No. 19-

IN THE

Supreme Court of the United States

LAURIE A. WHITE, Judge, Section A of the Orleans Parish Criminal District Court, *et al.*

Petitioners,

v.

ALANA CAIN, *et al.*,

Respondents.

HARRY E. CANTRELL, Magistrate Judge of Orleans Parish Criminal District Court,

Petitioner,

v.

ADRIAN CALISTE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DENNIS J. PHAYER
MINDY NUNEZ DUFFOURC*
BURGLASS & TANKERSLEY, LLC
5213 Airline Drive
Metairie, LA 70001-5602
(504) 836-2220
mnunezduffourc@burglass.com

Counsel for Petitioners

*Counsel of Record

293142

QUESTIONS PRESENTED

Does the federal court have jurisdiction to disqualify state criminal court judges from adjudicating matters, over which they have exclusive jurisdiction, based upon an alleged unconstitutional conflict of interest created by the state's statutory funding and fines and fees schemes?

Does the due process clause disqualify state criminal court judges from hearing certain criminal matters because those judges collectively administer a statutorily-created operating fund that is partially sourced, pursuant to state law, by certain categories of statutorily-authorized fines and fees?

LIST OF PARTIES

The Defendants-Petitioners in the *Cain* case are the Judges of the Orleans Parish Criminal District Court: Judge Laurie White; Judge Tracey Flemings-Davillier; Judge Benedict Willard; Judge Keva Landrum-Johnson; Judge Robin Pittman; Judge Byron Williams; Judge Camille Buras; Judge Karen Herman; Judge Darryl Derbigny; Judge Arthur Hunter; Judge Franz Zibilich; and Magistrate Judge Harry Cantrell. The Plaintiffs-Respondents in the *Cain* case are Alana Cain, Ashton Brown, Reynaud Variste, Reynajia Variste, Thaddeus Long, and Vanessa Maxwell, individually and on behalf of all others similarly situated.

The Defendant-Petitioner in the *Caliste* case is Orleans Parish Criminal District Court Magistrate Judge Harry Cantrell. The Plaintiffs-Respondents in the *Caliste* Case are Adrian Caliste and Brian Gisclair, individually and on behalf of all others similarly situated.

CORPORATE DISCLOSURE STATEMENT

The Defendants-Petitioners in both the *Cain* and *Caliste* cases are individuals.

LIST OF PROCEEDINGS

A. *Cain v. White*

1. In the United States Court of Appeals for the Fifth Circuit, the Opinion was filed on August 23, 2019 and the Order denying petitions for panel and en banc rehearing was filed on September 30, 2019 in docket number 18-30955 under the caption: Alana CAIN; Ashton Brown; Reynaud Variste; Reynajia Variste; Thaddeus Long; Vanessa Maxwell, Plaintiffs – Appellees v. Laurie A. WHITE, Judge, Section A of the Orleans Parish Criminal District Court; Tracey Flemings-Davillier, Judge, Section B of the Orleans Parish Criminal District Court; Benedict Willard, Judge, Section C of the Orleans Parish Criminal District Court; Keva Landrum-Johnson, Judge, Section E of the Orleans Parish Criminal District Court; Robin Pittman, Judge, Section F of the Orleans Parish Criminal District Court; Byron C. Williams, Judge, Section G of the Orleans Parish Criminal District Court; Camille Buras, Judge, Section H of the Orleans Parish Criminal District Court; Karen K. Herman, Judge, Section I of the Orleans Parish Criminal District Court; Darryl Derbigny, Judge, Section J of the Orleans Parish Criminal District Court; Arthur Hunter, Judge, Section K of the Orleans Parish Criminal District Court; Franz Zibilich, Judge, Section L of the Orleans Parish Criminal District Court; Harry E. Cantrell, Magistrate Judge of the Orleans Parish Criminal District Court, Defendants – Appellants.

2. In United States District Court for the Eastern District of Louisiana, the Order and Reasons granting summary judgment on the issue on appeal was filed on December 13, 2017 and the declaratory judgment

concerning the issue on appeal was filed on August 3, 2018 in docket number 15-4479 under the caption: Alana Cain, et al. v. City of New Orleans, et al. Other Orders in the same-docketed and captioned case were filed by the district court on December 3, 2015, April 21, 2016, April 22, 2016, May 3, 2016, May 11, 2016, May 13, 2016, May 23, 2016, December 8, 2016, February 3, 2017, and March 7, 2017.

B. ***Caliste v. Cantrell***

1. In the United States Court of Appeals for the Fifth Circuit, the Opinion was filed on August 29, 2019 and the Order denying petitions for panel and en banc rehearing was filed on October 1, 2019 in docket number 18-30954 under the caption: Adrian CALISTE, individually and on behalf of all others similarly situated; Brian Gisclair, individually and on behalf of all others similarly situated, Plaintiffs – Appellees v. Harry E. CANTRELL, Magistrate Judge of Orleans Parish Criminal District Court, Defendant – Appellant.

2. In United States District Court for the Eastern District of Louisiana, the Order and Reasons granting summary judgment on the issue on appeal was filed on August 6, 2018 and the declaratory judgment concerning the issue on appeal was filed on August 14, 2018 in docket number 17-6197 under the caption: Adrian CALISTE et al. v. Harry E. CANTRELL. Other Orders in the same-docketed and captioned case were filed by the district court on August 25, 2017, December 12, 2017, and March 16, 2018.

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OPINIONS AND ORDERS BELOW

A. *Cain v. White*

The Fifth Circuit Opinion is reported at *Cain v. White*, 937 F.3d 446 (5th Cir. 2019). (Appendix A) The Fifth Circuit's denial of Petitioners' petitions for panel and en banc rehearing is unreported. (Appendix E) The district court's Order and Reasons granting Respondents' Motion for Summary Judgment on the issue on appeal is reported at *Cain v. City of New Orleans*, 281 F.Supp.3d 624 (E.D. La. 2017). (Appendix C) The district court's Declaratory Judgment on the issue on appeal is unreported. (Appendix B)

B. *Caliste v. Cantrell*

The Fifth Circuit Opinion is reported at *Caliste v. Cantrell,* 937 F.3d 525 (5th Cir. 2019). (Appendix F) The Fifth Circuit's denial of Petitioners' petitions for panel rehearing and rehearing en banc is unreported. (Appendix I) The district court's Order and Reasons granting Respondents' Motion for Summary Judgment on the issue on appeal is reported at *Caliste v. Cantrell,* 329 F.Supp.3d 296 (E.D. La. 2018). (Appendix H) The district court's Declaratory Judgment on the issue on appeal is unreported. (Appendix G)

STATEMENT OF JURISDICTION

A. *Cain v. White*

On August 3, 2018, the district court issued the declaratory judgment from which the Defendants-

Petitioners appeal. Defendants-Petitioners filed a timely appeal to the Fifth Circuit Court of Appeals, which affirmed the district court's judgment on August 23, 2019. Defendants-Petitioners filed timely petitions for panel rehearing and rehearing en banc, which were denied on September 30, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

B. *Caliste v. Cantrell*

On August 14, 2018, the district court issued the declaratory judgment from which the Defendants-Petitioners appeal. Defendants-Petitioners filed a timely appeal to the Fifth Circuit Court of Appeals, which affirmed the district court's judgment on August 29, 2019. Defendants-Petitioners filed timely petitions for panel rehearing and rehearing en banc, which were denied on October 1, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S. Code § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The *Cain* Respondents are former criminal defendants in the Orleans Parish Criminal District Court ("OPCDC") who all pled guilty to crimes between 2011 and 2014. Respondents filed this civil rights action on behalf of themselves and others similarly situated under 42 U.S.C. § 1983 claiming that the Judges' authority over both fines and fees revenue and ability-to-pay determinations, which are required prior to a convicted criminal's detention for failure to pay fines and fees, violates the Fourteenth Amendment's Due Process Clause.

The *Caliste* Respondents are former criminal defendants in the OPCDC who appeared before Petitioner Magistrate Judge Harry Cantrell for bail hearings. Respondents filed a civil rights action on behalf of themselves and others similarly situated under 42 U.S.C. § 1983, claiming that Judge Cantrell's adjudication of bail hearings violates their right to due process because, pursuant to Louisiana law, 1.8% of the bond amount collected from commercial sureties is deposited into an account over which the Court, including Judge Cantrell, has discretionary use.

The *Cain* Petitioners are the Judges of the OPCDC, including Judge Harry Cantrell. The *Caliste* Petitioner is Judge Harry Cantrell. Petitioners are collectively referred to as "the Judges."

The district court had subject matter jurisdiction over both the *Cain* and *Caliste* matters pursuant to 28 U.S.C. § 1331, which grants the district courts "original jurisdiction of all civil actions arising under the . . . laws . . . of the United States."

Pursuant to Louisiana law, the OPCDC has, "exclusive jurisdiction of the trial and punishment of all crimes, misdemeanors, and offenses committed within the parish of Orleans if the jurisdiction is not vested by law in some other court." La. Rev. Stat. § 13:1336; *see* LA Rev Stat § 13:1335 (establishing one criminal district court, composed of twelve judges, for Orleans Parish). Louisiana law further requires Judge Cantrell, as the Magistrate Judge, to preside over initial appearances and make bail determinations. La. Rev. Stat. § 13:1346.

The Judges are statutorily authorized, and in some cases required, to assess the following fines and fees to criminal defendants at sentencing:

1. A fine pursuant to La. Rev. Stat. § 15:571.11(D), to be divided evenly between the OPCDC and the District Attorney;

2. Restitution pursuant to La. Code Crim. Proc. art. 883.2;

3. A mandatory $5 fee pursuant to La. Rev. Stat. § 13:1381.4(A)(1);

4. Fees of up to $500 for a misdemeanant and $2,500 for a felon pursuant to La. Rev. Stat. § 13:1381.4(A)(2);

5. Court costs of up to $100 pursuant to La. Rev. Stat. § 13:1377(A);

6. A $14 fee for the Indigent Transcript Fund pursuant to La. Rev. Stat. § 13:1381.1(B); and

7. Additional costs for the Indigent Transcript Fund pursuant to La. Code Crim. Proc. art. 887(A).

State law also requires commercial sureties in Orleans Parish to pay a bond fee of "three dollars for each one hundred dollars worth of liability underwritten by the commercial surety." La. Rev. Stat. § 22:822 (A)(2).

Pursuant to Louisiana law, OPCDC's revenue is divided into two funds: (1) a restricted fund used for

specified purposes and (2) the Judicial Expense Fund ("JEF"), which is the general operating fund for the court. *See* La. Rev. Stat. § 13:1381.4. Louisiana law requires certain fines and fees to be deposited into the JEF. La. Rev. Stat. §§ 13:1381.4; 15:571.11(D). In addition, state law requires 1.8% of the commercial surety fee to be deposited into the JEF. La. Rev. Stat. §§ 22:822(B)(3); 13:1381.5(B). Fines and fees, including bond fees, also benefit the district attorney, the sheriff, indigent defenders, victims of crimes, and indigent defendants. *See* La. Rev. Stat. §§13:1381.5(B); 13:1381.1(B); 15:571.11(D) (remitting fines and fees to entities other than the OPCDC); La. Code Crim. Proc. art. 883.2 (providing for restitution payments to victims).

State law gives the Judges collective administrative control over the JEF, with the exception that it cannot be used for the Judges' own salaries. La. Rev. Stat. §§ 15:571.11; 13:1381.4; The Judges must conduct an annual audit of the JEF, which shall be filed with the legislative auditor and available publicly. La. Stat. Ann. § 13:1381.4(B).

OPCDC's annual revenue from 2012 through 2015 ranged from $7,567,875 to $11,232,470. Approximately $4,000,000 of the total revenue was placed into the JEF. The overwhelming majority of the court's funding, approximately $7,000,000 to $8,000,000, comes from the State of Louisiana and the City of New Orleans. Court-ordered fines and fees and commercial surety fees each contributed approximately $1,000,000 to the JEF.[1] The

1. The contribution of fines and fees to the JEF has drastically decreased in recent years. For example, in 2018, fines

Judges receive no personal monetary benefit from the JEF. Instead, each Judge's division of court receives $250,000 for operating expenses from the JEF regardless the fines and fees collected in each division.

When the court has an expected budgetary shortfall, the Judges go to the City of New Orleans executives for funding. In the past, the Judges have requested and received additional funds from the City of New Orleans to fund OPCDC. In response to this suit, the Judges wrote off $1,000,000 in court debts, an entire year's worth of court-ordered fines and fees revenue, yet the court remained operational because state and city executives responsible for funding the court continued to provide funding.

REASONS FOR ALLOWANCE OF THE WRIT

I. REVIEW IS WARRANTED TO CORRECT A SIGNIFICANT DEPARTURE FROM FEDERAL COURTS' ACCEPTED AND USUAL EXERCISE OF JURISDICTION ONLY OVER CASES THAT INVOLVE AN ARTICLE III CASE OR CONTROVERSY.

This case does not present a justiciable case or controversy under Article III because the defendant Judges have no power to provide the relief that Respondents seek, namely the elimination of the Judges'

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and fees collections only totaled $507,735.52, and the OPCDC is still operational. The Judges' sought to supplement the record on appeal to update the fines and fees collections' statistics to include statistics from the years 2016-2018, but the Fifth Circuit denied that motion. The Judges contend that that denial was in error.

roles as both adjudicators of criminal matters and administrators of the JEF. *See* U.S. Const. art. III. As a result, no judgment in favor of Respondents and against the Judges, declaratory or otherwise, from a federal court can redress Respondents' alleged injuries because (A) the Judges have no power to change the state laws designing either the OPCDC's funding or the fines and fees structures and (B) the Principle of Necessity demands that the Judges hear criminal matters despite any conflict of interest created by their roles as both adjudicators of criminal matters and collective administrators of the JEF.

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "core" of standing, expressed by *Lujan* as "the irreducible constitutional minimum," demands an injury that is "likely" to be "redressed by a favorable decision." *Id.* at 561 (internal quotations omitted). Respondents do not have standing because their alleged injuries cannot be redressed, and without standing, there is no Article III case or controversy over which a federal court can exercise subject matter jurisdiction.

A. Respondents' Alleged Injuries are Not Redressible because the Judges Have No Power to Change State Laws Designing either OPCDC's Funding or the Fines and Fees Structures.

Respondents' alleged injury is the potential deprivation of their right to an impartial tribunal in pre-detention ability-to-pay hearings in *Cain* and bail hearings in *Caliste*. This deprivation purportedly stems from the

Judges' dual roles as adjudicators in ability-to-pay and bail hearings and administrators of the JEF, both of which are mandated by Louisiana law. Yet, instead of challenging the constitutionality of the statutes establishing the JEF and the OPCDC's jurisdiction, Respondents attack the Judges' impartiality.

The district court, in fact, issued decisions favorable to Respondents in both cases. In *Cain* the district court entered a judgment declaring that, "the Judges' failure to provide a neutral forum for determination of such persons' ability to pay is unconstitutional." (App. B at 19a.) In its Order and Reasons, the district court explained that, "[t]he Judges' control over both fines and fees revenue and ability-to-pay determinations violates due process." (App. C at 76a.) The Fifth Circuit agreed in *Cain* that, "the Judges' administrative supervision over the JEF, while simultaneously overseeing the collection of fines and fees making up a substantial portion of the JEF, crosses the constitutional line."[2] (App. A at 10a.)

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2. The Fifth Circuit opinion in *Cain* seemingly confuses the issue on appeal by focusing on the Judges' assessment of fines and fees instead of the Judges' ability to preside over pre-detention ability-to-pay hearings. The District Court in *Cain* was careful to note that, "Plaintiffs do not challenge the Judges' initial assessment of fines and fees and the Court does not address it." (App. C at 77a. fn. 156) Nevertheless, the subsequent Fifth Circuit decision in *Caliste* referenced the *Cain* opinion as, "holding that Orleans Parish judges' role in both ***imposing*** and administering court fees and fines violated due process." (App. F at 137a.) (emphasis added) To the extent that the Fifth Circuit in *Cain* mistakenly decided the constitutionality of fines and fees assessments, an issue not decided (and specifically excluded) by the district court, that decision is squarely outside of its appellate jurisdiction. (*See* App. C at 77a. fn. 156 (stating that the district court will not address fine and fees assessments))

In *Caliste*, the district court entered a judgment declaring that, "Judge Cantrell's institutional incentives create a substantial and unconstitutional conflict of interest when he determines their ability to pay bail and sets the amount of that bail." (App. G at 142a.) In its Order and Reasons, the district court explained that, "Judge Cantrell . . . has a financial interest in these determinations . . . because revenue collected as a percentage of the bail set by him is promptly sent to the [Judicial Expense] Fund." (App. H at 178a.) The Fifth Circuit agreed in *Caliste* that Judge Cantrell's dual role as both a decisionmaker in bail hearings and administrator of the JEF violates due process. (App. F at 136a.)

However, these otherwise favorable rulings do not redress Respondents' alleged deprivation of a neutral forum because the Judges have no power to change state law to either redesign the OPCDC's funding structure or to change the scope of the OPCDC's jurisdiction. That power rests solely with Louisiana's legislature. The Fifth Circuit nearly admits as much, observing that, "[G]iven today's ruling and last week's in *Cain*, it may well turn out that the only way to eliminate the unconstitutional temptation is to sever the direct link between the money the criminal court generates and the Judicial Expense Fund that supports its operations." (App. F at 139a.) The Fifth Circuit further acknowledges that the federal court has no power to undo the state statutes that direct portions of fines and fees into the JEF. *Id.* at 13. Nevertheless, it exercised jurisdiction over the *Caliste* case, seemingly because it mistakenly believes that, "Judge Cantrell's dual role . . . is not mandated by Louisiana Law." *Id.* at 13.

A clear reading of Louisiana law reveals that Judge Cantrell's dual role as an adjudicator in bail hearings and administrator of the JEF is indeed designed by the legislature and mandated by law. The state statute creating the Magistrate Judge position in OPCDC states that Judge Cantrell, "shall preside over the Magistrate Section." La. Rev. Stat. § 13:1346. It further states that he, "shall have jurisdiction to act as committing magistrate in felony and misdemeanor charges and to hold preliminary examinations, with the authority to bail or discharge, or to hold for trial, in all cases." *Id.* As a result, Judge Cantrell must fulfill his statutory mandate to make bail determinations. Similarly, in *Cain*, the Judges must make pre-detention ability-to-pay determinations when convicted criminals fail to pay court-ordered fines and fees because the OPCDC has exclusive jurisdiction over criminal cases in Orleans Parish. La. Rev. Stat. § 13:1336.

Regarding the Judges' collective administration of the JEF, the Louisiana statute creating the JEF allows the Judges to use money from the JEF, "for any purpose connected with, incidental to, or related to the proper administration or function of the court or the office of the judges thereof." La. Rev. Stat. § 13:1381.4. State law further mandates that fines and fees be deposited into an "account to be administered by the judges of the criminal district court of Orleans Parish." La. Rev. Stat. § 15:571.11(D). The state legislature recognized the statutorily-created dual role of the judges as both adjudicators of criminal matters and administrators of the JEF and provided further conditions to the Judges' administration of the JEF to combat against any perceived conflict of interest. One condition is that, "judges of the court shall cause to be conducted annually an audit of the fund and the books and

accounts relating thereto and shall file the same with the office of the legislative auditor where it shall be available for public inspection." *Id.* Another condition is that, "[n]o salary shall be paid from the judicial expense fund to any judges of the court." *Id.* As a result, Louisiana law is clear: The Judges' duties include both making judicial determinations and collectively administering the JEF, subject to statutory restrictions and oversight.

The *Lujan* court denied standing to Plaintiffs whose injury could not be redressed by the defendant Secretary when the funding agencies whose actions could redress the alleged injuries were neither parties to the suit nor "obliged to honor an incidental legal determination the suit produced." *See Lujan* at 570-71. Similarly, the only party whose actions can eliminate the alleged unconstitutional dual role of the Judges and redress Respondents' alleged deprivation of a neutral forum is the State of Louisiana, and the State is neither a party to this action nor obliged to change otherwise valid state law and policy based upon an incidental legal determination made by a federal court in these cases.

Respondents claim that the Judges are bound by the principle of supremacy to eliminate their unconstitutional conflict of interest regardless of Louisiana state law. But this is not a case where the Judges can choose between applying either a federal law or a directly conflicting state law. There is no judicial mechanism for the Judges to either eliminate the statutorily-created JEF or to refuse the funds that are automatically deposited into it pursuant to state law. Respondents are seemingly proposing that the Judges not adjudicate matters over which they have exclusive jurisdiction – bail hearings in *Caliste* and pre-detention ability-to-pay hearings in *Cain*.

Of course, what Respondents are really doing is launching disguised political attacks on what they perceive as general failings of the criminal justice system. In *Cain*, Respondents seek to eliminate a "user-pays" criminal justice system by attempting to force the Judges to forego the legal imposition of fines and fees as valid terms of criminal sentences[3] in order to avoid the necessity of presiding over ability-to-pay hearings for convicted criminals who fail to pay their debts. In *Caliste*, Respondents seek to eliminate the money bail system by attempting to prevent Judge Cantrell from setting monetary conditions on pre-trial release in order to avoid the statutorily-mandated fee on commercial sureties that, pursuant to state law, is deposited into the JEF.

However noble or well-intentioned Respondents' political goals may be, the structure and funding of Louisiana's criminal justice system is controlled by the State's legislative and executive branches, not the judicial branch. And whatever the Judges' own opinions may be regarding the wisdom of their court's funding structure, they have no more power to change state law than they do to shirk their responsibility to hear cases over which the Louisiana legislature gives them exclusive jurisdiction.

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3. The District Court noted that "[T]he Louisiana Supreme Court has recently held that state trial courts maintain discretion to impose a "broad category of costs" under Louisiana law. *See generally State v. Griffin*, 180 So. 3d 1262, 1268 (La. 2015). Moreover, the imposition of some costs, such as the 'special costs to the district indigent defender fund,' are not discretionary; a Louisiana trial court has no choice but to impose these costs on a criminal defendant who has been convicted. *See generally* La. Rev. Stat. § 15:168 ("Every court of original criminal jurisdiction . . . shall remit the following special costs . . ."). " (App. D at 112a-113a.)

B. Respondents' Injuries are Not Redressible because the Rule of Necessity Dictates that the Judges Must Preside Over State Court Criminal Cases, Including Pre-Detention Ability-to-Pay Hearings and Bail Hearings, despite any Conflict of Interest Created by Their Roles as Both Adjudicators of Criminal Matters and Collective Administrators of the JEF.

The longstanding common law Rule of Necessity dictates that judges who might otherwise be disqualified from hearing cases as a result of a conflict of interest can nevertheless hear cases when there is no alternative judge or forum available to hear the matter. Kurtis A. Kemper, Annotation, *Construction and Application of Rule of Necessity in Judicial Actions, Providing that a Judge Is Not Disqualified to Try a Case Because of Personal Interest If Case Cannot Be Heard Otherwise*, 27 A.L.R.6th 403 (2007). Any disqualifying conflict of interest resulting from the Judges' roles as adjudicators of criminal matters and administrators of the JEF is defeated by the Rule of Necessity because the Judges, whose Court has exclusive jurisdiction over pre-detention ability-to-pay and bail hearings in Orleans Parish, all collectively administer the JEF, leaving no alternative judge or forum to adjudicate ability-to-pay and bail hearings in Orleans Parish. *See* La. Rev. Stat. § 13:1336 (granting exclusive jurisdiction to the OPCDC over all criminal matters in Orleans Parish and giving the Judges authority to set bail in felony cases); La. Rev. Stat. § 13:1346 (giving the Magistrate judge authority to set bail in felony and misdemeanor cases). As a result, a decision in Respondents' favor declaring that the Judges have a disqualifying conflict of interest based

upon their administration of the JEF cannot redress the Respondents' complaints that they are deprived of an impartial tribunal in ability-to-pay and bail hearings because the Rule of Necessity requires the Judges to preside over those hearings.

