UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

David Dixon, et al.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	No. 19-2251
v.	)	No. 19-2254
	)	(consolidated)
City of St. Louis, et al.,	)	
	)	
Defendants-Appellants.	)	

APPELLEES' CONSOLIDATED RESPONSE IN OPPOSITION TO APPELLANTS' MOTIONS TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION

Appellees initiated this class action to challenge Defendant-Appellant Judges' and Defendant-Appellant Commissioner of Corrections Dale Glass's practice of detaining people in St. Louis City jails solely because they are too poor to afford money bail imposed as a condition of pretrial release.

The district court found that Appellants detain arrested individuals solely because they cannot make a monetary payment and that they enforce this pretrial detention without the substantive findings or procedural safeguards that federal constitutional precedent requires. They provide no notice or opportunity for arrestees to be heard on their pretrial release for *weeks* after they are detained, and they make no findings that an individual is a flight risk or danger to the public or that pretrial detention serves any government interest. Because these flagrant constitutional violations cause irreparable harm to hundreds of people every day, the district court issued a tailored preliminary injunction that enjoins Appellant Glass from detaining arrestees solely based on inability to pay unless the person has been afforded a timely hearing and the government has made a finding that pretrial detention is necessary to protect public safety or avoid flight risk. The district court then modified its order, with Appellees' consent, to provide Appellant Glass with additional time to work with Appellant Judges to provide hearings for class members already in his custody.

On appeal, Appellant Glass does not dispute that he is currently detaining hundreds of presumptively innocent individuals pretrial in violation of their

constitutional rights. Nonetheless, Appellants seek a stay of the injunction pending appeal. Their motions lack merit.

Appellants do not assert that they are likely to succeed in convincing this Court that their conduct is constitutional. Instead, Appellants argue that the district court should have abstained under *Younger v. Harris*, and that Appellees' claims must be pursued through a petition for a writ of habeas corpus, not the present § 1983 action. To the contrary, as the First, Fifth, Ninth, and Eleventh Circuits have held, *Younger* abstention does not apply to constitutional challenges to pretrial detention practices that are collateral to (and therefore do not interfere with) the merits of a prosecution or when, as here, class members must endure weeks of the very unconstitutional incarceration they seek to challenge before a state court will entertain their claims. Appellants' argument to the contrary depends on contorting this Court's decision in *Oglala Sioux v. Fleming*, 904 F.3d 603 (8th Cir. 2018)—a case about child custody—to convince this Court to create a circuit split. They are unlikely to succeed in that endeavor. Likewise, numerous courts have held that a class action lawsuit that seeks to ensure certain findings and procedures for pretrial detention hearings, but will not necessarily result in anyone's release, is cognizable under § 1983. Appellants are equally unlikely to prevail in persuading this Court to be the first to hold otherwise.

Appellants' arguments about irreparable harm and the public interest are also weak, especially when balanced with the continued unconstitutional jailing of hundreds of class members who suffer from lost employment, separation from their children and

families, lack of medical and mental health care, increased prospects for recidivism, and other harmful effects. Although Appellants suggest that dangerous criminals could be released, Appellants would release these same people under the current system if any of them could afford to purchase their freedom. As the district court observed, Appellants fail to acknowledge that the district court's order *permits* Appellant Glass to detain *anyone* found to be a danger to the public or a flight risk after an appropriate hearing. It is the system that Appellees challenge—in which people are released or detained based on the vicissitudes of access to cash without any individualized notice, hearing, evidence, argument, or findings—that risks public safety.

On this record, the public clearly benefits from providing those arrested in St. Louis with procedures to ensure that they are not imprisoned before their trials—while presumed innocent—solely because they cannot afford money bail.

STATEMENT OF THE CASE

In the city of St. Louis, a judge of the 22nd Judicial Circuit determines the conditions of release—including any money bail—for recently arrested individuals prior to an initial appearance.[1] The duty judge makes this decision based on a recommendation from the City Bond Commissioner, who, in nearly every case, provides no information beyond the defendant's charges and prior criminal history.

[1] Depending on when the arrest takes place, this task is handled by the "duty judge"—a role all judges of the 22nd Judicial Circuit, including Defendant-Appellants here, fulfill on a rotating basis, *see* Local Rule 6.12—or the judges of Divisions 25 and 26, who are also named as Defendants. Doc. 59-1 ¶¶ 4-5.

Doc. 83-1 (Ex. B) ¶ 8; Doc. 83-2 (Ex. C). This is true despite the Bond Commissioner having an opportunity to interview anyone arrested without a warrant.[2] Doc. 83-1 (Ex. B) ¶ 6. The Bond Commissioner virtually always recommends secured money bail as a condition of release: in a random sample of 163 recommendations, the Bond Commissioner proposed cash bail in 162. Doc. 83-2 (Ex. C).

