IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

DAVID DIXON, et al.	)	
	)	
Plaintiffs,	)	
	)	
V.	)	
	)	
CITY OF ST. LOUIS, et al.,	)	Cause No. 4:19-cv-00112
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT JUDGES' MOTION TO DISMISS

INTRODUCTION

In St. Louis, people who cannot afford to pay money bail imposed after they are arrested are incarcerated without an opportunity to contest their detention for four to five weeks. Sheriff's deputies routinely instruct recently arrested people not to speak at their first appearance in court, when the amount of money bail is announced.[1] Once the hearings begin, Judges refuse to entertain evidence or argument concerning bail, instead instructing anyone who attempts to speak that they must wait until not-yet-appointed counsel files a motion. As a result, these individuals are denied any meaningful opportunity to address pretrial release conditions, and financial conditions of release are set by judges without individualized hearings concerning the person's financial or social circumstances. The poor remain detained while those wealthy enough to pay go free.

At the time this suit was filed, the named Plaintiffs were detained and faced weeks of pretrial detention, without a hearing, because of unaffordable money bail that had been imposed as a condition of pretrial release in their cases. They initiated this class action under 42 U.S.C. § 1983 on behalf of themselves and others similarly situated to seek, among other relief, an order declaring that Defendant Judges violate their constitutional rights by requiring unaffordable money bail that results in de facto detention without making an inquiry into ability to pay, without providing a prompt adversarial hearing with the required procedural safeguards, and without making any finding that detention is necessary to serve a compelling government interest.

In their motion to dismiss, the Judges do not contend that these flagrantly unconstitutional practices are lawful. Instead, they claim that this Court lacks authority to issue declaratory relief against a judicial officer; that this Court must abstain from hearing the case under *Younger v. Harris*, 401 U.S. 37 (1971); and that the requested relief requires dismissal because it is

[1] The facts discussed in this brief are taken from Plaintiffs' complaint, which must be accepted as true at this stage. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

"intrusive." These arguments are meritless.

First, this Court possesses clear authority to enter a declaratory judgment against judicial officers. The plain language of 42 U.S.C. § 1983 explicitly contemplates such relief.

Second, *Younger* is an exceptional doctrine that requires abstention only when federal relief would interfere with a state prosecution *and* the plaintiff has an opportunity to raise the federal claim in the state proceeding. Neither requirement is met here. Plaintiffs challenge only pretrial detention practices, which, as the Supreme Court has held, are collateral to the merits of a criminal prosecution and thus outside of *Younger*'s scope. *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975). Separately, Plaintiffs lack an opportunity to be heard until weeks of incarceration have passed. By then, a "bond reduction" hearing cannot remedy the deprivation of liberty, separation from family, loss of employment, and numerous other harms that have *already occurred*.

Third, the Court need not abstain in this case as the relief requested would not require "intrusive federal court interference with State prosecutions generally." ECF 50 at 9. Declaratory relief here will cause no interference with "prosecutions" at all. The Judges' reliance on *O'Shea v. Littleton*, 414 U.S. 488 (1974), is misplaced. *O'Shea*'s concern about federal courts engaging in "an ongoing federal audit of state criminal proceedings," *id.* at 500, does not preclude courts from remedying constitutional violations caused by state and local bail practices.

Numerous courts—including three federal courts of appeals within the past 14 months—have rejected the applicability of *Younger* abstention to challenges to pretrial detention practices. *See, e.g.*, *Gerstein*, 420 U.S. at 108 n.9; *ODonnell v. Harris County*, 892 F.3d 147, 156 (5th Cir. 2018); *Walker v. City of Calhoun*, 901 F.3d 1245, 1254 (11th Cir. 2018); *Arevalo v. Hennessy*, 882 F.3d 763, 766 (9th Cir. 2018); *Hunt v. Roth*, 648 F.2d 1148, 1154 (8th Cir. 1981), *vacated as moot sub nom, Murphy v. Hunt*, 455 U.S. 478 (1982); *Fernandez v. Trias Monge*, 586 F.2d 848, 851 (1st Cir. 1978); *Caliste v. Cantrell*, No. CV 17-6197, 2017 WL 3686579, at *3–4 (E.D. La. Aug.