Courts have specifically approved application of the Rule of Necessity when judges have a financial interest in the outcome of the case. *See* Kemper at §§5-10. In *U. S. v. Will*, 449 U.S. 200 (1980), this Court found that the Rule of Necessity permitted federal court judges to decide issues that could affect their personal salaries. *Will* at 217 (noting that "The Rule of Necessity has been consistently applied in this country in both state and federal courts."). The federal judges' pecuniary interest in their personal compensation in *Will* implicated an interest far more concerning than the Judges' institutional interest in a fraction of the court's operating funds that cannot be used to pay their salaries. The *Will* Court found that application of the Rule of Necessity was necessary to serve the public's interest in the resolution of crucial matters. *Id*. Similarly, the Judges' adjudication of criminal cases in Orleans Parish serves a crucial public interest in having a functioning criminal court.

Courts have also applied the Rule of Necessity when judges might have been disqualified as a result of an institutional interest stemming from a judge's administrative functions. *See* Kemper at §22. In *Rosenfield v. Wilkins*, 468 F.Supp.2d 806 (W.D. Va. 2006), the Chief Judge found that the Rule of Necessity allowed him to preside over a case challenging the court's procedures for compensating attorneys who represent indigent criminal defendants despite the fact that he had an institutional

interest in administering the Criminal Justice Act pursuant to which attorneys appointed to represent indigent defendants were compensated. *Rosenfield* at 808-09. The Chief Judge concluded that, "every Article III judge shares my "institutional interest" in the statutory regime we are required to implement." *Id*. at 809. Similarly, the OPCDC Judges all share an institutional interest in administering the statutorily-created JEF, which, pursuant to statute, is partially funded by certain statutorily-authorized fines and fees.

In conclusion, even though a federal court has declared that the Judges have an unconstitutional conflict of interest by virtue of their collective administration of the JEF, the Respondents' alleged injury – the deprivation of an impartial tribunal – cannot be redressed because the Principle of Necessity overrides any institutional conflict of interest and demands that the Judges hear criminal matters over which only they have jurisdiction.

II. REVIEW IS WARRANTED TO RESOLVE A CONFLICT WITH THIS COURT'S DECISION IN *CAPERTON* REGARDING THE STANDARD APPLICABLE TO JUDICIAL DISQUALIFICATION UNDER THE DUE PROCESS CLAUSE.

The Fifth Circuit's assessment of the Judges' interest in the Judicial Expense Fund wholly disregards the principles articulated by this Court in *Caperton* for evaluating judicial disqualification under the due process clause. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009). *Caperton* articulated the "probability of actual bias" standard for assessing allegations of judicial impartiality. *Id.* at 886-87; *see also Id.* at 881 ("whether

the average judge . . .is 'likely' to be neutral"); 881 ("constitutionally intolerable probability of actual bias"); 883-84 ("whether . . . the interest poses a risk of actual bias.").

The Fifth Circuit never evaluated the Judges' alleged interests for a "probability of actual bias" as required by *Caperton*. Instead, it based its opinion that the Judges' interests violate due process by finding the existence of a "temptation" and the mere possibility of bias. (*See* App. F at 136a ("The dual role thus *may* make the magistrate 'partisan'") (emphasis added); at 137a. ("vulnerable to the 'temptation'"); *see also* App. A at 17a (finding that the "temptation" confronting the Judges was "too great")) The Fifth Circuit extracts this "temptation" test from the *Tumey* line of cases but fails to recognize *Caperton's* instruction that such a "temptation" violates due process only when it introduces a "probability of actual bias." *See Caperton* at 882; *Tumey v. State of Ohio*, 273 U.S. 510 (1927); *see also* Raymond McKowski, *Judicial Disqualification After Caperton v. A.T. Massey Coal Company: What's Due Process Got To Do With It?*, 63 Baylor L. Rev. 368, 372 (2011) ("[U]nder the *Tumey* test as interpreted by *Caperton*, due process requires recusal whenever the circumstances: (1) viewed objectively; (2) demonstrate a serious risk of actual bias; (3) on the part of the average judge.")

Caperton further warned that finding a probability of actual bias violative of due process happens only in "extreme," "extraordinary," and "rare" cases. *See Caperton*, 556 U.S. at 887. "This Court's recusal cases are illustrative. In each case the Court dealt with extreme facts that created an unconstitutional probability of

bias." *Id*. *Caperton* characterized its decision as one that "addresse[d] an extraordinary situation where the Constitution requires recusal." *Id.* at 888. It also warned that, "[a]pplication of the constitutional standard implicated in th[at] case will thus be confined to rare instances." *Id.* at 890. The Fifth Circuit never characterized these cases as extreme, extraordinary, or rare. Instead, it evaluated them under the less stringent professional standard for recusal, such as the one articulated by the ABA Model Code of Judicial Conduct, which seeks "to eliminate even the appearance of partiality." *Caperton* at 888-90. (*See* App. A at 14a. (quoting "appearance of justice" language); App. F at 133a. (using "mere threat of impartiality" language)) But *Caperton* is quick to note that, "the codes of judicial conduct provide more protection than due process requires." *Id*. at 890; *see also* McKowski at 391 (noting while the ABA test is judged by the standard of an "ordinary reasonable person," the due process test is judged by the "average judge" standard.). A proper inquiry under *Caperton* asks whether the Judges are likely to be or will probably be partial when making decisions in pre-detention ability-to-pay and bail hearings. The Fifth Circuit never engaged in this inquiry because it applied the wrong standard to evaluate the Judges' alleged interest.

If this Court allows the Fifth Circuit's "appearance/temptation" standard to stand as the measure of a disqualifying interest for judges under the due process clause, the repute and operation of all courts hang in the balance. This Court pays more than lip service to the policy implications that can result from a relaxed approach to finding due process violations based upon judges' conflicts of interest and emphasizes the extremity

required to violate due process. *See Caperton*, 556 U.S. 868, 887 ("It is true that extreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong."). The dissenters in *Caperton* highlighted the potential implications that judicial bias cases can have on the justice system:

> To its credit, the Court seems to recognize that the inherently boundless nature of its new rule poses a problem. But the majority's only answer is that the present case is an "extreme" one, so there is no need to worry about other cases . . . But this is just so much whistling past the graveyard. Claims that have little chance of success are nonetheless frequently filed . . . Every one of the "Caperton motions" or appeals or §1983 actions will claim that the judge is biased, or probably biased, bringing the judge and the judicial system into disrepute. And all future litigants will assert that their case is really the most extreme thus far . . . Extreme cases often test the bounds of established legal principles. There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: "Hard cases make bad law."

Id. at 899 (dissenting opinion). If *Caperton* was a hard case that tested the bounds of due process, these cases are easily within those boundaries.

All judges have an institutional interest in keeping their courts functional. If a criminal court judge cannot constitutionally hear matters that might have some effect on their court's funding when that same judge partially manages a portion of those funds, what is next? A claim that a judge with no administrative role can no longer constitutionally hear matters in her court because she has an institutional interest in and benefits from fines and fees that are used to fund the court? Or an argument that criminal judges cannot decide criminal cases because certain fines and fees used to fund the court can only be assessed to convicted criminals, thereby giving the judges an institutional interest in convicting rather than acquitting criminal defendants? Expanding the *Caperton* scope of extremity to encompass the Judges' adjudication of bail and ability-to-pay hearings not only breaks from the controlling precedent involving judicial disqualification, it calls into question the integrity of the judiciary and the impartiality of every judge whose court benefits from fines and fees assessments.

III. REVIEW IS WARRANTED TO CORRECT THE FIFTH CIRCUIT'S IMPERMISSIBLE EXTENSION OF THE *TUMEY*/*WARD*/*CAPERTON* PRINCIPLES FOR JUDICIAL DISQUALIFICATION TO A BROAD CATEGORY OF INTERESTS.

The Fifth Circuit impermissibly extends the *Tumey*/*Ward*/*Caperton* principles to the Judges' general institutional interest in the OPCDC's operating funds. *See Tumey v. State of Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972); *Caperton*, 556 U.S. 868. *Tumey* adopted the common

law rule that a judge's "direct, personal, substantial pecuniary interest" in a case disqualifies the judge from adjudicating the matter. *Tumey*, 273 U.S. at 523. *Ward* extended *Tumey* to encompass the interest of a mayor-judge with broad executive power finding that he could not serve as an impartial adjudicator even though, unlike the *Tumey* mayor, his salary was not paid from the fines and fees he collected. *Ward*, 409 U.S. 57. Though the *Ward* mayor's interest was institutional rather than personal, the mayor's findings of guilt directly led to the collection of a fine, which in turn directly increased the village's revenue, for which the mayor was ultimately responsible as chief executive. In *Caperton*, this Court synthesized the *Tumey*/*Ward* lines of cases to articulate a "probability of actual bias" standard and warned that finding an interest violative of due process happens only in "extreme," "extraordinary," and "rare" cases. *Caperton*, 556 U.S. at 882, 887.

While the district court in both cases was clear that the Judges' interest here was neither direct nor personal[4], the Fifth Circuit is seemingly conflicted about how to classify the Judges' interest. The district court in both

4. The Louisiana Supreme Court has rejected that idea institutional revenue derived from court costs demands recusal. In response to a criminal defendant's assertion that prosecutors, whose office collects a portion of fines and fees following a conviction, were "'interested' in a conviction," the Court noted the district attorneys' duty is to "seek 'equal and impartial justice – not to seek a conviction or a fee'" and emphasized that, "[T]his Court has never held — and declines to hold here — that a standardized fee collection, set forth in a public schedule and imposed on convicted criminals, is tantamount to, or in any way equates to, a 'personal interest' in a matter." *State v. Griffin*, 180 So. 3d 1262, 1272 (La. 2015).

cases agreed that the Judges' interest is "institutional, rather than direct and individual." (App. C at 85a.); (App. H at 181a.) In *Cain*, the Fifth Circuit appears to adopt the district court's classification of the Judges' interest as "institutional," noting that the JEF revenue "does not support the Judges' personal salaries." (App. A at 16a.)

In *Caliste*, however, the Fifth Circuit disagrees with the district court and classifies Judge Cantrell's interest as "direct and personal." (App. F at 136a.) Interestingly, the Fifth Circuit in *Caliste* appears to find Judge Cantrell's interest to be non-pecuniary, noting that "Judge Cantrell does not receive a penny, either directly or indirectly, from his bail decisions. But requiring a secured money bond provides him with substantial nonmonetary benefits." (App. F at 133a-134a.); *See also* App F at 134a ("So we do not think it makes much difference that the benefits Judge Cantrell and his colleagues receive from bail bonds are not monetary.").

Taking both cases together, the Fifth Circuit whittles down the *Tumey/Ward* principle to encompass interests that can be neither direct, personal, nor pecuniary as long as they are judged to be substantial. This impermissible extension (or destruction) of the *Tumey/Ward* principle for disqualification directly conflicts with *Caperton*'s requirement that disqualification of judges be restricted to interests that create a likelihood of actual bias.

A. The Judges' Interest is Neither Direct nor Personal.

In *Cain*, the outcome of ability-to-pay hearings do not directly affect the financial well-being of the court. More

specifically, a Judge's finding that a convicted criminal who failed to pay a debt is able to pay that debt, and therefore can be imprisoned for such failure to pay, does not directly affect each Judge's institutional interest in the money he or she receives from the JEF for operating expenses. Likewise, in *Caliste*, neither Judge Cantrell's bail decisions nor the amount of money collected by the OPCDC from commercial sureties affect his institutional interest in the money he receives from the JEF for operating expenses. In both cases, operating expenses paid by the JEF do not inure to the Judges' personal benefit.

1. The Judges' Interest in *Cain v. White*

Neither the district court nor the Fifth Circuit classify the Judges' interest in *Cain* as a personal interest. While the lower courts seemingly dispose of both the direct and personal requirements of *Tumey* with one finding that the Judges' interest is "institutional, rather than direct and individual," a proper analysis of the interest for directness reveals that the Judges' interest, while institutional, is not direct. First, there is no evidence that an ability-to-pay finding increases the amount of money in the JEF. To find that a Judge's decision directly affects the amount of money in the JEF, two unsupported assumptions must be made. First, one must assume that the fines and fees that the convicted criminal owes belong to a category of fines and fees that is deposited into the JEF. Second, one must assume that an ability-to-pay finding directly leads to the collection of the outstanding fines and fees.[5] To the

5. The district court found, and Appellants do not dispute, that the Judges should hold ability-to-pay determinations prior to

contrary, if the Judges determine that a defendant is able to pay, then the defendant's failure to pay could lead to imprisonment, which, in turn, would make it more difficult for the defendant to earn money to pay the outstanding debt.

Next, even if the Judges' ability-to-pay findings did increase outstanding debt payment and assuming that the outstanding debts were in the categories of fines and fees that are deposited into the JEF, there is no relationship between the amount of fines and fees collected in each Judge's division of court and the amount of money each division receives annually from the JEF for operating expenses. Each Judge's division of court receives $250,000 for operating expenses from the JEF regardless of the amount of fines and fees each judge assesses or collects. (*See* App. A at 4a; App. H at 181a.)

Finally, there is no evidence the Judges will not have money to cover operating expenses absent the deposit of any outstanding fines and fees into the JEF. The Judges

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imprisonment for nonpayment of court debt. The prior absence of pre-imprisonment ability-to-pay determinations had the practical effect of assuming an ability-to-pay determination for all criminal defendants with outstanding court debts absent an affirmative assertion of indigence, which the Judges have always considered. The district court describes how under this assumed ability-to-pay system, the court collected "only 40% and 50% of the fines and fees it assesses" and how "[t]he amounts that go uncollected run in the hundreds of thousands of dollars." If an assumption that ***every*** criminal defendant with an outstanding court debt had the ability to pay did not result in collection of debts, it is hard to imagine, as the Fifth Circuit assumes, that the Judges' determinations of ability to pay on a case-by-case basis will lead to increased collection of debts.

manage the JEF in accordance with legislative mandates, but when the court has a budgetary shortfall, state and city executives are ultimately responsible for funding the court. For example, in response to this suit, the Judges wrote off $1,000,000 in court debts, yet the OPCDC still received enough funding from other sources to pay its operational expenses. Unlike *Ward*, where the mayor's "broad executive powers and the significance of the mayor's court revenues to the fiscal health of the village, for which he was responsible, made his position inherently partisan," the Judges do not exercise broad executive power over the court's revenue nor are they ultimately responsible for the fiscal health of the court.

2. Judge Cantrell's Interest in *Caliste v. Cantrell*

The Fifth Circuit hinges its finding of a direct and personal interest in the *Caliste* case on the conclusion that Judge Cantrell might lose his job if he does not make bail decisions that ultimately increase a portion of the funds that help support the operation of his chambers. (*See* App. A at 134a. ("The fees the Orleans Parish Criminal District Court receives from commercial sureties thus help fund critical pieces of a well-functioning chambers. And if an elected judge is unable to perform the duties of the job, the job may be at risk."); at 136a. ("Because he must manage his chambers to perform the judicial tasks the voters elected him to do, Judge Cantrell has a direct and personal interest in the fiscal health of the public institution that benefits from the fees his court generates and that he also helps allocate.")) This conclusion has several flaws.

First, the Fifth Circuit misstates the relevant interest. The interest implicated by Judge Cantrell's bail decisions is an interest in the 1.8% commercial surety fee, not the general fiscal health of the court. Judge Cantrell's bail decisions hardy impact the overall fiscal health of OPCDC, which is primarily funded by the State of Louisiana and the City of New Orleans.[6] On the other hand, Judge Cantrell's bail decisions might possibly impact, though indirectly, the collection of a 1.8% fee charged to commercial sureties. As a result, the interest that should be evaluated when determining whether Judge Cantrell has an unconstitutional conflict of interest in making bail determinations is his interest in the 1.8% commercial surety fee that is deposited into the JEF; that interest is neither direct nor personal. Judge Cantrell does not receive any personal money from the JEF. Instead, the magistrate division of the OPCDC receives $250,000 for operating expenses from the Judicial Expense Fund regardless of the amount of commercial surety fees deposited into the JEF.

Next, even assuming that the relevant interest is Judge Cantrell's interest in the general fiscal health of the court, the Fifth Circuit further assumes that the Magistrate's court will be forced to close its doors without the 1.8% fee that it receives from commercial sureties because, as the opinion explains, Judge Cantrell cannot serve as his own court reporter. (*See* App. F at 134a.) However, there is no precedent to support this assumption. Though OPCDC has had funding challenges in the past, it has never shut its doors and fired the Magistrate Judge.

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6. From 2012 through 2015, bond fees from commercial sureties accounted for only 9.5-11% of the court's total revenues.

Additionally, though Louisiana law allows the Judges to use the JEF to pay for court reporters, law clerks, and secretaries, it does not provide that the JEF is the exclusive source of revenue for those operating expenses, and it is unreasonable to assume that the city and state executives responsible for funding the court would force Judge Cantrell to serve as his own court reporter if the JEF did not cover the cost of one.

Finally, assuming that OPCDC does experience a funding deficiency because of inadequate contribution from commercial surety fees, the opinion further assumes that voters would hold Judge Cantrell responsible for that deficiency. In reality, because Judge Cantrell is an elected judge, voters are more likely to hold him accountable for his judicial decisions, including those made at bail hearings, than for funding the court. As a result, his personal job security relies upon his public service as an impartial decision-maker[7], not his fictitious responsibility for funding the entire court through commercial surety fees. To the extent that voters are concerned with the court's fiscal health, they will look to elected city and state executives who are ultimately responsible for funding the states' courts.

7. It is not lost on Judge Cantrell that Plaintiffs' simultaneously accuse him of categorically keeping criminal defendants in jail because they are poor and categorically letting criminal defendants out of jail on a secured money bond so that he can generate revenue for the court.

B. The Fifth Circuit Ignored this Court's Prior Precedents in Finding that the Judges' Interest is Substantial Enough to Violate Due Process.

The Judges' interest in the portion of fines and fees deposited into the JEF does not compare to the interests that this Court has found violate due process. In *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972), the case most relied upon by the Fifth Circuit to classify the Judges' interest as substantial, the fines and fees assessed by the mayor-judge contributed between 37-51% of the *total* village revenues, serving in at least one year as the *majority of the village's funding*. *Ward*, 409 U.S. at 58. The Fifth Circuit determined that the 20-25% contribution by each court-ordered fines and fees (in *Cain*) and bond fees (in *Caliste*) to the JEF was comparable to *Ward*, but a true comparison of this interest to the interest in *Ward* requires the court to determine what percentage court-ordered fines and fees and bond fees from commercial sureties contribute to the court's *total* revenue, not only the revenue of the JEF. (*See* App. F at 136a; App. C at 26a.) From 2012 through 2015, court-ordered fines and fees and bond fees from commercial sureties each accounted for approximately 10% of the court's total revenues, less than one third of the lowest contribution considered in *Ward*.

The Judges' institutional interest in the Judicial Expense Fund is less than the institutional interest of the mayor in *Dugan v. State of Ohio*, 277 U.S. 61 (1928). In *Dugan*, this Court found that a mayor who maintained no executive power in the city, served on the five-member city commission, and received his salary from the same fund that drew revenue from his fines and fees assessments, but received a salary regardless of how he decided cases,

did not have an unconstitutional conflict of interest. *Id.* Like the mayor in *Dugan*, the Judges do not have any executive power over the city nor are their salaries or the amount of money they receive from the JEF affected by their judicial decisions. Unlike the *Dugan* mayor, the Judges have no presence on the city council, which has executive responsibilities for funding the OPCDC, and their salaries are not drawn from any fund that receives revenue from fines and fees. *See Id.* at 62-62 (noting that the mayor-judge was a member of the city commission whose salary was paid from the same fund in which fines and fees were deposited).

Though they involve both a personal and direct interest (unlike the Judges' interest here), two additional Supreme Court cases indicate what constitutes an interest substantial enough to disqualify a judge. In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), the Court found that a judge's personal receipt of $30,000 was a substantial interest violative of due process. In *Caperton*, when determining whether a litigant's judicial campaign contribution violated due process, the Court stated that, "[t]he inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Caperton*, 556 U.S. at 884. The *Caperton* Court ultimately concluded that because the litigant's $3 million campaign contribution to the judge was three times more that the amount spent by the judge's own campaign committee and $1 million more than the total amount spent by both candidates' campaign committees combined, the contribution's influence was significant and disproportionate. *Id.*

Here, the amount of money that the OPCDC receives from the State of Louisiana is five to six times more, and the amount that it receives from the City of New Orleans is at least two times more, than the amount received from court-ordered fines and fees or bond fees. Additionally, the amount of money that the Judges receive annually from the JEF is $250,000, approximately 2-3% of OPCDC's total revenue, and is not affected the Judges' decisions in ability-to-pay or bail hearings. As a result, the revenue that the OPCDC receives from court-ordered fines and fees or bond fees collected from commercial sureties is neither substantial nor disproportionate considering its other sources of funding and considering that the Judges' judicial decisions do not affect the amount they receive annually for operating expenses.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of these matters.

Respectfully Submitted,

Dennis J. Phayer
Mindy Nunez Duffourc*
Burglass & Tankersley, LLC
5213 Airline Drive
Metairie, LA 70001-5602
(504) 836-2220
mnunezduffourc@burglass.com

Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 23, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-30955

ALANA CAIN; ASHTON BROWN; REYNAUD VARISTE; REYNAJIA VARISTE; THADDEUS LONG; VANESSA MAXWELL,

Plaintiffs-Appellees

v.

LAURIE A. WHITE, JUDGE SECTION A OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; TRACEY FLEMINGS-DAVILLIER, JUDGE SECTION B OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; BENEDICT WILLARD, JUDGE SECTION C OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; KEVA LANDRUM-JOHNSON, JUDGE SECTION E OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; ROBIN PITTMAN, JUDGE SECTION F OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; BYRON C. WILLIAMS, JUDGE SECTION G OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; CAMILLE BURAS, JUDGE SECTION H OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; KAREN K. HERMAN, JUDGE SECTION I OF THE

Appendix A

ORLEANS PARISH CRIMINAL DISTRICT COURT; DARRYL DERBIGNY, JUDGE SECTION J OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; ARTHUR HUNTER, JUDGE SECTION K OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; FRANZ ZIBILICH, JUDGE SECTION L OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; HARRY E. CANTRELL, MAGISTRATE JUDGE OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT,

Defendants-Appellants

Appeal from the United States District Court
for the Eastern District of Louisiana

Before HAYNES, GRAVES, and HO, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

Plaintiff-Appellees are former criminal defendants in Orleans Parish, Louisiana who sued Defendant-Appellants, Judges of the Orleans Parish Criminal District Court ("OPCDC"), under 42 U.S.C. § 1983. Plaintiffs alleged the Judges' practices in collecting criminal fines and fees violated the Due Process Clause of the Fourteenth Amendment. The district court granted summary judgment in Plaintiffs' favor. We affirm, although we emphasize at the outset that the resolution of this case is dictated by the particular facts before us.

Appendix A

I. BACKGROUND

A. The Parties

Plaintiff-Appellees are Alana Cain, Ashton Brown, Reynaud Variste, Reynajia Variste, Thaddeus Long, and Vanessa Maxwell, former criminal defendants in OPCDC who pleaded guilty to various criminal offenses between 2011 and 2014. All but Reynaud Variste qualified for and were appointed public defenders. At sentencing, Plaintiffs were assessed fines and fees ranging from $148 to $901.50. All were arrested for failure to pay their assessed fines and fees, given a $20,000 bond, and spent anywhere from six days to two weeks in jail.

Defendant-Appellants are twelve OPCDC judges, Judges Laurie A. White, Tracey Flemings-Davilier, Benedict Willard, Keva Landrum-Johnson, Robin Pittman, Byron C. Williams, Camille Buras, Karen K. Herman, Darryl Derbigny, Arthur Hunter, Franz Zibilich, and Magistrate Judge Harry Cantrell (the "Judges")[1].

