IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

EDWARD LITTLE, on behalf of himself and all others similarly situated, Plaintiffs, v. COMMISSIONER THOMAS FREDERICK, in his judicial capacity as Commissioner of the 15th Judicial District of Louisiana; CHIEF JUDGE KRISTIAN EARLES, in his official capacity as Chief Judge of the 15th Judicial District of Louisiana; and SHERIFF MARK GARBER, in his official capacity as Sheriff of Lafayette Parish, Louisiana, Defendants.	Case No. 17-CV-724 (Class Action)

PLAINTIFFS' CONSOLIDATED MEMORANDUM OF LAW IN RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

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Named Plaintiff Edward Little, on behalf of himself and all others similarly situated, respectfully submits this memorandum of law in opposition to Defendants' motions to dismiss.[1]

I. INTRODUCTION

When he filed the Complaint and class-certification motion in this case, named Plaintiff Edward Little was in a Lafayette Parish Jail cell because he could not secure $3,000. Commissioner Frederick required $3,000 for Mr. Little's release from jail without inquiring into his ability to pay it and without considering any non-financial or unsecured conditions of release. Sheriff Garber, knowing the circumstances under which Commissioner Frederick required the money, and in his capacity as either a policymaker for the Sheriff's Office or an enforcer of state law, jailed Mr. Little because he could not access the money. Jailing someone because he cannot make a monetary payment violates the Equal Protection and Due Process Clauses of the United States Constitution.

The Defendants do not appear to contest the merits of Plaintiffs' constitutional arguments, and for good reason. The constitutional principles governing this case are well-established. First, the Constitution forbids keeping someone in jail solely because he cannot make a money payment. *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc) ("At the outset we accept the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible."). Second, as a matter of well-settled law, the government may detain arrestees prior to trial only if it makes the substantive showing that no other alternatives can further its compelling interests and only then after applying rigorous procedural safeguards. *United States*

[1] On June 5, 2017, Plaintiffs filed the Complaint (Doc. 1) in this action, as well as motions for class certification (Doc. 3) and for a preliminary injunction (Doc. 4). On July 3, 2017, Sheriff Garber moved to dismiss the allegations against him. (Doc. 18.) On July 12, 2017, the Court granted Plaintiffs' request to file a joint response to all Rule 12 motions in this case and set the deadline for that response as August 5, 2017. (Doc. 25.) On July 17, 2017, Commissioner Frederick and Chief Judge Earles moved to dismiss the allegations against them. (Doc. 26.) On August 2, 2017, the Honorable Patrick J. Hanna, United States Magistrate Judge, entered an order suspending deadlines in this case. (Doc. 40.) On September 15, 2017, Judge Hanna entered an order lifting the suspension of deadlines in this case. (Doc. 47).

v. Salerno, 481 U.S. 739 (1987). An unattainable financial condition of release is equivalent to an order of pretrial detention and must meet exacting procedural and substantive constitutional standards. *Compare United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) ("[O]nce a court finds itself in this situation—insisting on terms in a 'release' order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid detention order."), *with Salerno*, 481 U.S. 739 (describing procedural requirements for a valid detention order, including: a hearing with counsel, legal standards requiring proof of dangerousness by clear and convincing evidence, opportunity to present evidence, consideration of less restrictive alternative conditions, and reviewable findings). Several federal district courts have held that practices materially identical to the Defendants' are unconstitutional. *Walker v. City of Calhoun, Ga.*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *2 (N.D. Ga. June 16, 2017); *ODonnell v. Harris Cty., Tex.*, No. CV H-16-1414, 2017 WL 1735456, at *67 (S.D. Tex. Apr. 28, 2017); *Jones v. City of Clanton*, No. 215CV34-MHT, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015). The well-pleaded facts of the Complaint show that the named Plaintiff and hundreds of other similarly situated people are confined in jail simply because they cannot deposit enough money, and without either consideration of alternative conditions of release or the inquiry, findings, and procedural safeguards that federal law requires. This is unconstitutional.

Defendants instead argue that this case is moot; that this Court must abstain under *Younger v. Harris*, 401 U.S. 37 (1971); that the Sheriff cannot be enjoined from violating the Constitution because he does not himself set money bail amounts; and that Plaintiff is impermissibly requesting a "right to bail," (Doc. 26-1, at 1). As discussed below, Defendants' arguments have been thoroughly rejected by federal courts in materially identical circumstances.

As a matter of well-settled law, all of these arguments are without merit. The Defendants' motions should be denied.

II. FACTS[2]

The facts of this case are materially identical to practices declared unconstitutional by the Fifth Circuit in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc), and by federal courts in similar lawsuits brought in Alabama, Mississippi, Missouri, Tennessee, Kansas, Georgia, and Texas.[3]

A. Edward Little

Edward Little lives on a farm in Carencro, Louisiana, with his wife, Heather, and their two children. (Doc. 1, Complaint ¶ 8.) The Littles run a resale business, refurbishing old goods and selling them on the internet. (*Id.* ¶ 9.) Their income is unstable, and even when the business is going well, they have trouble meeting basic expenses. (*Id.*) Mr. Little was arrested on June 3, 2017, and he filed this case while in jail. (*Id.* ¶¶ 10, 15.) Commissioner Frederick set a secured money bail amount of $3,000, meaning that at least $375 had to be paid to a for-profit surety in order for Mr. Little to be released from jail. (*Id.* ¶¶ 11–13.) Mr. Little was unable to pay $375. (*Id.* ¶ 13.) It

[2] Plaintiffs describe the facts of this case in their memorandum of law in support of their motion for a preliminary injunction. (Doc. 4-1.) That factual description is reproduced here (with minor alterations) for the Court's convenience.

[3] *Edwards v. Cofield*, No. 3:17-CV-321-WKW, 2017 WL 3015176, at *1 (M.D. Ala. July 14, 2017) (denying motions to dismiss claims against wealth-based pretrial detention scheme); *ODonnell v. Harris Cty., Texas*, No. CV H-16-1414, 2017 WL 1735456 (S.D. Tex. Apr. 28, 2017); *Rodriguez v. Providence Cmty. Corrs., Inc.*, 155 F. Supp. 3d 758 (M.D. Tenn. 2015) (granting class-wide preliminary injunction to stop the use of money bond to detain misdemeanor probationers without an inquiry into the arrestee's ability to pay); *Cooper v. City of Dothan*, 1:15-cv-425-WKW, 2015 WL 10013003 (M.D. Ala. June 18, 2015) (issuing Temporary Restraining Order and holding that the practice of requiring secured money bond without an inquiry into ability to pay violates the Fourteenth Amendment); *Jones ex rel. Varden v. City of Clanton*, No. 2:15-cv-34-MHT, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015) (declaring secured money bond unconstitutional without an inquiry into ability to pay); *Thompson v. City of Moss Point*, 1:15-cv-182-LG-RHW, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015) (same); *Pierce v. City of Velda City*, 4:15–cv–570–HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015) (issuing a declaratory judgment that the use of a secured bail schedule is unconstitutional as applied to the indigent and enjoining its operation).

was not until June 10, 2017, that payment was made to a for-profit surety company to secure Mr. Little's release.