The judge announces each individual's conditions of release at an off-the-record "initial appearance." A review of a random sample of 222 cases revealed that, in 98 percent, the judge set conditions of release without any information about the individual's ability to pay money bail. Doc. 95 (Ex. A) ("Dist. Ct. Op.") at 27–28; Doc. 83-1 (Ex. B) ¶ 9. Nonetheless, the judges impose a secured financial condition of release in over 95 percent of cases.[3] They do so without making any inquiry into the individual's ability to pay. Doc. 93-2 (Ex. E) ¶ 5. Indeed, prior to the initial appearance, sheriff's deputies instruct the arrested person not to speak. *E.g.*, Doc. 41-10 (Ex. G) ¶ 5 ("The Sheriff told me, 'Do not talk to the judge.' They said, 'Nobody talk or ask questions. We are just trying to get it done.'"); Doc. 41-3 (Ex. H) ¶ 3. If the individual attempts to speak—including in an attempt to complain that the amount of money bail demanded

[2] Those arrested pursuant to a warrant have their bond fixed on the warrant prior to any opportunity for an interview and therefore also on the basis of no information related to ability to pay.

[3] Close the Workhouse Campaign, *Close the Workhouse* (2018) at 17, available at https://perma.cc/ZQ74-RK6V; *see also* Tr. (Ex. Z) 9:20-21, 11:16-18 (statements of counsel for Commissioner Glass representing that cash bond is "almost always" set, even for individuals charged with murder).

is too high—the judge cuts him off and instructs him that he must wait to have counsel to challenge the conditions of release. *E.g.*, Doc. 41-1 (Ex. I) ¶ 5; Doc. 41-2 (Ex. J) ¶ 3; Doc. 41-8 (Ex. K) ¶ 6; *see also* Doc. 93-2 (Ex. E) ¶ 5.

The entire initial appearance lasts less than two minutes, with no opportunity to be heard, no inquiry into ability to pay, no inquiry into a person's individual circumstances, no finding about whether the individual poses a danger to the public or a flight risk, and no finding about whether less restrictive alternative conditions are appropriate. *Id.*; Doc. 41-5 (Ex. L) ¶ 6; Doc. 93-2 (Ex. E) ¶ 6. In setting conditions of release in this manner, Appellant Judges defy the Missouri Rules, with which Appellant Judges repeatedly claim they should be presumed to comply. *See* Mo. Sup. Ct. R. 33.01(e) (providing that, in setting conditions of release, the court shall take into account not just the charges and criminal history, but also "the accused's family ties, employment, financial resources, character, mental condition").

If a person can afford to pay the amount required, he can be released immediately. Doc. 59-1 ¶ 8. If not, he remains jailed by Appellant Glass. *Id.* ¶ 9. Detained individuals must then wait until a public defender is appointed to challenge their conditions of release. This takes approximately four weeks on average.[4] Doc. 93-3 (Ex. L) ¶ 6.c. It then takes an average of six additional days for the court to set a hearing on conditions of release once the attorney makes a request. *Id.*

[4] For those who cannot afford their money bail but are also not eligible for a public defender, the process of securing an attorney can take even longer.

The district court found, and Appellants do not contest, that pretrial detention causes profound harm to detained individuals and the surrounding community. Dist. Ct. Op. at 30–31 & nn.15–17.

Pretrial detention inflicts economic instability by compromising the ability to maintain or secure employment. Class member Reginald Lee lost his job. Doc. 41-9 (Ex. F) ¶ 11; *see also, e.g.*, Doc. 41-10 (Ex. G) ¶ 2. Class member Khalil Roy missed a job interview. Doc. 41-7 (Ex. N) ¶ 9. This harms not only the detained individual, but also their families. Mr. Lee's inability to provide for his girlfriend and her two-year-old child resulted in their utilities being shut off. 41-9 (Ex. F) ¶ 10. Class member India Carter-Stewart's incarceration prevented her from recertifying her Supplemental Nutrition Assistance Program benefits, on which her children relied for food. Doc. 41-8 (Ex. K) ¶¶ 8-10. Other examples abound. *E.g.*, Doc. 41-10 (Ex. G) ¶¶ 2, 8; Doc. 41-12 (Ex. O) ¶ 8; Doc. 41-15 (Ex. Q) ¶¶ 4-5; Doc. 41-17 (Ex. R) ¶ 5.

Pretrial detention prevents individuals from fulfilling their roles as caregivers. Named Plaintiff Aaron Thurman, for example, had been responsible for caring for a sister with Stage IV breast cancer and served as her "full time nurse." Doc. 41-3 (Ex. H) ¶ 14. His incarceration prevented him from providing that assistance. Ms. Carter-Stewart's five-year-old son had to live with his grandmother, who depended on social security insurance and could not afford to care for him. Doc. 41-8 (Ex. K) ¶ 8. Class member Richard Robards was prevented from helping his pregnant girlfriend prepare for their first child. Doc. 41-3 (Ex. H) ¶¶ 11-2; Doc. 41-12 (Ex. O) ¶¶ 3-5; *see also, e.g.*,

Doc. 41-10 (Ex. G) ¶ 8; Doc. 41-13 (Ex. P) ¶¶ 3-5; Doc. 41-15 (Ex. Q) ¶¶ 7-10; Doc. 41-17 (Ex. R) ¶ 4; Doc. 41-21 (Ex. T) ¶¶ 7-8; Doc. 41-24 (Ex. V) ¶¶ 3-9; Doc. 41-25 (Ex. W) ¶¶ 3-4.