25, 2017); *Little v. Frederick*, No. 6:17-CV-00724, 2017 WL 8161160, at *4 (W.D. La. Dec. 11, 2017), *report and recommendation adopted in relevant part, rejected in part*, No. 6:17-CV-00724, 2018 WL 1188077 (W.D. La. Mar. 6, 2018). The Judges give no reason to depart from these decisions. The motion to dismiss should be denied.

ARGUMENT

I. Declaratory Relief Is Available Against the Judges Under 42 U.S.C. § 1983

In 1996, the Federal Courts Improvement Act (FCIA) was enacted to confer partial statutory immunity on judicial officers from § 1983 cases seeking injunctive relief. To that end, the FCIA amended § 1983 to provide that, "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." The Judges argue that courts have "extended this immunity" from *injunctive relief* to also reach "requests for *declaratory relief*." ECF 50 at 4 (emphasis added). This argument is plainly wrong.

The Judges' argument would render the FCIA nonsensical. The plain language of § 1983 allows for injunctive relief when declaratory relief is "unavailable." If the Judges were correct that declaratory relief is *never* available, then injunctive relief would *always* be an option, undermining the core purpose of the FCIA. Likewise, by allowing a federal court to issue injunctive relief against a judge when a "declaratory decree [i]s violated," § 1983 explicitly contemplates that a court may order declaratory relief against a judge. The Judges' argument reads that language out of the statute. Consistent with this statutory scheme, numerous courts have found that declaratory relief may be awarded against judicial defendants. *See, e.g.*, *Ward v. City of Norwalk*, 640 F. App'x 462, 467 (6th Cir. 2016) ("[T]he plain language of § 1983 contemplates a declaratory judgment

against judicial officers.").[2] None of the cases the Judges cite are binding, and none of them counsel a different result.[3]

The Judges, conceding that "some courts have found" declaratory relief to be available, also advance the narrower claim that this Court cannot issue declaratory relief against a judicial officer when there is an adequate remedy at law available. ECF 50 at 5–6. This argument is inconsistent with *Younger* and would require the Court to create a novel rule that, where the defendant is a judicial officer, dismissal requires nothing more than an adequate remedy at a law. There is no support for this invented standard. The case on which the Judges rely, *Sterling v. Calvin*, 874 F.2d 571 (8th Cir. 1989) (per curiam), merely "observe[d]" in dicta the rule that "suits for *injuncti[ve]* . . . relief [are] not appropriate where an adequate remedy under state law exists."[4] *Id.* at 572 (emphasis added). But the Court need not dwell on this argument. As explained below, Plaintiffs lack an adequate remedy at law.

---

[2] *See also, e.g.*, *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 320 (E.D. La. 2018); *Cain v. City of New Orleans*, 281 F. Supp. 3d 624, 652 (E.D. La. 2017); *VanHorn v. Nebraska State Racing Comm'n*, No. 4:03CV3336, 2006 WL 3408055, at *1 (D. Neb. Oct. 16, 2006); *Tesmer v. Granholm*, 114 F. Supp. 2d 603, 605 (E.D. Mich. 2000).

[3] Two of the cases considered only an argument that injunctive relief was available and did not distinguish declaratory relief. *See Hamilton v. City of Hayti, Missouri*, No. 1:16-CV-54R-LW, 2017 WL 836558, at *4 (E.D. Mo. Mar. 2, 2017); *Dancer v. Haltom*, No. 4:10-CV-4118, 2010 WL 5071239, at *4 (W.D. Ark. Nov. 16, 2010). Two of the cases—both brought by *pro se* plaintiffs—dismissed claims for declaratory relief without any explanation of how the language of the FCIA bars such relief. *See Guerin v. Higgins*, 8 F. App'x 31, 32 (2d Cir. 2001); *Taylor v. Smithart*, No. 2:10-CV-1057-ID, 2011 WL 1188553, at *1 (M.D. Ala. Jan. 25, 2011). And the final district court decision on which the Judges' rely is mistaken on its face as to the state of the law: the court cited *Pulliam v. Allen*, 466 U.S. 522 (1984)—by then abrogated by the FCIA—for the proposition that "judicial immunity does *not* bar prospective injunctive relief" but nonetheless faulted the plaintiff for not "specifically assert[ing]" her request for declaratory relief "overc[a]me" the defendant's claim of immunity. *Howell v. Hofbauer*, 123 F. Supp. 2d 1178, 1185–86 (N.D. Iowa 2000) (emphasis added). None of this requires a different result here.