B. Arrest and Detention in Lafayette Parish

In the 15th Judicial District of Louisiana (15th JDC), which covers Lafayette, Vermilion, and Acadia Parishes, most arrestees who do not have outstanding warrants are ordered detained on a secured money bail and are thus deemed immediately eligible for post-arrest release if they can pay the amount of money required. This secured money bail is imposed as a condition of release without any inquiry into arrestees' ability to pay it or any consideration of alternative conditions of release.

Secured financial conditions of release for most misdemeanor arrestees are predetermined by a money bail schedule that Defendant Chief Judge Kristian Earles promulgated. (*E.g., id* ¶ 5.) The schedule does not consider the arrestees' ability to pay or non-financial alternatives. (*Id.*, Ex. A.) Pursuant to policy and practice, everyone arrested for a given charge must pay the same amount to be released, no matter how rich or how poor she is. (*Id.*)

Secured financial conditions of release for felony defendants (and some misdemeanor defendants) are required by Commissioner Frederick without any inquiry into whether the arrestee can pay them and without consideration of non-financial alternatives. (*Id.* ¶ 6 & n.2.) When he imposes the initial conditions, Commissioner Frederick has never seen the arrestee and has no information about the arrestee's finances. (*Id.* ¶ 22.) Louisiana law defines "bail"[4] to include "(1) Bail with a commercial surety[;] (2) Bail with a secured personal surety[;] (3) Bail with an unsecured personal surety[;] (4) Bail without surety[; and] (5) Bail with a cash deposit," La. Code.

[4] "[B]ail," as defined by history, law, and practice, "is a mechanism for pretrial release and not for continued pretrial preventive detention." *ODonnell*, 2017 WL 1735456, at *12.

Crim. Proc. art. 321. Yet in Lafayette Parish, initial conditions of release are usually financial and almost always secured, meaning that the arrestee must deposit the money upfront in order to be released. (*Id.* ¶ 16.) And although Louisiana law explicitly permits Defendants to detain individuals that they believe to be especially dangerous or unlikely to reappear in court, regardless of the crimes with which those people are charged, La. Code Crim. Proc. art. 313, those people may be detained only after "a contradictory hearing [and] . . . upon proof by clear and convincing evidence either that there is a substantial risk that the defendant might flee or that the defendant poses an imminent danger to any other person or the community." Although federal constitutional law requires such hearings before the government may issue an order of pretrial detention, Defendants do not conduct such hearings prior to issuing de facto orders of detention based on unattainable amounts of money. (*Id.* ¶ 17.) Instead, as a practice, Defendants declare almost all arrestees eligible for release and then jail them—solely because of their poverty—for up to four days without a court appearance of any kind, and for a week or more thereafter without any even conceivable opportunity for them to raise their ability to pay or address the availability of non-financial alternative conditions of release. (*Id.* ¶¶ 26, 37.)

Whenever someone is arrested in Lafayette Parish, she is brought to the Lafayette Parish Correctional Center ("Jail"). (*Id.* ¶ 18.) Sheriff Mark Garber oversees the jail and has the policy of confining arrestees in his jail if they cannot make the predetermined monetary payment. (*Id.* ¶¶ 18, 20.) If the person was arrested on a warrant and is charged with an offense that is covered by the bail schedule, Sheriff Garber will release the arrestee only if she can pay the amount of money listed on the schedule; for charges not covered by the schedule, Commissioner Frederick imposes an initial secured financial condition of release when he approves the warrant and the Sheriff will release the arrestee only if she can pay that amount. (*Id.* ¶ 20.)

If a person is arrested without a warrant, the arresting officer calls Commissioner Frederick and describes the facts leading to the arrest. Commissioner Frederick decides whether there was probable cause to support the arrest and issues his ruling over the phone. (*Id.* ¶ 21.) If the offense with which the arrestee is charged is covered by the predetermined secured money bail schedule, the Sheriff will release her only if she can pay the amount listed on the schedule; if the offense is not covered by the bail schedule, Commissioner Frederick imposes secured financial conditions of release over the phone and the Sheriff will release the arrestee only if she can pay the amount of money required by Commissioner Frederick. (*Id.*) Based on these policies and practices, every arrestee in Lafayette is released only if she can pay an amount of money set without any inquiry into whether she can pay it or consideration of alternative conditions of release.

The first time an arrestee will see a judicial officer is at her initial appearance. (*Id.* ¶ 25.) State law mandates that this appearance happen within 72 hours of arrest, excluding Saturdays, Sundays, and legal holidays. La. Code Crim. Proc. art. 230.1(A). (*Id.*) Initial appearances are referred to locally as "72 hearings" or "72s." In Lafayette, Commissioner Frederick presides over 72-hour hearings on Tuesdays and Fridays. (*Id.* ¶¶ 25–26.) Therefore, someone arrested immediately after the 72-hour hearing on a Tuesday will not see a judicial official for at least three days, and someone arrested immediately after the 72-hour hearing on a Friday will not see a judicial officer for at least four days. (*Id.* ¶ 26.)

Seventy-two hour hearings are a rote exercise. They are conducted by video link: Commissioner Frederick is in the courthouse while the arrestee is in a room at the jail. (*Id.* ¶ 27.) Each hearing lasts approximately 25–30 seconds. (*Id.* ¶ 30.) Commissioner Frederick asks the arrestee if her name, address, and date of birth are correctly listed on her arrest paperwork; tells the arrestee what the charges against her are; tells the arrestee her conditions of release; and asks

the arrestee if she can afford a lawyer. (*Id.*) If she cannot afford a lawyer, Commissioner Frederick formally appoints one, usually from the District Public Defender's Office. A Defender's Office lawyer is present in the courtroom at the 72-hour hearing. She does not communicate with arrestees at the 72-hour hearing and, after formally accepting the appointment, waives the formal reading of the charges on the arrestees' behalf without consulting with them. A jail employee then gives the arrestee a sheet of paper with the Defender's Office's information on it.

Although state law explicitly authorizes Commissioner Frederick to "review a prior determination of the amount of bail" at the 72-hour hearing, La. Code Crim. Proc. Ann. art. 230.1(B), his policy and practice is to refuse to address conditions of release at the hearing. (*Id.* ¶ 31.) He forbids the introduction of evidence and legal argument concerning release and detention. (*Id.* ¶ 33.) For example, when two recent arrestees told Commissioner Frederick that they could not afford the predetermined secured financial conditions of release, Commissioner Frederick told them to "read the sheet" and "take it up with your lawyer." (*Id.* ¶ 31.) When another arrestee said that he could not meet a secured financial condition of release, and that he would be "stuck in jail" as a result, Commissioner Frederick said only "next," and moved on to the next hearing. (*Id.* ¶ 32.) Commissioner Frederick, as a matter of policy and practice, does not entertain arguments to modify conditions of release at the 72-hour hearing. (*Id.* ¶ 33.)