Pretrial detention endangers individuals' health. St. Louis's jails are in horrid condition, and people must endure leaking ceilings, rats, mice, and mold. Doc. 41-1 (Ex. I) ¶ 15; Doc. 41-4 (Ex. S) ¶ 10. Some cannot gain access to their medication. Doc. 41-22 (Ex. U) ¶¶ 3, 8; Doc. 41-25 (Ex. W) ¶ 8. And the conditions exacerbate mental health problems. Doc. 41-26 (Ex. X) ¶ 4.

Pretrial detention also contributes to long-term entanglement with the criminal legal system. Those detained have statistically worse outcomes at trial. *See, e.g.*, Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 786–87 (2017); Arpit Gupta, et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization* at 3 (2016), *available at* https://perma.cc/Q4DREVYD. And they are more likely to commit crime in the future. Gupta, *The Heavy Costs of High Bail* at 18–20; Dist. Ct. Op. at 32.

It was on this record that the district court issued its preliminary injunction. The injunction is directed only at Appellant Glass. Dist. Ct. Op. at 33-34. It prohibits him from enforcing a monetary condition of release that results in detention "solely by virtue of arrestee's inability to pay," unless that individual receives a timely hearing and a finding is made that no alternative conditions exist to protect the government's interest in protecting public safety or ensuring court appearance. *Id.* The district court's

order took effect immediately for people not yet arrested, but provided Appellant Glass with seven days (until June 18) to comply for people currently in detention solely because of inability to pay. *Id.* at 34. After Appellants complained to the district court that virtually everyone Appellant Glass detains pretrial in St. Louis's jails—totaling approximately 700 people—is detained because of inability to pay, Tr. (Ex. Z) 7:13–22, 11:16–18, the district court, with Appellee' consent, modified its injunction to provide Appellant Glass with more time to comply. Doc. 112 (Ex. Y). The district court granted a preliminary extension until June 21 and ordered Appellants to provide a request for a further extension by that date. *Id.* On June 20, 2019, this Court entered an administrative stay of the preliminary injunction.

Before the stay took effect, however, at least 171 hearings were held for detained individuals. Declaration of Alyxandra Haag (Ex. D) ¶ 7. The judges presiding over those hearings found that 52 individuals could not be released, determining that pretrial detention was necessary to protect public safety and flight risk. *Id.*

The remaining 119 people were released, 59 on their own recognizance, and 47 on money bail reduced to an affordable amount. *Id.* An additional 13 cases were dismissed *nolle prosequi*. *Id.* Taken together, total money bonds were reduced by $2,123,700. *Id.* ¶ 10.

The 119 people who were released had spent a combined ***11,147 days in jail prior to that point***. *Id.* ¶ 9. That is 30 years of unnecessary pretrial detention.

ARGUMENT

I. Appellees Are Likely to Succeed on the Merits

A. The District Court Correctly Exercised Its Jurisdiction

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. The Court's most recent decision on *Younger* "cautioned" that courts may abstain in only three discrete circumstances: when a federal court order would interfere with (1) "state 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 72, 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 Appellants' are unlikely to succeed on appeal. As the district court held, there is no interference with a criminal prosecution because bail proceedings are collateral to the merits of a criminal case. And there is no adequate opportunity for Appellees to present their claims in state court because any hearing, after weeks of incarceration, would come far too late to be timely for the purposes of challenging that same unlawful incarceration.

In reaching these conclusions, the district court joined the First, Fifth, Ninth, and Eleventh Circuits, as well as numerous other district courts, in rejecting Appellants' claim that *Younger* abstention precludes federal courts from entertaining challenges to pretrial detention practices like the ones maintained in St. Louis. *See 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); *Fernandez v. Trias Monge*, 586 F.2d 848, 851 (1st Cir. 1978); *see also Hunt v. Roth*, 648 F.2d 1148, 1154 (8th Cir. 1981), *vacated as moot sub nom., Murphy v. Hunt*, 455 U.S. 478 (1982); Dist. Ct. Op. at 18 n.5 (collecting district court cases). The district court's decision is likely to be upheld on appeal.

i. *Younger* Abstention Does Not Apply to Proceedings Collateral to the Merits of a Criminal Prosecution

The district court's conclusion that bail proceedings are collateral to the merits of a criminal prosecution and therefore do not interfere with the merits of a criminal prosecution follows directly from the Supreme Court's decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975). Dist. Ct. Op. at 17–18. In *Gerstein*, persons detained in Florida after warrantless arrests were jailed without an opportunity to "obtain[] a judicial determination of probable cause" for weeks, until either they could invoke a "special statute allowing a preliminary hearing after 30 days" or they were arraigned, which "was often delayed a month or more after arrest." *Id.* at 106. The plaintiffs filed suit to obtain

prompt determinations of probable cause by a neutral judicial decisionmaker. *Id.* at 106–07. The Supreme Court held that *Younger* 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).

As the district court reasoned, the challenge here, like that in *Gerstein*, concerns "a finite stage"—pretrial detention—"involving a discrete determination"—conditions of release—"separate from the merits of the criminal prosecution." Dist. Ct. Op. at 18. The district court's conclusion accords with that of multiple courts of appeals. *See Arevalo*, 882 F.3d at 766 ("[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."); *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"); *see also 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"); *cf. ODonnell*, 892 F.3d at 156 ("[T]he relief sought by ODonnell—i.e., improvement of pretrial procedures and practice—is not properly reviewed by criminal proceedings in state court.").