[4] *Sterling* cited *Bonner v. Circuit Court of City of St. Louis, Mo.*, 526 F.2d 1331 (8th Cir. 1975), which did discuss remedies at law, but only in the context of applying *Younger*, the same standard Plaintiffs address below. *Id.* at 1337 (citing *Samuels v. Mackell*, 401 U.S. 66 (1971)).

II. The *Younger* Abstention Doctrine Does Not Apply to Plaintiffs' Claims

Federal courts have a "virtually unflagging" "obligation" to adjudicate cases within their jurisdiction. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (citation omitted). Although *Younger* abstention is an exception to this rule, the Supreme Court has emphasized that it is a narrow one. To ensure the doctrine is not extended beyond its purpose, the Court's most recent decision on *Younger* clarified that courts may abstain in only three discrete circumstances: when a federal court order would interfere with (1) criminal prosecutions, (2) civil enforcement proceedings, or (3) "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 78 (citation omitted). Even then, three "*additional* factors" must exist for abstention to be appropriate. *Id.* at 81. There must be "(1) an ongoing state judicial proceeding, which (2) implicates important state interests, and (3) provides an adequate opportunity to raise federal challenges." *Id.* (citation and alterations omitted). Application of these principles demonstrates that the Judges' arguments for abstention lack merit.

A. The Challenged Pretrial Detention Practices Do Not Fall Into Any of the Three Scenarios To Which *Younger* May Apply

Challenges to pretrial detention practices are collateral to the merits of a state criminal prosecution and therefore do not fit within any of the three discrete circumstances to which *Younger* may be applied. The Supreme Court's decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975)—a case that presented facts materially indistinguishable from those here—is dispositive on this point. In *Gerstein*, persons detained in Florida after warrantless arrests were held without an opportunity to "obtain[] a judicial determination of probable cause" for weeks, either until they could invoke a "special statute allowing a preliminary hearing after 30 days" or they had an arraignment, which "was often delayed a month or more after arrest." *Id.* at 106. The plaintiffs filed suit, seeking a prompt determination of probable cause by a neutral judicial decisionmaker, *id.* at 106–07, and the Supreme Court held that *Younger* abstention posed no obstacle to their case:

> 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 (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 (emphasis added). The Supreme Court later reaffirmed that in *Gerstein*, "the action was not barred by *Younger* because the injunction 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) (emphasis added). In short, where the declaratory or injunctive relief would not "halt or substantially interfere with" the actual prosecution, *Younger* is not applicable. *Conover v. Montemuro*, 477 F.2d 1073, 1080 (3d Cir. 1972) (cited with approval in *Gerstein*, 420 U.S. at 108 n.9). And a pretrial release hearing, even more than a probable cause hearing, does not halt or in any way prevent individuals' continued criminal prosecution.

Applying *Gerstein* here compels the same result, as numerous courts confronting challenges to pretrial detention practices have held. In *Arevalo v. Hennessy*, the Ninth Circuit, citing *Gerstein*, explained that "[r]egardless of how the bail issue is resolved, the prosecution will move forward unimpeded." 882 F.3d at 766. The court concluded: "[B]ecause the question of whether the petitioner is entitled to a constitutional bail hearing *is separate from the state prosecution*, and would not interfere with those proceedings, *Younger* abstention is not appropriate." *Id.* (emphasis added); *accord Hunt*, 648 F.2d at 1154 (rejecting abstention because "[a] declaratory judgment that the State cannot decree per se that certain offenses are non-bailable before trial does not interfere with the state's orderly criminal prosecution"); *Walker*, 901 F.3d at 1255 ("[A]s in *Gerstein*, Walker merely asks for a prompt pretrial determination of a distinct issue, which will not interfere with subsequent prosecution."); *Fernandez*, 586 F.2d at 852 (rejecting abstention because "that collateral right" to "not . . . be detained prior to trial without a due process hearing" was "neither a defense at trial nor grounds for vacation upon conviction"). Because the

issue of bail is collateral to a criminal prosecution, none of the limited bases for applying *Younger* are applicable in this case.

