automatically mooted simply because S.B. 6 addresses bail practices. Plaintiffs allege that there remain continuing constitutional violations and that S.B. 6 does not provide the relief Plaintiffs requested in the prayer for relief in their complaint. Six months of post-S.B. 6 video evidence does not prevent the court from "meaningfully … assess[ing] the issues in this appeal on the present record." *Fusari v. Steinberg*, 419 U.S. 379, 387 (1975).

I would find that the case is not moot. Therefore, I respectfully dissent.