Appellants argue, however, that *Oglala* interpreted *Gerstein* as solely concerning the third prong of *Younger* abstention (the inadequacy of state court proceedings) and not the first prong (whether federal court intervention would interfere with an ongoing criminal prosecution). That argument can be easily rejected. For one thing, interpreting *Oglala* so broadly would create a circuit split with the First, Ninth, and Eleventh Circuits, all of which have read *Gerstein* as holding that *Younger* does not apply to challenges to collateral pretrial detention proceedings.[5] For another, *Oglala* is not properly read as extending so broadly. *Oglala* did not address a challenge to a collateral proceeding, as is the case here. Rather, as the district court explained—and Appellants have not

[5] *See also* Application of *Younger* Rule—In General, 17B Fed. Prac. & Proc. Juris. (3d. ed.) § 4252 ("The Supreme Court has held that state criminal practices can be challenged in federal court if the relief requested is not directed to the prosecution as such and if the federal claim is one that cannot be raised in defense of the criminal prosecution.").

contested—*Oglala* concerned how South Dakota courts conduct temporary child custody proceedings *on the merits*. 904 F.3d at 608; Dist. Ct. Op. at 18.

Indeed, *Oglala* distinguished *Gerstein* on this very ground, describing *Gerstein* as holding "that *Younger* did not bar the plaintiffs' claim for relief because the injunction they sought 'was not directed at the state proceedings as such, but only at the legality of pretrial detention without a judicial hearing.'" *Id.* (quoting *Gerstein*, 420 U.S. at 108 n.9). Continuing its recognition of the collateral nature of pretrial detention proceedings, this Court noted that *Gerstein* "emphasized" that the plaintiffs could not raise their claims "in defense of the criminal prosecution." *Id.* By contrast, the *Oglala* Court held, *Gerstein* "does not preclude abstention *based on the type of relief sought here*," 904 F.3d at 613 (emphasis added)—that is, relief aimed at a state child custody proceeding on the merits. In so holding, this Court was following Supreme Court precedent established in *Moore v. Sims*, 442 U.S. 415, 431–32 (1979), which, similarly distinguishing *Gerstein*, applied *Younger* to state child custody proceedings. *Oglala*, 904 F.3d at 610 (explaining that there was "no meaningful distinction between the custody proceedings in *Moore* and the temporary custody proceedings at issue in South Dakota").

Appellant Judges also mistakenly contend that *Gerstein* does not control because the district court failed to appreciate that the "intrusiveness of the relief" it granted resembled the intrusiveness of the relief in *Oglala*. Judges' Mot. at 14. Again, *Oglala* applied *Younger* because the relief the plaintiffs sought would have been directed at the

merits of a state court proceeding, not because the procedures at issue were, alone, too "intrusive." 904 F.3d at 612–13.

Gerstein confirms this. The Supreme Court approved 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. That is effectively what the district court ordered here: promptly provided procedures and a determination that pretrial detention is necessary as a "condition for . . . pretrial restraint." It was not too intrusive in *Gerstein*, and it is not here either.

Likewise, two appellate courts considering challenges to pretrial detention practices approved of the type of relief the district court ordered. *ODonnell*, 892 F.3d at 164–65; *Walker*, 901 F.3d at 1255. In *ODonnell*, for instance, the Fifth Circuit provided a model injunction order that included, 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. Judge Clement's unanimous opinion explained that such relief would only "impose nondiscretionary procedural safeguard[s]" that would not "require federal intrusion into pretrial decisions on a case-by-case basis." *Id.* at 156–57. Here, too, Appellants are unlikely to succeed in their request to limit the applicability of *Gerstein*.

ii. Abstention Is Unwarranted Because Appellees Have No Adequate Opportunity to Raise Their Claims in State Court

Younger abstention also does not apply where the federal plaintiff lacks an "opportunity to raise and have *timely* decided by a competent state tribunal the federal issues involved." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (emphasis added). The uncontested record demonstrates, and the district court found, that class members must endure "weeks-long incarceration awaiting a meaningful hearing." Dist. Ct. Op. at 20. Supreme Court case law establishes that this type of delay—which requires class members to endure the very unconstitutional detention they seek to challenge for weeks before they can be heard—precludes application of *Younger*.

Gerstein illustrates this principle as well. The plaintiffs in *Gerstein* were not detained without *any* opportunity to be heard. Rather, that opportunity was delayed: the plaintiffs had to wait at least 30 days for a special preliminary hearing or an arraignment. 420 U.S. at 106. Although Florida law "seemed to authorize" earlier "preliminary hearings to test probable cause," Florida courts had, in practice, 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, the Court held that abstention was improper. *Id.*

The factual record in this case establishes that class members face the same type of delay. They cannot challenge their detention at their initial appearance, where they

are unrepresented and instructed not to speak. Dist. Ct. Op. at 27. If they attempt to challenge the financial condition, the judge instructs them that they cannot do so until they obtain counsel, who must then file a motion. *Supra* at 4–5. That process—appointing counsel from the Public Defender's office and scheduling a hearing on bail—takes an average of at least four weeks. *Id.* Based on this record, the district court correctly held that Plaintiffs lacked an adequate opportunity to stop the constitutional violation before they suffered it. Dist. Ct. Op. at 20–21.