B. The Judicial Expense Fund ("JEF")

The JEF is established pursuant to La. Rev. Stat. § 13:1381.4 and consists of OPCDC revenue that is not designated or restricted for a specific purpose. Accordingly,

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1. All claims against the OPCDC and the City of New Orleans were dismissed prior to the district court's order granting summary judgment at issue here. Judicial Administrator Robert Kazik and Orleans Parish Sheriff Marlin Gusman are not parties to this appeal.

it is also known as the General Fund. The JEF receives funding from a variety of sources, including the City of New Orleans and bail bond fees, but approximately one quarter of the monies it receives comes from the court's collection of fines and fees.

The Judges have exclusive control over how the JEF is spent, and generally use it for the following:

> salaries and related-employment benefits (excluding the judges), CLE travel, legislative expenses, conferences and legal education, ceremonies, office supplies, cleaning supplies, law books, bottled water, jury expenses, telephone, postage, pest control, dues and subscriptions, paper supplies, advertising, building maintenance and repairs, cleaning services, capital outlay, equipment maintenance and repairs, lease payments, equipment rentals, professional and contractual expenses, the drug testing supplies, coffee, transcripts, insurance, and miscellaneous.

Money from the fund may not be used to supplement the Judges' own salaries, although, as noted above, it can be used to pay the salaries of court personnel. La. Rev. Stat. § 13:1381.4(D). Each judge is allocated $250,000 per annum for personnel salaries and $1,000 for court costs from the JEF. The fund also covers the cost of professional liability insurance coverage as authorized by the Louisiana Supreme Court. "For some time prior to 2011, some judges received supplemental benefits" from the JEF

in the form of supplemental health insurance policies and reimbursement for out-of-pocket medical expenses; however, this practice fully ended by 2012 following an investigation by the Louisiana Legislative Auditor.

When collection of the fines and fees is reduced, the OPCDC can have a difficult time meeting its operational needs, leading to cuts in services, reduction of staff salaries, and leaving some positions unfilled. During these times, the Judges have attempted to increase their collection efforts and have also requested assistance from other sources of funding, including the City of New Orleans.

C. The Fines and Fees

Several Louisiana statutes and codes permit the Judges to assess fines and fees to criminal defendants at sentencing. Some fines and fees have specific purposes and are collected to be distributed for specific statutory purposes,[2] while others are collected and then split between the court and other agencies.[3] However, some

2. Restitution is collected to benefit the victims of crime, *see* La. Code Crim. Proc. Art. 883.2, and a $14 fee is collected to be deposited into the indigent transcript fund to compensate court reporters. La. Rev. Stat. § 13:1381.1. Additionally, Louisiana statute allows the assessment of the costs of drug treatment or drug testing if the defendant is found not to be indigent. § 13:5304(B)(3)(e), (C)(3)–(4). After 2012, it appears that these the indigent transcript fund fee and drug testing costs were deposited into the JEF.

3. For example, fines pursuant to La. Rev. Stat. § 15:571.11 are split between the OPCDC and the District Attorney, and

fines and fees go directly into the JEF.[4] The statutory requirements of yet other fines and fees is ambiguous.[5]

D. OPCDC's Debt Collection Practices

Prior to this lawsuit, the Judges delegated collection authority to the Collections Department, established by the OPCDC judges[6] in the late 1980s "to (1) facilitate the collection of costs and fines [and] (2) to minimize the

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"court costs" assessed by the Judges can include fees that go to other agencies, including the Orleans Public Defender, the District Attorney, the Criminal Sheriff, etc. The Sheriff also collects a 3% fee on bail bonds, two thirds of which goes to an "administration of criminal justice fund" overseen by the chief judge of the OPCDC, the Orleans Parish sheriff, the district attorney, and the director of the Orleans Parish indigent defender's program, or their designees. § 22:822(A)(2), (B)(3); § 13.1381.5. The remaining third goes to the OPCDC. § 22.822(3).

4. These include a mandatory $5 fee, La. Rev. Stat. § 13:1381.4, an "additional cost" of up to $500 for a defendant convicted of a misdemeanor and $2,000 for a defendant convicted of a felony. § 13:1381.4(A)(2), (B).

5. For instance, three Plaintiffs were charged a $100 or $200 fee to go into the indigent transcript fund as a "condition of probation," which went into the JEF. Louisiana Code of Criminal Procedure Article 887(A) also allows for the collection of "all costs of the prosecution or proceeding, . . . recoverable by the party or parties who incurred the expense." The Judges assessed these costs, but it is not clear where these costs went once collected.

6. None of the Judges who are defendants in this lawsuit were on the bench or otherwise employed at the court when Collections was created.

administrative and logistical burden on" the OPCDC's dockets. The Collections Department, supervised by both Mr. Kazik and the Judges, worked with criminal defendants in creating payment plans, accepting payments, and granting extensions. The Collections Department had "no standard list of factors or questions . . . to ask a criminal defendant except those at intake when collections obtained address, telephone and employment information and used it for purposes of contacting the criminal defendant when they did not pay."

Before issuing a warrant for a defendant's arrest for failure to pay a court debt, the Collections Department would send two form letters to the defendant warning them of their overdue fines and fees and the possibility of arrest for failure to pay. If checking the court dockets or probation and jail records did not reveal a reason for nonpayment, the Collections Department issued an alias capias warrant for contempt of court and generally set surety bail at $20,000. A person imprisoned on one of these warrants would usually remain "in jail until their family or friends could make a payment on their court debt, or until a judge released them."

After Plaintiffs filed the instant suit, the Judges withdrew the Collections Department's authority to issue warrants, recalled all active fines and fees warrants issued prior to September 18, 2015 (except those where restitution remained unpaid or the individual had not appeared in court), and wrote off approximately $1,000,000 in court debts. The Judges now handle collection issues on their own dockets, although they still issue alias capias

warrants for failure to pay fines and fees. At the time of the district court's summary judgment ruling, there was no evidence that the Judges had ever instituted a practice of considering a defendant's ability to pay before jailing them for failure to pay their court debts.

E. Procedural Background

Plaintiffs brought this action under 42 U.S.C. § 1983, alleging that the Judges' collection practices violated their Fourth and Fourteenth Amendment rights, as well as Louisiana tort law. The only one of their seven claims at issue on appeal is Count Five, summarized by the district court as follows:

> Defendants' policy of jailing indigent debtors for nonpayment of court debts without any inquiry into their ability to pay is unconstitutional under the Due Process clause and the Equal Protection Clause of the Fourteenth Amendment, *and the Judge's authority over both fines and fees revenue and ability-to-pay determinations violates the Due Process Clause.*

Cain v. City of New Orleans, 281 F. Supp. 3d. 624, 633 (E.D. La. 2017) (emphasis added). The district court ordered the parties to submit cross-motions for summary judgment on Count Five (and several other counts) and granted summary judgment to Plaintiffs on both portions of Count Five. The district court then certified a class and issued a declaratory judgment.

The Judges only challenge the portion of the district court's declaratory judgment which declared that "with respect to all persons who owe or will incur court debts arising from cases adjudicated in OPCDC, and whose debts are at least partly owed to the OPCDC Judicial Expense Fund, the Judges' failure to provide a neutral forum for determination of such persons' ability to pay is unconstitutional." They do not challenge the district court's judgment stating that "the Judges' policy or practice of not inquiring into the ability to pay of such persons before they are imprisoned for nonpayment of court debts is unconstitutional."

II. STANDARD OF REVIEW

"This court reviews a district court's grant of summary judgment de novo, applying the same legal standards as the district court." *Tradewinds Envtl. Restoration, Inc. v. St. Tammany Park, LLC*, 578 F.3d 255, 258 (5th Cir. 2009) (quoting *Condrey v. SunTrust Bank of Ga.*, 429 F.3d 556, 562 (5th Cir. 2005)). "Summary judgment is appropriate when 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *United States v. Nature's Way Marine, L.L.C.*, 904 F.3d 416, 419 (5th Cir. 2018) (quoting Fed. R. Civ. P. 56(a)).

III. DISCUSSION

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re*

Murchison, 349 U.S. 133, 136 (1955)). "That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule." *Tumey v. State of Ohio*, 273 U.S. 510, 522 (1927). However, "[a]ll questions of judicial qualification may not involve constitutional validity." *Id.* at 523. The issue here is whether the Judges' administrative supervision over the JEF, while simultaneously overseeing the collection of fines and fees making up a substantial portion of the JEF, crosses the constitutional line.

A. "Average Man as Judge" versus "Average . . . Judge"

The Judges primary argument is that the district court improperly applied the "average man as judge" standard rather than the "average judge" standard when determining whether the Judges' interest in the JEF violated due process. According to the Judges, the "average man as judge" standard is applied in situations where "the impartiality of non-judges acting as judges" is called into question, not cases where the "average judge's" impartiality is under debate. Essentially, the Judges argue that an average *man* might be swayed by the institutional interest at play here, but not an average *judge*. The caselaw simply does not support such a distinction.

1. Legal Background

In *Tumey*, the mayor of an Ohio village presided over a "liquor court," which allowed him to try and convict individuals alleged to unlawfully possess intoxicating liquor within the county. *Tumey*, 273 U.S. at 515. The Ohio

statutes which established the liquor courts allowed the mayor to impose a fine on those convicted and to order the person sentenced to remain in prison until the fine was paid. *Id.* at 516. As remuneration for his troubles, the mayor could retain the amount of his costs in each case from the convicted defendant over and above his regular salary. *Id.* at 519–20. In addition, the village over which the mayor presided received half the funds from the imposed fines (the other half went to the state). *Id.* at 534–35.

Eventually, a defendant challenged the mayor's qualifications to hear his case and the Court found the defendant "was entitled to halt the trial because of the disqualification of the judge, which existed both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." *Id.* at 535. The Court observed,

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Id. at 532.

While *Tumey* was generally thought to focus on a judge's financial interest, both personal and institutional, *In re Murchison,* 349 U.S. 133 (1955) established a

separate line of Supreme Court cases focusing on a judge's possible "conflict arising from his participation in an earlier proceeding." *Caperton*, 556 U.S. at 880. In *Murchison*, the unconstitutional conflict came from a judge who, as allowed by statute, had been examining witnesses as a "one-man judge-grand jury" in deciding whether criminal charges should be brought. *Murchison*, 349 U.S. at 133–34. The judge, unhappy with the responses of two witnesses, subsequently charged, tried, and convicted each one of contempt based on his belief that one witness lied and the other refused to answer questions before him as "judge-grand-jury." *Id.* at 134–35. The Court concluded this dual-role violated due process, and quoted *Tumey* in saying that "[e]very procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Murchison*, 349 U.S. at 136 (quoting *Tumey*, 273 U.S. at 532).

In a case fairly similar to *Tumey*, the Supreme Court again addressed the possible institutional biases inherent in another mayor's court. *Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57 (1972). In *Ward*, an Ohio statute allowed "mayors to sit as judges in cases of ordinance violations and certain traffic offenses" and the "fines, forfeitures, costs, and fees imposed by" the mayor in these courts formed a major part of the village's funding. *Ward*, 409 U.S. at 57–58. In addition, the mayor was the "president of the village council, preside[d] at all meetings, vote[d] in case of a tie, account[ed] annually to the council respecting village finances, fill[ed] vacancies in village offices and

ha[d] general overall supervision of village affairs." *Id.* at 58.

The Court applied the same test espoused in *Tumey*:

> Although 'the mere union of the executive power and the judicial power in him cannot be said to violate due process of law,' the test is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused . . . .'

Ward, 409 U.S. at 60 (quoting *Tumey*, at 532, 534) (internal citations removed)). Because "that 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court," the Court found the mayor's court in *Ward* presented "a 'situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.'" *Id.* at 60.

Over a decade later, the Supreme Court again had occasion to discuss what level of financial interest might render "the average . . . judge" unable "to hold the balance nice, clear and true." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986). In *Aetna*, a justice on the Alabama

Supreme Court participated in a decision regarding punitive damages in bad faith insurance claims while he was simultaneously a lead plaintiff in a class action suit seeking punitive damages on a bad faith claim. *Id.* at 817. While the Court discussed many factors that might bear on the necessity for recusal, the Court held "simply that when Justice Embry made that judgment, he acted as 'a judge in his own case.'" *Id.* at 824 (quoting *Murchison*, 349 U.S. at 136).

While it was possible that the justice was not influenced by his participation in the state court case, under the principles laid out in *Tumey*, *Murchison*, and *Ward*, *actual* influence was not necessary—it only mattered whether the situation "would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear and true." *Aetna*, 475 U.S. at 825 (quoting *Ward*, 409 U.S. at 60). Because of Justice Embry's participation in the case, the Court found the "appearance of justice" best "served by vacating the decision and remanding for further proceedings." *Id.* at 828.

2. Judges' Argument

Disregarding the principles undergirding *Aetna*, the Judges argue that *Aetna* essentially came along and established a new standard by shortening *Tumey* and *Ward*'s "average man as judge" to "average . . . judge." *Aetna*, 475 U.S. at 822, 825. While the Court did alter "average man as judge," the Court applied the exact same principles discussed in *Ward*, *Murchison*, and *Tumey* to the Alabama Supreme Court justice. There was no

articulation of a higher standard for judges, much less an explanation as to how such a standard might differ from that applied to mayors acting as judges. *Aetna*, 475 U.S. at 825. Furthermore, reading *Aetna* as the Judges suggest would mean reading *Aetna* to overrule *Murchison*, which applied the "average man as judge" standard to a sitting judge. *Murchison*, 349 U.S. at 136. We find it hard to believe that the Court overruled one of its cases with an ellipsis. Finally, the recent Supreme Court case of *Caperton* reinforces the idea that the standards announced, and the situations presented, in *Tumey* and *Ward* apply equally to judges and non-judges acting as judges. *Caperton*, 556 U.S. at 877–82 (discussing the various principles from *Tumey, Ward, Murchison* and *Aetna* as applying to "judges").

The district court did not err in applying the principles from *Tumey* and *Ward* to the facts of this case.

B. The Judges' Institutional Interest in the JEF

1. The District Court's Reliance on *Ward*

The Judges next contest the district court's reliance on *Ward* to find that the Judges' pecuniary interest in the JEF "crosses the constitutional line." They allege "[t]he district court erred in its blanket comparison of the Judges' institutional interest here to the mayor's institutional interest in *Ward*." The Judges distinguish *Ward* by noting the mayor there had broad executive power over all the village finances and he was politically responsible for the town's funds, whereas here the Judges

only directly manage a portion of the revenue from the fines and fees. Plaintiffs argue that the Judges' interest here is almost exactly like that in *Ward* because the Judges impose the fines and fees and exercise complete control over how the revenue generated from the fines and fees is spent.

The district court very thoroughly examined the ways in which the Judges have an institutional interest in the JEF. It observed that the "[f]ines and fees revenue goes into the Judicial Expense Fund," over which "the Judges exercise total control." *Cain*, 281 F. Supp. 3d at 654. It noted that while the money does not support the Judges' personal salaries, it largely goes to support the salaries of each Judges' staff. In addition, the district court noted that while some of the money collected from fees is earmarked for specific purposes, the revenue all goes to the JEF and makes up approximately one-fourth of the OPCDC's budget.

In *Ward*, "[a] major part of village income [was] derived from the fines, forfeitures, costs, and fees imposed" by the mayor in his court, and the mayor had "wide executive powers" that included accounting to the village council regarding village finances, filling vacancies in village offices, and "general overall supervision of village affairs." *Ward*, 409 U.S. at 58. Here, the Judges have exclusive authority over how the JEF is spent, they must account for the OPCDC budget to the New Orleans City Council and New Orleans Mayor, and the fines and fees make up a significant portion of their annual budget. We agree with the district court that the situation here falls within the

ambit of *Ward*. In doing so, we emphasize it is the totality of this situation, not any individual piece, that leads us to this conclusion. In sum, when everything involved in this case is put together, the "temptation"[7] is too great.

Given this constitutional infirmity, we find the Judges' remaining arguments unavailing.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court. The Judges' motion to supplement the record is DENIED.

7. In so concluding, we do not in any way suggest that the Judges actually succumbed to that "temptation."

APPENDIX B — DECLARATORY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, DATED AUGUST 3, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 15-4479
SECTION "R" (2)

ALANA CAIN, *ET AL.*

VERSUS

CITY OF NEW ORLEANS, *ET AL.*

DECLARATORY JUDGMENT

Named Plaintiffs, on behalf of all persons similarly situated, filed this action against, among others, the Judges of the Orleans Parish Criminal District Court (OPCDC), challenging the debt collection practices of that court. The undisputed evidence in this case establishes that the Judges have a policy or practice of not inquiring into criminal defendants' ability to pay before those individuals are imprisoned for nonpayment of court debts. The undisputed evidence further establishes that because of the Judges' institutional conflict of interest, the Judges fail to provide a neutral forum for determination of criminal defendants' ability to pay. The Fourteenth Amendment to the U.S. Constitution prohibits a state actor from arresting or detaining a criminal defendant solely for failure to pay a

court-imposed debt absent a determination of ability to pay. *See Bearden v. Georgia*, 461 U.S. 660 (1983). The Fourteenth Amendment also requires a state court to provide a neutral forum in which to adjudicate ability to pay. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927). Considering this law, the evidence in the record, and the Court's orders and reasons on file herein,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of Plaintiffs on Count Five of the Complaint. The Court DECLARES that with respect to all persons who owe or will incur court debts arising from cases adjudicated in OPCDC, the Judges' policy or practice of not inquiring into the ability to pay of such persons before they are imprisoned for nonpayment of court debts is unconstitutional. The Court further DECLARES that with respect to all persons who owe or will incur court debts arising from cases adjudicated in OPCDC, and whose debts are at least partly owed to the OPCDC Judicial Expense Fund, the Judges' failure to provide a neutral forum for determination of such persons' ability to pay is unconstitutional.

New Orleans, Louisiana, this 3rd day of August, 2018.

/s/_____
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED DECEMBER 13, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 15-4479
SECTION "R" (2)

ALANA CAIN, *et al.*,

VERSUS

CITY OF NEW ORLEANS, *et al.*

December 13, 2017, Decided
December 13, 2017, Filed

ORDER AND REASONS

Plaintiffs Alana Cain, Ashton Brown, Reynaud Variste, Reynajia Variste, Thaddeus Long, and Vanessa Maxwell filed this civil rights putative class action under 42 U.S.C. § 1983, challenging the manner in which the Orleans Parish Criminal District Court collects post-judgment court debts from indigent criminal defendants. Before the Court are the parties' cross-motions for partial summary judgment.[1] These motions turn on justiciability, the constitutionality of defendants' debt collection

1. R. Docs. 250, 251.

practices, and the constitutionality of the legislative framework that vests both judicial and executive power in the judges of the Orleans Parish Criminal District Court. For the following reasons, the Court grants in part and denies in part each motion.

I. BACKGROUND

Plaintiffs are former criminal defendants in the Orleans Parish Criminal District Court (OPCDC). Each named plaintiff pleaded guilty to various criminal offenses between 2011 and 2014.[2] All named plaintiffs, except Reynaud Variste, were appointed counsel.[3] The Court previously dismissed Reynaud Variste's and Long's claims for equitable relief.[4] Thus, only Cain, Brown, Reynajia Variste, and Maxwell have live claims for equitable relief.

The remaining defendants are OPCDC Judges Laurie A. White, Tracey Flemings-Davillier, Benedict Willard, Keva Landrum-Johnson, Robin Pittman, Byron C. Williams, Camille Buras, Karen K. Herman, Darryl Derbigny, Arthur Hunter, Franz Zibilich, and Magistrate Judge Harry Cantrell (collectively, the Judges); OPCDC Judicial Administrator Robert Kazik; and Orleans Parish Sheriff Marlin Gusman.

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2. R. Doc. 248 at 4-5.

3. R. Doc. 59-3 at 2, 6, 9, 18, 23; R. Doc. 95-7 at 1.

4. *See* R. Doc. 109 at 19-21.

Appendix C

A. Fines and Fees Imposed by OPCDC

The Judges impose various costs on convicted criminal defendants at their sentencing. First, the Judges may impose a fine, which is divided evenly between OPCDC and the District Attorney (DA). La. Rev. Stat. § 15:571.11(D). Second, the Judges may order a criminal defendant to pay restitution to victims. La. Code Crim. Proc. art. 883.2. Third, the Judges impose various fees that go to OPCDC:

- A mandatory $5 fee, La. Rev. Stat. § 13:1381.4(A)(1);
- Additional fees up to $500 on a misdemeanant and $2,500 on a felon, *id.* § 13:1381.4(A)(2);
- Court costs up to $100, *id.* § 13:1377(A);
- A fee of $14 for the Indigent Transcript Fund, *id.* § 13:1381.1(B), which "compensate[s] court reporters for the preparation of all transcripts for indigent defendants," *id.* § 13:1381.1(A); and
- Additional costs under Louisiana Code of Criminal Procedure Article 887(A) for the Indigent Transcript Fund.[5]

Fourth, the "court costs" imposed by Judges also include

5. For example, both Alana Cain and Ashton Brown were assessed $100 for the Indigent Transcript Fund as a condition of their probation. R. Doc. 248 at 4.

fees that go to other entities, such as the Orleans Public Defender, the DA, and the Louisiana Supreme Court.[6] After sentencing, OPCDC may further assess criminal defendants for the costs of drug treatment and drug testing. La. Rev. Stat. § 13:5304.

Separately, the Sheriff collects a 3% fee on bail bonds secured by commercial sureties. *Id.* § 22:822(A)(2). Sixty percent of this fee, or 1.8% of the bonds, goes to OPCDC. *Id.* §§ 22:822(B)(3), 13:1381.5(B)(2)(a).

As a result of their criminal convictions, the named plaintiffs were assessed fines and fees ranging from $148 (imposed on Long) to $901.50 (imposed on Cain).[7] Cain pleaded guilty to felony theft on May 30, 2013.[8] At sentencing, the court stated that payment of fines and fees was a special condition of probation.[9] The court directed Cain to make the first $100 payment at the courthouse on July 8, 2013, and stated, "[e]ven if you don't have the money, you have to come here to the courtroom . . . for an extension."[10] The court later ordered Cain to pay $1,800 in restitution.[11]

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6. *See* R. Doc. 248-1 at 5 (breakdown of court costs that go to OPCDC and other entities).

7. R. Doc. 248 at 4-5.

8. R. Doc. 255-3 at 2, 16.

9. *Id.* at 13.

10. *Id.* at 19.

11. R. Doc. 59-3 at 2.

Brown received a 90-day suspended sentence after pleading guilty to misdemeanor theft on December 16, 2013.[12] The court imposed $500 in fees: $146 for the Judicial Expense Fund, $100 for the Indigent Transcript Fund, $234 in court costs, and a $20 special assessment for the DA.[13] As with Cain, the court instructed Brown to make his first $100 payment at the courthouse on January 13, 2014.[14] The judge told Brown that if he could not pay on that date, he should go to the judge's courtroom and request an extension.[15]

Reynajia Variste was sentenced to two years of probation after she pleaded guilty to aggravated battery on October 21, 2014.[16] Variste was assessed fees in the amount of $886.50: $286.50 in court costs, $200 for the Indigent Transcript Fund, and $400 for the Judicial Expense Fund.[17] The judge warned Variste that "[f]ailure to make those payments will result in contempt of Court proceedings."[18]

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12. R. Doc. 255-4 at 2, 4, 11.

13. *Id.* at 11, 15. Again, "court costs" include fees that go to other entities besides OPCDC. *See* R. Doc. 248-1 at 5.

14. R. Doc. 255-4 at 15.

15. *Id.* at 16.

16. R. Doc. 95-6 at 8-9, 13.

17. *Id.* at 13.