After the 72-hour hearing, an arrestee's only opportunity to modify her conditions of release is by filing a motion before a Judge of the 15th JDC. (*Id.* ¶ 36.) If the district attorney has not yet decided whether to prosecute the defendant—locally, this is referred to as "picking up" the charge—a bail-modification motion will be heard by the judge on duty; if the charges have been accepted by the District Attorney, the arrestee's case will be assigned to a Division of Court and only that Division's Judge can preside over the motion. (*Id.* ¶ 36.) Release-eligible arrestees will

typically wait a week or more from filing a motion before they could conceivably be heard in an adversarial proceeding on the issue of their ability to pay or the consideration of non-financial alternative conditions of release. (*Id.* ¶ 37.)

III. ARGUMENT

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The standard of "facial plausibility" is met 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.* And "a facial [Rule] 12(b)(1) challenge, which attacks the complaint on its face without contesting its alleged facts, is like a 12(b)(6) motion in requiring the court to 'consider the allegations of the complaint as true.'" *E.g.*, *Hartig Drug Co. Inc. v. Senju Pharm. Co.*, 836 F.3d 261, 268 (3d Cir. 2016). Here, Defendants do not contest the facts giving rise to jurisdiction and, therefore, Plaintiffs' well-pleaded factual allegations are taken as true for the purposes of this motion.

Defendants argue that: this case is moot; this Court must abstain under *Younger v. Harris*, 401 U.S. 37 (1971); the Sheriff cannot be enjoined from violating the constitution because he does not determine money bail amounts; and Plaintiffs are impermissibly requesting a "right to bail," (Doc. 26-1, at 1). These arguments fail and Defendants' motion should be denied.

First, this case is not moot and this Court has subject-matter jurisdiction to hear it. Defendants acknowledge that *Sosna v. Iowa*, 419 U.S. 393, 402 (1975), governs this case because named Plaintiff filed a class-certification motion while his "inherently transitory" claim was live. *See also Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). Defendants argue, without citation or

support, that *Sosna* and *Gerstein* are somehow distinguishable because payment was eventually made to a for-profit bonding company to attain Mr. Little's release from jail. They are not.

Second, Supreme Court precedent forecloses Defendants' *Younger*-abstention argument. *Gerstein*, 420 U.S. at 108 n.9. In this action, Plaintiffs challenge only the money-based post-arrest detention practices under which they are detained, and there is no adequate state forum in which they can do so prior to suffering the very constitutional violation they allege. (*See* Doc. 1 ¶¶ 26, 33). Therefore, *Younger* abstention does not apply and this Court may not abstain from hearing Plaintiffs' case.

Third, the Sheriff may be enjoined from violating Plaintiffs' constitutional rights, and the well-pleaded facts of the Complaint state a claim for relief against him. Although the Sheriff contends that he is not responsible for determining the required money bail amounts, he may nonetheless be enjoined in this case because his actions violate the Constitution. First, he may be enjoined even if he simply enforces judicial orders over which he has no discretion—making him a *state* actor enforcing those orders—because *Ex parte Young* and a long line of precedent following it ensure that federal courts can enjoin state actors from committing constitutional violations. *Edwards v. Cofield*, 2017 WL 3015176, at *1; *ODonnell v. Harris Cty., Texas*, 227 F. Supp. 3d 706, 750–51 (S.D. Tex. 2016) ("The Sheriff represents the State . . . to the extent he enforces judicial orders of detention."). Second, he may be enjoined under *Monell* in his official capacity as a policymaker for the Lafayette Parish Sheriff's Office to the extent that he knowingly enforces invalid orders of detention and has some discretion under state law to decline to enforce them. *See, e.g.*, *ODonnell*, 227 F. Supp. at 747 ("The Sheriff is a County Policymaker to the extent he knowingly enforces invalid orders of detention."). If the Sheriff has discretion under state law to modify or decline to enforce invalid orders of detention, he is a policymaker for the Lafayette

Parish Sheriff's Office and is subject to prospective relief in that capacity; if the Sheriff does not have discretion under state law to modify or decline to enforce invalid orders of detention, he is a state actor and subject to prospective relief in that capacity. Either way, the Sheriff may be enjoined from violating the Constitution.

Finally, Plaintiff states a claim for relief against Chief Judge Earles and Commissioner Frederick ("Judicial Defendants"). The Judicial Defendants misunderstand Plaintiffs' allegations. Plaintiffs do not allege that every arrestee is entitled to "bail" as the Judicial Defendants describe it, nor do they allege that any individual is necessarily entitled to pretrial release. Instead, Plaintiffs argue that under the Equal Protection and Due Process clauses, an order of release on unattainable secured money bail is a de facto order of pretrial detention. A person cannot be detained solely because of his or her poverty. Any order of pretrial detention must be accompanied by basic findings concerning alternative conditions of release and adequate procedures to ensure against the erroneous deprivation of pretrial liberty.

A. This Court has Subject Matter Jurisdiction over this Case and May Not Abstain from Hearing it.

Defendants argue that this court lacks subject matter jurisdiction over this case because it is moot and that this Court should abstain under *Younger* because there is a pending criminal case in state court. Both arguments are foreclosed by binding precedent.

1. This Case is Not Moot

Defendants argue that this case is moot because the named Plaintiff was released from jail after the filing of the Complaint and class-certification motion. Because the named Plaintiff had standing to seek prospective relief when he filed this action and because the case did not become moot when he was released, the Defendants' argument fails. As Chief Judge Watkins in the Middle District of Alabama recently held on materially identical facts, Defendants' arguments are

foreclosed by binding Supreme Court precedent. *Edwards*, 2017 WL 3015176, at *2–*3; *see also Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (holding that representative plaintiffs' challenge to county's failure to make prompt probable cause determinations was not moot although the plaintiffs received probable cause determinations or release from custody prior to class certification).

Standing and mootness are related but separate issues. "[T]he emphasis in standing problems is on whether the party invoking federal court jurisdiction has a personal stake in the outcome of the controversy and whether the dispute touches upon the legal relations of parties having adverse legal interests." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (citations and internal quotation marks omitted). Once a party has established standing to invoke the jurisdiction of the court, the claim he asserts must remain "live" throughout the pendency of the lawsuit—that is, it cannot become moot. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969); *see also Dunn v. Dunn*, 148 F. Supp. 3d 1329, 1333 (M.D. Ala. 2015) (collecting cases). There is no dispute that the named Plaintiff had standing when he filed this case, so the only question is whether the case became moot when he was released.