Appellants are not likely to prevail in seeking reversal of this record-specific conclusion. Appellant Judges first argue that Appellees should have presented their claims in the trial court through a bond-modification motion, but this is utterly belied by the record, which shows that hearings on such motions do not take place for multiple weeks while Appellees remain illegally detained, just as in *Gerstein*.

Appellant Judges next argue that—although they do not provide an opportunity to be heard in criminal cases—people detained in jail and without counsel have an adequate opportunity to raise claims by filing a separate civil petition for writ relief (either mandamus or habeas) in a higher court.[6] This demonstrates a fundamental misunderstanding of Appellees' claims: Appellees seek to challenge the period of incarceration prior to any individualized hearing. Requiring Appellees to await review

[6] Under Missouri law, to seek review of a bond order, an individual must initiate a new civil proceeding and file a mandamus or habeas petition. Mo. Sup. Ct. R. 33.09; 91.01(c); 97.02.

in a higher court by filing a separate civil case from their jail cell would force them to endure the exact harm they seek to challenge and, effectively, moot their claims. *See Pugh v. Rainwater*, 483 F.2d 778, 782 (5th Cir. 1973), *aff'd in part, rev'd in part sub nom. Gerstein v. Pugh*, 420 U.S. 103 (1975).

Indeed, the Supreme Court has already foreclosed this argument. In *Gibson v. Berryhill*, the Court held that, where no actual hearing exists at the trial court, *Younger* does not require the plaintiff to endure irreparable harm while awaiting a first review in a higher court. 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. De novo judicial review would be available on appeal, but 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). Thus, in *Gibson*, there was effectively no initial hearing because of bias. And "appellate" review, the Court explained, was insufficient to warrant abstention because it was not timely: it could not undo the "irreparable damage" of a temporary loss of license and negative publicity that the plaintiffs would have been forced to endure between the close of the board proceedings and an appeal. *Id.* at 577 & n.16.

Younger does not apply here for the same reason. Indeed, 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 refuse to entertain evidence or argument at the initial appearance. Thus, under *Gibson*, the *Younger* doctrine does not callously demand that Appellees pursue, and await, a *first* opportunity to be heard in a higher court. As explained, that would force them to endure the exact harm they seek to challenge and, as the district court found, be "tantamount to a guaranty of [Appellees'] continued detention." Dist. Ct. Op. at 20.

Appellant Judges further argue that the district court's conclusion that state procedures do not afford an adequate remedy failed to accord the state the presumption it deserves that the courts will follow established procedures. Judges' Mot. at 10–11. This misses the critical point. Even if Missouri courts entertain extraordinary writs, they do not do so instantaneously. *Gibson* demonstrates that *Younger* does not impose a presumption that state courts decide cases at an unrealistic speed. And, even if the challenged period of purely wealth-based detention only lasted a few days—as it did in the Fifth Circuit's recent decision in *ODonnell*, 892 F.3d at 154—Appellees' constitutional challenge to *that pre-hearing period* of wealth-based detention is, by definition, not subject to *Younger* abstention.

The cases the Appellant Judges cite for the proposition that mandamus relief can sometimes provide an adequate remedy do not counsel a different result. First, in each of the cases, the federal plaintiff had a timely opportunity to press the merits of the claim in state court *before* seeking relief via appeal or mandamus. *Aaron v. O'Connor*, 914 F.3d 1010, 1018–19 (6th Cir. 2019); *SKS & Assocs., Inc. v. Dart*, 619 F.3d 674, 676 (7th

Cir. 2010); *Texas Ass'n of Bus. v. Earle*, 388 F.3d 515, 517, 521 (5th Cir. 2004). The appellate and mandamus relief discussed in these cases merely provided another bite at the apple.[7] Second, these cases involved attempts to obtain compensation (through medical malpractice damages in *Aaron* and eviction in *SKS & Assocs., Inc.*) and to avoid a grand jury investigation (in *Texas Ass'n of Bus.*), none of which constitutes irreparable harm. *See Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009) (injuries compensable through damages are not irreparable); *Younger*, 401 U.S. at 46 ("the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution" is not irreparable harm). By contrast, Appellees would have to endure unconstitutional jailing and irreparable deprivation of their liberty to get their *first* bite at the apple if forced to await a ruling on a petition for a extraordinary writ. *See Gerstein*, 420 U.S. at 108 n.9; *cf. Arevalo*, 882 F.3d at 766–67 (unconstitutional pretrial detention is irreparable injury warranting refusal to abstain).