18. *Id.*

Vanessa Maxwell was sentenced to eighteen months imprisonment for battery and six months for simple criminal damage after pleading guilty on March 6, 2012.[19] Maxwell was assessed $191.50 in court costs, although the judge did not specify this amount at sentencing.[20]

B. The OPCDC Budget

The Judges manage the budget of OPCDC.[21] From 2012 through 2015, the court's revenue ranged from $7,567,857 (in 2012) to $11,232,470 (in 2013).[22] Some of this revenue could be used only for specified purposes and went into a restricted fund; unrestricted revenue went into OPCDC's Judicial Expense Fund, which is the general operating fund for court operations.[23] *See* La. Rev. Stat. § 13:1381.4. The Judges exclusively control this fund and may use it "for any purpose connected with, incidental to, or related to the proper administration or function of the court or the office of the judges thereof." *Id.* § 13:1381.4(C). They may not use it to supplement their own salaries. *Id.* § 13:1381.4(D). Most money for salaries and benefits of OPCDC employees (apart from the Judges) comes from the Judicial Expense Fund.[24]

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19. R. Doc. 95-8 at 8, 12, 15.

20. *Id.* at 1, 15; R. Doc. 248 at 5.

21. R. Doc. 251-2 at 3; R. Doc. 255-5 at 5.

22. R. Doc. 248 at 2.

23. *Id.*; R. Doc. 251-2 at 3. The Judicial Expense Fund is also known as the General Fund. R. Doc. 248 at 2.

24. R. Doc. 251-2 at 5; R. Doc. 255-5 at 9.

From 2012 through 2015, the Judicial Expense Fund's annual revenue was approximately $4,000,000.[25] Roughly half of this revenue came from other governmental entities, especially the City of New Orleans.[26] About $1,000,000 came from bail bond fees, and another $1,000,000 from fines and other fees.[27] Since at least 2013, all fines and fees revenue has gone to the Judicial Expense Fund.[28]

C. OPCDC's Debt Collection Practices

All named plaintiffs were subject to OPCDC's debt collection practices. At least until September 18, 2015, the Judges delegated authority to collect court debts to the Collections Department, which the Judges and Administrator Kazik jointly instructed and supervised.[29] The Collections Department created payment plans for criminal defendants, accepted payments, and granted extensions.[30] Some Judges also delegated authority to the Collections Department to issue alias capias warrants against criminal defendants who failed to pay court debts.[31]

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25. R. Doc. 248-1 at 1-4. Specifically, the Judicial Expense Fund had $4,090,707 in revenue in 2012; $4,100,413 in 2013; $3,928,025 in 2014; and $3,940,535 in 2015.

26. *Id.* at 1-3.

27. R. Doc. 248 at 2.

28. R. Doc. 251-2 at 12.

29. R. Doc. 248 at 7.

30. *Id.*

31. *Id.*

Appendix C

Before the Collections Department issued these alias capias warrants, its agents were trained to send two form letters to criminal defendants who had missed payments.[32] The first letter stated: "Recently, at your sentencing in court, you were given probation. At such time the Judge instructed you, that as a condition of probation you were to report to our office and make arrangements to pay your fines that are now delinquent." The letter also directed its recipient to appear at the court "to resolve this matter" by a given date. "Failure to comply with the conditions of probation," the letter warned, "will result in your immediate arrest."[33] The second letter stated: "Unless arrangements are made with [the collections agent] or payment is received in full within 72 hours[,] . . . we will request your immediate arrest."[34]

The Collections Department then checked court dockets to determine whether the court had granted an extension on or accepted a payment toward an individual's court debts.[35] The Collections Department also checked probation and local jail records.[36] If these checks revealed no reason for an individual's failure to pay, the Collections Department issued an alias capias warrant for the individual's arrest.[37]

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32. R. Doc. 251-2 at 20; R. Doc. 255-5 at 27; R. Doc. 1-2 at 6.

33. R. Doc. 251-5 at 328.

34. *Id.* at 329.

35. R. Doc. 248 at 7.

36. *Id.*

37. *Id.*; R. Doc. 251-5 at 330 (example of a blank alias capias warrant).

These alias capias warrants stated that the individual named in the warrant was charged with contempt of court.[38] The warrants usually set surety bail at the predetermined amount of $20,000.[39] Although the Judges did not review these warrants, the Collections Department affixed a judge's signature to each one.[40] OPCDC's Collections Department issued such warrants to arrest the named plaintiffs for failure to pay fines and fees.[41]

Individuals arrested pursuant to these warrants ordinarily remained in jail until their family or friends could make a payment on their court debt, or until a judge released them.[42] The named plaintiffs were imprisoned for periods ranging from six days to two weeks.[43]

Alana Cain was arrested pursuant to an alias capias warrant on March 11, 2015.[44] Apparently unable either to make a payment or to post the $20,000 bond, she spent a week in jail before she obtained a court hearing on March

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38. R. Doc. 251-5 at 330.

39. *Id.*; R. Doc. 248 at 7.

40. R. Doc. 251-2 at 21; R. Doc. 255-5 at 28; R. Doc. 1-2 at 8.

41. R. Doc. 248 at 4.

42. R. Doc. 251-2 at 22; R. Doc. 255-5 at 25; R. Doc. 1-2 at 12-13.

43. R. Doc. 251-2 at 23; R. Doc. 255-5 at 25.

44. R. Doc. 251-5 at 369; *see also* R. Doc. 59-3 at 2 (warrant issued on March 4, 2015).

18.[45] At that hearing, the judge asked Cain when she would be able to continue making payments.[46] Cain explained that she had missed a payment after giving birth a few weeks earlier, but could continue making payments upon her release.[47] The judge ordered her release and directed her to return to court for a status update two weeks later.[48] OPCDC suspended Cain's court debts on April 7, 2016,[49] although Cain made further payments toward her court debts after that date.[50]

Ashton Brown spent two weeks in jail before his family secured his release by making a $100 payment to OPCDC.[51] An alias capias warrant issued on July 16, 2015, and Brown was arrested on July 23.[52] Brown appeared in court without counsel on August 6; the court agreed to release Brown upon payment of $100 to OPCDC.[53] Brown's family made this payment the next day, and Brown was

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45. R. Doc. 251-2 at 23; R. Doc. 255-5 at 25.

46. R. Doc. 95-3 at 30.

47. *Id.* at 29-31.

48. *Id.* at 32.

49. R. Doc. 250-3 at 22

50. *See* R. Doc. 230-3 at 1-2 (payment receipts dated August 26, 2016, and October 12, 2016).

51. R. Doc. 251-2 at 23; R. Doc. 255-5 at 25.

52. R. Doc. 59-3 at 6.

53. *Id.*

released.[54] OPCDC suspended Brown's court debts on September 23, 2016,[55] although Brown, like Cain, made further payments after that date.[56]

Reynajia Variste was arrested pursuant to an alias capias warrant on May 28, 2015.[57] On June 2, a family member paid $400 to OPCDC in order to secure her release.[58] Although Variste did not appear before a judge on that date, her attorney did.[59] OPCDC waived Variste's outstanding debt on August 31, 2016.[60]

Vanessa Maxwell was arrested on May 10, 2015, on an alias capias warrant.[61] On May 12, she filed a grievance with the Orleans Parish Sheriff's Office seeking a new date to make a payment.[62] The office responded that she did not yet have a court date, and that to secure her release she just needed to "get someone to go to fines

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54. *Id.*

55. R. Doc. 250-3 at 23.

56. R. Doc. 230-3 at 3 (payment receipt dated February 10, 2017).

57. R. Doc. 95-6 at 1.

58. *Id.* at 1-2, 22.

59. *Id.* at 1.

60. R. Doc. 250-3 at 25.

61. R. Doc. 251-5 at 370.

62. *Id.* at 362.

and fees to make arrangements."[63] Maxwell filed another grievance two days later, asking the Sheriff's Office to place her on the court's docket; the office again directed Maxwell to "get a family [member] to go over and make arrangements with fines n fees [sic]. Explain you have been incarcerated[;] they will make some type of arrangements for payments."[64] Maxwell finally appeared before a judge, with counsel, on May 22, 2015.[65] The judge ordered her release without payment.[66] Maxwell paid off her court debt on June 2, 2016.[67]

After this suit was filed, the Judges revoked the Collections Department's authority to issue warrants.[68] The Judges also recalled all active fines and fees warrants issued by the Collections Department before September 18, 2015, unless restitution remained unpaid or the individual had failed to appear in court.[69] In doing so, the Judges wrote off $1,000,000 in court debts.[70] Each Judge now "handles collection-related matters on their respective dockets."[71]

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63. *Id.*

64. *Id.*

65. R. Doc. 95-8 at 2.

66. *Id.*

67. R. Doc. 250-3 at 24.

68. R. Doc. 250-2 at 13, 76; R. Doc. 250-3 at 3.

69. R. Doc. 250-3 at 4.

70. *Id.*

71. *Id.* at 5.

Nevertheless, at least some active warrants for failure to pay restitution still exist.[72] And the Judges themselves now issue alias capias warrants for failure to pay fines and fees.[73] There is no evidence that the Judges now consider, or have ever considered, ability to pay before imprisoning indigent criminal defendants for failure to pay fines and fees. Indeed, the Judges do not routinely solicit financial information from criminal defendants who fail to pay court debts,[74] though they state that they do consider ability to pay when the issue is brought to their attention.[75]

D. Procedural History

Plaintiffs filed this civil rights action under 42 U.S.C. § 1983, alleging violations of their Fourth and Fourteenth Amendment rights, and violations of Louisiana tort law. Plaintiffs brought this action on behalf of themselves and all others similarly situated.[76] The first amended complaint, filed shortly after the initial complaint, named the following defendants: (1) The City of New Orleans, (2) OPCDC, (3) Sheriff Gusman, (4) Clerk of Court Arthur Morrell, (5) Judicial Administrator Kazik, and (6) the

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72. *Id.*

73. *See, e.g.*, R. Doc. 250-3 at 16, 21.

74. R. Doc. 251-2 at 17.

75. R. Doc. 250-2 at 12; R. Doc. 259-1 at 8.

76. Although plaintiffs moved for class certification on February 10, 2017, *see* R. Doc. 230, the Court stayed all motion practice—and thus denied plaintiffs' class certification motion without prejudice—pending further order, *see* R. Doc. 237.

Judges. The Court has summarized plaintiffs' seven counts as follows:

(1) Defendants' policy of issuing and executing arrest warrants for nonpayment of court debts is unconstitutional under the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment;

(2) Defendants' policy of requiring a $20,000 "fixed secured money bond" for each Collections Department warrant (issued for nonpayment of court debts) is unconstitutional under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment;

(3) Defendants' policy of indefinitely jailing indigent debtors for nonpayment of court debts without a judicial hearing is unconstitutional under the Due Process Clause of the Fourteenth Amendment;

(4) Defendants' "scheme of money bonds" to fund certain judicial actors is unconstitutional under the Due Process Clause of the Fourteenth Amendment. To the extent defendants argue this scheme is in compliance with Louisiana Revised Statutes §§ 13:1381.5 and 22:822, governing the percentage of each surety bond that judicial actors receive, those statutes are unconstitutional;

(5) Defendants' policy of jailing indigent debtors for nonpayment of court debts without any inquiry into their ability to pay is unconstitutional under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, and the Judges' authority over both fines and fees revenue and ability-to-pay determinations violates the Due Process Clause;

(6) Defendants' policy of jailing and threatening to imprison criminal defendants for nonpayment of court debts is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because it imposes unduly harsh and punitive restrictions on debtors whose creditor is the State, as compared to debtors who owe money to private creditors;

(7) Defendants' conduct constitutes wrongful arrest and wrongful imprisonment under Louisiana law.

Plaintiffs' request for relief seeks: (1) declaratory judgments that defendants' actions violate plaintiffs' Fourth and Fourteenth Amendment rights; (2) an order enjoining defendants from enforcing the purportedly unconstitutional policies; (3) money damages for the named plaintiffs; and (4) attorney's fees under 42 U.S.C. § 1988.

After a round of motions, all claims against the City of New Orleans, the Sheriff, and OPCDC were dismissed, along with Count Three and claims against the remaining

defendants for monetary and injunctive relief.[77] The Court then granted plaintiffs' leave to re-plead Counts Four and Seven against the Sheriff in plaintiffs' second amended complaint.[78] The Court also consolidated this case with *LaFrance v. City of New Orleans*, 16-14439.[79]

Now, plaintiffs seek declaratory relief against the Judges in their official capacity on Counts One, Two, Four, Five, and Six; declaratory relief against Administrator Kazik in his individual capacity on Counts One, Two, and Six; injunctive and declaratory relief against Sheriff Gusman in his official capacity on Count Four; and injunctive and declaratory relief as well as damages against the Sheriff on Count Seven.

As ordered by the Court, the parties have submitted cross-motions for summary judgment on Counts One, Two, Four, Five, and Six.[80]

II. STANDARD OF REVIEW

Summary judgment is warranted when "the movant shows that there is no genuine dispute as to any material

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77. R. Docs. 119, 123-26.

78. R. Doc. 228.

79. R. Doc. 249.

80. R. Doc. 237. The Court has stayed all other motion practice. In contravention of the Court's order, plaintiffs have moved for summary judgment on Count Seven. Plaintiffs' summary judgment motion is DENIED WITHOUT PREJUDICE to the extent it seeks relief on Count Seven.

fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). When assessing whether a dispute as to any material fact exists, the Court considers "all of the evidence in the record but refrain[s] from making credibility determinations or weighing the evidence." *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398-99 (5th Cir. 2008). All reasonable inferences are drawn in favor of the nonmoving party, but "unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985); *see also Little*, 37 F.3d at 1075. "No genuine dispute of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 481 (5th Cir. 2014).

If the dispositive issue is one on which the moving party will bear the burden of proof at trial, the moving party "must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial." *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264-65 (5th Cir. 1991). The nonmoving party can then defeat the motion by either countering with evidence sufficient to demonstrate the existence of a genuine dispute of material fact, or "showing that the moving party's evidence is so sheer that it may not persuade the reasonable fact-finder to return a verdict in favor of the moving party." *Id.* at 1265.

If the dispositive issue is one on which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record is insufficient with respect to an essential element of the nonmoving party's claim. *See Celotex*, 477 U.S. at 325. The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exists. *See id.* at 324. The nonmovant may not rest upon the pleadings, but must identify specific facts that establish a genuine issue for trial. *See, e.g., id.*; *Little*, 37 F.3d at 1075 ("Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." (quoting *Celotex*, 477 U.S. at 322)).

III. DISCUSSION

A. Justiciability

Defendants' motion for summary judgment challenges the justiciability of this action on several grounds. First, defendants argue that the named plaintiffs lack standing. Second, they argue that certain claims are moot in light of defendants' voluntary cessation of challenged conduct. Third, defendants argue that plaintiffs impermissibly seek a writ of mandamus against state judicial officers. Fourth, defendants argue that the Court cannot grant declaratory relief in this case. Finally, defendants argue that the Eleventh Amendment bars official-capacity claims against state judicial officers.

Appendix C

1. Standing and Mootness

Article III of the U.S. Constitution limits federal jurisdiction to cases or controversies. U.S. Const. art. III, § 2. To satisfy this case-or-controversy requirement, a plaintiff must have a personal stake in the suit she commences. *See Davis v. FEC*, 554 U.S. 724, 732-33, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008). This personal stake must exist both at commencement and throughout the life of the suit. *Id.* ("To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997))). If a plaintiff does not have the requisite personal stake at the commencement of the suit, she lacks standing. If her once-sufficient personal stake dissipates during the life of the suit such that Article III is no longer satisfied, her claims become moot. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (first addressing standing at the commencement of suit and then addressing mootness).

Defendants confuse these two doctrines—standing and mootness—in their motion for summary judgment. First, they argue that the named plaintiffs lack standing because their debts have been "suspended" or "waived."[81] Second, defendants argue that their voluntary cessation of certain debt collection practices moots plaintiffs' claims

81. R. Doc. 250-1 at 4.

challenging those practices.[82] Neither argument applies to plaintiffs' damages claim under Louisiana law, in which plaintiffs obviously have a continuing interest.

The waiver or suspension of plaintiffs' court debts after the commencement of this suit relates to mootness, not standing. Plaintiffs have standing to bring suit as long as they "had the requisite stake in the outcome when the suit was filed." *Davis*, 554 U.S. at 734. Standing to bring suit, however, has no bearing on whether plaintiffs' claims became moot during the life of the suit. *See, e.g., County of Riverside v. McLaughlin*, 500 U.S. 44, 51, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991) (distinguishing standing from mootness). Whether the "suspension" or "waiver" of plaintiffs' court debts destroyed their interest in the outcome of this suit is properly addressed as a question of mootness.

2. Plaintiffs Had Standing to Bring Suit

The Court is nonetheless obligated to determine whether the parties had standing to bring suit. *Laidlaw*, 528 U.S. at 180. Standing consists of three elements: (1) the plaintiff must have suffered an injury-in-fact, which is an invasion of a legally protected interest that is concrete and particularized as well as actual or imminent; (2) the injury must be fairly traceable to the challenged conduct of the defendant; and (3) it must be likely that the plaintiff's injury will be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct.

82. *Id.* at 10.

2130, 119 L. Ed. 2d 351 (1992). With regard to "equitable relief for past wrongs, a plaintiff must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future." *Soc'y of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1285 (5th Cir. 1992). As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing each element of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016).

In support of their standing argument, defendants note that this Court dismissed Reynaud Variste's and Thaddeus Long's claims for equitable relief because neither plaintiff owed outstanding courts debts for which they could be imprisoned.[83] But those plaintiffs lacked standing to seek equitable relief because they faced no imminent injury *when the suit commenced.* The amended complaint itself acknowledged that both plaintiffs had already paid their court debts, and thus no longer faced an imminent threat of injury from defendants' debt collection policies and practices.[84]

The Court is satisfied that the other named plaintiffs—Alana Cain, Ashton Brown, Reynajia Variste, and Vanessa Maxwell—had standing to bring suit. Defendants do not contest that these plaintiffs owed court debts when this suit was filed in September 2015. Thus, there is no dispute that these plaintiffs were subject to defendants' debt collection policies and practices when this suit began.

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83. R. Doc. 109 at 20.

84. R. Doc. 7 at 15 ¶ 48, 18 ¶ 67.

Plaintiffs demonstrated a concrete and imminent injury arising from defendants' policies and practices: the risk of arrest and imprisonment for failing to pay outstanding court debts. This risk was not hypothetical or speculative; plaintiffs themselves were arrested and imprisoned for that very reason shortly before the suit commenced. *Compare Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 543 (5th Cir. 2008) (concluding that "because some Plaintiff bar owners have been charged under the ordinance and all Plaintiff bar owners face the real potential of immediate criminal prosecution, they have standing to bring their claims"), *with Soc'y of Separationists*, 959 F.2d at 1285-86 (holding that the likelihood of plaintiff juror again being selected for jury service and again assigned to defendant judge was too slim to permit prospective relief against defendant). Finally, plaintiffs' requested relief—a declaration that defendants' debt collection policies and practices are unconstitutional—would redress the threat of injury they faced. The Court now turns to whether plaintiffs' personal stake in the litigation, sufficient to support Article III standing at commencement, dissipated over time.

3. Defendants' Voluntary Cessation Moots Counts One, Two, and Four

The Court first addresses whether any claims are moot in light of defendants' voluntary cessation of certain debt collection practices. As a general rule, "any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot," *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661

(5th Cir. 2006), and requires that the case be dismissed, *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013). Although "[i]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice,'" *Laidlaw*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982)), this rule is not absolute. "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)). Additionally, "[w]ithout evidence to the contrary, [courts] assume that formally announced changes to official governmental policy are not mere litigation posturing." *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009). Nonetheless, a defendant's burden of showing mootness by virtue of its voluntary cessation is "formidable." *Laidlaw*, 528 U.S. at 190.

Defendants, through an affidavit by Administrator Kazik, state that they have taken the following actions in response to this lawsuit:[85]

- Defendants rescinded the Collections Department's authority to issue warrants.[86]

85. R. Doc. 250-1 at 11.

86. R. Doc. 250-2 at 13, 76; R. Doc. 250-3 at 3.

- Defendants identified all Collections Department fines and fees warrants based solely on failure to pay fines and fees (other than restitution) and directed Sheriff Gusman to recall these warrants.[87]

- Defendants have "written off" approximately $1,000,000 in fines and fees owed to the court.[88]

- Defendants have worked together "to implement new procedures to correct complaints about delays in getting arrestees timely to court."[89]

The Collections Department's practice of issuing fines and fees warrants forms the basis of Counts One, Two, and Four. Count One asserts that defendants issue arrest warrants for failure to pay fines and fees without probable cause, without review by a neutral magistrate, and without oath or affirmation.[90] The allegations in support of Count One relate solely to warrants issued by the Collections Department.[91] Similarly, Counts Two and

87. R. Doc. 250-2 at 13-14; R. Doc. 250-3 at 4.

88. R. Doc. 250-2 at 13-14; R. Doc. 250-3 at 4.

89. R. Doc. 250-1 at 11; R. Doc. 250-3 at 6, 29.

90. R. Doc. 161-4 at 56-57 ¶¶ 185-86; R. Doc. 251-1 at 18-25.

91. *See, e.g.*, R. Doc. 161-4 at 34 ¶ 118 ("Pursuant to Collections Department policy and practice, if a person fails to make the payments determined by the Collections Department, Collections Department employees will seek a warrant for the debtor's arrest. . . . The 'warrants' are never presented to a judge or neutral magistrate for review, and no judicial officer is even aware of any particular warrant application or issuance. They are not supported by oath or affirmation.").

Four relate to the fixed, $20,000 money bail imposed on individuals who are arrested on Collections Department warrants.[92] Counts Five and Six, by contrast, do not depend on abandoned Collections Department practices. Count Five asserts that the Judges fail to consider ability to pay before imprisoning plaintiffs for failure to pay court debts.[93] Count Five further asserts that the Judges do not provide a neutral tribunal to determine ability to pay because their financial interest in fines and fees revenue deprives plaintiffs of due process.[94] Count Six broadly alleges that defendants' practice of imprisoning criminal defendants for failure to pay fines and fees is invidious discrimination.[95] Thus, if it is absolutely clear that the Collections Department's warrant practices have ceased and cannot reasonably be expected to recur, then Counts One, Two, and Four, but not Counts Five and Six, would be moot.

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92. *See id.* at 27 ¶ 95 ("The OPCDC Defendants impose an automatic $20,000 secured money bond on anyone illegally arrested and imprisoned on a Collections Department warrant for non-payment or late payment of court debts."); *id.* at 57 ¶ 191 ("The Defendants violate the Plaintiffs' rights by placing and keeping them in jail prior to any debt-collection proceedings when they cannot afford to pay the preset amount of money required for release after a Collections Department nonpayment arrest . . . ."); *id.* at 58 ¶ 195 ("Defendants operate a system of money bond in which the OPCDC Defendants set a bond amount on Collections Department warrants that the Defendants know will result in their collecting and controlling 1.8% of the bond amount if it is ultimately paid.").

93. *Id.* at 59 ¶¶ 198-99.

94. *Id.* at 59-60 ¶ 200.

95. *Id.* at 60 ¶ 202.

Defendants insist that the Collections Department "will never again issue warrants."[96] The Court does not doubt defendants' sincerity. But the Fifth Circuit has cautioned that "allegations by a defendant that its voluntary conduct has mooted the plaintiff's case require closer examination than allegations that happenstance or official acts of third parties have mooted the case." *Fontenot*, 777 F.3d at 747-48 (quoting *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 528 n.4 (5th Cir. 2008)).

