UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ADRIAN CALISTE and BRIAN GISCLAIR, individually and on behalf of all others similarly situated, Plaintiffs, v. HARRY E. CANTRELL, Magistrate Judge of Orleans Parish Criminal District Court, Defendant.	Case No. 2:17-cv-06197-EEF-MBN

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

Plaintiffs Adrian Caliste and Brian Gisclair oppose Defendant Magistrate Harry Cantrell's motion to dismiss (ECF No. 12). Magistrate Cantrell has raised a lack of standing and also argued that this Court should abstain from hearing Plaintiffs' claims. Both arguments fail, and Defendant's motion to dismiss should therefore be denied.

I. Factual Summary

Defendant Cantrell is the Magistrate of the Orleans Parish Criminal District Court. In that capacity, Cantrell conducts first appearances and establishes the conditions of release for arrestees under the jurisdiction of the Orleans Criminal District Court. (Complaint, ECF No. 1 ¶ 8.) Cantrell retains the authority to determine conditions of release until an indictment has been issued or a bill of information filed and the case assigned to a section of the court, which often takes months. (*Id.*) Magistrate Cantrell routinely requires secured financial conditions of $2,500 per charge, regardless of the circumstances of the individual defendants appearing before him,

and he refuses to permit argument or to consider evidence that would weigh in favor of lower monetary bail amounts or non-financial alternatives to secured money bail. (*Id.* at 6, 8–13)

The Orleans Parish Criminal District Court receives a 1.8% fee on every commercial surety bond issued in the parish. (*Id.* at 13–14.) This generates about $1,000,000 per year, nearly one quarter of the court's General Fund budget. (*Id.* at 14 ¶ 47.) The $1,000,000 collected from this fee on commercial surety bonds funds the court's operations, including the operating costs for the Magistrate Section. (*Id.* ¶ 45.) Along with his fellow judges of the Criminal District Court, Magistrate Cantrell exercises complete executive control over the General Fund. (*Id.* at 15 ¶ 49.)

Plaintiffs Adrian Caliste and Brian Gisclair were both arrested on nonviolent misdemeanor charges and brought before Defendant Cantrell on June 20, 2017, for their first appearances and bail determinations. (*Id.* at 4–5.) On each of their charges (one for Mr. Gisclair and two for Mr. Caliste), Magistrate Cantrell required a secured financial condition of $2,500. (*Id.*) Consistent with his policy, Magistrate Cantrell made no inquiry into the ability of either man to pay this amount or whether alternative conditions of release would have served the government's purposes. (*Id.*) Accordingly, he made no findings on either issue.

II. Standard of Review for Motions Challenging Jurisdiction under Rule 12(b)(1).

A case should be dismissed under Fed. R. Civ. P. 12(b)(1) only where "the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). Challenges under Rule 12(b)(1) may be either facial or factual. *Superior MRI Svcs., Inc. v. Alliance Healthcare Svcs., Inc.*, 778 F.3d 502, 504 (5th Cir. 2015). A facial challenge is one in which the facts as alleged in the complaint are taken as true, similar to a 12(b)(6) standard. *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th

Cir. 1981). "A motion to dismiss for lack of subject-matter jurisdiction should only be granted if it appears certain that the plaintiff cannot prove any set of facts in support of his claims entitling him to relief." *In re FEMA Trailer Formaldehyde Prods. Liability Litig.*, 668 F.3d 281, 287 (5th Cir. 2012). A factual challenge under 12(b)(1) challenges an underlying fact necessary for the court's jurisdiction, such as prudential standing or the citizenship of a party in a case being heard under the court's diversity jurisdiction. *See Superior MRI Svcs., Inc.*, 778 F.3d at 504.

Magistrate Cantrell has not raised a factual challenge to this Court's jurisdiction over the representative Plaintiffs' claims. He has appended to his motion to dismiss the docket entries for various people who are not the Plaintiffs (ECF No. 12-3), and challenged the "standing" of those individuals. The standing of individuals who are not Plaintiffs is irrelevant, as discussed in Section III(A) below. The remainder of Magistrate Cantrell's motion, which argues for abstention under *Younger v. Harris*, 401 U.S. 37 (1971), disputes none of the facts as alleged by Plaintiffs and is a facial challenge that can be resolved solely with reference to the Complaint.