Although, generally, named plaintiffs must maintain an ongoing stake in a class action, the Supreme Court long ago explained that "[t]here may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion." *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). There are two principal circumstances in which this can be true: (1) in cases that are by their nature transitory and are, therefore, capable of repetition yet evading review, *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); and (2) in cases where the defendant tries to "pick off" plaintiffs by satisfying small claims to frustrate class certification, *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1050

(5th Cir. 1981). In either circumstance, "the certification can be said to 'relate back' to the filing of the complaint." *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919 (5th Cir. 2008) (quoting *Sosna*, 419 U.S. at 402); *see also Edwards*, 2017 WL 3015176, at *2–*3; *Walker v. City of Calhoun, Georgia*, No. 4:15-CV-170-HLM, 2016 WL 361580, at *4 (N.D. Ga. Jan. 28, 2016), *appeal not considered* 682 F. App'x 721 (11th Cir. 2017). If a named Plaintiff in these circumstances had standing at the time of the filing of his complaint—and the named Plaintiff here indisputably did—he can serve as a class representative throughout the litigation.

In *Gerstein*, 420 U.S. at 110 n.11, the Supreme Court held, on facts materially identical to the facts here, that a class action was not moot because of the "inherently transitory" nature of pretrial detention. "Pretrial detention," the Court explained, "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. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly capable of repetition, yet evading review." *Id. Gerstein* controls. This case is not moot.

Although acknowledging that Plaintiffs' claims would not be moot under *Sosna* and *Gerstein*, Defendants nonetheless appear to contend that the fact that a pretrial arrestee secured his release pursuant to a for-profit surety somehow makes this case an exception to that general rule. Defendants do not cite any authority in support of this proposition, and there is none. In *ODonnell*, the fact that one named Plaintiff was released pursuant to a for-profit surety bond did not somehow moot her claim, nor did the decision of another named Plaintiff to plead guilty after four days in custody. *ODonnell*, 227 F. Supp. 3d at 734–35 (allowing a class-action to proceed although a named plaintiff had "moot[ed] his own constitutional claims over the delay in obtaining release by

pleading guilty to end that delay"). Even if trying to secure his release from unlawful custody could be deemed a wholly uncoerced act, federal court precedent makes clear that where named plaintiffs agree voluntarily to take actions that might moot their individual claims, class actions may nonetheless proceed, especially if the claims are inherently transitory and involve ongoing irreparable harm. *E.g.*, *Wilson v. Gordon*, 822 F.3d 934, 943 (6th Cir. 2016) (holding that class-action claims were not moot even though individual claims were moot where "Plaintiffs knew that . . . by agreeing to [procedures offered by defendant], they might receive their requested relief" and moot their claims). And "[c]ourts routinely apply the *Sosna* exception in pretrial detention cases because pretrial detentions are the very sort of transitory subject matter for which the exception was created." *Edwards*, 2017 WL 3015176, at *1 (citing *Dunn v. Dunn*, 148 F. Supp. 3d at 1340 ("Claims that derive from potentially imminent release from custody are a classic example of a transitory claim.")); *see also McLaughlin*, 500 U.S. at 52. Plaintiffs' claims are not moot and this Court therefore has subject matter jurisdiction to decide them.

2. Younger *Abstention Does Not Apply*

Defendants argue that this Court must decline to exercise its jurisdiction to remedy the constitutional violations alleged in this case because of the principles announced in *Younger v. Harris*, 401 U.S. 37, 44 (1971). *Younger* abstention does not apply in this case.

Abstention is an exceptional doctrine to be applied narrowly. *Sprint Commc'ns v. Jacobs*, 134 S. Ct. 584, 591 (2013) ("Jurisdiction existing, this Court has cautioned, a federal court's obligation to hear and decide a case is virtually unflagging." (internal quotation marks omitted)). *Younger* abstention requires (1) that there be the potential for undue interference with an ongoing state court proceeding; (2) that an important state interest be implicated by that proceeding; *and* (3) that there be an adequate opportunity to raise the relevant claim in that proceeding. *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 433 n.12 (1982); *see also Bice*

v. La. Public Defender Bd., 677 F.3d 712, 716 (5th Cir. 2012). This case does not meet the first and third requirements of the *Middlesex* analysis.

a. Plaintiffs Lack an Adequate Opportunity to Raise Their Claims in their State Proceedings.

This case fails to meet the third *Middlesex* requirement because arrestees have no adequate opportunity to raise their constitutional claims in any ongoing state proceeding before they suffer the very violation they challenge. Under the post-arrest detention scheme that Plaintiffs challenge, arrestees who cannot afford to pay must remain in jail for up to several days until they are afforded a video appearance at a 72-hearing. Even then, they are not permitted to raise, let alone meaningfully litigate with evidence and argument, constitutional claims at that hearing. Under Defendants' practices, there is no opportunity to challenge unlawful post-arrest detention for well over a week after arrest. *Younger* does not prevent arrestees from raising a constitutional challenge in federal court to violations that take place *before they have a chance to present their constitutional claim* to a state court.

The *Younger* question in this case is controlled by *Gerstein*, 420 U.S. at 108 n.9. In *Gerstein*, state arrestees complained that they were being held in jail after arrest without a prompt probable cause determination. *Id.* at 106–07. The Supreme Court explained that *Younger* abstention is improper when arrestees challenge detention procedures prior to a state court proceeding in which they could challenge those procedures. *Id.* at 108 n.9. The reason for that holding is obvious: if the irreparable harm complained of occurs prior to any opportunity to challenge it, then the federal court must not decline to vindicate important federal rights.

Plaintiffs do not have an adequate forum in which to raise their constitutional claims in state court. Plaintiffs claim that they are illegally detained between the time that they are arrested and the time that a bail-review motion can be heard by a district court judge solely because they

cannot deposit money. During this period, someone with access to enough money can walk out of jail; everyone else remains there at least until a motion can be heard by a judge of the 15th JDC. Before the 72-hearing, Plaintiffs cannot raise legal challenges to their detentions because they do not appear in any capacity before a judicial officer. This alone is sufficient to defeat *Younger* abstention. Additionally, the well-pleaded facts of the Complaint show that Plaintiffs cannot raise their claims at the 72-hearing (Doc. 1 ¶¶ 31–33), and that by the time they can file a motion in district court, they have already suffered the irreparable harm that their constitutional claim seeks to prevent, (Doc. 1 ¶ 37; Doc. 4-1, at 17–18).