Finally, although the Appellant Judges criticize the district court for referring to the difficulty that indigent and unrepresented class members would have in bringing actions for extraordinary writs while detained in the city's jails, Judges' Mot. at 11, their criticism does not establish that extraordinary writs provide an adequate or timely

[7] Appellant Judges also cite, but misunderstand, *Diamond "D" Const. Corp. v. McGowan*, 282 F.3d 191 (2d Cir. 2002). There, the Second Circuit held that an administrative proceeding provided the federal plaintiff an opportunity to raise federal claims, and mandamus was available to expedite that proceeding—but not to decide the merits—if it was taking too long. *Id.* at 202.

alternative means of pressing their claims. To start, even represented individuals cannot obtain a timely hearing. The record establishes that it takes an average of six days to schedule a hearing on bond in the trial court after counsel makes a request, *supra* at 5, and relief in a higher court also would not be immediate even with the assistance of counsel. *Cf. Gibson*, 411 U.S. at 577. More fundamentally, Appellant Judges cite nothing to support their assertion that *Younger* abstention is required because pro bono counsel who represent a class of plaintiffs in a federal civil action theoretically could represent the thousands of class members in the future (or even just the Named Plaintiffs) in state court extraordinary writ proceedings. Their argument, if accepted, would defeat the purpose of certifying a class for class-action relief. And their argument, if accepted, does not account for the irreparable harm of detention while awaiting possible relief on an extraordinary writ.

iii. The relief ordered will not impermissibly interfere with future proceedings

Citing *Oglala* and *O'Shea v. Littleton*, 414 U.S. 488 (1974), Appellant Judges assert that the district court's order is improper because it will interfere with future court proceedings. Judges' Mot. at 15. This misconceives the issue in both cases. The plaintiffs in *Oglala* and *O'Shea* were not personally the subject of any ongoing proceedings at the time they filed suit and asserted that they were at risk of future harm. *Oglala*, 904 F.3d at 610; *O'Shea*, 414 U.S. at 501. Given that posture, the plaintiffs argued that the requisite "ongoing proceeding" was missing for purposes of *Younger* abstention. *Oglala*,

904 F.3d at 610; *O'Shea*, 414 U.S. at 501. *Oglala* and *O'Shea* rejected this attempt to evade *Younger*, reasoning that the relief sought would result in interference in future state proceedings. *Id.*

These holdings have no bearing here. Appellees do not argue that abstention is improper because there is no "ongoing proceeding." Rather, Appellees are likely to succeed on the merits because *Younger* does not apply to collateral pretrial detention proceedings and because Appellees have no timely and adequate opportunity to be heard. These are independent bases to reject abstention (as other courts have done), and neither *Oglala* nor *O'Shea* requires disregarding them simply because this is a class action that will have prospective effect.

Further, like *Oglala*, *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.

In short, Appellant Judges' concern that requiring constitutionally minimal findings and procedures at the discrete stage of initial bail hearings would lead to a "federal audit of [future] state criminal proceedings," Judges' Mot. at 16 (quoting *O'Shea*,

414 U.S. at 500), is entirely misplaced—as both the Fifth and Eleventh Circuits found in rejecting this exact argument in cases involving materially indistinguishable relief. *See ODonnell*, 892 F.2d at 156–57; *Walker*, 901 F.3d at 1255; *see also supra* at 14.

B. Plaintiffs' Claims Are Cognizable under § 1983

Appellants also argue that they are likely to succeed on the merits of their appeal because, they claim, the preliminary injunctive relief ordered by the district court is unavailable in a suit under § 1983, and must be brought via a petition for habeas corpus. They base this argument on *Preiser v. Rodriguez*, 411 U.S. 475 (1973), in which the Supreme Court held that "a § 1983 action is barred . . . if success in that action would *necessarily* demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81–82 (2005) (emphasis added). Appellants' *Preiser* argument is unlikely to succeed.

The touchstone of the inquiry in *Preiser* is whether the claim brought would "necessarily" lead to release. Where a plaintiff does not seek "immediate or speedier release into the community . . . and a favorable judgment would not necessarily imply the invalidity of their convictions or sentences," he or she may "properly invoke[] § 1983." *Skinner v. Switzer*, 562 U.S. 521, 533–34 (2011) (internal quotation marks, brackets, and citation omitted). *Preiser* does not bar a § 1983 claim based on the mere hope or belief "that victory . . . will lead to speedier release from prison" if release is not inevitable.

Here, not a single class member has claimed entitlement to release. Rather, Appellees' complaint challenges the imposition of unaffordable money bail in the complete absence of procedures and substantive findings that meet basic constitutional requirements. Consistent with this challenge, the preliminary injunction allows for both financial conditions of release and pretrial detention of any class member, provided that adequate procedures and findings are made. In fact, during the limited time the preliminary injunction was in effect, many of the class members who received hearings were ordered detained, not released. Because compliance with the district court's order will not necessarily result in release of any class member, the district court properly rejected Appellants' argument:

> [Defendants' *Preiser*] theory is predicated on Defendants' characterization that Plaintiffs seek wholesale, unconditional release of all class members, which is inaccurate. Plaintiffs do not seek blind, class-wide release; rather, they seek individualized determinations of release conditions with a presumption *against* [money] bail, as opposed to [money] bail as the default rule for all.