III. ARGUMENT

A. The Named Representative Plaintiffs Have Standing.

Magistrate Cantrell first argues that some criminal defendants appearing before him, whose transcripts were cited as examples of his policies and practices in the fact section of Plaintiffs' Complaint, have had their cases resolved since the Complaint was filed. He argues that they have now lost "standing" to pursue this litigation. (ECF No. 12 at 1 ("[P]laintiffs lack standing because some state criminal proceedings have concluded. . . .").) Magistrate Cantrell

attached to his motion docket entries in the criminal cases cited by Plaintiffs and the docket entries for the Plaintiffs themselves. (ECF No. 12-3.)[1]

This argument fails because the individuals who Defendant Cantrell alleges to lack standing are not Plaintiffs in this litigation. There are two named Plaintiffs to this litigation: Adrian Caliste and Brian Gisclair. Defendant does not dispute that those two individuals have standing and has made no argument that the named Plaintiffs lack standing to challenge their money-based post-arrest detention. The transcripts of proceedings before Defendant Cantrell that were cited in Plaintiffs' complaint were merely examples of the unconstitutional conduct that help to establish Defendant Cantrell's policies and practices. Whether those other individuals have "standing" to sue Defendant Cantrell has no bearing on the question of whether Mr. Caliste, Mr. Gisclair, and the class of similarly situated people that they represent have standing. Mr. Caliste and Mr. Gisclair were detained pursuant to financial conditions of release at the time they filed their Complaint and Motion for Class Certification and therefore have standing under long-established federal law to challenge the money-based procedures that led to their unlawful detention.[2] Defendant does not even dispute this point.

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[1] Both the exhibit and Cantrell's memo in support of his motion note that the representative Plaintiffs, Mr. Caliste and Mr. Gisclair, continued to have open cases in the Magistrate section of Orleans Criminal District Court.

[2] While using the word "standing, Defendants appear to be attempting actually to invoke the concept of mootness. But even if Defendant had made a mootness challenge referencing those other arrestees or to the named Plaintiffs' claims, such an argument would be foreclosed by decades of Supreme Court precedent. *See Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (holding that a representative plaintiff's challenge to the county's failure to make prompt probable cause determinations was not moot even though the plaintiffs received probable cause determinations or release from custody prior to class certification); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (holding that the termination of a class representative's pretrial detention did not moot the class members' claims challenging the length of pretrial detention without a prompt probable cause hearing). In such cases, the claims are so "inherently transitory" that the trial court would not be able to certify a class before the named representative's claim became moot. As a result, class certification will relate back to the filing of the complaint. *Riverside*, 500 U.S. at 52; *see also Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919 (5th Cir. 2008); *Edwards v. Cofield*, No. 3:17-cv-321-WKW, 2017 WL 3015176, at *2–3 (S.D. Ala. July 14, 2017) (holding that the representative plaintiff's release from jail did not moot class-action claims challenging county's post-arrest detention practices).

B. *Younger* Abstention is Inappropriate in this Case.

Defendant next contends that this Court should decline jurisdiction to remedy the constitutional violations in this case based on the principles announced in *Younger v. Harris*, 401 U.S. 37 (1971), in which the Supreme Court established a doctrine by which federal courts should abstain from enjoining criminal proceedings in state courts. But, as an initial matter, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). Abstention is thus the exception and applies narrowly. It is not warranted here.

Younger abstention requires three factors be met: (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 (1982). Apart from the *Middlesex* factors, the Supreme Court has long recognized an exception to *Younger* abstention if the state proceeding is in a biased tribunal. *See Gibson v. Berryhill,* 411 U.S. 564 (1973). In this case, the third *Middlesex* factor is not met, since the Plaintiffs lack an adequate opportunity to raise these claims before Defendant Cantrell. Second, Defendant Cantrell suffers is biased by an institutional financial conflict of interest when he adjudicates financial conditions of release. Thus abstention is inappropriate on either of these independent grounds.

1. *Younger* Abstention is Inappropriate Because the Magistrate Section of Orleans Criminal District Court Does Not Provide an Adequate Opportunity for Plaintiffs to Raise their Claims.

Plaintiffs and those similarly situated lack an adequate opportunity to challenge the legality of their wealth-based detention in the Magistrate Section of Orleans Criminal District Court. Magistrate Cantrell does not permit argument or evidence on the question of ability to pay, and he routinely refuses to consider alternative non-financial conditions of release. (Complaint, ECF No. 1 at 6, 8–13) He also declines to make appropriate findings or to employ any of the procedures required under state and federal law for the entry of a valid order of pretrial detention. When attorneys attempt to present any of these arguments, he has threatened to hold them in contempt. (*Id.* at 11–13.)

Federal courts may not abstain when arrestees challenge the lack of an adequate hearing into the legality of their post-arrest detention. *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975). The *Gerstein* plaintiffs (as here) challenged a pretrial practice, specifically their detention without a prompt probable-cause determination. 420 U.S. at 106–07. The Supreme Court held that *Younger* did not apply to a claim that a prompt hearing into the validity of their detention was required, because the claim "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." *Id.* at 108 n.9. The *Gerstein* opinion was an affirmation of the Fifth Circuit's rejection of *Younger* abstention to challenges to pretrial detention: "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." *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).