Under *Gerstein*, *Younger* abstention is inapplicable and this Court has the duty to consider the claims raised in this case. Under Defendants' view, arrestees must endure the harm that they allege is unconstitutional before they can raise their claims in state court. (*See* Doc. 18-1, at 15 ("[A] bail reduction hearing can take a week to get heard.").) The Fifth Circuit rejected exactly this argument in a binding opinion affirmed by the Supreme Court in *Gerstein*: "no remedy would exist," the court held, if an arrestee were forced to wait until a later hearing in his state-court case because the period of incarceration that he challenges is transitory and "would have ended as of the time of" the first opportunity to address a judge. *Pugh v. Rainwater*, 483 F.2d 778, 782 (5th Cir. 1973), *aff'd in part, rev'd in part sub nom Gerstein*, 420 U.S. 103. As the Fifth Circuit explained: "If these plaintiffs were barred by *Younger* from this forum, what relief might they obtain in their state court trials? Since their pre-trial incarceration would have ended as of the time of trial, no remedy would exist." *Id.*; *see also Middlesex*, 457 U.S. at 432; *Pompey v. Broward Cty.*, 95 F.3d 1543, 1550 (11th Cir. 1996) (recognizing that the "permissibility of federal equitable relief" may be based on "the absence of an adequate state forum for raising the issue"). This conclusion is so straightforward that every federal court to consider the issue in the context of

similar challenges to money-based post-arrest detention practices has explicitly rejected Defendants' arguments. *See Caliste v. Cantrell*, No. CV 17-6197, 2017 WL 3686579, at *4 (E.D. La. Aug. 25, 2017); (holding that *Younger* abstention is inappropriate in case challenging post-arrest detention practices "because the damage is done" by the time that detainees could seek redress in state court); *ODonnell*, 227 F. Supp. 3d at 735–36 (explaining why *Younger* abstention does not apply on materially identical facts); *Walker*, 2017 WL 2794064, at *2; *Rodriguez*, 155 F. Supp. at 758 (rejecting *Younger* abstention in a case challenging the use of money bond to detain people arrested for misdemeanor probation violations prior to any hearing concerning whether they could afford the predetermined amount of money); *Welchin v. City of Sacramento*, 2016 WL 5930563, at *6–9 (E.D. Cal. Oct. 10, 2016) (declining to abstain in a similar challenge to a money-based bail schedule system that involved several days of post-arrest detention prior to any judicial proceedings at which plaintiffs could raise their constitutional claim); *Buffin v. City and Cty. of San Francisco*, 2016 WL 374230, at *2–5 (N.D. Cal. Feb. 1, 2016) (same).

b. *Plaintiffs' Requested Relief Will Not Cause Undue Interference in Their Criminal Prosecutions.*

This case also fails to meet the first *Middlesex* requirement. *Younger* forbids restraining state criminal prosecutions, not proceedings collateral to the merits of state criminal prosecutions. 401 U.S. at 43–44. Like the detention procedures challenged by the *Gerstein* plaintiffs, the unconstitutional money-based detention practices challenged in this case are collateral to the merits of any future criminal trial. The legality of their post-arrest detention has no bearing on the merits of their criminal prosecutions and cannot be raised as a defense in their criminal prosecutions. *See Gerstein*, 420 U.S. at 108 n.9 ("The [district court's] order to hold preliminary hearings could not prejudice the conduct of the trial on the merits."). Bail is collateral to guilt or innocence. *See Stack v. Boyle*, 342 U.S. 1, 5 (1951). Pretrial detention affects independent liberty

interests and cannot "be raised in defense of the criminal prosecution." *Gerstein*, 420 U.S. at 108 n.9; *see also Younger*, 401 U.S. at 46 ("[T]he threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single prosecution."); *Habich v. City of Dearborn*, 331 F.3d 524, 532 (6th Cir. 2003) (explaining that "the issues in Habich's federal suit could neither be proven as part of the state case-in-chief nor raised as an affirmative defense"); *Stewart v. Abraham*, 275 F.3d 220, 226 (3d Cir. 2001) (same); Charles Alan Wright, et. al., *17B Federal Practice and Procedure Jurisdiction* § 4252 (3d ed. 2016) ("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."). Therefore, relief addressed to those procedures is not "directed at [any] state prosecutions as such" and "could not prejudice the conduct of the trial on the merits" in any pending case. *Gerstein*, 420 U.S. at 108 n.9.

To the extent that Defendants contend otherwise, they misunderstand Plaintiffs' allegations. Plaintiffs do not seek to "appeal" the money bail decisions in any individual case (*contra* Doc. 18-1, at 15), and they do not seek to "impose . . . an ongoing audit of state court proceedings, (*contra* Doc. 26-1, at 2 (citing *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974))). Plaintiffs seek only to vindicate their right not to be detained after arrest because they cannot pay a sum of money required without any inquiry into or findings concerning their ability to pay it, and without a hearing at which a court considers alternatives to their money-based detention and enters a procedurally and substantively valid order of detention. Precedent from the Fifth Circuit and the United States Supreme Court therefore compel the conclusion that *Younger* abstention does not apply, and this Court should decide the merits of this case.

B. The Sheriff Can Be Enjoined from Violating the Constitution.

Sheriff Garber argues that the case against him should be dismissed on two discernible grounds: first, that state law requires him to detain people when they are unable to pay financial conditions of release required by the predetermined bail schedule and Commissioner Frederick; and second, that the Complaint fails to adequately state a claim for relief against him. (*See* Doc. 18-1, at 6–11.) Both arguments are mistaken. He also alludes to another district court's dismissal of another defendant sheriff in *Cain v. City of New Orleans*, No. 15-4479, 2016 WL 2849498 (E.D. La. May 13, 2016), but that ruling does not help him either. As explained below, Sheriff Garber can be enjoined in either of two capacities: in his official capacity as a policymaker for the Lafayette Parish Sheriff's Office or in his official capacity as a state official enforcing court orders pursuant to state law. At this juncture, the Court need not decide (and Plaintiffs need not take a position as to) which of these two governmental entities the Sheriff serves when he enforces the orders of detention issued by the Judicial Defendants, because he can be enjoined either way: Either he acts for his municipality and is subject to prospective relief under § 1983 and *Monell v. Dep't. of Social Servs.*, 436 U.S. 658, 694 (1978), or he acts for the state and is subject to prospective relief under § 1983 and *Ex parte Young*, 209 U.S. 123 (1908). And, moreover, the Sheriff does not explain why he contends that as a matter of state law he is required to enforce orders that he knows to be invalid.

1. If the Sheriff Acts for the State in Enforcing Unconstitutional Detention Orders, He Can Be Enjoined under § 1983 and *Ex parte Young*.

The Sheriff argues that the allegations against him should be dismissed because he is merely following judicial orders. As the United States District Court for the Middle District of Alabama recently put it when allowing a case for injunctive relief to move forward against a sheriff on materially identical facts, this "argument ignores hornbook law that has been around for over 100 years." *Edwards v. Cofield*, No. 3:17-CV-321-WKW, 2017 WL 3015176, at *1 (M.D. Ala.