See Dist. Ct. Op. at 39 n. 12. The district court's conclusion is in accord with every court to consider this issue in the bail context. *Holland v. Rosen*, 277 F. Supp. 3d 707, 738 (D.N.J. 2017) (*Preiser* inapplicable because plaintiff "does not seek an injunction ordering his immediate or speedier release into the community, but rather an injunction ordering a hearing that conforms to his conception of his constitutional rights"), *aff'd*, 895 F.3d 272 (3d Cir. 2018); *ODonnell v. Harris Cnty.*, 260 F. Supp. 3d 810, 816 (S.D. Tex. 2017) (rejecting *Preiser* argument because "[t]he plaintiffs mount a broad-based

challenge to Harris County's administration of its bail procedures, but they do not seek or assert 'entitlement' to pretrial release"); *Booth v. Galveston Cty.*, No. 3:18-CV-104, 2018 U.S. Dist. LEXIS 218967, at *27–29 (S.D. Tex. Dec. 10, 2018) (*Preiser* inapplicable for plaintiff who "seeks an injunction requiring constitutionally adequate processes to determine post-arrest release or detention"); *Walker v. City of Calhoun*, No. 15-CV-170, 2016 WL 361612, at *13 (N.D. Ga. Jan. 28, 2016) (finding *Preiser* inapplicable in a challenge to money bail schedule), *vacated on other grounds*, No. 16-10521, 2017 WL 929750 (11th Cir. Mar. 3, 2017). And the district court's conclusion accords with this Court's understanding of *Preiser*. *Compare Otey v. Hopkins*, 5 F.3d 1125, 1131-32 (8th Cir. 1993) (Section 1983 appropriate vehicle for capital defendant challenging commutation procedures because plaintiff was "not seeking a determination that he has an entitlement to commutation"), *and Adams v. Agniel*, 405 F.3d 643, 644 (8th Cir. 2005) (suit for changes to factual record underlying parole denial did not implicate *Preiser*), *with Offet v. Solem*, 823 F.2d 1256, 1259 (8th Cir. 1987) (*Preiser* implicated where a judgment that a decision "was rendered in an unconstitutional manner ineluctably would lead to a different outcome in the disciplinary proceeding").

Appellant Judges nonetheless argue that the district court's order implicates *Preiser* because it resembles a conditional writ of habeas corpus. Judges' Mot. at 18. This argument is meritless. Relief that would be available through conditional writs of habeas corpus still falls within the *Preiser* rule: that suits under § 1983 are barred only if release would inevitably result. Tellingly, in support of their argument, Appellant Judges cite to

Justice Scalia's concurrence in *Dotson*. *Id.* But Justice Scalia's concurrence states the opposite of what Appellants contend. Justice Scalia, in accordance with the general rule, made the critical distinction between conditional writs where release is *guaranteed* once the error is corrected (which implicate *Preiser*), and conditional writs that correct deficiencies in proceedings but do *not* guarantee release (which do not). *Dotson*, 544 U.S. at 86–87 (distinguishing between conditional writs to correct unlawful sentences and conditional writs to correct procedures in discretionary parole determinations). This case falls within the latter category.

The Supreme Court applied these principles in *Gerstein*. There, Texas, as *amicus*, argued that the plaintiffs' claim should have been raised in a habeas proceeding because no "purpose could be served by a determination of probable cause" other than to release improperly held detainees. Brief of *Amicus Curiae* State of Texas at 9, *Gerstein v. Pugh*, 420 U.S. 103 (1975) (No. 73-477), 1974 WL 186448, at *9. The Court rejected this argument. Looking instead at whether the injunction would *necessarily* require release, the Court concluded that by asking that the state only be ordered "to give them a probable cause determination," "the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy." *Gerstein*, 420 U.S. at 107 n.6; *see also Holland*, 277 F. Supp.3d at 738; *ODonnell*, 260 F. Supp. 3d at 816; *Booth*, 2018 U.S. Dist. LEXIS 218967, at *27–29; *Walker*, 2016 WL 361612, at *13.

C. Appellant Glass's Other Assertions Are Not Likely to Succeed

Appellant Glass separately asserts that the district court's order is likely to be reversed on appeal because, unlike in *Walker* and *ODonnell*, where the defendant judges were county policymakers and the cases involved the application of fixed bail schedules to misdemeanors, he is a state officer and the case does not involve a fixed bail schedule, nor is it limited to misdemeanors. Glass Mot. at 6. But Appellant Glass offers no argument to support these assertions. A party that "has made no arguments in support of [an] assertion" waives the argument. *United States v. Frausto*, 636 F.3d 992, 997 (8th Cir. 2011). Further, courts have provided the relief requested here where each of the factors Appellant Glass identifies are present. *See ODonnell*, 892 F.3d at 166 (injunction against sheriff who was not a county policymaker); *Daves v. Dallas Cty., Texas*, 341 F. Supp. 3d 688, 697 (N.D. Tex. 2018) (felony offenses); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 320 (E.D. La. 2018) (no bail schedule).

II. The Preliminary Injunction Will Not Irreparably Harm Appellants

Neither Appellant faces irreparable harm if the preliminary injunction is not stayed pending appeal.