B. Plaintiffs Lack Any Adequate Remedy at Law

Abstention under *Younger* is also inappropriate here because Plaintiffs do not have an adequate and "timely" opportunity to seek a remedy for constitutional harms. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). Plaintiffs' complaint alleges that Plaintiffs have no opportunity to contest the conditions for their release at the initial appearance. As a result, individuals who are poor must endure four to five *weeks* of detention before counsel is appointed and files a motion on their behalf. Only then do the Judges consider a "bond reduction" motion.

Where, as here, a plaintiff is already enduring irreparable harm, *Younger* does not require abstention merely because an eventual hearing may result in ending *further* harm. *Gerstein* illustrates this principle. The plaintiffs in *Gerstein* were not detained until trial without any opportunity to be heard. Rather, that opportunity was delayed: plaintiffs had to wait 30 days for a special preliminary hearing or at least a month for an arraignment. 420 U.S. at 106. Although Florida law "seemed to authorize" earlier "preliminary hearings to test probable cause," in practice, Florida courts had declined to provide the plaintiffs such hearings. *Id.* at 105–06. The plaintiffs were thus left without any realistic opportunity to challenge their detention for at least a month, at which point a ruling could not remedy the incarceration they had suffered already. *Id.* at 108 n.9. Under those circumstances, *Younger* abstention was improper. *Id.*

The Supreme Court's earlier decision in *Gibson v. Berryhill*, 411 U.S. 564 (1973), applied similar reasoning. There, optometrists sought to enjoin state proceedings that had been initiated to revoke their licenses on the ground that the state board that presided over the proceedings was unconstitutionally biased. *Id.* at 569–70. Although de novo judicial review would be available on appeal, the Supreme Court still rejected application of *Younger* because abstention requires "the

opportunity to raise and have *timely* decided by a competent state tribunal the federal issues involved." 411 U.S. at 577 (emphasis added). Under the circumstances in *Gibson*, where there was effectively no *initial* hearing because of bias, the requisite "timely" hearing was missing. Appellate review, the Court explained, was not sufficiently timely because it could not undo the "irreparable damage" of a temporary loss of license and attendant negative publicity that the plaintiffs would have been forced to endure between the close of the board proceedings and a reversal (if obtained) on appeal. *Id.* at 577 & n.16.

Gerstein and *Gibson* are indistinguishable from this case. Plaintiffs here challenge their weeks-long incarceration without a bail hearing. *See* Compl. ¶¶ 3, 29. The first appearances overseen by the Judges last 1 to 2 minutes—after Sheriff's deputies have already instructed detained individuals not to speak—and include no individualized assessment of a detainee's ability to meet the predetermined financial conditions of release. *Id.* ¶ 27. Indeed, the Judges have eliminated any opportunity to be heard by "repeatedly [telling] individuals that if they would like to challenge the conditions set, they must wait for an attorney to file a motion"—which takes four to five weeks—and they "cannot do so themselves." *Id.* ¶¶ 3, 28–29; *see also id.* ¶¶ 15–18 (describing this practice as applied to the named Plaintiffs, two of whom attempted to speak). This first appearance is therefore no different than the immediate hearing that "seemed to [be] authorize[d]" in *Gerstein*, but had been rendered null by Florida courts, 420 U.S. at 105, or the board proceeding that was rendered meaningless by bias in *Gibson*.

Further, the fact that a "bond reduction" hearing may be held after four to five weeks of detention is insufficient, as a matter of law, to provide an adequate state court remedy to constitutional violations already suffered by Plaintiffs. The Judges' bail practices lack any individualized determinations of ability to pay or whether alternatives to pretrial detention exist and, therefore, do not provide impoverished arrestees with any opportunity for release for more

than a month. As in *Gerstein*, abstention cannot be used to force impoverished individuals to endure the very same irreparable constitutional harm that they seek to prevent. Thus, even if this period of purely wealth-based detention only lasted a few days—as it did in the Fifth Circuit's recent decision concerning Harris County, *see ODonnell*, 892 F.3d at 154—a constitutional challenge to *that pre-hearing period of wealth-based detention* is, by definition, not subject to *Younger* abstention. St. Louis's delay of 28 to 35 days prior to any individualized bail hearing renders Plaintiffs' claims on the merits even stronger than in Harris County. Even without such an extreme delay, there is widespread federal court consensus on the inapplicability of *Younger* to such claims. *See also Pugh v. Rainwater*, 483 F.2d 778, 782 (5th Cir. 1973), *aff'd in relevant part, rev'd in part sub nom Gerstein* v. Pugh, 420 U.S. 103 (1975) (explaining that, because the challenged period of pre-hearing detention "would have ended" by the time plaintiffs had an opportunity to be heard, *Younger* did not apply).[5]