Upon close examination, the Court is satisfied that defendants' voluntary conduct has mooted plaintiffs' claims related to Collections Department fines and fees warrants. A memorandum issued by Administrator Kazik on September 18, 2015 stated: "Pursuant to the En Banc directive issued earlier today, all Collections Agents for Criminal District Court may no longer issue an Alias Capias for non-payment of fines and fees or for failure to appear. This is effective immediately."[97] The Court must assume that this "formally announced change[] to official governmental policy [was] not mere litigation posturing." *Sossamon*, 560 F.3d at 325. Moreover, the Judges reviewed all active fines and fees warrants issued by the Collections Department before September 18, 2015, and recalled all such warrants unless restitution remained unpaid or the individual had failed to appear in court.[98] In doing so,

96. R. Doc. 250-1 at 11.

97. R. Doc. 250-2 at 76.

98. R. Doc. 250-3 at 4.

the Judges wrote off $1,000,000 in court debts.[99] Each Judge now "handles collection-related matters on their respective dockets," according to Administrator Kazik.[100]

Admittedly, the timing of these policy changes suggests that they were made in response to this litigation. Administrator Kazik states in his affidavit that the Judges decided to revoke the Collections Department's authority to issue warrants on "the day the Judges first heard about this lawsuit."[101] Furthermore, there is no indication that defendants' new policy will be binding on future OPCDC judges and administrators. *Cf. Lewis v. La. State Bar Ass'n*, 792 F.2d 493, 496 (5th Cir. 1986) (finding no reasonable expectation that the alleged violation would recur because defendant bar association had changed its policy, and the state supreme court would need to approve any subsequent policy change). There is also precedent for stopping and restarting the Collections Department's warrant process: in October 2012, the former chief judge of OPCDC directed the Collections Department to discontinue issuing fines and fees warrants, but reversed course in February 2013.[102]

Nevertheless, the Court finds that defendants' voluntary policy changes make it absolutely clear that Collections Department practices could not reasonably be

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99. *Id.*

100. *Id.* at 5.

101. *Id.* at 3.

102. R. Doc. 250-2 at 77-78.

expected to recur. Defendants have formally revoked the Collections Department's authority to issue warrants. The sincerity of this policy change is reflected in defendants' decision to rescind all warrants issued by the Collections Department for failure to pay fines and fees, other than for restitution. Defendants have met their formidable burden of showing that their voluntary conduct has mooted Counts One, Two, and Four.

4. Defendants' Voluntary Cessation Does Not Moot Counts Five and Six

As discussed earlier, Counts Five and Six focus on what the Judges do, not what the Collections Department did, when criminal defendants fail to pay fines and fees. Specifically, Count Five challenges the Judges' practice of failing to inquire into ability to pay before plaintiffs are imprisoned for nonpayment, and the Judges' conflict of interest in deciding plaintiffs' ability to pay.[103] Count Six challenges the Judges' practice of imprisoning criminal defendants for failure to pay fines and fees as invidious discrimination.[104] The predicate constitutional injuries underlying both of these claims are that plaintiffs are subject to imprisonment for failure to pay court debts, and that the Judges do not inquire into plaintiffs' ability to pay before their imprisonment.

A defendant's voluntary cessation of challenged conduct moots a claim only if it is absolutely clear that

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103. R. Doc. 161-4 at 59-60 ¶¶ 198-200.

104. *Id.* at 60 ¶ 202.

the challenged conduct could not reasonably be expected to recur. *Laidlaw*, 528 U.S. at 189. Here, to moot Counts Five and Six, defendants must show that plaintiffs are no longer subject to imprisonment for nonpayment of court debts, or at least that the Judges inquire into plaintiffs' ability to pay before their imprisonment.

The Court finds that defendants have not met their formidable burden of showing mootness on Counts Five and Six. First, and most importantly, the Judges do not represent that they have ceased imprisoning individuals for failure to pay court debts by some means other than Collections Department warrants. Nor do they represent that they now consider ability to pay before imprisoning such individuals. Unlike the en banc directive withdrawing the Collections Department's authority to issue warrants, there is no formal statement in the record indicating that the Judges' challenged practices have changed.

Defendants principally rely on the affidavit of Administrator Kazik to show mootness. But Administrator Kazik cannot—and does not—represent what the Judges' current practices are, nor what the Judges will do going forward. Instead, Administrator Kazik states that "[t]o the best of Judicial Defendants' ability, no fines and fee warrants issued by a currently sitting or prior judge exist, unless there was a determination that other good cause existed in the court record supporting the warrant, such as a failure to appear in court or a failure to pay restitution."[105] At most, this carefully worded affidavit

105. R. Doc. 250-3 at 5.

shows only that at one point in time—when Administrator Kazik made this statement—there were no active fines and fees warrants purely for failure to pay court debts, other than restitution. Defendants' corrective efforts to recall fines and fees warrants do not suffice to show a change in the Judges' practices. Indeed, as discussed later, the Judges still have enormous incentives to collect fines and fees. Without evidence of an actual policy change, the Court cannot simply assume that the Judges have altered their debt collection practices.

Second, the Judges now handle collection efforts on their respective dockets,[106] and there is evidence in the record that these efforts include issuing alias capias warrants against criminal defendants for nonpayment of fines and fees.[107] Defendants produced worksheets listing all alias capias warrants issued by Sections G and I of OPCDC as of May 18, 2017.[108] Both sections had issued (and apparently then recalled) alias capias warrants for failure to pay fines and fees as late as April 2017.[109] Moreover, in early 2017, the Judges met en banc to discuss issues with securing court appearances for arrestees in a timely manner. The Judges requested that "arrestees be placed on our respective jail lists on the day of or the next day after their arrest on a capias [warrant]."[110] This request

106. *Id.* at 5.

107. *See id.* at 16, 21.

108. *Id.* at 12-21.

109. *Id.* at 16, 21.

110. *Id.* at 29.

suggests that criminal defendants are still subject to imprisonment on alias capias warrants issued by OPCDC, with no pre-imprisonment court hearing.

Third, defendants' corrective efforts are so riddled with exceptions and omissions as to cast doubt on the sincerity of their actions. Administrator Kazik's affidavit concedes the existence of active warrants for failure to pay restitution and for failure to appear on court dates related to fines and fees. And the police continue to arrest individuals on these warrants. Plaintiffs sought to join one such individual—Monique Merren—as a named plaintiff in this case.[111] An alias capias warrant issued against Merren in 1999 after she failed to pay restitution for a 1998 conviction.[112] Merren was arrested and imprisoned on this warrant in June 2016.[113] Defendants offer no explanation for treating criminal defendants who owe restitution differently from those who don't. Additionally, OPCDC still operates a Collections Department. And, as discussed earlier, the Judges stopped the Collections Department's warrant process in 2012 before restarting it in 2013. This policy reversal undercuts a finding that the Judges have changed their practices for good.[114]

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111. *See* R. Doc. 161.

112. R. Doc. 161-7 at 1. The Court takes judicial notice of Merren's OPCDC docket sheet, attached as an exhibit to plaintiffs' motion for leave to file their second amended complaint.

113. *Id.*

114. The Court did not find this policy reversal sufficient to defeat mootness on Counts One, Two, and Four in light of the Judges' en banc directive revoking the Collections Department's

Understandably, the Judges would like to see this lawsuit go away. But they have not done enough to show institutional change. Again, the Judges have not indicated that they have ceased imprisoning criminal defendants for failure to pay, or that they now inquire into those criminal defendants' ability to pay. Evidence in the record confirms that plaintiffs still face the possibility of alleged constitutional injury if they fail to pay their court debts. For these reasons, defendants' voluntary conduct does not moot Counts Five and Six.

5. The Named Plaintiffs' Claims Are Not Moot

The Court next addresses whether plaintiffs' claims are moot in light of the apparent cancellation of their court debts. A case will become moot when "there are no longer adverse parties with sufficient legal interest to maintain the litigation," or "when the parties lack a legally cognizable interest in the outcome" of the litigation. *In re Scruggs*, 392 F.3d 124, 128 (5th Cir. 2004) (quoting *Chevron, U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993)). The purpose of this personal stake requirement is to ensure that the case involves "sharply presented issues in a concrete factual setting

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warrant authority and their follow-up efforts rescinding Collections Department warrants. Here, the Judges have not issued any formal statement indicating that they have changed their practices of imprisoning plaintiffs for nonpayment and not inquiring into plaintiffs' ability to pay. Additionally, the Judges' follow-up efforts were aimed principally at eliminating Collections Department warrants.

and self-interested parties vigorously advocating opposing positions." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980).

A case should not be declared moot so "long as the parties maintain a 'concrete interest in the outcome' and effective relief is available to remedy the effect of the violation." *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir. 1998) (quoting *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571, 104 S. Ct. 2576, 81 L. Ed. 2d 483 (1984)). The bar to overcome mootness is lower than the bar to establish standing: "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Laidlaw*, 528 U.S. at 190.

Defendants assert that OPCDC suspended the remaining balance of court debts owed by Alana Cain and Ashton Brown, and waived that of Reynajia Variste.[115] Additionally, defendants contend that Vanessa Maxwell's court debts have been paid in full.[116] Plaintiffs do not contest these facts.[117] Instead, plaintiffs make two arguments: (1) at least Cain and Brown retain a personal interest in the outcome of the litigation; and (2) the named plaintiffs' claims cannot be mooted because a motion for class certification is pending.[118]

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115. R. Doc. 250-2 at 12.

116. *Id.*

117. *See* R. Doc. 259-1 at 8.

118. R. Doc. 259 at 4.

Plaintiffs first argue that defendants may reinstate Cain's and Brown's suspended debts. While OPCDC suspended Cain's and Brown's court debts, it waived Maxwell's. The Court presumes that a state court uses language decidedly, and that OPCDC used suspension and waiver to describe different actions.

To suspend a debt implies that OPCDC has temporarily ceased enforcing its claim against an individual for her court debts. *See Merriam-Webster Dictionary* Online, www.merriam-webster.com (defining suspend as "to cause to stop temporarily"; "to defer to a later time on specified conditions"; "to hold in an undetermined or undecided state awaiting further information"). By contrast, to waive a debt suggests a decision permanently to forgo debt collection. *See id.* (defining waive as "to refrain from pressing or enforcing (something, such as a claim or rule): forgo · waive the fee"); *see also Veverica v. Drill Barge Buccaneer No. 7*, 488 F.2d 880, 883 (5th Cir. 1974) (holding that deferral of payment for a salvage operation did not *waive* the resulting maritime lien, "but merely *suspend[ed]* the remedy on the lien" until payment came due (emphasis added)). Thus, the plain meanings of "suspend" and "waive" indicate that defendants may reinstate Cain's and Brown's, but not Maxwell's, court debts.

Supreme Court precedent makes plain that temporary relief from injury does not moot a plaintiff's claim for permanent equitable relief. In *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983), the Supreme Court reviewed a district court injunction

against the use of chokeholds by police officers. After the Court granted certiorari, the city imposed a moratorium on chokeholds. *Id.* at 100. As the Court stated in a later opinion, this moratorium "surely diminished the already slim likelihood that any particular individual would be choked by police." *Laidlaw*, 528 U.S. at 190. Nevertheless, the Supreme Court held that the city's moratorium did not moot the case because "the moratorium by its terms [was] not permanent." *Lyons*, 461 U.S. at 101. By the same logic, this Court finds that temporarily suspending Cain's and Brown's court debts does not moot their claims for declaratory relief.

Moreover, the record shows that defendants continued to collect payments from Cain and Brown after suspending their debts. According to a docket sheet, Cain's court debts were suspended on April 7, 2016.[119] Nevertheless, a payment receipt dated October 12, 2016, states that Cain owes a balance of $251.50 and that the next payment is due on October 31, 2016.[120] Similarly, a minute entry shows that Brown's court debts were suspended as of September 23, 2016,[121] but a payment receipt dated February 10, 2017, shows a balance of $432.50.[122] This evidence indicates that suspension of a court debt does not bar defendants from trying to collect that debt. Because plaintiffs Cain and Brown remain subject to defendants' debt collection

119. R. Doc. 250-3 at 22.

120. R. Doc. 230-3 at 2.

121. R. Doc. 250-3 at 23.

122. R. Doc. 230-3 at 3.

policies and practices, including the Judges' practices that form the basis of Counts Five and Six, they have not been "divested of all personal interest in the result" of the litigation. *Dailey*, 141 F.3d at 227.

At oral argument, the parties represented that Cain has received a reimbursement check from OPCDC. It is unclear, however, when or why Cain received the reimbursement check, or which court costs it reimbursed. The check is not in the summary judgment record, and the Court cannot simply assume that OPCDC has reimbursed Cain for all payments made after the date her debts were suspended. Moreover, defendants have not asserted that Brown—or anyone else whose debts were suspended—received a reimbursement check from OPCDC. Cain's reimbursement check does not affect the Court's analysis.

That OPCDC continued to collect payment from Cain and Brown after suspending their debts also shows that the "capable of repetition, yet evading review" exception applies. *Ctr. for Individual Freedom*, 449 F.3d at 661. This "exception can be invoked if two elements are met: '(1) [T]he challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Id.* (alteration in original) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S. Ct. 347, 46 L. Ed. 2d 350 (1975)). Defendants suspended Cain's court debts in April 2016—merely seven months after this proceeding began. Seven months was too short a time to resolve this complicated suit. Additionally, defendants' actual

debt collection efforts after suspending Cain's and Brown's debts creates a reasonable expectation that these plaintiffs will again be subject to defendants' debt collection practices in the future. Thus, even if defendants' suspension of Cain's and Brown's court debts otherwise moots their individual claims, the capable of repetition, yet evading review exception applies.

Plaintiffs also argue that the named plaintiffs' claims cannot be mooted because a motion for class certification is pending.[123] Generally, "a class action becomes moot when the putative representative plaintiff's claim has been rendered moot before a class is certified." *Fontenot v. McCraw*, 777 F.3d 741, 748 (5th Cir. 2015). But, as the Supreme Court has noted,

> There 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. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially . . . [whether] otherwise the issue would evade review.

Sosna v. Iowa, 419 U.S. 393, 402 n.11, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975); *see also Genesis Healthcare*, 569 U.S. at 75 ("[A]n inherently transitory class-action claim is

123. R. Doc. 259 at 4.

not necessarily moot upon the termination of the named plaintiff's claim.") (internal quotation marks omitted)). An example of such a claim is a constitutional challenge to pretrial detention, which "is by nature temporary." *Gerstein v. Pugh*, 420 U.S. 103, 111 n.11, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975). The Court in *Gerstein* noted: "It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class." *Id.* In such a case, "the termination of a class representative's claim does not moot the claims of the unnamed members of the class." *Id.*

The Supreme Court again addressed a challenge to pretrial detention in *McLaughlin*. The named plaintiffs in *McLaughlin* were incarcerated and had not yet received a probable cause hearing when they filed suit. 500 U.S. at 48-49. Before the district court certified the class, the named plaintiffs either received a probable cause determination or were released. "That the class was not certified until after the named plaintiffs' claims had become moot [did] not deprive [the Court] of jurisdiction," however. *Id.* at 52 (citing *Gerstein*, 420 U.S. at 110 n.11). As in *Gerstein*, the Court held that the relation back doctrine "preserve[d] the merits of the case for judicial resolution." *Id.*

While *Sosna, Gerstein*, and *McLaughlin* all applied the relation back doctrine to inherently transitory claims, the Fifth Circuit has further applied the doctrine to claims "rendered moot by purposive action of the defendants." *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1049 (5th Cir. Unit A July 1981). The *Zeidman* court held that, when "the plaintiffs have filed a timely motion

for class certification and have diligently pursued it, the defendants should not be allowed to prevent consideration of that motion by tendering to the named plaintiffs their personal claims before the district court reasonably can be expected to rule on the issue." *Id.* at 1045. The court reasoned that defendants should not "have the option to preclude a viable class action from ever reaching the certification stage" by "picking off" the named plaintiffs, whose claims would otherwise become moot.[124] *Id.* at 1050.

Plaintiffs' claims for equitable relief tend to evade review, especially if defendants can pick off the named plaintiffs by suspending or waiving their court debts. Moreover, plaintiffs timely moved for class certification.[125] The Court stayed this motion pending resolution of the parties' cross-motions for summary judgment.[126] Plaintiffs—both named and unnamed—should not be punished by the order in which the Court has addressed

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124. The Fifth Circuit has since cast doubt on whether the core holding of *Zeidman* remains good law as to claims for money damages. Specifically, the court has stated that *Genesis Healthcare* "undermines, at least in money damages cases, *Zeidman*'s analogy between the 'inherently transitory' exception to mootness and the strategic 'picking off' of named plaintiffs' claims." *Fontenot*, 777 F.3d at 750. In *Genesis Healthcare*, the Supreme Court declined to apply the "inherently transitory" exception to a claim for money damages, which "cannot evade review," "[u]nlike claims for injunctive relief challenging ongoing conduct." 569 U.S. at 77. Where, as here, plaintiffs seek equitable relief, the "inherently transitory" exception still applies and *Zeidman* remains good law.

125. R. Doc. 230.

126. R. Doc. 237.

issues in this case, or by defendants' willingness to suspend or waive the court debts of the named plaintiffs.

Nevertheless, the Court does not rely on the relation back exception in determining that this case is not moot. The relation back exception applies to a class certification motion that is adjudicated after the named plaintiffs' claims become moot. *See Fontenot*, 777 F.3d at 748. The Court is not aware of any authority for applying this exception to summary judgment motions. To the contrary, the *Zeidman* court made clear that "[a] named plaintiff whose individual claim has been rendered moot may in no event argue the merits of the case before a class has properly been certified; prior to that time the plaintiff may at most argue the class certification question." *Id.* at 1045; *see also Geraghty*, 445 U.S. at 404 ("A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified.").

The Court therefore finds that the named plaintiffs' claims are not moot for two reasons. First, Alana Cain and Ashton Brown still owe court debts; defendants' temporary suspension of these debts does not destroy Cain's or Brown's personal stake in the litigation. Second, with respect to Cain's and Brown's debts, defendants' debt collection practices are capable of repetition, yet evading review.

6. Plaintiffs Do Not Request Mandamus

Defendants argue that plaintiffs' claims for declaratory relief against the Judges and Administrator Kazik are

tantamount to requests for a writ of mandamus.[127] It is well-established that "federal courts have no general power to issue writs of mandamus to direct state courts and their judicial officers in the performance of their duties." *Lamar v. 118th Judicial Dist. Court of Tex.*, 440 F.2d 383, 384 (5th Cir. 1971); *see also In re Campbell*, 264 F.3d 730, 731 (7th Cir. 2001) (discussing when mandamus against state judicial officers may be appropriate). But federal courts may grant declaratory and injunctive relief against state judicial officers. *See Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984); *Holloway v. Walker*, 765 F.2d 517, 525 (5th Cir. 1985). Indeed, Section 1983 explicitly recognizes the availability of such remedies. *See* 42 U.S.C. § 1983 (providing that, "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable").

Plaintiffs' summary judgment motion clearly frames the claims against the Judges and Administrator Kazik as requests for declaratory relief. But defendants argue that plaintiffs essentially want this Court to direct defendants in the exercise of their judicial duties. Specifically, according to defendants, plaintiffs seek a court order directing the Judges to hold hearings on ability to pay, to cease delegating warrant authority to the Collections Department, and to stop issuing capias warrants.[128]

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127. R. Doc. 250-1 at 6.

128. R. Doc. 250-1 at 7-8.

A writ of mandamus compels the defendant to perform a certain act. *See Mandamus*, Black's Law Dictionary (10th ed. 2014). By contrast, the declaratory judgments plaintiffs seek on Counts One, Two, Four, Five, and Six would merely state that certain of defendants' practices are unconstitutional.[129] The Supreme Court has recognized the authority of federal courts to issue such relief against state judges. *See Pulliam*, 466 U.S. at 526 (affirming attorneys' fees award in case where district court declared magistrate's practice of "requir[ing] bond for nonincarcerable offenses . . . to be a violation of due process and equal protection and enjoined it"). Thus, the Court rejects defendants' argument that plaintiffs' claims for declaratory relief are in fact requests for a writ of mandamus.

7. Declaratory Relief Is Appropriate

Defendants further argue that the Court lacks the authority to entertain plaintiffs' claims for declaratory relief.[130] The Declaratory Judgment Act, 28 U.S.C. § 2201, is "an enabling act, which confers a discretion on the courts" to decide or dismiss a declaratory judgment suit, "rather than an absolute right upon the litigant" to bring such a suit. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995) (quoting *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241, 73 S. Ct. 236, 97 L. Ed. 291 (1952)); *accord Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 387, 389 (5th Cir. 2003). In analyzing claims under the Act, a court must determine

129. *See* R. Doc. 161-4 at 61.

130. R. Doc. 250-1 at 8-9.

"(1) whether the declaratory action is justiciable; (2) whether the court has the authority to grant declaratory relief; and (3) whether to exercise its discretion to decide or dismiss the action."[131] *Sherwin-Williams*, 343 F.3d at 387.

Defendants argue that declaratory relief is not appropriate because this case is no longer justiciable. As explained earlier, Counts Five and Six are not moot. Thus, the Court may entertain these claims for declaratory relief.

8. The Eleventh Amendment Does Not Bar Plaintiffs' Official-Capacity Claims

Defendants' final justiciability challenge relates to whether the Judges enjoy sovereign immunity on plaintiffs' official-capacity claims against them. Defendants argue that suing a state official in her official capacity is the same as suing the state directly.[132] This proposition is true for retrospective relief, but not for prospective relief. Under *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), plaintiffs may sue state officials in their official capacity for prospective relief. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for

131. The Court has already addressed, and rejected, the argument that it should exercise its discretion not to decide this case. R. Doc. 119 at 14-19. Defendants do not renew this argument in their motion for summary judgment.

132. R. Doc. 250-1 at 10.

prospective relief are not treated as actions against the State.'" (quoting *Kentucky v. Graham*, 473 U.S. 159, 167, n.14, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985))). Prospective relief includes both injunctive and declaratory relief. *See Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002) (allowing plaintiff to seek both injunctive and declaratory relief "against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*"). Thus, defendants' Eleventh Amendment argument is meritless.

* * *

Because Counts One, Two, and Four are moot, defendants are entitled summary judgment on these counts. Having found that Counts Five and Six remain justiciable, the Court turns to the merits of these claims.

B. The Judges' Practice of Imprisoning Individuals for Failure to Pay Court Debts Without Considering Ability to Pay Is Unconstitutional

The core of plaintiffs' constitutional challenge to the Judges' debt collection measures is that the Judges imprison poor debtors solely because they cannot afford to pay court debts. Count Five specifically challenges the Judges' practice of failing to inquire into indigent debtors' ability to pay court debts before the debtors are imprisoned for nonpayment.[133]

133. As discussed in the next section, Count Five also challenges the constitutionality of the legislative framework that vests both judicial and executive power in the Judges.

Appendix C

1. The Judges Have a Policy or Practice of Failing to Conduct Any Inquiry into Plaintiffs' Ability to Pay Court Debts Before Plaintiffs Are Imprisoned for Nonpayment

The facts related to Count Five are undisputed. Most importantly, the Judges do not routinely solicit financial information from criminal defendants who fail to pay their court debts,[134] though they do consider ability to pay when the issue is brought to their attention.[135] As discussed earlier, plaintiffs continue to face the possibility that they will be imprisoned for failure to pay court debts.[136] Thus, it is the Judges' practice not to inquire into plaintiffs' ability to pay such debts even though plaintiffs may be imprisoned for failure to pay.

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134. R. Doc. 251-2 at 17. Plaintiffs posed the following interrogatory: "Please describe any and all policies, procedures, and practices related to assessing whether a person who owes fines and/or fees to the court has the ability to pay those fines and/or fees?"; defendants responded: "There are no written policies or procedures; the general practice, which varies depending upon the matter, includes input from defense counsel and/or the defendant when brought to the Court's attention." R. Doc. 251-5 at 297. Although defendants deny that the Judges fail to routinely solicit information about criminal defendants' ability to pay, *see* R. Doc. 255-5 at 14, they neither point to contrary evidence in the record nor show that plaintiffs' evidence is too sheer to support summary judgment. *See* Fed. R. Civ. P. 56(c)(1); *Int'l Shortstop*, 939 F.2d at 1265. Defendants therefore fail to carry their summary judgment burden of showing a genuine dispute of fact.

135. R. Doc. 250-2 at 12; R. Doc. 259-1 at 8.

136. *See supra* Part III.A.4.

The evidence in the record confirms this practice. Each named plaintiff was imprisoned for failure to pay court debts. But at no point—not at sentencing, not before their imprisonment, not at a hearing while they were imprisoned—did a judge inquire into their ability to pay. By way of example, Ashton Brown was imprisoned for failure to pay court fees from July 23 to August 7, 2015.[137] No judge inquired into his ability to pay before his imprisonment.[138] Brown did secure an appearance in court, without counsel, on August 6.[139] The judge refused to release Brown, who lived in poverty and struggled to support himself and his nine-month-old daughter, unless he paid $100 to OPCDC.[140] There is no indication in the record that the judge asked about Brown's income or ability to pay. Brown had to ask his grandmother for help, and only after she made a $100 payment was Brown released.[141]

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137. R. Doc. 59-3 at 6.