July 14, 2017). If, as the Sheriff claims, he has no choice but to enforce state-court orders, then he is a state actor charged with enforcing those orders. *Crane v. Texas*, 759 F.2d 412 (5th Cir. 1985) (citing *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980)). Whether or not the Sheriff knows they are illegal or has state-law authority to refuse them, this Court can enjoin him from enforcing them.

"The landmark case of *Ex parte Young*, 209 U.S. 123 (1908), created an exception to [state sovereign immunity] by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State." *Green v. Mansour*, 474 U.S. 64, 68 (1985). In cases—like this one—for purely prospective relief, a state official may be enjoined in his official capacity. *Young*, 209 U.S. at 160; *see also, e.g.*, *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997) ("An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient" to seek injunctive relief); *Terrace v. Thompson*, 263 U.S. 197, 214 (1923); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *Echols*, 909 F.2d at 800 (holding that a district attorney was a state actor in enforcing an unconstitutional state statute and was properly enjoined under § 1983). A state actor may be enjoined from engaging in an unconstitutional act if the official in question "has some connection with the enforcement of the act and 'threaten[s] and [is] about to commence proceedings' to enforce the unconstitutional act." *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001). This connection can arise from the act being challenged or from "sufficient indicia of the defendant's enforcement powers found elsewhere in the laws of the state." *Id.* at 419.

Despite this clear rule of law, the Sheriff nonetheless contends that he may not be enjoined in this case because Plaintiffs' "claim . . . requires the Sheriff to disobey the orders of the State Court," and because such a requirement, according to the Sheriff, would be "an invitation to

disorder." (Doc. 18-1, at 10.) This is false. "*Ex parte Young* assumes that the state actor has done nothing more than enforce the law as promulgated by the State." *Edwards*, 2017 WL 3015176, at *1. The Sheriff contends that he may not be enjoined from enforcing orders regardless of their content. If the Sheriff were correct, he could not be enjoined from enforcing judicial orders that required him to detain only Jewish arrestees, or only African-American arrestees. But it is hornbook law that the Sheriff may be enjoined from enforcing unconstitutional state mandates, including court orders. As the Fifth Circuit explained in *Due v. Tallahassee Theatres, Inc.*, for example:

> If . . . the Sheriff, either through misunderstanding as to the scope of the order, or in excessive zeal in enforcing it, or because the order itself was void as violating the constitutional rights of the appellants, invaded appellants' constitutional rights, this could be tested out in a suit seeking to enjoin such conduct by the public officials.

333 F.2d 630, 632 (5th Cir. 1964). More recently, after the Alabama Supreme Court, in defiance of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), issued an order requiring enforcement of its state-law prohibition on same-sex marriage, the federal district court in *Strawser v. Strange* nevertheless enjoined local officials from enforcing the marriage ban, holding that the state court's order could not prevent enforcement of the federal Constitution. 105 F. Supp. 3d 1323, 1329–30 (S.D. Ala. 2015), *aff'd* (Oct. 20, 2015).[5]

This Court unquestionably has the power to order state and local government officials to stop violating the Constitution, even if their conduct is authorized by state law or local judicial

[5] The Sheriff cites cases noting that it is no defense to federal criminal contempt for a private, individual defendant to claim merely that the court order he disobeyed was unconstitutional. (Doc. 18-1 at 10-11.) But this says nothing about a federal court's power to enforce the Constitution against state actors. The Sheriff also cites a *state* case making a parallel claim about *state* criminal contempt, *id.* at 11 (citing *Dauphine v. Carencro High School*, 2002-2005 (La. 4/21/03), 843 So.2d 1096), but that claim is unavailing for the same reasons recognized in *Due* and *Strawser*. *See also Armstrong v. Exceptional Child Ctr., Inc.*, 125 S. Ct. 1378, 1384 (2015) ("[A]s we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted.").

order—indeed, even if their conduct is compelled by state law or local judicial order. *See, e.g.*, *Armstrong*, 135 S. Ct. at 1384 (noting *Young*'s applicability to both state actors and to "violations of federal law by federal officials"); *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 228, 233–33 (1964) (enjoining county officials); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (noting that the principle established in *Ex parte Young* and its progeny "is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred"); *Bostic v. Schaefer*, 760 F.3d 352, 371 n.3 (4th Cir. 2014) (holding that a city clerk can be enjoined under *Ex parte Young* because he was responsible for enforcing Virginia's same-sex marriage ban); *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 957 (9th Cir. 2002) (reinstating official capacity claims against municipal officers because they were "classic *Ex parte Young* defendants"); *Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir. 1999) (holding injunctive relief can be granted where "county officials are sued simply for complying with state mandates that afford no discretion").

In *Viet Anh Vo v. Gee*, the Eastern District of Louisiana recently enjoined Louisiana clerks of court—who, like Sheriffs, are political subdivisions of the state—from enforcing a state law that required applicants for a marriage license to produce a birth certificate. Civil Action No. 16-15639, 2017 WL 1091261 (E.D. La. Mar. 23, 2017). Judge Lemelle rejected the clerks of courts' claim that they could be liable for injunctive relief *only* under a *Monell* theory: "the *Monell* requirements that defendants reference apply where a municipal official acts in a local capacity, not where the official performs as a state actor. . . . The appropriate standard that should be used in the instant matter is the one found in *Ex Parte Young*." *Id.* at *4 (citing *Cain v. City of New Orleans*, No. 15-4479, 2017 WL 467685 (E.D. La. Feb. 3, 2017)). To the extent that Sheriff Garber

is a state actor when enforcing the de facto detention orders of the 15th JDC, his defense that he is only following orders is meritless, and his motion should be denied.

2. The Sheriff Can Be Enjoined Under *Monell* as a Municipal Policymaker.

Under Louisiana law, sheriffs' offices are political subdivisions akin to municipal entities. *Burge v. Par. of St. Tammany*, 187 F.3d 452, 469 (5th Cir. 1999); *cf. Cain*, 2016 WL 2849498, at *6 (treating the Orleans Parish Sheriff's Office as a "municipal entity"). The Fifth Circuit has held that a municipality is accountable under § 1983 for the "official conduct and decisions" of an official, "at least in those areas in which he, alone, is the final authority or ultimate repository of [municipal] power." *See Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980). As the keeper of the Lafayette Parish Jail, La. Rev. Stat. §§ 13:5539(C), 15:704, Sheriff Garber is the final authority as to who is detained there. Because all other criteria for municipal liability are uncontroversial in this case, he can therefore be enjoined from unconstitutionally detaining Plaintiffs under § 1983 and *Monell*.