Moore v. Sims, 442 U.S. 415 (1979), is consistent with the rule that *Younger* does not apply to a challenge to the period of detention prior to the first opportunity to be heard. In *Moore*, the plaintiffs challenged the Texas statutory scheme that governed removing children from their parents in situations involving abuse. The plaintiffs argued that *Younger* should not apply because they had been separated from their children for 42 days without a hearing. *Id.* at 431. Although the Supreme Court found abstention appropriate, it did so based on two important factors not present here. First, the 42-day delay resulted not from the lack of an opportunity to be heard, but from the plaintiff parents' failure to pursue that opportunity, including by attempting to avoid service. *See id.* at 432, 434. The Supreme Court expressly cautioned that the question would have been "much

[5] *See also, e.g.*, *Fernandez*, 586 F.2d at 853 ("[P]ost-trial review is small comfort to the juvenile who claims to have been detained for several months prior to trial without due process."); *Little*, 2017 WL 8161160, at *4 (rejecting abstention in challenge to pretrial detention because of the delay in ruling on a motion to reduce bail); *Caliste*, 2017 WL 3686579, at *4 ("[T]he delay required by these appeals is problematic because the damage is done by the time the appeal is perfected.").

closer" if the parents had "diligently" sought a hearing but had been denied. *Id.* at 432. Plaintiffs here are not delinquent in pursuing opportunities to be heard; instead, they have expressly been told not to speak and that they cannot pursue any remedies before counsel is appointed weeks later.

The second critical difference in *Moore* is that, by the time the injunction issued, the children already had been returned to their parents and the case was not a class action such that an injunction could provide relief to a constantly transitory class of others facing the same imminent, irreparable harm, as was the case in *Gerstein*. *Id.* at 431, 433. As a result, the federal court injunction under consideration did not operate to provide a hearing in the face of ongoing irreparable harm, but interfered with ongoing litigation about the children's future status. *Id.* at 434. It was thus akin to an injunction against an ongoing criminal prosecution. By contrast, class members here (like the named Plaintiffs before a temporary restraining order was sought) remain subject, or will be subjected, to unlawful incarceration without an opportunity to be heard.

Finally, contrary to the Judges' suggestion, the availability of a petition for a remedial writ in a higher court under Rule 33.09 does not provide an adequate opportunity to be heard.

First, the possibility of obtaining a remedial writ from a higher court cannot cure the irreparable harm suffered because of the failure to hold a constitutionally adequate bail hearing in the first instance. *Gibson v. Berryhill* makes clear that a plaintiff need not endure the delay of seeking relief from a higher court in circumstances where there is no opportunity at all to be heard in the court imposing the unlawful order and the harm from delay is irreparable. Here, there is more than a *de facto* lack of opportunity to be heard because of a biased adjudicator, as in *Gibson*; there is no opportunity to be heard at all because the Judges set conditions of release unilaterally and "cut . . . off" any attempts to raise a claim. *See, e.g.*, Compl. ¶¶ 18, 23, 28. To force Plaintiffs to await a ruling on a petition for a remedial writ—which the Judges do not even suggest would be prompt—would force them to endure the exact harm they seek to challenge.