138. The court did advise Brown at sentencing that if he did not have the money to make his first payment, he should seek an extension. R. Doc. 255-4 at 16. To be clear, plaintiffs are not challenging the imposition of fines and fees at sentencing without an ability-to-pay inquiry; their challenge is focused on the Judges' practice of not providing this inquiry at any point before plaintiffs are imprisoned for failure to pay.

139. R. Doc. 59-3 at 6.

140. *Id.*; R. Doc. 8-3 at 1.

141. R. Doc. 8-3 at 1; R. Doc. 59-3 at 6.

Appendix C

Alana Cain was imprisoned for failure to pay restitution and fees from March 11 to March 18, 2015.[142] There is no indication that any judge inquired into her ability to pay before her imprisonment. She appeared before a judge while in jail; at that hearing, the transcript of which is in the record,[143] the judge did not ask Cain whether she could pay her court debts, nor did he ask her about her income.[144] If the judge had inquired into Cain's ability to pay, he would have learned that Cain—who had given birth to her first child a few weeks earlier—made only $200 per month and struggled to afford food and clothes.[145] The judge did ask Cain *when* she would be able to continue making payments.[146] After Cain stated that she could continue making payments upon her release, the judge ordered her release and directed her to return to court for a status update two weeks later.[147]

Some criminal defendants who appeared before a judge while they were imprisoned for failure to pay fines and fees were sent back to jail, apparently because they could not make a payment. For example, Tyrone Singleton was arrested for failure to pay fines and fees on November

142. R. Doc. 59-3 at 2; R. Doc. 251-5 at 369.

143. R. Doc. 95-3 at 27-35.

144. R. Doc. 8-2 at 1-2.

145. *Id.* at 1.

146. R. Doc. 95-3 at 30.

147. *Id.* at 29-32.

11, 2013.[148] He appeared before a judge two weeks later, on November 25, but was sent back to jail for another week before his release.[149]

This evidence suggests that the Judges do not release criminal defendants imprisoned for failure to pay court debts without a payment, or some promise of payment.[150] Defendants cite no statutory authority for the Judges' actions.[151] This process most resembles contempt of court in which an individual is imprisoned until she complies with a court order—here, an order to pay fines and fees. Because plaintiffs may secure their release by making a payment, their imprisonment for nonpayment is a conditional penalty. *Hicks v. Feiock*, 485 U.S. 624, 633, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988). Contempt of court that imposes a conditional penalty is civil, rather than criminal, "because it is specifically designed to compel the doing of some act," rather than to punish. *Id.*

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148. R. Doc. 251-5 at 411. The Court takes judicial notice of the facts contained within this exhibit, which were taken from publicly available docket sheets.

149. *Id.*

150. *See* R. Doc. 251-2 at 22; R. Doc. 255-5 at 25.

151. Because OPCDC sometimes includes payment of court debts as a condition of probation, the court could revoke an individual's probation for failure to pay. *See* La. Code Crim. Proc. art. 895.1 (authorizing courts to require payment of restitution and certain fees as a condition of probation); *id.* arts. 899, 900 (describing procedures for revoking probation). But there is no indication in the record that OPCDC's debt collections practices generally, or ever, involve probation revocation.

There is no genuine dispute, therefore, that the Judges have a practice of not inquiring into plaintiffs' ability to pay court debts when plaintiffs are essentially held in civil contempt and imprisoned for nonpayment.

2. The Judges' Failure to Inquire into Plaintiffs' Ability to Pay Court Debts Before Plaintiffs Are Imprisoned for Nonpayment Violates Due Process

Plaintiffs argue that the Judges' failure to inquire into plaintiffs' ability to pay court debts violates the Fourteenth Amendment.[152] Although "[d]ue process and equal protection principles converge" in cases involving the criminal justice system's treatment of indigent individuals, *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), plaintiffs' argument sounds in procedural due process. Thus, the familiar framework set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), applies. *See Turner v. Rogers*, 564 U.S. 431, 444-45, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011) (applying *Mathews v. Eldridge* to civil contempt proceedings). The *Mathews v. Eldridge* framework calls for the Court to consider three factors: "(1) the nature of 'the private interest that will be affected,' (2) the comparative 'risk' of an 'erroneous deprivation' of that interest with and without 'additional or substitute procedural safeguards,' and (3) the nature and magnitude of any countervailing interest in not providing 'additional or substitute procedural requirements.'" *Id.* (quoting *Mathews*, 424 U.S. at 335).

152. R. Doc. 251-1 at 38-39.

Appendix C

Supreme Court precedent speaks directly to the kind of procedural protections the Judges must provide to plaintiffs. This precedent is grounded in the well-established principle that an indigent criminal defendant may not be imprisoned solely because of her indigence. *See Tate v. Short*, 401 U.S. 395, 398, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971); *see also United States v. Voda*, 994 F.2d 149, 154 n.13 (5th Cir. 1993) ("Constitutionally, courts are limited in the penalty they can impose for nonpayment of criminal fines because of inability to pay."). Admittedly, there is nothing necessarily unconstitutional about imprisoning a convicted criminal defendant for failing to pay fines and fees. As the Supreme Court recognized, this custom "dates back to medieval England and has long been practiced in this country." *Williams v. Illinois*, 399 U.S. 235, 239, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970) (footnote omitted). But the Supreme Court has imposed constitutional limits on this practice when applied to indigent criminal defendants. In *Williams*, for example, the Court held that "an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum [term of imprisonment] authorized by the statute regulating the substantive offense." 399 U.S. at 241. Such imprisonment constitutes "impermissible discrimination that rests on ability to pay." *Id.*

Following *Williams*, the Supreme Court addressed a constitutional challenge to a state's method of collecting fines from an indigent criminal defendant. *Tate*, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130. The criminal defendant in *Tate* had accumulated fines for traffic offenses, which were punishable only by fine. *Id.* at 396-

97. Because the defendant was indigent when the state court imposed the fines, the court sentenced him to a term of imprisonment—each day counted as five dollars toward the defendant's outstanding fines. *Id.* The Court invalidated this practice as violating equal protection, explaining that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." *Id.* at 398 (citation omitted).

Over a decade later, in *Bearden*, the Supreme Court addressed a similar challenge to a probation revocation proceeding. There, the Court held that an indigent defendant's probation cannot be revoked (and thus converted into a jail term) for his failure to pay a court-imposed fine or restitution "absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate." 461 U.S. at 665. The Court further held:

> [A] sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment . . . . If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate

> measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his, he cannot pay the fine.

Id. at 672-73. The state court imprisoned Bearden "because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders." *Id.* at 674. In this way, "the court automatically turned a fine into a prison sentence." *Id.*

More recently, the Supreme Court in *Turner* reiterated the importance of the ability-to-pay determination prior to imprisonment, this time in the context of a civil contempt proceeding. The Court applied the *Mathews v. Eldridge* framework to determine whether an indigent defendant has "a right to state-appointed counsel at a civil contempt proceeding, which may lead to his incarceration." *Turner*, 564 U.S. at 441. The Court noted "the importance of the interest at stake"—the defendant's interest in preventing the "loss of [his] personal liberty through imprisonment." *Id.* at 445. Given the importance of this interest, the Court stated, "it is obviously important to assure accurate decisionmaking in respect to the key 'ability to pay' question." *Id.* The Court held that due process does not require state-appointed counsel so long as the state provides other procedural safeguards equivalent to "adequate notice of the importance of

ability to pay, fair opportunity to present, and to dispute, relevant information [concerning ability to pay], and court findings." *Id.* at 448.

The Court finds that *Bearden* is controlling, and that *Turner* is instructive. Admittedly, there are some differences between those cases and this one. For example, unlike the court in *Bearden*, OPCDC does not impose a term of imprisonment upon criminal defendants for failure to pay their court debts. And OPCDC's debt collection procedures appear to operate independently from revocation of probation. *See State v. Kenniston*, 976 So. 2d 226, 227 (La. App. 4 Cir. 2008) (noting that OPCDC issued two alias capias warrants for failure to pay court debts, and that the state later initiated probation revocation proceedings); *see also* La. Code Crim. Proc. arts. 899-900 (describing probation revocation procedures). But "[n]othing in the language of the *Bearden* opinion prevents its application to any given enforcement mechanism." *United States v. Payan*, 992 F.2d 1387, 1396 (5th Cir. 1993). And civil contempt in this case, like probation revocation in *Bearden*, works the same constitutional injury: plaintiffs, like the criminal defendant in *Bearden*, are subject to imprisonment for failure to pay court-imposed fines and fees.

Like the defendant in *Turner*, plaintiffs are subject to imprisonment as the result of civil contempt-like proceedings. Admittedly, neither party in *Turner* was represented by counsel during the civil contempt proceeding, and the complaining party was not the state, 564 U.S. at 448-49; here, by contrast, the complaining

party—OPCDC—is both an organ of the state and represented by counsel (the Judges), and the criminal defendants generally are also represented by counsel. But *Turner* does stand for the broader proposition that the ability-to-pay inquiry required by *Bearden* must have some procedural safeguards.

Bearing in mind that *Bearden* and *Turner* speak directly to the procedural requirements of an ability-to-pay inquiry, the Court now turns to the application of the *Mathews* framework to the facts of this case. First, plaintiffs' interest in securing their "freedom 'from bodily restraint[]' lies 'at the core of the liberty protected by the Due Process Clause.'" *Turner*, 564 U.S. at 445 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)). Plaintiffs' liberty interest weighs heavily in favor of procedural safeguards provided before imprisonment.

Second, the risk of erroneous deprivation without an inquiry into ability to pay is high. At least some criminal defendants, including the named plaintiffs, are subject to imprisonment for failure to pay fines and fees despite their indigence. OPCDC necessarily determined that all named plaintiffs, except Reynaud Variste, were indigent when it appointed counsel for them during their criminal proceedings.[153] Moreover, Louisiana courts presume that

153. *See* R. Doc. 228 at 6; R. Doc. 251-2 at 17; R. Doc. 255-5 at 24; La. Rev. Stat. § 15:175(A)(1)(b) ("A person will be deemed 'indigent' who is unable, without substantial financial hardship to himself or to his dependents, to obtain competent, qualified legal representation on his own.").

a criminal defendant who cannot afford counsel is indigent for purposes of ability to pay court debts. *See State v. Williams*, 288 So. 2d 319, 321 (La. 1974) (noting that appointment of counsel established defendant's indigence); *State v. Morales*, 221 So. 3d 257, 258 (La. App. 3 Cir. 2017) (noting that appointment of counsel is "presumptive evidence of indigence"); *State v. Hebert*, 669 So. 2d 499, 502 (La. App. 4 Cir. 1996) ("[A] defendant represented by appointed counsel . . . is presumed indigent and cannot be ordered to serve additional jail time in lieu of the payment of costs."). The inquiry itself surely must involve at least notice and opportunity to be heard, as suggested by *Turner*; an ability-to-pay inquiry without these basic procedural protections would likely be ineffective.

Third, the Judges fail to point to any countervailing interest in not inquiring into plaintiffs' ability to pay before imprisonment. According to Administrator Kazik, the Judges consider ability to pay if a criminal defendant raises the issue.[154] But *Bearden* and *Turner* require more. *Bearden* commands that before a court imprisons an individual for failure to pay a court-imposed fine or fee, the court must inquire into her reasons for failure to pay. 461 U.S. at 672. If the individual is unable to pay the court debts despite sufficient bona fide efforts to do so, then the court must consider alternative measures. *Id. Turner* holds that this ability-to-pay inquiry must have at least some procedural safeguards. The record shows that at least until 2015, the Collections Department gave notice to

154. R. Doc. 250-3 at 5 (Kazik Affidavit stating that "[i]f a criminal defendant raises the issue of their ability to pay, the judges consider it").

criminal defendants before issuing alias capias warrants for failure to pay, and these criminal defendants usually appeared before a judge while they were imprisoned for failure to pay. The Judges therefore provided notice and an opportunity to be heard to plaintiffs—just not "in respect to the key 'ability to pay' question." *Turner*, 564 U.S. at 445. In light of this limited notice and opportunity to be heard formerly provided by OPCDC, the Court cannot discern any state interest in the Judges' failure to provide notice and an opportunity to be heard on ability to pay before imprisonment.

Moreover, there is no authority for the proposition that a criminal defendant must raise the issue of her inability to pay. As the Court explained in an earlier order, the Judges' reliance on *Garcia v. City of Abilene*, 890 F.2d 773 (5th Cir. 1989), and *Sorrells v. Warner*, 21 F.3d 1109 [published in full-text format at 1994 U.S. App. LEXIS 41508] (5th Cir. 1994) (unpublished), is unavailing.[155] In both cases, the criminal defendant had an opportunity to claim indigence but squandered it by failing (or repeatedly failing) to appear, in person, at scheduled court hearings. *Sorrells*, 21 F.3d at *1 [published in full-text format at 1994 U.S. App. LEXIS 41508]; *Garcia*, 890 F.2d at 775; *see also Doe v. Angelina County*, 733 F. Supp. 245, 253 (E.D. Tex. 1990) (distinguishing *Garcia* because "a party cannot fail to appear if no provision is made for such a proceeding" in the first place); *De Luna v. Hidalgo County*, 853 F. Supp. 2d 623, 646-47 (S.D. Tex. 2012) (citing *Doe v. Angelina County*). Regardless, *Turner* clearly suggests that the

155. R. Doc. 136 at 15-16.

state provide the procedural protection of notice that ability to pay is important; a contrary rule, requiring the criminal defendant to raise the issue on her own, would undermine *Bearden*'s command that a criminal defendant not be imprisoned solely because of her indigence. 461 U.S. at 672-73.

It is undisputed that the Judges provide no ability-to-pay inquiry, nor any further procedural safeguards, to indigent criminal defendants who are subject to imprisonment for failure to pay court debts. Under *Bearden* and *Turner*, the Judges must inquire into plaintiffs' ability to pay before their imprisonment. This inquiry must involve certain procedural safeguards, especially notice to the individual of the importance of ability to pay and an opportunity to be heard on the issue. If an individual is unable to pay, then the Judges must consider alternative measures before imprisoning the individual.

Plaintiffs are entitled summary judgment on Count Five to the extent they seek a declaration that the Judges' practice of not inquiring into plaintiffs' ability to pay before they are imprisoned for nonpayment violates the Fourteenth Amendment.

C. The Judges' Control over Both Fines and Fees Revenue and Ability-to-Pay Determinations Violates Due Process

Count Five also challenges the dual role the Judges play: they are responsible for both determining criminal

defendants' ability to pay fines and fees and managing a portion of the revenue derived from those fines and fees.[156] Plaintiffs argue that the Judges' power over this revenue creates a financial conflict of interest, depriving criminal defendants of a neutral tribunal to determine their ability to pay.[157]

1. Legal Background

"Trial before an unbiased judge is essential to due process." *Pub. Citizen, Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2001) (quoting *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S. Ct. 1778, 29 L. Ed. 2d 423 (1971)); *see also Brown v. Edwards*, 721 F.2d 1442, 1451 (5th Cir. 1984) ("The right to a judge unbiased by direct pecuniary interest in the outcome of a case is unquestionable."). Although due process requires a judge's disqualification "only in the most extreme of cases," *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986), the Supreme Court has found due process violations when judges maintained pecuniary interests in cases before them.

In *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927), a defendant was convicted of possessing liquor in violation of Ohio's Prohibition Act. The Act provided for trial in a "liquor court," in which the

156. Plaintiffs do not challenge the Judges' initial assessment of fines and fees, and the Court does not address it.

157. R. Doc. 251-1 at 38.

village mayor served as judge. *Id.* at 521. The money raised by fines levied in these courts was divided between the state, the village general fund, and two other village funds. *Id.* at 521-22. One of these other funds covered expenses associated with enforcing the Prohibition Act, including nearly $700 paid to the mayor "as his fees and costs, in addition to his regular salary." *Id.* at 522. The Supreme Court overturned Tumey's conviction, and held that the mayor, acting as judge, was disqualified from deciding Tumey's case "both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." *Id.* at 535.

In *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972), the Court considered a challenge to traffic fines imposed by another Ohio mayor's court. Fines generated by the mayor's court at issue in *Ward* provided a "major part" of the total operating funds for the municipality that the mayor oversaw. *Id.* at 58. The Court viewed the case as controlled by *Tumey* and noted, "that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle" of judicial bias articulated in that case. *Id.* at 60. Instead, the Court offered a general test to determine whether an arrangement of this type compromises a criminal defendant's right to a disinterested and impartial judicial officer:

> [T]he test is whether the [judge's] situation is one "which would offer a possible temptation to the average man as a judge to forget the burden

> of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused."

Id. (quoting *Tumey*, 273 U.S. at 532). In holding that the mayor's court in *Ward* violated due process, the Court found that the impermissible temptation "[p]lainly . . . may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.*

In some cases, a judicial officer's institutional interest may be too remote to create an unconstitutional conflict of interest. In *Dugan v. Ohio*, 277 U.S. 61, 48 S. Ct. 439, 72 L. Ed. 784 (1928), for example, a mayor with judicial functions also served as one of five commissioners. Collectively, these commissioners exercised the legislative power of the city, and shared executive powers with the city manager (who was the "active executive"). *Id.* at 63. The Court held that the mayor's relation "to the executive or financial policy of the city" was too "remote" to interfere with his judicial functions. *Id.* at 65.

The Fifth Circuit applied *Tumey* and *Ward* to strike down Mississippi's system of compensating justices of the peace. *Brown v. Vance*, 637 F.2d 272 (5th Cir. Jan. 1981). By law, the justices of the peace were paid based on the volume of cases filed in their courts. *Id.* at 274. No evidence of "actual judicial bias" was necessary "to hold the fee system constitutionally infirm." *Id.* at 282. Instead, the incontrovertible possibility that the justices of the

peace would "compete for business by currying favor with arresting officers or taking biased actions to increase their caseload . . . deprive[d] criminal defendants of their due process right to a trial before an impartial tribunal." *Id.*

2. The Judges Face a Conflict of Interest When They Determine Ability to Pay Fines and Fees

It is undisputed that the Judges are responsible for both managing fines and fees revenue and determining whether criminal defendants are able to pay those same fines and fees, once imposed. Fines and fees revenue goes into the Judicial Expense Fund,[158] which the Judges may use "for any purpose connected with, incidental to, or related to the proper administration or function of the court or the office of the judges thereof," La. Rev. Stat. § 13:1381.4(C), except to supplement their own salaries, *id.* § 13:1381.4(D). In their capacity as administrators and executives of OPCDC, the Judges exercise total control over the Judicial Expense Fund.[159] The Judges use this money primarily to fund their own staffs.[160]

Various statutes give the Judges authority over revenue from fines and fees. First, Louisiana law directs the Sheriff to allocate half of all fines and forfeitures to an

158. R. Doc. 251-2 at 12; R. Doc. 251-5 at 382.

159. R. Doc. 251-2 at 3; R. Doc. 255-5 at 1.

160. R. Doc. 251-2 at 5-6; R. Doc. 255-5 at 2; *see also* R. Doc. 248 at 3.

"account to be administered by the judges of the criminal district court of Orleans Parish." *Id.* § 15:571.11(D). This revenue is "to be used in defraying the expenses of the criminal courts of the parish, extraditions, and such other expenses pertaining to the operation of the criminal court of Orleans Parish." *Id.*

Second, the Judges may impose costs of up to $100 on convicted criminal defendants (other than those who are indigent); Louisiana law directs the Judicial Administrator to place these sums in a "Criminal Court Cost Fund" to be administered by the Judges. *Id.* § 13:1377. Each of the Judges may authorize disbursements from this fund "to assist in the operation and maintenance" of OPCDC. *Id.* § 13:1377(C).

Third, and most importantly, the Judges may impose a fee of up to $500 on a misdemeanant and up to $2,500 on a felon; Louisiana law directs the Judicial Administrator to place these sums in the Judicial Expense Fund. *Id.* § 13:1381.4. The same provision also imposes a $5 fee on every convicted criminal defendant, and directs the Judicial Administrator to place these sums in the Judicial Expense Fund. *Id.* § 13:1381.4(A)(1).

Fourth, the Judges may impose a $14 fee on convicted, non-indigent criminal defendants; this cost goes into an Indigent Transcript Fund "to compensate court reporters for the preparation of all transcripts for indigent defendants." *Id.* § 13:1381.1(A). Louisiana law authorizes the Judges, sitting *en banc*, to pay "deputy court reporters for the transcription of indigent defendant cases" out of the

Indigent Transcript Fund. *Id.* § 13:1381.1(C). Evidently, the Judges impose additional costs under Louisiana Code of Criminal Procedure Article 887(A) for the Indigent Transcript Fund.[161]

Fifth, the Judges (or presiding judge) may establish a drug division and may administer a probation program for criminal defendants charged with an alcohol- or drug-related offense. La. Rev. Stat. § 13:5304. Louisiana law requires that individuals in this program pay for their own drug testing, "unless the court determines that he is indigent." *Id.* § 13:5304(B)(3)(e).

Although several of these fees appear to be dedicated to certain purposes, the revenue all goes into the Judicial Expense Fund.[162] Approximately $1,000,000 from various fines and fees goes into the OPCDC budget each year.[163] This funding structure puts the Judges in the difficult position of not having sufficient funds to staff their offices unless they impose and collect sufficient fines and fees from a largely indigent population of criminal defendants.

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161. R. Doc. 248 at 4.

162. R. Doc. 251-2 at 12. In support of this fact, plaintiffs point to spreadsheets showing that from 2013 through 2015, all fines and fees revenue went to the general fund (*i.e.*, the Judicial Expense Fund) rather than the restricted fund. R. Doc. 251-5 at 382-83. In 2012, some of these fines and fees, including indigent transcript fees, went into the restricted fund. *Id.* Defendants do not contradict this evidence.

163. Specifically, OPCDC obtained $830,384 in fines and fees revenue in 2012, $973,311 in 2013, $1,084,968 in 2014, and $1,188,420 in 2015. R. Doc. 248 at 2.

Appendix C

The Judges' power over fines and fees revenue creates a conflict of interest when those same Judges determine (or are supposed to determine) whether criminal defendants are able to pay the fines and fees that were imposed at sentencing. As explained earlier, the Judges have a constitutional obligation to inquire into criminal defendants' ability to pay court debts. But the Judges have a financial stake in the outcome of ability-to-pay determinations; if they determine that a criminal defendant has the ability to pay, and collect money from her, then the revenue goes directly into the Judicial Expense Fund. *Cf. United Church of the Med. Ctr. v. Med. Ctr. Comm'n*, 689 F.2d 693, 699 (7th Cir. 1982) ("In this case the Commission has a pecuniary interest in the outcome of the reverter proceedings, because if the Commission finds a nonuse or disuse, the property reverts to the Commission . . . . This is sufficient . . . to mandate disqualification of the Commission in the reverter proceeding . . . ."). The Judges therefore have an institutional incentive to find that criminal defendants are able to pay fines and fees.

The Judges' dual role, as adjudicators who determine ability to pay and as managers of the OPCDC budget, offer a possible temptation to find that indigent criminal defendants are able to pay their court debts. This "inherent defect in the legislative framework" arises not from the bias of any particular Judge, but "from the vulnerability of the average man—as the system works in practice and as it appears to defendants and to the public." *Brown*, 637 F.2d at 284.