This analysis is so straightforward that *Younger* abstention arguments have consistently been rejected in similar cases. *See, e.g.*, *ODonnell v. Harris Cty., Tex.*, 227 F. Supp. 3d 706, 734–39 (S.D. Tex. 2016), *recons. denied*, No. CV H-16-1414, 2017 WL 784899 (S.D. Tex. Mar. 1, 2017). As the Middle District of Tennessee recently commented, "*Gerstein* stands for the principle that when it comes to the adequacy of the state court proceedings as an opportunity to address constitutional harms, the opportunity must be available before the harm is inflicted." *Rodriguez v. Providence Cmty. Corrs.*, 15 F. Supp. 3d 758, 766 (M.D. Tenn. 2015). Multiple District Courts have rejected *Younger* abstention in similar pretrial detention challenges. *See Walker v. City of Calhoun, Ga.*, No. 4:15-CV-0170-HLM, 2017 WL 2794064 (N.D. Ga. June 16, 2017) (denying application of *Younger* due, in part, to fact that challenging constitutionality of pretrial detention was not a challenge to underlying criminal case and could not be raised in those cases); *Welchin v. Cty. of Sacramento,* No. 2:16-cv-00185-TLN-KJN, 2016 WL 5930563, at *6–9 (E.D. Cal. Oct. 10, 2016) (refusing 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*, Case No. 15-cv-04959-YGR, 2016 WL 374230, at *2–5 (N.D. Cal. Feb. 1, 2016) (same).

As alleged in Plaintiffs' Complaint, Magistrate Cantrell routinely refuses to consider the ability of arrestees' to pay the secured money bails he imposes or to even entertain any argument on the subject: "First of all, this Court never goes any lower than $2,500; okay. So you'll know that for reference. You don't have to ask me for that anymore." (ECF No. 1 at 7.) He has explicitly stated to defense counsel that he will not consider arguments to lower secured surety bonds. When a defense attorney attempted to argue for a lower surety bond for his client,

Magistrate Cantrell responded, "You can give me some information[,] but I'm going to set her bond at $2,500." The attorney persisted: "So the bond will be set at $2,500 regardless of the information given?" Cantrell replied, "Yes." (*Id.* at 9.) Cantrell goes so far as to threaten defense attorneys with contempt if they attempt to present argument for lowered bail amounts or non-financial conditions of release. (*Id.* at 11–13.)

Plaintiffs are simply unable to raise their Equal Protection and Due Process arguments before Magistrate Cantrell. Until a bill of information is filed, an arrestee for whom Cantrell has set bail has no means of challenging this bail determination before another judge. If the arrestee files a motion for bail reduction, Magistrate Cantrell would be the only judge to hear his motion. (ECF No. 1 at 3.) Even if arrestees could later demonstrate to a different court section that their days or weeks of post-arrest wealth-based detention was unconstitutional, the state court judge could not remedy those harms that would already have been suffered. By the time such a state-court forum is available to them, they may already have been detained for weeks or months on a secured money bail order that has been required without consideration of their ability to pay or of non-financial alternative conditions of release.

2. *Younger* Abstention is Inappropriate Where the State Proceeding Before Magistrate Cantrell is Inherently Biased.

Apart from the Plaintiffs' inability to even raise their Constitutional claims, Magistrate Cantrell's inherent institutional financial conflict of interest precludes *Younger* abstention, even if the *Middlesex* factors were met.

In *Gibson v. Berryhill*, 411 U.S. 564 (1973), the Supreme Court addressed the question of whether a federal court should abstain from hearing a claim for injunctive relief against a state's professional licensing board where the plaintiffs alleged that the board had a financial bias. The *Gibson* Court ruled that "the predicate for a *Younger v. Harris* dismissal was lacking, for . . . the

State Board of Optometry was incompetent by reason of bias to adjudicate the issues pending before it." *Gibson*, 411 U.S. at 577.[3] The Supreme Court has since reaffirmed this principle that *Younger* does not prevent a federal court's vindicating constitutional rights when a state tribunal is biased. *See, e.g.*, *Kugler v. Helfant*, 421 U.S. 117, 124 (1975) ("The policy of equitable restraint expressed in *Younger v. Harris*, in short, is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights.")