Second, the Judges' argument ignores that the Complaint alleges that the Judges instruct that any person who "would like to challenge the conditions set, . . . must wait for an attorney to file a motion *and cannot do so themselves*." Compl. ¶ 28 (emphasis added). Thus, even assuming an indigent *pro se* prisoner at a jail facility could figure out that an original remedial writs exist and how to petition for one, Plaintiffs would be forced to disobey an instruction of the Judges if they are to take advantage of Rule 33.09. Plaintiffs have thus satisfied their burden of demonstrating they lack an opportunity to be heard for the period of detention they seek to challenge. *See, e.g.*, *Gerstein*, 420 U.S. at 105–06, 108 n.9 (theoretical statutory opportunity to be heard immediately inadequate because judges had foreclosed it in practice); *cf. ODonnell*, 892 F.3d at 153–54, 156 (finding *Younger* inapplicable when plaintiffs had been told "not to speak" at hearings where bail, in theory, could have been raised); *Simes v. Huckabee*, 354 F.3d 823, 829 (8th Cir. 2004) ("[F]ederal plaintiffs cannot be said to have had a reasonable opportunity to raise their federal claims in state court where the state court declines to address those claims . . . .").

Third, a petition for a remedial writ under Rule 33.09 cannot constitute the "adequate opportunity to be heard" necessary to satisfy *Younger* because such petitions are not a part of the "proceeding" that Plaintiffs challenge. The relevant question for *Younger* is whether there is an adequate opportunity to raise the federal constitutional challenge in the "ongoing state proceeding," *Barzilay v. Barzilay*, 536 F.3d 844, 850 (8th Cir. 2008), not in a *separate* civil writ proceeding that the plaintiff could initiate. Were it otherwise, the rule that § 1983 has no state exhaustion requirement, *see, e.g.*, *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982), effectively would be overturned, *see Fernandez*, 586 F.2d at 852. The Judges cite no Supreme Court case applying *Younger* to require a plaintiff to initiate a separate state court civil action, though that is effectively what the Judges urge here.

Rule 33.09 requires compliance with Rule 84.24. That rule, in turn, requires following

Rules 91 through 98, defining available writs, all of which must be pursued through separately filed "civil actions." *See* Mo. Sup. Ct. R. 91.01(c), 94.02, 97.02. They are thus not part of the "ongoing proceeding" and cannot satisfy *Younger*.[6] *See, e.g.*, *Fernandez*, 586 F.2d at 852 (rejecting that *Younger* requires initiating a "completely separate . . . proceeding outside the four corners of the pending state prosecution"). Accordingly, requiring Plaintiffs to rely on Rule 33.09 petitions would transform *Younger* from a doctrine of comity to a particular existing state court proceeding to a doctrine of exhaustion.

Additionally, the nature of Rule 33.09 petitions disproves the Judges' claim that the decisions in *ODonnell* and *Walker* are distinguishable. The Judges argue that those decisions are "factually" inapposite because, unlike Texas and Georgia, "Missouri allows the accused to seek review of his or her conditions of release" via Rule 33.09. ECF 50 at 12–13. But there is no "factual" difference at all: Georgia and Texas also permit challenges to conditions of release through separate habeas proceedings. *See, e.g.*, *Rainwater v. Langley*, 587 S.E.2d 18, 19 (Ga. 2003); *Ex parte Marcus Hanson*, 2019 WL 1065897, at *1 (Tex. Ct. App. March 7, 2019). Indeed, Harris County made this argument to no avail on appeal. *See Br. of Appellants, ODonnell v. Harris*

[6] *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018), does not undermine this conclusion. There, the Eighth Circuit, distinguishing the pretrial detention context at issue in *Gerstein*, noted that a mandamus petition may provide an adequate remedy in a different context: child custody proceedings in South Dakota. *Id.* at 613. But the court did not consider whether mandamus proceedings were separate from, or a part of, the custody proceedings at issue in the case, and the parties did not raise the relevance of that fact. The determination that mandamus relief could, in theory, provide an adequate opportunity to be heard is therefore not binding here, where Plaintiffs are arguing that original remedial writs are heard in separate proceedings in Missouri and requiring their use would run counter to Supreme Court precedent on exhaustion. *See, e.g.*, *United States v. Green*, 691 F.3d 960, 964 (8th Cir. 2012) ("None of the decisions that applied plain error review considered the effect of the Rule 12 waiver provision, and a prior panel's implicit resolution of an issue that was not raised or discussed is not binding precedent."). Additionally, the availability of mandamus was not necessary to the holding in *Oglala Sioux*; the court also found an adequate opportunity to be heard because the custody proceedings took place in courts where the plaintiffs could raise their claims and an interlocutory appeal could be taken from the custody proceeding. 904 F.3d at 613. This is not true of the first appearances in this case.