The Judges' practice of failing to inquire into ability to pay is itself indicative of their conflict of interest. *Cf. Esso Std. Oil Co. (P.R.) v. Mujica Cotto*, 389 F.3d 212, 219 (1st Cir. 2004) (noting that evidence of actual bias includes "procedural irregularities in the decision to assess [a] fine"). As is the dramatic increase in assessments for indigent transcript fees between 2012 and 2013—from $9,841.50 to $271,581.75—when OPCDC shifted revenue from such fees from the restricted fund to the Judicial Expense Fund.[164] Defendants insist that they do not benefit from this revenue, which solely aids indigent criminal defendants.[165] This assertion is undercut by financial statements for the Judicial Expense Fund, which show expenditures on transcripts of $0 in 2013 and 2015 and $7,044 in 2014.[166]

Further evidence of an actual conflict of interest is that the Judges have sought ways to increase collections from criminal defendants. At a City Council hearing in July 2014, a judge explained that the Judges were sharing ideas "in an effort to increase [their] collection" of fines and fees.[167] The Collections Department itself was created

164. R. Doc. 248-1 at 6-7; R. Doc. 251-5 at 382-83.

165. R. Doc. 255-5 at 17.

166. R. Doc. 248-1 at 2-4.

167. R. Doc. 251-5 at 284. Defendants object to City Council transcripts as incomplete and taken out of context. R. Doc. 255-5 at 18. But the Judges' statements are admissible as admissions of party opponents. Fed. R. Evid. 801(d)(2). Moreover, defendants do not contend that the statements at issue were inaccurately transcribed.

by the Judges in the 1980s to facilitate collection efforts.[168] Moreover, at least from 2013 through 2015, the amount of fees (which go entirely to OPCDC) imposed by the Judges far exceeded the amount of fines (only half of which goes to OPCDC).[169] This suggests that the Judges prefer to impose fees for OPCDC rather than share fines with the DA.

Defendants' reliance on *Broussard v. Parish of New Orleans*, 318 F.3d 644 (5th Cir. 2003), is misplaced. The plaintiffs in *Broussard* challenged the constitutionality of the Louisiana bail fee statutes on a number of grounds. As relevant here, the plaintiffs argued that these statutes violated *Tumey* and *Ward* by "tempt[ing] sheriffs to stack charges against arrestees in violation of their due process rights." *Id.* at 661. The court found that *Tumey* and *Ward* were inapplicable because the sheriffs-defendants in *Broussard* did not exercise a judicial function. *Id.* at 662. As purely executive actors, the sheriffs were "not expected to maintain a level of impartiality equal to that expected of judges." *Id.* Unlike the sheriffs in *Broussard*, the Judges in this case do exercise a judicial function when they are required to determine ability to pay fines and fees. Thus, unlike in *Broussard*, the *Ward* test applies to whether the Judges have an unconstitutional conflict of interest.

That the Judges have an institutional, rather than direct and individual, interest in maximizing fines and fees revenue is immaterial. *See Chrysler Corp. v. Tex.*

168. R. Doc. 248 at 7.

169. *See* R. Doc. 248-1 at 7-9, 11-13.

Motor Vehicle Comm'n, 755 F.2d 1192, 1199 (5th Cir. 1985) ("Certainly the due process principle distilled from the *Tumey* line reaches beyond immediate economic stakes to include economic interests said to be 'indirect' or 'institutional.'"). *Ward* itself involved a mayor who had no direct, personal interest in traffic fine revenue; his interest related solely to his "executive responsibilities for village finances." 409 U.S. at 60. Likewise, the Judges' interest in fines and fees revenue is related to their executive responsibilities for OPCDC finances.

Additionally, that the Judges manage court funds collectively does not render their institutional interest too remote. Unlike in *Dugan*, where the mayor was only one member of a five-person commission that shared executive power with the city manager (who was the acting executive), collectively the Judges exercise all executive power over OPCDC's share of fines and fees revenue. Moreover, the Supreme Court has applied *Tumey* and *Ward* to the members of a state board of optometry, all of whom had a personal interest in revoking the licenses of optometrists employed by corporations. *Gibson v. Berryhill*, 411 U.S. 564, 578, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973). The Court held that the board members were disqualified from adjudicating charges against such optometrists. *Id.*; *cf. Chrysler*, 755 F.2d at 1199 (finding no impermissible bias where only four out of nine commissioners potentially had conflict of interest).

Plaintiffs have established that the Judges' dual role creates a "possible temptation . . . not to hold the balance nice, clear, and true between the state and the

accused." *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532). By no fault of their own, the Judges' "executive responsibilities for [court] finances may make [them] partisan to maintain the high level of contribution," in the form of fines and fees, from criminal defendants. *Id.*

3. The Judges' Conflict of Interest Is Substantial

Plaintiffs must also establish that the Judges' conflict of interest is substantial. In *Tumey*, the Court noted that "[t]he minor penalties usually attaching to the ordinances of a village council, or to the misdemeanors in which the mayor may pronounce final judgment without a jury, do not involve any such addition to the revenue of the village as to justify the fear that the mayor would be influenced in his judicial judgment by that fact." 273 U.S. at 534. According to the Ninth Circuit, the proper question is "whether the official motive here is 'strong,' so that it 'reasonably warrants fear of partisan influence on the judgment.'" *Alpha Epsilon Phi Tau Chapter Hous. Ass'n v. City of Berkeley*, 114 F.3d 840, 847 (9th Cir. 1997) (quoting *Commonwealth of N. Mariana Islands v. Kaipat*, 94 F.3d 574, 575, 582 (9th Cir. 1996)).

The Judges' institutional interest in maximizing fines and fees revenue is substantial. Fines and fees revenue is obviously important to the Judges; fines and fees provide approximately 10% of the total OPCDC budget and one quarter of the Judicial Expense Fund.[170] *Cf. DePiero v.*

170. R. Doc. 248 at 2; R. Doc. 248-1 at 1-4.

City of Macedonia, 180 F.3d 770, 780-82 (6th Cir. 1999) (finding a due process violation when a maximum of 9% of municipality's general fund derived from mayor's court revenue). Judge Zibilich emphasized the importance of this revenue during a City Council hearing, stating that the fines and fees revenue "probably represents fully a fourth of the monies that we need to be operational, and if we are handcuffed in that particular regard, that money['s] replacement's going to have to come from some place."[171] The Judges spend most of the Judicial Expense Fund on salaries and benefits for their employees (though not themselves), and most of the money for these salaries and benefits comes from the Judicial Expense Fund.[172]

Moreover, the aggregate amount at stake in determining criminal defendants' ability to pay is significant. According to the parties' joint stipulations of fact, OPCDC collects only between 40% and 50% of the fines and fees it assesses.[173] The amounts that go uncollected run in the hundreds of thousands of dollars. In 2013, for example, OPCDC assessed $1,517,031.17 in Judicial Expense Fund fees, Indigent Transcript Fund fees, and drug testing fees—the three largest categories of fees that go into the Judicial Expense Fund.[174] OPCDC

171. R. Doc. 251-5 at 247.

172. R. Doc. 251-2 at 5-6; R. Doc. 255-5 at 2.

173. R. Doc. 248 at 5.

174. *See* R. Doc. 248-1 at 7.

collected only $805,067.12 in these fees.[175] The amount uncollected, $711,964.05, was equal to 17% of the Judicial Expense Fund revenue in 2013.[176] That same figure was 14% in 2014, and 18% in 2015.[177]

Both Administrator Kazik and Judge Zibilich have suggested that collection rates are low partly because most criminal defendants are indigent. In a 2014 letter requesting a higher appropriation from the City of New Orleans, Administrator Kazik explained that most of the OPCDC budget "is received from the various fines and fees assessed to defendants at sentencing."[178] But, he stated, "[m]ost defendants are unemployed and indigent, which makes collecting those assessed fees a challenge and an unreliable revenue resource for the Court's operational needs."[179] At a City Council meeting, Judge Zibilich noted that nearly 95% of the criminal defendants in OPCDC cannot afford an attorney, and stated: "If they can't afford an attorney, just imagine how difficult it's going to be for us to have to chase them around the block to try to get money from them."[180]

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175. *See id.* at 11. Of course, fees assessed in one year may be collected in later years. But the record does not include time frames for collections of specific assessments.

176. *See id.* at 2 (2013 general fund revenue was $4,100,413).

177. *See id.* at 3 (2014 general fund revenue was $3,928,025); *id.* at 4 (2015 unrestricted fund revenue was $3,940,535); *id.* at 8-9 (2014 and 2015 assessments); *id.* at 12-13 (2014 and 2015 collections).

178. R. Doc. 251-5 at 174.

179. *Id.*

180. *Id.* at 286.

It is undisputed that OPCDC depends heavily on fines and fees revenue, that many criminal defendant subject to these fines and fees are indigent, and that collection rates are only 40% to 50%. Based on these facts, it is clear the Judges' motive to maximize fines and fees revenue is strong enough reasonably to warrant fear of partisan influence on ability-to-pay determinations. *See Alpha Epsilon*, 114 F.3d at 847 (9th Cir. 1997). Thus, plaintiffs have established that the Judges face a substantial conflict of interest when they determine ability to pay fines and fees (or are supposed to do so).

This conflict of interest exists by no fault of the Judges themselves. It is the unfortunate result of the financing structure, established by governing law, that forces the Judges to generate revenue from the criminal defendants they sentence. Of course, the Judges would not be in this predicament if the state and city adequately funded OPCDC. So long as the Judges control and heavily rely on fines and fees revenue, however, the Judges' adjudication of plaintiffs' ability to pay those fines and fees offends due process. Thus, plaintiffs are entitled summary judgment on Count Five to the extent they seek a declaration that the Judges' institutional incentives create an impermissible conflict of interest when they determine, or are supposed to determine, plaintiffs' ability to pay fines and fees.

D. Plaintiffs Are Not Entitled Summary Judgment on Count Six

Count Six is an equal protection challenge against defendants' debt collection practices. Plaintiffs argue that

these practices are harsher than debt collection measures available to private creditors.[181]

Plaintiffs attempt to show discrimination on the face of the Louisiana statutory framework for contempt proceedings. *See, e.g., Lewis v. Ascension Par. Sch. Bd.*, 72 F. Supp. 3d 648, 662-63 (M.D. La. 2014) (distinguishing explicit classification from discriminatory application of facially neutral law); *see also Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 543-45 (3d Cir. 2011) (same). Plaintiffs principally rely on *James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972), where the Supreme Court addressed a Kansas recoupment statute that allowed the state to "recover in subsequent civil proceedings counsel and other legal defense fees expended for the benefit of indigent defendants." *Id.* at 128. The statute excluded these indigent defendants from "the array of protective exemptions Kansas has erected for other civil judgment debtors," such as "the exemption of his wages from unrestricted garnishment." *Id.* at 135. The Court struck down the statute as "embod[ying] elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law." *Id.* at 142.

Plaintiffs argue that defendants' practice of jailing criminal defendants is similarly discriminatory. They note that Louisiana has abolished the writ of *capias ad satisfaciendum*, which allowed a private creditor to imprison a debtor until her judgment was satisfied. *See* La. Rev. Stat. § 13:4281 (abolishing writ); *Capias*, Black's

181. R. Doc. 251-1 at 53.

Law Dictionary (defining *capias ad satisfaciendum* as "[a] postjudgment writ commanding the sheriff to imprison the defendant until the judgment is satisfied"). According to plaintiffs, a private creditor seeking to enforce a judgment against a debtor may now seek contempt of court. A debtor in that situation has various procedural protections under Louisiana law. For example, the court must issue a rule "to show cause why [the debtor] should not be adjudged guilty of contempt"; this rule to show cause must be served on the debtor at least 48 hours before trial; and if the court finds the debtor guilty, it must issue "an order reciting the facts constituting the contempt." La. Code Civ. Proc. art. 225.

By law, criminal defendants have similar procedural protections in contempt proceedings: the judge must issue a rule to show cause; this rule must be served on the criminal defendant at least 48 hours before trial; and if the court finds the defendant guilty, it must issue "an order reciting the facts constituting the contempt." La. Code Crim. Proc. art. 24. Thus, the statutory procedures for contempt proceedings are essentially the same for both civil and criminal defendants. Unlike in *James*, there is no discrimination on the face of these statutes. Plaintiffs are not entitled summary judgment on Count Six.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS plaintiffs' motion for summary judgment on Count Five. The Court GRANTS defendants' motion for summary judgment on Counts One, Two, and Four. The parties' motions are otherwise DENIED. Counts One, Two, and

Four are DISMISSED AS MOOT. Administrator Kazik is DISMISSED from this case.

New Orleans, Louisiana, this 13th day of December, 2017.

/s/ Sarah S. Vance
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED APRIL 22, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 15-4479
SECTION: R(2)

ALANA CAIN, *et al.*,

VERSUS

CITY OF NEW ORLEANS, *et al.*

April 22, 2016, Decided
April 22, 2016, Filed

ORDER AND REASONS

Named plaintiffs Alana Cain, Ashton Brown, Reynaud Variste, Reynajia Variste, Thaddeus Long, and Vanessa Maxwell filed this civil rights action under 42 U.S.C. § 1983 seeking to declare the manner in which the Orleans Parish Criminal District Court collects post-judgment court costs from indigent debtors unconstitutional. According to plaintiffs, the Criminal District Court and other, related actors maintain a policy of jailing criminal defendants who fail to pay their court costs solely because of their indigence.[1]

1. *See generally* R. Doc. 7 (Plaintiffs' First Amended Class Action Complaint).

The "judicial defendants" now move the Court to dismiss this case for plaintiffs' alleged failure to join indispensable parties under Federal Rule of Civil Procedure 12(b)(7) and 19.[2] Because the Court finds that the parties defendants assert must be joined are not required, the Court denies the motion.

I. BACKGROUND

A. Factual Allegations

In this section 1983 civil rights lawsuit, plaintiffs allege, on behalf of themselves and those similarly situated, that the City of New Orleans, the Orleans Parish Criminal District Court, its judges and judicial administrator, and Orleans Parish Sheriff Marlin Gusman maintain an unconstitutional scheme of jailing indigent criminal defendants and imposing excessive bail amounts for nonpayment "offenses" in an effort to collect unpaid court courts. According to plaintiffs, the Criminal District Court maintains an internal "Collections Department," informally called the "fines and fees" department, that oversees the collection of court debts from former criminal defendants. The "typical" case allegedly proceeds as follows.

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2. R. Doc. 53. The "judicial defendants" are the Orleans Parish Criminal District Court, its thirteen judges, and the judicial administrator, Robert Kazik. Originally, plaintiffs also sued the Criminal District Court clerk, Arthur Morell, but he has been voluntarily dismissed. R. Doc. 65.

Appendix D

When a person is charged with a crime, the Criminal District Court judges first determine whether the criminal defendant is legally "indigent," meaning they qualify for appointment of counsel through the Orleans Public Defenders under Louisiana Revised Statutes § 15:175. According to plaintiffs, eight-five percent of the criminal defendants in Orleans Parish are legally indigent.[3] With assistance of counsel, the defendants either plead guilty to their criminal charges or proceed to trial. If convicted, the criminal defendants must appear before a judge at the Criminal District Court for sentencing.

At sentencing, in addition to imposing a term of imprisonment or probation, the court may assess against the criminal defendants various "court costs." These costs may include restitution to any victim, a statutory fine, fees, or other costs imposed at the judge's discretion. According to plaintiffs, the discretionary assessments "fund the District Attorney's office, the Public Defender, and the Court[,]" which rely on these collections "to fund their operations and to pay employee salaries and extra benefits."[4] Plaintiffs allege that the Criminal District Court judges impose court costs without inquiring into the criminal defendants' ability to pay.[5]

If the criminal defendants cannot immediately pay in full, the Criminal District Court judges direct them to

3. R. Doc. 7 at 5.

4. *Id.* at 22-23 ¶ 88.

5. *Id.* at 23 ¶ 91.

the Collections Department, or "fines and fees." There, a Collections Department employee imposes, at his discretion and without inquiring into a defendant's ability to pay, a payment schedule—usually requiring a certain amount per month.[6] Collections Department employees also warn the defendants that failure to pay the monthly amount, in full, will result in their arrests. Collections Department employees refuse to accept anything less than full payment.[7]

When criminal defendants fail to pay, a Collections Department employee allegedly issues a pre-printed warrant for the defendant's arrest by forging a judge's name.[8] According to plaintiffs, the Collections Department often issues these warrants "years after a purported nonpayment," and the warrants are "routinely issued in error" or without regard to a debtor's indigence.[9]

Plaintiffs also allege that each Collections Department arrest warrant is "accompanied by a preset $20,000 secured money bond required for release."[10] According to plaintiffs, defendants' unwavering adherence to this "automatic $20,000 secured money bond" requirement results from defendants' financial interest in state-court

6. *Id.* at 27-28 ¶103.

7. *Id.* at 28 ¶ 106.

8. *Id.* at 29 ¶ 109.

9. *Id.* at ¶ 110.

10. *Id.* at ¶ 113.

arrestees' paying for their release.[11] Plaintiffs contend that the Criminal District Court judges collect 1.8% of each bond, while the Orleans Parish District Attorney's office, the Orleans Public Defenders' office, and the Orleans Parish Sheriff each collect 0.4% of each bond.[12]

When criminal defendants are arrested for nonpayment, they are "routinely told" that to be released from prison, they must pay for the $20,000 secured money bond, the entirety of their outstanding court debts, or some other amount "unilaterally determine[d]" by the Collections Department.[13] As a result, these indigent debtors "languish" in prison "indefinite[ly]" because they cannot afford to pay any of the foregoing amounts.[14] Although "arrestees are eventually brought to court," the Sheriff, the Criminal District Court, and the judges "have no set policy or practice" regarding how long arrestees must wait for a hearing. According to plaintiffs, indigent debtors "routinely" spend a week or more in prison.[15] Some arrestees, with help from family and friends, pay for their release without ever having a hearing and thus have "no opportunity to contest the debt or the jailing."[16]

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11. *Id.* at 21-22 ¶88.

12. *Id.* at 22 ¶88.

13. *Id.* at 30 ¶114.

14. *Id.* at ¶115.

15. *Id.*

16. *Id.* at ¶114.

When criminal defendants are brought to court, the Criminal District Court judges allegedly send them back to prison if they are unable to pay their debts or release them "on threat of future arrest and incarceration" if they do not promptly pay the Collections Department.[17] At these brief "failure-to-pay hearings," the judges allegedly do not consider the debtors' abilities to pay.[18]

Plaintiffs contend that these practices are unconstitutional and have created "a local debtors' prison" in Orleans Parish.[19]

B. Parties

The named plaintiffs in the First Amended Complaint are six individuals who were defendants in the Orleans Parish Criminal District Court—Alana Cain, Ashton Brown, Reynaud Variste, Reynajia Variste, Thaddeus Long, and Vanessa Maxwell.[20] The facts pertaining to the named plaintiffs, as alleged in their complaint, are as follows.

The Criminal District Court appointed counsel from the Orleans Public Defenders to represent each of the named plaintiffs, except Reynaud Variste, during

17. *Id.* at ¶116.

18. *Id.*

19. *See* R. Doc. 7 at 3.

20. R. Doc. 7 at 7 ¶7.

their criminal proceedings.[21] Thus, the court must have determined that Cain, Brown, Reynajia Variste, Long, and Maxwell were legally indigent under Louisiana Revised Statutes §15:175.[22] Reynaud Variste appears to have retained private counsel.[23]

With the assistance of counsel, all of the named plaintiffs pleaded guilty to their respective criminal charges, which include theft,[24] battery,[25] drug possession,[26] "simple criminal damage,"[27] and disturbing the peace.[28] At plaintiffs' sentencings, the presiding judges imposed terms of imprisonment, which were often suspended, as

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21. R. Doc. 59-3 at 1 (Alana Cain Docket Sheet, entry for 12/04/2012) ("Court appointed Alex Liu, OPD."), 5 (Ashton Brown Docket Sheet, entry for 10/02/2013) ("Court appointed Seth Wayne, OPD."), 9 (Reynajia Variste Docket Sheet, entry for 10/02/2014) ("Court appointed Lindsey Samuel, OPD.") 23 (Vanessa Maxwell Docket Sheet, entry for 12/14/2011) ("Court appointed Jerrod Thompson-Hicks, OIPD."); R. Doc.95-7 at 1 (Thaddeus Long Docket Sheet, entry for 06/02/2011) ("Court appointed Anna Fecker, OIDP).

22. *See* R. Doc. 7 at 5.

23. R. Doc. 59-3 at 14 (Reynaud Variste Docket Sheet, entry for 9/25/2012) ("Defendant must retain private counsel.").

24. *Id.* at 4 (Alana Cain Guilty Plea), 8 (Ashton Brown Guilty Plea).

25. *Id.* at 12 (Reynajia Variste Guilty Plea).

26. *Id.* at 22 (Reynaud Variste Guilty Plea).

27. *Id.* at 28 (Vanessa Maxwell Guilty Plea).

28. R. Doc. 95-7 at 5 (Thaddeus Long Guilty Plea).

well as terms of active or inactive probation. In addition, the judges assessed against plaintiffs various court costs—whether restitution, fines, and/or discretionary fees and costs.[29] At some point, all of the named plaintiffs were arrested for failing to pay outstanding court costs.

For example, plaintiffs allege that on one occasion, Alana Cain explained to a Collections Department supervisor that she could not satisfy the full amount of her expected monthly payment. The Collections Department supervisor warned Cain that if she could not afford her monthly payment, he would issue a warrant for her arrest.[30] In March 2015, Cain was arrested for failing to pay her court debts.[31] Jail staff told Cain that her bail was set at "a $20,000 secured bond pursuant to standard policy" and that "there was no way to find out when her court date would be."[32] When Cain eventually attended a hearing, the presiding judge told her that "if she ever missed a payment again, she would have to spend 90 days in jail."[33] The judge did not inquire into Cain's ability to

29. R. Doc. 59-3 at 2 (Alana Cain Docket Sheet, entry for 5/30/2013), 6 (Ashton Brown Docket Sheet, entry for 12/16/2013), 9 (Reynajia Variste Docket Sheet, entry for 10/21/2014), 18 (Reynaud Variste Docket Sheet, entry for 10/31/2013), 23 (Vanessa Maxwell Docket Sheet, entry for 3/06/2012); R. Doc. 95-7 at 1 (Thaddeus Long Docket Sheet, entry for 7/29/2011).

30. R. Doc. 7 at 10 ¶ 18.

31. *Id.* at ¶¶20-22.

32. *Id.* at 10-11 ¶¶22-23.

33. *Id.* at 11 ¶27.

meet the monthly payments imposed by the Collections Department.

According to plaintiffs, in July and August 2015, Ashton Brown spent twenty-nine days in prison solely because of unpaid debts stemming from a 2013 conviction.[34] When Brown finally received a hearing on the issue of his nonpayment, the presiding judge refused to release Brown, "unless he paid at least $100."[35] Because Brown could not afford to pay, the judge set another hearing for several days later and warned Brown "that he would be kept in jail unless he got a family member to pay."[36] Eventually, Brown's family "scrape[d] together $100," and Brown was released.[37] Collections Department employees have since threatened arrest and jail time if Brown does not continue making monthly payments.[38]

Reynaud Variste was allegedly arrested for nonpayment in January 2015 when police "stormed [Variste's] home with assault rifles and military gear."[39] These officers told Variste "not to worry . . . because he simply owed some old court costs."[40] In prison, jail staff

34. *Id.* at 12-13 ¶¶ 33-38.

35. *Id.* at 13 ¶ 38.

36. *Id.*

37. *Id.* at 14 ¶40.

38. *Id.*

39. *Id.* at ¶41.

40. *Id.* at ¶42.

allegedly told Variste that they "had no idea when or whether [he] would be taken to court."[41] A bail bondsman told Variste that "he would probably not be released . . . until he paid his entire court debts, which would be cheaper than paying the $20,000 money bond" imposed upon him.[42] Eventually, Variste's girlfriend paid "the entire debt amount." Variste was released from prison without a hearing.[43]

Reynajia Variste was arrested in May 2015 for failing to pay her court costs. Jail staff allegedly told Variste that she could pay her outstanding court debts or post the "standard $20,000 money bond" to be released.[44] While Variste was still in jail, a Collections Department employee told a member of Variste's family that Variste had to pay "at least $400 before [the Collections Department] would agree to let [Variste] out of jail."[45] The Collections Department allegedly arrived at this amount because it was "close to half of what [Variste] owed in total."[46] Variste spent at least seven days in prison and was never given a hearing before her family gathered enough money "to buy her release."[47] According to the First Amended

41. *Id.* at 15 ¶47.