The Fifth Circuit has established a three-part test for municipal liability under *Monell*. Plaintiffs must show (1) a policymaker,[6] (2) a policy, and (3) that the policy was the "moving force" behind the plaintiff's injury. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). The Sheriff does not appear to contest that his office has a policy of consistently enforcing money-based de facto orders of detention issued by local judges (Doc. 18-1, at 11), that the Sheriff is a policymaker for the Sheriff's Office, and that the enforcement policy was the moving force behind Plaintiffs' alleged harms.

[6] A complaint need not "identify" the policymaker responsible for an unlawful policy. *See Groden v. City of Dallas, Tex.*, 826 F.3d 280, 284 (5th Cir. 2016) (explaining that the identity of the "policymaker" is a legal concept that need not be pleaded in a complaint). Instead, a complaint need only plead facts sufficient to give rise to a reasonable inference that a policymaker exists. In this case, it is beyond dispute that the Sheriff is the chief policymaker for the Lafayette Parish Jail.

The Sheriff is a policymaker for the Sheriff's office. A policymaker is an official "who speaks[s] with final policymaking authority for the local government actor concerning the alleged action to have caused" the constitutional violation, *Flores v. Cameron Cty., Tex.*, 92 F.3d 258, 264 (5th Cir. 1996), one "who could be held responsible, through actual or constructive knowledge, for enforcing a policy that caused [the plaintiffs'] injuries." *Piotrowski*, 237 F.3d at 578–79. A policymaker's knowledge of an unconstitutional custom may be inferred "on the ground that [he] would have known of the violations if [he] had properly exercised [his] responsibilities." *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984). In this case, it is beyond dispute that the Sheriff himself is the relevant policymaker, and the Complaint gives rise to a reasonable inference that he has a policy of enforcing financial conditions of release operating as de facto orders of detention that he knows to have been entered without any of the substantive findings or procedures required by the Constitution for a valid order of pretrial detention.[7]

The Sheriff's enforcement policy is the "moving force" behind Plaintiffs' constitutional harms. To show that a policy is a "moving force," a plaintiff "must show that the municipal action . . . reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow," and "demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Valle v. City of Houston*, 613 F.3d 536, 542 (5th Cir. 2010). The Sheriff does not deny that his actions in fact cause the harms that the Plaintiffs allege. Nor

[7] Federal courts have found that sheriffs have the requisite knowledge on materially identical facts. (*See* Doc. 1 ¶¶ 18, 23, 24, 34, 35); *see also ODonnell*, 227 F. Supp. 3d at 747 (citing *Doe v. Angelina Cty.*, 733 F. Supp. 245 (E.D. Tex. 1990); *De Luna v. Hidalgo Cty.*, 853 F. Supp. 2d 623 (S.D. Tex. 2012); *Dodds v. Logan Cty. Sheriff's Dept.*, Civil No. 8–333, 2009 WL 8747487 (W.D. Okla. Aug. 3, 2009) (holding sheriff liable for "deliberate indifference to the due process rights of arrestees whose bail had been pre-set" by acquiescing in a policy set by local judges); *Blumel v. Mylander*, 954 F. Supp. 1547, 1557 (M.D. Fla. 1997) (sheriff and jailer liable for violating right of pretrial release when they were "actually and constructively aware" that the 48-hour requirement had been exceeded)). The well-pleaded facts of the Complaint show that the Sheriff knows that Plaintiffs are in jail for no reason other than their inability to pay sums of money set without any inquiry into their ability to pay. He, therefore, knows the facts necessary to show that the orders of detention based on those sums of money are invalid.

does he deny that he causes these harms knowingly. He does not even mention *Monell* or the criteria for municipal liability.

Instead he simply notes that "Judge Vance in the Eastern District dismissed somewhat similar allegations leveled against Sheriff Gusman in the *Cain v. City of New Orleans* case." (Doc. 18-1, at 11.) The court in *Cain* concluded that the plaintiffs there had failed to allege that the Orleans Parish Sheriff's Office was a moving force behind the alleged violations, on the ground that they had "allege[d] no facts—and cite[d] no law—indicating that the Sheriff's Office ha[d] authority" to do what the plaintiffs claimed it was constitutionally required to do. *See Cain*, 2016 WL 2849498 at *8. By gesturing at *Cain*, then, Sheriff Garber indirectly suggests that his policy of enforcing invalid de facto orders of detention is not the moving force behind Plaintiffs' constitutional harms because he is required by state law to follow those orders.

Whatever the merits of this argument,[8] it cannot require dismissal here. For insofar as Sheriff Garber acts for the state in carrying out his enforcement policy, he can still be enjoined as a state actor under § 1983 and over a century of Supreme Court precedent, as explained above. The court in *Cain* did not consider this alternative. *See ODonnell*, 227 F. Supp. 3d at 751 ("The *Cain* court did not consider the sheriff's liability for prospective relief as a state actor.").

[8] Cain involved markedly different facts than those involved in the instant matter. The *Cain* court suggested that municipalities cannot be liable for actions required by state law. *See* 2016 WL 2849498 at *8 (citing *Briscoe*, 619 F.2d at 404, for the proposition "that a municipal defendant may [not] be held liable under § 1983 for enforcing a state statute [when] the statute mandates a particular course of action"). But *Briscoe* did not involve a live claim for injunctive relief; it involved only claims for declaratory relief and damages. *See* 619 F.2d at 397. Moreover, the court there actually *granted* the declaratory relief, *id.* at 398–402, withholding only the damages. As the Fifth Circuit stated in *Crane*, *Briscoe* "stands . . . for the unexceptionable proposition that local governments and their officials who act in conformance with a state statutory scheme will not be held liable for § 1983 *damages* if the scheme is later held unconstitutional." 759 F.2d at 430 n.19 (emphasis added). Neither *Briscoe* nor *Crane* involved claims for injunctive relief, and the only form of prospective relief sought in either case was granted. Whatever "good faith" protections municipalities may claim from damages for maintaining policies pursuant to state law or judicial order, federal courts have the power to declare their unconstitutional actions unlawful and to order them stopped. In any event, for the reasons explained above, the Court need not reach this question in order to deny the present motion to dismiss, as Sheriff Garber can be enjoined even if he is regarded as acting for the state when enforcing unlawful detention orders.

3. Plaintiffs' Well-Pleaded Factual Allegations Give Rise to a Claim Against the Sheriff.

Finally, the Sheriff argues that the Complaint does not state a claim against him because some of the allegations are directed at practices enforced by all the Defendants rather than against the Sheriff alone. As described above, the well-pleaded facts of the complaint plainly allege that the Sheriff violates the Constitution as either a state or local actor when he enforces invalid orders of money-based detention. No more is required. To the extent that the Sheriff argues that he is entitled at this stage to a more specific description of the precise injunction that Plaintiffs seek against him alone, he is wrong. This Court, after a hearing on Plaintiffs' motion for a preliminary injunction, will determine the proper scope of relief to be afforded. And that relief will depend in part on the relief that Plaintiffs secure from the other Defendants in this case.