Appellant Glass asserts that he will be irreparably harmed in the absence of a stay because he risks contempt from the federal court if he fails to comply with the preliminary injunction and contempt from the state court if he does comply. Glass Mot. at 8. As to the former, the risk of contempt for deliberately violating constitutional rights in defiance of a federal court order is not cognizable irreparable harm. As to the

latter, nothing in the record supports Appellant Glass's purported fear that Appellant Judges will hold him in contempt—in violation of the Supremacy Clause—for violating their orders; to date, Appellant Judges have voluntarily worked with Appellant Glass to enable him to comply with the district court's order. Appellant Glass's claim is pure conjecture insufficient to amount to irreparable harm. *See Packard Elevator v. ICC*, 782 F.2d 112, 115 (8th Cir. 1986) (denying stay where "allegations of irreparable harm are speculative and unsubstantiated by the record").

Appellant Judges' claim of irreparable harm is equally unpersuasive. As an initial matter, the preliminary injunction is directed solely at Appellant Glass. But more importantly, the "injury" about which Appellant Judges complain involves holding the very hearings and making the very findings they argue are required by Missouri's rules. If anything, the preliminary injunction will incentivize compliance—not departure—from state law. Performing these core judicial functions in compliance with the Constitution and the Missouri Rules cannot reasonably be considered irreparable harm.

Appellants also suggest that the injunction irreparably harms them by creating a risk to public safety. Judges' Mot. at 19. This mistakes what may constitute irreparable harm to Appellants with matters of concern to the public interest.

Regardless, the preliminary injunction creates no such risk. The preliminary injunction does not preclude Appellant Judges from ordering that someone be detained as a danger to the public or a flight risk. Nor does it prevent Appellant Glass from detaining someone for these reasons. Evidencing this, before the stay was entered,

judges ordered many people detained. The preliminary injunction merely requires that the individual be afforded a hearing and that Appellant Judges make a finding that detention is necessary before Appellant Glass may enforce the detention order. Indeed, the district court, with Appellees' consent, modified its order to allow Appellant Glass additional time to work with Appellant Judges to provide the requisite hearings so that no one will be released prematurely.

In fact, the preliminary injunction is more precise in ensuring public safety and preventing flight risk than the prior system. In the past, any individual, regardless of his charge and personal history, could walk free so long as he could afford to pay his money bail. This is the essence of the irrationality of Appellants' system of wealth-based discrimination. Under the preliminary injunction, conditions of release—or denial of release—will be appropriately tailored to the individual's actual characteristics, not blindly dependent on his (unknown) wealth.

III. Appellees Will Suffer Irreparable Harm if the Preliminary Injunction Is Stayed

Appellant Glass readily concedes that he is detaining hundreds of class members in violation of their constitutional rights and that additional individuals are arrested and detained on a daily basis. It is settled that this "[d]epriv[ation] of physical liberty" and violation of constitutional rights constitutes irreparable harm. *See, e.g., Arevalo*, 882 F.3d at 766–67. If a stay is entered, these irreparable injuries will continue, as will class

members being separated from their families, prevented from pursuing employment, and having their health endangered, among other harms. *See supra* at 6–7.

In the face of this obvious irreparable harm, Appellants assert that class members will be in the same position if a stay is entered because Appellants should be presumed to follow Missouri law that requires them to provide additional procedures beyond what the district court found to be constitutionally required. Judges' Mot. at 21; Glass Mot. at 8–9. But the record, as the district court found, contains "[a]mple evidence" that they do not follow state law. Dist. Ct. Op. at 27. Moreover, at a June 14, 2019, hearing, counsel for Appellant Judges was unaware of any plan for complying with the new Missouri Rules and offered his "suspicion" that the Rules do not apply "retroactively" to class members currently in jail. Tr. (Ex. Z) at 16:24–17:10. Given this record, there is no ground for this Court to "presume" compliance.

IV. The Preliminary Injunction Is in the Public Interest

"'[I]t is always in the public interest to prevent the violation of a party's constitutional rights.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted). Further, as the district court held—and the record forcefully illustrates—unconstitutional detention carries significant negative consequences for the public, including "extreme hardship on arrestees' families" and contributing to recidivism. Op. at 31–32 & n.17. And, to the extent that some detained individuals will be released after being provided with adequate process, the City and public will enjoy cost savings and a reduced demand on their resource-strapped jails. *See Close the Workhouse* at 23 (detailing

the cost of incarcerating people in the Workhouse jail, including that the City must spend $16,300 to jail a person for one year).

Appellants' assertion that a stay will be in the public interest is based on the same erroneous assumption that Appellant Judges will comply with the Missouri Rules going forward. Judges' Mot. at 21. As explained, Appellants' assumption is unfounded. And, even if Appellant Judges could be expected to hold hearings in compliance with the new rule, a preliminary injunction consistent with these new practices would not be *against* the public interest.

At bottom, it simply cannot be contrary to the public interest to enjoin Appellant Glass from continuing to detain individuals—whom he admits he is jailing in violation of their constitutional rights—even after he has been provided sufficient time to cure the constitutional defect.

CONCLUSION

Appellees request this Court deny Appellants' motions.

Dated: June 28, 2019

Respectfully submitted,

/s/ Robert D. Friedman

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CERTIFICATE OF COMPLIANCE

The motion has 7,923 words in fourteen-point Garamond font, a proportionally spaced typeface. Appellees moved for and have been granted permission to file this overlength response. The motion was prepared using Microsoft Word.

/s/ Robert D. Friedman
Robert D. Friedman

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2019, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Robert D. Friedman
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