County, 17-2033, 2017 WL 2734151, at *21 (5th Cir.).[7]

C. Abstention Is Not Appropriate Here Because the Relief Plaintiffs Request Will Not Interfere with State Prosecutions

The Judges also invoke *O'Shea v. Littleton*, 414 U.S. 488 (1974), to argue that this Court should abstain under *Younger* because the relief requested would "require intrusive federal court interference with state prosecutions." ECF 50 at 9. As argued above, and as many courts have held, Plaintiffs' request for relief related to pretrial detention will not intrude upon any "prosecutions" at all, let alone so much that dismissal is required. *See supra* at 6. Further, the Judges' argument rests on a misreading of *O'Shea*. The Court in *O'Shea* cited and applied *Younger*: it did not overrule the three-part test for *Younger* abstention, described above, that has been repeatedly reaffirmed both before and after *O'Shea*. If the *Younger* factors are not met, courts should not abstain.

In any event, contrary to the Judges' assertion, *O'Shea* concerned vastly different facts and legal theories that have no bearing on the narrow challenge that Plaintiffs advance in this case. In *O'Shea*, the plaintiffs challenged every aspect of an entire jurisdiction's criminal justice system—from bail to selective prosecution to jury fees to sentencing—arguing that the entire legal system was tainted by racial bias, among other constitutional violations. *Id.* at 491–92. As a result, the relief requested would have required the federal court to supervise the daily administration of almost every aspect of the criminal proceedings in the state courts and to review each case for potential racial bias. *Id.* at 501–02.

By contrast, the relief Plaintiffs seek here is limited to procedural safeguards accompanied

[7] The Judges claim that "[t]his case is like *Wallace* [*v. Kern*, 520 F.2d 400 (2d Cir. 1975)]" also does not support abstention. ECF 50 at 13. *Wallace* relied on the availability of habeas relief to conclude that abstention was appropriate, *id.* at 407, but the Second Circuit has since recognized this holding "cannot be squared with more recent Supreme Court authority." *DeSario v. Thomas*, 139 F.3d 80, 86 n.2 (2d Cir. 1998) *judgment vacated on other grounds sub nom. Slekis v. Thomas*, 525 U.S. 1098 (1999); *see also Fernandez*, 586 F.2d at 853 (rejecting *Wallace* as unpersuasive).

by substantive findings for pretrial detention practices. In *Gerstein*, the Supreme Court endorsed relief requiring a "fair and reliable determination of probable cause" made "promptly after arrest" as a "condition for any significant pretrial restraint." 420 U.S. at 125. This articulation of the basic substantive and procedural requirements prior to de facto pretrial detention is effectively what Plaintiffs here request: promptly provided procedures and a determination that pretrial detention is necessary as a "condition for . . . pretrial restraint."

The Judges are incorrect that *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018), "controls" this case. ECF 50 at 15. *Oglala Sioux* concerned a challenge to the procedures applied at a hearing for parents whose children had been taken from their custody. The Eighth Circuit held first that there was "no meaningful distinction between the custody proceedings in *Moore*, and the temporary custody proceedings at issue in South Dakota" and thus, as in *Moore*, abstention was appropriate. 904 F.3d at 610. It then relied on *O'Shea* to reject the plaintiffs' attempt to avoid abstention by arguing that the requested relief would not interfere with ongoing state proceedings because it would apply only prospectively. *Id.* at 611. Nothing in *Oglala Sioux*, *Moore*, or *O'Shea*, undermines the holding of *Gerstein*, which is directly applicable here. Indeed, both *Moore* and *Oglala Sioux* distinguished the challenge to temporary custody in those cases from the challenge to pretrial restraint in *Gerstein*. *See Moore*, 442 U.S. at 432 (injunction sought in *Gerstein* was not barred by *Younger* because it "was not addressed to a state proceeding and therefore would not interfere with the criminal prosecutions themselves"); *Oglala Sioux*, 904 F.3d at 612–13 (same). Moreover, as in *Gerstein*, plaintiffs here, unlike those in *Moore* and *Oglala Sioux*, have no opportunity to press their claim in the state courts.