The Sheriff appears to rely on *Cain v. City of New Orleans*, No. CV 15-4479, 2017 WL 467685, at *12 (E.D. La. Feb. 3, 2017), for the broad proposition that "collective allegations . . . should be disregarded" and, therefore, that the case against him should be dismissed. (Doc. 18-1, at 9.) *Cain*'s holding is not so broad. Nothing in *Cain* or any other cited authority supports the proposition that making some collective allegations is improper where a Complaint clearly and unequivocally alleges the specific role of a specific defendant in enforcing an unconstitutional practice. Regardless *Cain* is inapplicable here. Unlike in *Cain*, Plaintiffs in this case have pleaded facts sufficient to give rise to a reasonable inference that the Sheriff is aware of the invalidity of the orders of detention. *Contra Cain*, 2017 WL 467685, at *12.[9] And, unlike in *Cain*, Plaintiffs in this case seek to enjoin the Sheriff as an enforcer of *state law*, in which capacity his knowledge of

[9] Counsel from Civil Rights Corps, along with others, represent the plaintiffs in the *Cain* litigation, which is ongoing. Counsel from Civil Rights Corps in that matter disagree that the *Cain* plaintiffs did not plead facts sufficient to give rise to a reasonable inference that the defendant sheriff in that case lacked knowledge of the illegality of the orders he enforces. Plaintiffs do not address that issue here because, regardless, *Cain*'s reasoning does not apply in this case.

the illegality of the orders and discretion to disobey them are irrelevant. *Contra id*; *see also ODonnell*, 227 F. Supp. 3d at 751 ("The *Cain* court did not consider the sheriff's liability for prospective relief as a state actor."). Nonetheless, if the Court believes that it would benefit from a more precise description of the relief sought, Plaintiffs stand ready to offer one at the hearing on their motion for a preliminary injunction or in an appropriate filing. Accordingly, the Sheriff's argument lacks merit and his motion should be denied.

C. Plaintiffs' Well-Pleaded Facts Show that They Are Entitled to a Declaratory Judgment Against Chief Judge Earles and Commissioner Frederick

The Judicial Defendants argue that the case against them should be dismissed because there "is no absolute right to bail under the Constitution" (Doc. 26-1, at 1); "there is nothing inherently unconstitutional with bond schedules" (*id.* at 2); and "bail hearing[s] held within 48 hours [of arrest] [are] . . . presumptively constitutional" (*id.*). The Judicial Defendants misunderstand Plaintiffs' arguments. Plaintiffs do not argue that there is an absolute right to bail but instead claim, *inter alia*, that once arrestees are declared eligible for release they may not be detained simply because they cannot pay a sum of money that is required without an inquiry into their ability to pay and consideration of non-financial alternatives. Plaintiffs do not argue that there is anything *inherently* unconstitutional about financial conditions of release, but instead claim that predetermined conditions violate the Constitution when they operate to jail the poor and free the rich without the proper findings and process that the Supreme Court and the Fifth Circuit have required. *See United States v. Salerno*, 481 U.S. 739 (1987). And Plaintiffs do not argue that they are deprived of their rights to a prompt probable cause hearing under *Gerstein* and *County of Riverside v. McLaughlin*, 500 U.S. 44, 54 (1991), but instead that they are detained before *and after* their first judicial appearance solely because they cannot make a money payment. Judicial Defendants' arguments are, therefore, inapposite and their motion should be denied.

First, Plaintiffs do not argue that there is an absolute, freestanding "right to bail." The Constitution clearly permits the state to deny pretrial release altogether when it finds, at a procedurally valid hearing, that an arrestee poses an immitigable risk of flight or danger to the community. *Salerno*, 481 U.S. 739. But the state may not deny pretrial release only to those who cannot deposit enough money. *Pugh*, 572 F.2d at 1056 ("At the outset we accept the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible."). Defendants' argument is inapposite and, in any event, is foreclosed by *Pugh*, 572 F.2d 1053. That case similarly involved a challenge, by indigent individuals, to Florida's secured money bail rules. And the Fifth Circuit accepted the validity of a wealth-based challenge to monetary bail under the Equal Protection and Due Process Clauses without holding that there is a freestanding "right to bail." *Id.* at 1056 ("The incarceration of those who cannot [meet bail conditions], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."). Because *Pugh* is binding Circuit precedent, the Defendant Judges' argument fails.

Second, Plaintiffs do not argue that there is anything inherently unconstitutional about the use of predetermined "bail schedules." An order of financial conditions of release, whether it comes from a schedule or an ad hoc determination by a judicial officer, is subject to heightened scrutiny if and only if it *results in detention*. When an order of financial conditions results in detention, it is unconstitutional unless (1) a court makes a finding that the person *can* satisfy the financial condition but is willfully refusing to do so (a finding that will be exceptionally rare in the pretrial context), *e.g.*, *Bearden v. Georgia*, 461 U.S. 600 (1983); or (2) that an order of pretrial detention could validly issue against the arrestee, *Salerno*, 481 U.S. 739. Because Judicial

Defendants in this case do neither, the financial conditions of release that they impose are unconstitutional.

Finally, bail hearings held within 48 hours are not "presumptively constitutional." (Doc. 26-1, at 2.) Under *Gerstein*, the Fourth Amendment entitles a warrantless arrestee to a judicial determination of probable cause within a reasonable period after arrest. 420 U.S. at 1114. Under *McLaughlin*, a judicial determination of probable cause conducted within 48 hours of arrest is presumptively reasonable. 500 U.S. 44 at 56. But these cases say nothing about whether hearings held within 48 hours comply with the Due Process and Equal Protection clauses. Judicial Defendants seem to contend that so long as a hearing is held within 48 hours of arrest it is constitutional for all purposes. It is not. If it were, a hearing at which a judge ruled all African American arrestees ineligible for post-arrest release would be constitutional so long as it happened quickly. And in any event Plaintiffs cannot raise their ability to pay for well over 48 hours. (Doc. 1, ¶ 37.) This argument fails.

Commissioner Frederick requires secured money bail amounts without inquiring into arrestees' ability to pay, without hearing evidence about their dangerousness or risk of flight, and without making any constitutionally required findings that could conceivably justify an order of preventive detention. People detained based on the predetermined money bail schedule fare no better. These practices violate the United States Constitution, and a declaratory judgment saying so may issue against the Judicial Defendants. *See* 42 U.S.C. § 1983 ("[I]n 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.").

IV. CONCLUSION

For the foregoing reasons, Defendants' motions should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed using the Court's CM/ECF filing system, which will provide electronic notice to all counsel of record.

/s Charles Gerstein

Charles Gerstein