Federal Circuit Courts have found abstention inapplicable in cases alleging biased state tribunals. *See Esso Standard Oil v. Lopez-Freytes*, 522 F.3d 136 (1st Cir. 2008) (denying abstention where state administrative adjudication was biased by deposit of fines in accounts controlled by adjudicative body); *Trust & Inv. Advisers, Inc. v. Hogsett*, 43 F.3d 290 (7th Cir. 1994) (reversing trial court's dismissal on *Younger* grounds and remanding for further factual development of the question of bias on the part of state administrative body); *Yamaha Motor Corp., U.S.A. v. Riney*, 21 F.3d 793 (8th Cir. 1994) (denying abstention where member of state adjudicative board had pecuniary interest in the adjudication).

In *Nissan Motor Corp. in U.S.A. v. Royal Nissan, Inc.*, Judge Mentz of the Eastern District of Louisiana refused to apply *Younger* abstention in a case in which the plaintiff sought an injunction against the Louisiana Motor Vehicle Commission and alleged that the Commission's members had a financial bias against it. 757 F. Supp 736, 739 (E.D. La. 1991).

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[3] It remains unsettled whether a biased tribunal qualifies as an inadequate opportunity to raise a federal plaintiff's claims under the third *Middlesex* factor, or whether it is instead an "extraordinary circumstance" that would exclude *Younger* abstention even where the other three factors are met. *See, e.g., Kugler v. Helfant*, 421 U.S. 117, 125 n.4 (1975). Regardless, a biased tribunal results in the same outcome: "[W]hether bias is considered separately from the three-prong *Middlesex* text, or whether we disregard the clear language in *Kugler* and consider bias to be a part of the third prong of the test . . . . under *Gibson* it is clear that bias on the merits of a disciplinary proceeding is sufficient to preclude *Younger* abstention." *Partington v. Gedan*, 880 F.2d 116, 139-40 (9th Cir. 1989).

Other districts in the Fifth Circuit agree. *See Geots v. Miss. Bd. of Veterinary Med.*, 986 F. Supp. 1028 (S.D. Miss. 1997) ("[N]ot only will the federal court not abstain where the potential for bias is shown, but upon a finding that members of a state tribunal have a personal interest that might preclude their fair and impartial hearing of charges, it is appropriate for the federal court to enjoin the state proceedings against the plaintiff.").

Magistrate Cantrell cites to the case of *El v. Louisiana*, No. 16-2125, 2017 WL 1969552 (E.D. La. May 12, 2017), for the proposition that *Younger* abstention applies to Plaintiffs' claims. But the plaintiff in *El* appeared to be specifically requesting the District Court to enjoin the District Attorney from prosecuting his arrest for various misdemeanors. Furthermore, Mr. El based his argument on the proposition that the state court lacked jurisdiction over him because he is an adherent to the Moorish Science Temple faith and therefore an entity beyond the jurisdiction of the United States. Thus *El v. Louisiana* is easily distinguished from this case. Plaintiffs here do not seek to enjoin their criminal prosecutions nor do their claims challenge the jurisdiction of the state court over them.

Magistrate Cantrell has an unconstitutional conflict of interest in his role in setting Plaintiffs' bail. (ECF No. 1 at 13–15.) Indeed, this Court already found such a financial conflict (in which judicial officers receive a percentage of monetary bail amounts to the Judicial Expense Fund) to violate due process over 25 years ago. *Augustus v. Roemer*, 771 F. Supp. 1458, 1472–73 (E.D. La. 1991). Chief Judge Vance recently held that an identical claim states a due process violation for the same reasons. *Cain v. City of New Orleans*, No. 15-4479, 2017 WL 467685 at *17–18 (E.D. La. Feb. 3, 2017). To summarize: through the statutory scheme requiring the payment of 1.8% of every commercial surety bond to the Orleans Criminal District Court, Magistrate Cantrell has an impermissible financial conflict in determining whether to require

commercial money bail as a condition of pretrial release and then in the calibration of what any monetary bail amount should be. The 1.8% fee is deposited into an account controlled by Magistrate Cantrell and the Judges of the Orleans Criminal District Court. (ECF No. 1 at 15.) This fee amounts to a quarter of the court's operating budget. (*Id.* at 14.) Therefore, Magistrate Cantrell has an incentive to require financial conditions of release and to calibrate the amount of those conditions in a manner that maximizes the revenue that he controls. Even if Plaintiffs had the ability to raise this argument within the confines of their first appearance, they would be forced to make this argument before Magistrate Cantrell, who is not the neutral adjudicator that the Due Process Clause requires. *Younger* abstention is therefore inapplicable in this case.

IV. CONCLUSION

Magistrate Cantrell's Motion to Dismiss should be denied. First, he has made an irrelevant challenge to the "standing" of nonparties. Second, this case falls squarely outside the bounds of claims that a federal court must abstain from hearing under *Younger v. Harris*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being filed using the Court's CM/ECF system, which provides notice to all parties.

/s/ Eric A. Foley
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