Moreover, two recent courts of appeals decisions concerning relief substantially similar to what Plaintiffs seek here further confirm that *O'Shea* does not warrant abstention. In *ODonnell v. Harris County*, the Fifth Circuit held that practices involving unaffordable money bail were

unconstitutional and explained that an appropriate injunction may include, among other relief, a determination of an arrested individual's ability to pay money bail, a hearing within 48 hours if the person cannot afford such bail, and "factual findings on the record" if a judge decides to impose an amount of bail that will result in detention. 892 F.3d at 164–65. The Fifth Circuit rebuffed the defendants' argument that *O'Shea* applied, finding that the relief sought would only "impose nondiscretionary procedural safeguard[s]" that would not "require federal intrusion into pretrial decisions on a case-by-case basis." 892 F.2d at 156–57. Addressing a similar challenge in *Walker v. City of Calhoun*, the Eleventh Circuit rejected that *O'Shea* required dismissal because the plaintiff "merely ask[ed] for a prompt pretrial determination of a distinct issue [namely, ability to pay]," not "the sort of pervasive federal court supervision of State criminal proceedings that was at issue in *O'Shea*." 901 F.3d at 1255.

The Judges attempt to distinguish *ODonnell* and *Walker* on the ground that Plaintiffs here "ask for much more," specifically, "substantive findings" in addition to procedures. ECF 50 at 14. Their argument is frivolous. *ODonnell* endorsed relief that would include "factual findings" when detention was required, and *Walker* found no issue with a prompt "determination" of ability to pay. This is consistent with *Gerstein*'s approval of relief requiring a substantive "determination"—a finding—of probable cause. Likewise, the Judges are incorrect to assert that relief that includes substantive findings will lead this Court to review whether pretrial detention is "warranted" in any given case or "why" a less restrictive alternative will not suffice. ECF 50 at 10. The relief Plaintiffs request would simply require the Judges to hold hearings and make certain findings before imposing unaffordable money bail. As in *ODonnell* and *Walker*—and *Gerstein* before them—the relief requested does not trigger abstention.

CONCLUSION

For the foregoing reasons, Plaintiffs request the Court deny the Judges' motion.

Dated: March 22, 2019

Respectfully submitted,

/s/ *Seth Wayne*
Institute for Constitutional Advocacy and Protection
Seth Wayne (D.C. Bar No. 888273445,
Federal Bar No. 888273445) (admitted *pro hac vice*)
Robert Friedman (D.C. Bar No.1046738,
Federal Bar No. 5240296NY) (admitted *pro hac vice*)
Institute For Constitutional
Advocacy and Protection
Georgetown University Law Center
600 New Jersey Ave. NW
Washington, D.C. 20001
Tel: 202-662-9042
sw1098@georgetown.edu
rdf34@georgetown.edu

ArchCity Defenders, Inc.
/s/ *Blake A. Strode*
Blake A. Strode (MBE #68422MO)
Michael-John Voss (MBE #61742MO)
Jacqueline Kutnik-Bauder (MBE # 45014MO)
Sima Atri (MBE #70489MO)
John M. Waldron (MBE #70401MO)
440 N. 4th Street, Suite 390
Saint Louis, MO 63102
855-724-2489
314-925-1307 (fax)
bstrode@archcitydefenders.org
mjvoss@archcitydefenders.org
jkutnikbauder@archcitydefenders.org
satri@archcitydefenders.org
jwaldron@archcitydefenders.org

Advancement Project
/s/ *Thomas B. Harvey*
Thomas B. Harvey (MBE #61734MO)
1220 L Street, N.W., Suite 850
Washington, DC 20005
Tel: (202) 728-9557
Fax: (202) 728-9558
tharvey@advancementproject.org

Civil Rights Corps
/s/ *Alec Karakatsanis*
Alec Karakatsanis

D.C. Bar No. 999294
(Pro Hac Vice Application forthcoming)
Civil Rights Corps
910 17th Street NW, Suite 200
Washington, DC 20006
Tel: 202-599-0953
Fax: 202-609-8030
alec@civilrightscorps.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March, 2019, I electronically filed the foregoing with the clerk of the court for the U.S. District Court, Eastern District of Missouri, using the electronic case filing system of the Court.

By: /s/ Seth Wayne