42. *Id.*

43. *Id.* at ¶48.

44. *Id.* at 16 ¶55.

45. *Id.* at 17 ¶57.

46. *Id.*

47. *Id.* at ¶60.

Complaint, the Collections Department continues to threaten Reynajia Variste with prison time if she cannot make her monthly payments.[48]

Plaintiffs contend that Thaddeus Long was wrongly arrested for failing to pay his court costs because Long paid his debts in full years before. According to the First Amended Complaint, Long was convicted in 2011 and finished paying his court costs in October 2013.[49] In June 2015, a New Orleans police officer, conducting a traffic stop, discovered an outstanding warrant for Long's supposed nonpayment.[50] The officer arrested Long, and Long spent six days in prison, unable to post "the standard $20,000 secured money bond" before he was given a hearing. At the failure-to-pay hearing, Long explained that he had already paid his court debts in full, a "mistake . . . apparent from the court records," and he was released immediately.[51]

Vanessa Maxwell allegedly spent twelve days in prison after her arrest for nonpayment before being brought to court.[52] According to plaintiffs, the presiding judge did not evaluate Maxwell's present ability to pay, but nonetheless made her release from prison contingent

48. *Id.* at ¶ 64.

49. *Id.* at 18 ¶67.

50. *Id.*

51. *Id.* at ¶69.

52. *Id.* at 20 ¶83.

on Maxwell's paying $191 "within a week."[53] Plaintiffs contend that Maxwell was never able to come up with the money, and Maxwell is now "in imminent danger of arrest . . . pursuant to monetary conditions that she cannot [meet]."[54]

Plaintiffs now sue the City of New Orleans for hiring the Criminal District Court's Collection Department workers, as well as the police officers who execute the allegedly invalid arrest warrants.[55] Plaintiffs also sue Sheriff Marlin Gusman, in his official capacity, for "unconstitutionally detain[ing] impoverished people indefinitely because of their inability to . . . pay[] for their release."[56] In addition, plaintiffs sue the Orleans Parish Criminal District Court for its role in managing and funding the Collections Department, and the court's Judicial Administrator, Robert Kazik, in his individual and official capacities, because he is allegedly responsible for operating the Collections Department.[57] Finally, plaintiffs name as defendants every judge at the Criminal District Court—thirteen in all—because they allegedly supervise the Collections Department employees and have failed to provide the parish's criminal defendants with constitutionally-required process before imprisoning

53. *Id.*

54. *Id.* at ¶84.

55. *Id.* at 7 ¶8.

56. *Id.* at 8 ¶12.

57. *Id.* at 7-8 ¶¶9-10.

people for failure to pay court costs. Plaintiffs sue the judges only for declaratory relief.[58]

C. Plaintiffs' Claims for Relief

Plaintiffs filed this civil rights action under 42 U.S.C. § 1983, alleging violations of their Fourth and Fourteenth Amendment rights, as well as violations of Louisiana tort law. Plaintiffs seek damages (including attorneys' fees) and an injunction against all defendants, except the judges. Plaintiffs also seek a declaratory judgment regarding the constitutionality of defendants' practices.[59]

The Court summarizes plaintiffs' claims as follows:

(1) Defendants' policy of issuing and executing arrest warrants for nonpayment of court costs is unconstitutional under the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment;

(2) Defendants' policy of requiring a $20,000 "fixed secured money bond" for each Collections Department warrant (issued for nonpayment of court costs) is unconstitutional under the Due

58. *Id.* at 8 ¶13.

59. Only Cain, Brown, Reynajia Variste, and Maxwell's claims for equitable relief remain. In an order addressing an earlier motion to dismiss, the Court found that Reynaud Variste and Thaddeus Long lacked standing to pursue prospective equitable relief and dismissed those claims. R. Doc. 109 at 19-21.

Process Clause and the Equal Protection Clause of the Fourteenth Amendment;

(3) Defendants' policy of indefinitely jailing indigent debtors for nonpayment of court costs without a judicial hearing is unconstitutional under the Due Process Clause of the Fourteenth Amendment;

(4) Defendants' "scheme of money bonds" to fund certain judicial actors is unconstitutional under the Due Process Clause of the Fourteenth Amendment. To the extent defendants argue this scheme is in compliance with Louisiana Revised Statutes §§ 13:1381.5 and 22:822, which govern the percentage of each surety bond that the judicial actors receive, those statutes are unconstitutional;

(5) Defendants' policy of jailing indigent debtors for nonpayment of court costs without any inquiry into their ability to pay is unconstitutional under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment;

(6) Defendants' policy of jailing and threatening to imprison criminal defendants for nonpayment of court debts is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because it imposes unduly harsh and punitive restrictions on debtors whose creditor is the State, as compared to debtors who owe money to private creditors;

(7) Defendants' conduct constitutes wrongful arrest under Louisiana law; and

(8) Defendants' conduct constitutes wrongful imprisonment under Louisiana law.

Importantly, plaintiffs do not ask the Court to declare that defendants' practice of *imposing* court costs, discretionary or not, is unconstitutional.

D. The Judicial Defendants' Motion to Dismiss

The Orleans Parish Criminal District Court, the thirteen judges, and the judicial administrator now move to dismiss plaintiffs' suit for plaintiffs' alleged failure to join required parties under Federal Rule of Civil Procedure 12(b)(7) and 19. Defendants argue that the "Indigent Transcript Fund," the Orleans Public Defenders office, the Orleans Parish District Attorney, the "[Louisiana Commission on Law Enforcement] Training and Assistance Fund," the "Crime Victims Reparation Fund," the Louisiana Supreme Court, "Crime Stoppers," the "Coroner's Operational Fund," and the "Drug Abuse Education and Treatment Fund" are all required parties because Louisiana law empowers Criminal District Court judges to impose varying amounts of "courts cost" on criminal defendants to fund the operations of these entities. According to defendants, any ruling by this Court regarding the constitutionality of defendants' "assessing and collecting these costs will have direct . . . and potentially catastrophic impacts" on these absent

parties.[60] Defendants also argue that a ruling in plaintiffs' favor by this Court may conflict with an existing state writ of mandamus that requires defendants to assess the Indigent Defender Fund fee mandated by Louisiana Revised Statute §15:168.[61] *See Louisiana Public Defender Board v. Parker*, No. 597627 (19th Judicial District Court, Parish of Jefferson, Mar. 4, 2011).

In opposition to the motion to dismiss, plaintiffs argue that defendants misunderstand the relief plaintiffs seek. To start, plaintiffs reiterate that they do not challenge the validity of the court costs imposed upon them by defendants. Plaintiffs do not seek to eliminate the Criminal District Court judges' ability to impose court costs, as permitted by Louisiana law. Plaintiffs' constitutional challenges lie with defendants' means of collecting validly-imposed court costs—specifically, with defendants' alleged jailing of indigent debtors without a meaningful inquiry into the debtors' ability to pay. Plaintiffs therefore contend that the entities defendants argue must be joined are unnecessary and not required to resolve this litigation.

II. LEGAL STANDARD

Federal Rules of Civil Procedure 12(b)(7) permits a party to bring a motion to dismiss a complaint for failure to join a required party under Rule 19. *See* Fed. R. Civ. P. 12(b)(7). Proper joinder under Rule 19 is a two-step

60. R. Doc. 53-1 at 2.

61. *Id.*

process. First, the court must decide if the absent party is required to fairly and completely resolve the dispute. *See* Fed. R. Civ. P. 19(a); *Sch. Bd. of Avoyelles Par. V. U.S. Dep't of Interior*, 647 F.3d 570, 578 (5th Cir. 2011); *Dore Energy Corp. v. Prospective Inv. & Trading Co. Ltd.*, 570 F.3d 219, 230-31 (5th Cir. 2009). Second, if the absent party is required, but joinder is not feasible, the court must decide whether the absent party is "indispensable" to the action under Rule 19(b). *See* Fed. R. Civ. P. 19(b); *Sch. Bd. of Avoyelles Par.*, 647 F.3d at 578.

Under Rule 19(a)(1), a party is "required" if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (b) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a).

Appendix D

If a required party cannot be joined in the action because its joinder would defeat the court's diversity jurisdiction, the court must determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). In making this determination, the court may consider:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> > (A) protective provisions in the judgment;
> >
> > (B) shaping the relief; or
> >
> > (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

State law is relevant "in determining what interest the outsider actually has, but the ultimate question whether, given those state-defined interests, a federal court may proceed without the outsider is a federal matter." *Morrison v. New Orleans Pub. Serv. Inc.*, 415 F.2d 419, 423 (5th Cir. 1969) (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 125 n. 22, 88 S.Ct. 733, 746 n. 22, 19 L. Ed. 2d 936 (1968)).

III. DISCUSSION

The Court begins by clarifying the relief plaintiffs seek in their First Amended Complaint. Although defendants characterize plaintiffs' complaint as a broad attack on the "constitutional permissibility of assessing and collecting" court costs imposed on state-court criminal defendants,[62] this characterization is incorrect for two reasons. First, plaintiffs do not complain about defendants' imposing or assessing court costs as valid terms of the sentences of state-court criminal defendants. Indeed, as defendants note, the Louisiana Supreme Court has recently held that state trial courts maintain discretion to impose a "broad category of costs" under Louisiana law. *See generally State v. Griffin*, 180 So. 3d 1262, 1268 (La. 2015). Moreover, the imposition of some costs, such as the "special costs to the district indigent defender fund," are not discretionary; a Louisiana trial court has no choice but to impose these costs on a criminal defendant who has been convicted. *See generally* La. Rev. Stat. § 15:168 ("Every court of original criminal jurisdiction . . . *shall* remit the following

62. R. Doc. 53-1 at 2.

special costs . . .” (emphasis added)). Second, plaintiffs do not complain about defendants’ generally collecting court costs, assuming those collection efforts are carried out in a manner consistent with constitutional principles.

A review of the First Amended Complaint reveals that plaintiffs challenge only the manner in which defendants allegedly collect outstanding court costs from indigent criminal defendants who have failed to pay. Specifically, plaintiffs take issue with the following alleged policies: defendants’ failing to inquire into a criminal defendant’s reasons for failing to pay court costs before issuing and executing arrest warrants for nonpayment by indigent debtors (Counts One, Five, Six, Seven, and Eight); defendants’ requiring a $20,000 “secured money bond,” allegedly motivated by their financial interests, to release indigent debtors from prison (Counts Two and Four); and defendants’ detaining indigent debtors without a prompt judicial appearance after their arrests (Count Three). Having properly framed plaintiffs’ allegations, the Court finds that none of the absent parties defendants argue must be joined is a required party under Rule 19.

Despite the absence of the third party entities that defendants propose must be joined, the Court can accord complete relief among the existing litigants. In making this determination, the Court looks to the relief prayed for by the claimant. *See In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 273 F.R.D. 380, 385-86 (E.D. La. 2011); *Plains Expl. & Prod. Co. v. 4-C’s Land Corp.*, No. 10-702, 2010 U.S. Dist. LEXIS 97043, 2010 WL 3430516, at *3 (E.D. La. Aug. 20, 2010). The Court “does

not consider the effect that a judgment may have on absent parties when evaluating 'complete relief.'" *VFS US LLC v. Vaczilla Trucking, LLC*, No. 15-2226, 2015 U.S. Dist. LEXIS 154560, 2015 WL 7281619, at *14 (E.D. La. Nov. 16, 2015) (citing *United States v. Rutherford Oil Corp.*, No. G-08-0231, 2009 U.S. Dist. LEXIS 40233, 2009 WL 1351794, at *2 (S.D. Tex. May 13, 2009)).

As noted, plaintiffs request the Court to declare unconstitutional defendants' policies of incarcerating indigent debtors for nonpayment, automatically requiring from them a "$20,000 secured money bond," and detaining them without a prompt judicial appearance. In seeking this relief, plaintiffs have sued the state actors who are allegedly responsible for the specific conduct at issue. There are no allegations (from either plaintiffs or defendants) that the Orleans Parish Coroner or whoever administers Louisiana's Drug Abuse Education and Treatment Fund, for example, participates in the decisions to arrest indigent debtors for nonpayment. The same is true for defendants' allegedly requiring a "$20,000 secured money bond" and detaining arrestees without a prompt judicial appearance—these third party entities are not involved. Because none of the third parties participates in the conduct complained of, their presence in this litigation is unnecessary for the Court to "accord complete relief" if plaintiffs ultimately prevail on their claims. *See Haas v. Jefferson Nat'l Bank of Miami Beach*, 442 F.2d 394, 398 (5th Cir. 1971) (finding absent person to be a required party under Rule 19(a) because "his presence is critical to the disposition of the important issues in the litigation").

The Court next addresses whether any of these third parties "claim[] an interest relating to the subject of the action." *See* Fed. R. Civ. P. 19(a)(1). The "interest relating to the subject of the action" must be a legally protected one. *E.g., United States v. San Juan Bay Marina*, 239 F.3d 400, 406 (1st Cir. 2001) ("A party is necessary under Rule 19(a) only if they claim a 'legally protected interest' relating to the subject matter of the action."); *see also Escamilla v. M2 Tech., Inc.*, 536 F. App'x 417, 421 (5th Cir. 2013) (noting that the licensor of a trademark is usually a required party because "the licensor has a legally protected interest in the subject matter of the action"). "Rule 19 does not contemplate joinder of any party who might possibly be affected by a judgment in any way." *Shelton v. Exxon Corp.*, 843 F.2d 212, 218 (5th Cir. 1998). Several district courts in the Fifth Circuit hold that an absent party's failure to "seek joinder on its own is indicative of its lack of interest in the subject matter of the suit." *Woodard v. Woodard Villa, Inc.*, No. 15-1777, 2016 U.S. Dist. LEXIS 44777, 2016 WL 1298995, at *4 (W.D. La. Mar. 31, 2016) (collecting cases); *see also Colbert v. First NBC Bank*, No. 13-3043, 2014 U.S. Dist. LEXIS 43596, 2014 WL 1329834, at *3 (E.D. La. Mar. 31, 2014) ("[T]o be a required party under Rule 19(a)(1)(B) because of an interest in the subject matter of the action, the party must assert its own interest.").

Here, none of the absent parties has moved to intervene or otherwise attempted to participate in this litigation. Defendants merely argue on behalf of the absent parties that any potential ruling on the merits in this case will have "potentially catastrophic impacts on

the criminal justice operations of entities not before the Court."[63] Defendants' dire prediction, lacking any concrete support, is insufficient to show that these absent parties are necessary to resolve plaintiffs' claims.

Regardless, defendants' only argument that the absent parties are interested in the subject matter of this litigation rests on the erroneous assertion that plaintiffs challenge defendants' *imposition* of court costs.[64] Any potential ruling regarding the manner in which defendants *collect* court costs will not, "as a practical matter[,] impair or impede" the absent parties' entitlement to receive court costs under Louisiana law. *See* Fed. R. Civ. P. 19(a)(1)(B)(i). Any argument that defendants will collect less money overall, and thus financially impact the absent parties, unless they continue current—allegedly unconstitutional—practices is theoretical at best. "[T]he mere theoretical possibility of prejudice does not require joinder." *Colbert*, 2014 U.S. Dist. LEXIS 43596, 2014 WL 1329834, at *4 (quoting *Cortez v. County of L.A.*, 96 F.R.D. 427, 430 (C.D. Cal. 1983)).

Further, this proceeding is unlikely to subject defendants to "multiple or otherwise inconsistent obligations," as they contend. *See* Fed. R. Civ. P. 19(a)

63. R. Doc. 53-1 at 2.

64. Defendants do not argue—and the Court cannot discern any legitimate reason why—the absent parties have any interest in the subject matter of plaintiffs' other allegations, *i.e.*, determining the appropriate amount of bail for nonpayment offenses or how long arrestees wait for a judicial hearing.

(1)(B)(ii). Defendants argue that the Criminal District Court judges are currently subject to state-court writ of mandamus requiring them to assess a "special cost[]" benefitting the Orleans Parish indigent defender fund in every case in which a state-court criminal defendant is convicted. *See Louisiana Public Defender Board v. Parker*, No. 597627 (19th Judicial District Court, Parish of Jefferson, Mar. 4, 2011). Again, because plaintiffs do not challenge the validity of the costs, any relief, if ultimately granted, will not invalidate the imposition of court costs. *Cf. Shelton v. Exxon Corp.*, 843 F.2d 212, 218 (5th Cir. 1988) ("It is the threat of inconsistent obligations, not the possibility of multiple litigation or a subjective preference for state court, that determines Rule 19 considerations."); *EEOC v. Brown & Root, Inc.*, 688 F.2d 338, 342 (5th Cir.1982) (finding insufficient under Rule 19(a) a party's claim "that it will somehow be left facing inconsistent obligations," which was "groundless"); *U.S. ex rel. Branch Consultants, LLC v. Allstate Ins. Co.*, 265 F.R.D. 266, 272 (E.D. La. Feb. 12, 2010). ("[T]he key is whether the possibility of being subject to multiple obligations is real; an unsubstantiated or speculative risk will not satisfy the Rule 19(a) criteria.").[65]

65. The only case defendants cite in support of their arguments that the proposed third parties must be joined is *Schutten v. Shell Oil Co.*, 421 F.2d 869 (5th Cir. 1970). *Schutten* involved an ownership dispute over immovable property and its attendant mineral rights. The plaintiffs sought to evict the defendant, Shell Oil Company. *Id.* at 870. Shell was the lessee of a mineral contract with the Orleans Parish Levee Board, who also claimed ownership of the property at issue. *Id.* at 870-71. The Fifth Circuit held that the Levee Board was a required party because any resolution in favor of the plaintiffs against Shell affected the Levee Board "would most assuredly

Because joinder of the absent parties is not required under Rule 19(a), further analysis under Rule 19(b) is unnecessary.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES defendants' motion to dismiss for failure to join indispensable parties.

New Orleans, Louisiana, this 22nd day of April, 2016.

/s/ Sarah S. Vance
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

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create a cloud on the Levee Board's title and greatly diminish the value of the property." *Id.* at 874. For the reasons already explained, the facts of *Schutten*, a property dispute among multiple parties—each of which asserted a direct, tangible ownership interest in the property—do not bolster defendants' arguments here.

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 30, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-30955

ALANA CAIN; ASHTON BROWN; REYNAUD VARISTE; REYNAJIA VARISTE; THADDEUS LONG; VANESSA MAXWELL,

Plaintiffs-Appellees,

v.

LAURIE A. WHITE, JUDGE SECTION A OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; TRACEY FLEMINGS-DAVILLIER, JUDGE SECTION B OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; BENEDICT WILLARD, JUDGE SECTION C OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; KEVA LANDRUM-JOHNSON, JUDGE SECTION E OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; ROBIN PITTMAN, JUDGE SECTION F OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; BYRON C. WILLIAMS, JUDGE SECTION G OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; CAMILLE BURAS, JUDGE SECTION H OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; KAREN

Appendix E

K. HERMAN, JUDGE SECTION I OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; DARRYL DERBIGNY, JUDGE SECTION J OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; ARTHUR HUNTER, JUDGE SECTION K OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; FRANZ ZIBILICH, JUDGE SECTION L OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT; HARRY E. CANTRELL, MAGISTRATE JUDGE OF THE ORLEANS PARISH CRIMINAL DISTRICT COURT,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND REHEARING *EN BANC*

(Opinion 08/23/2019, 5 Cir., ___, ___ F.3d ___)

Before Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing *En Banc*, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing *En Banc* is also DENIED.

Appendix E

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing *En Banc* is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause *en banc*, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing *En Banc* is DENIED.

ENTERED FOR THE COURT:

/s/_____
JAMES E. GRAVES, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 29, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

August 29, 2019, Filed

No. 18-30954

ADRIAN CALISTE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; BRIAN GISCLAIR, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs - Appellees

v.

HARRY E. CANTRELL, MAGISTRATE JUDGE OF ORLEANS PARISH CRIMINAL DISTRICT COURT,

Defendant - Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana.

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

GREGG COSTA, Circuit Judge:

Appendix F

"No man can be judge in his own case." Edward Coke, Institutes of The Laws of England, § 212, 141 (1628). That centuries-old maxim comes from Lord Coke's ruling that a judge could not be paid with the fines he imposed. *Dr. Bonham's Case*, 8 Co. Rep. 107a, 118a, 77 Eng. Rep. 638, 652 (C.P. 1610). Almost a century ago, the Supreme Court recognized that principle as part of the due process requirement of an impartial tribunal. *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927).

This case does not involve a judge who receives money based on the decisions he makes. But the magistrate in the Orleans Parish Criminal District Court receives something almost as important: funding for various judicial expenses, most notably money to help pay for court reporters, judicial secretaries, and law clerks. What does this court funding depend on? The bail decisions the magistrate makes that determine whether a defendant obtains pretrial release. When a defendant has to buy a commercial surety bond, a portion of the bond's value goes to a fund for judges' expenses. So the more often the magistrate requires a secured money bond as a condition of release, the more money the court has to cover expenses. And the magistrate is a member of the committee that allocates those funds.

Arrestees argue that the magistrate's dual role—generator and administrator of court fees—creates a conflict of interest when the judge sets their bail. We decide whether this dual role violates due process.

Appendix F

I.

Judge Henry Cantrell is the magistrate for the Orleans Parish Criminal District Court. He presides over the initial appearances of all defendants in the parish, which encompasses New Orleans. At those hearings, there are typically 100-150 a week, Judge Cantrell appoints counsel for indigent defendants and sets conditions of pretrial release. One option for ensuring a defendant's appearance is requiring a secured money bond. Just about every defendant who meets that financial condition does so by purchasing a bond from a commercial surety, as that requires paying only a fraction of the bond amount.

When a defendant buys a commercial bail bond, the Criminal District Court makes money. Under Louisiana law, 1.8% of a commercial surety bond's value is deposited in the court's Judicial Expense Fund.[1] *See* La. R.S. §§ 22:822(A)(2), (B)(3), 13:1381.5(B)(2)(a). That fund does not pay judges' salaries, but it pays salaries of staff, including secretaries, law clerks, and court reporters. It also pays for office supplies, travel, and other costs. The covered expenses are substantial, totaling more than a quarter million dollars per judge in recent years. The bond fees are a major funding source for the Judicial Expense Fund, contributing between 20-25% of the amount spent in

1. Other government offices also benefit. The Sherriff's Office, District Attorney's Office, and Office of the Indigent Defender each receive 0.4% of the bond. *See* La. R.S. §§ 22:822(A)(2), (B)(3), 13:1381.5(B)(2)(b-d).

recent years.[2] All 13 judges of the district court, including Judge Cantrell, administer the fund.

Judge Cantrell requires a secured money bond for about half of the arrestees. So it was not unusual when he imposed that condition for both Adrian Caliste and Brian Gisclair when they appeared before him on misdemeanor arrests. Nor was it uncommon when Judge Cantrell did not make findings about their ability to pay or determine if nonfinancial conditions could secure their appearance. It took over two weeks for Caliste to come up with the money to buy a bail bond, which cost about 12-13% of the $5,000 amount the court set (Caliste had two charges and bail was set at $2,500 per offense). Gisclair was never able to come up with the money and stayed in jail for over a month before being released.

While they were in custody, Caliste and Gisclair filed this federal civil rights lawsuit against Judge Cantrell. They sued on their own behalf and to represent a class of all arrestees "who are now before or who will come before" Judge Cantrell for pretrial release determinations and

2. In another case, plaintiffs argued that a separate conflict of interest existed because of the court fees and fines that also help fund the Judicial Expense Fund. That case was brought against all the judges of the Orleans Criminal District Court, contending that their "administrative supervision over [the Fund], while simultaneously overseeing the collection of fines and fees making up a substantial portion of [the Fund], crosses the constitutional line." *Cain v. White*, 937 F.3d 446, 2019 U.S. App. LEXIS 25437, 2019 WL 3982560 (2019). A different panel of this court recently held that this arrangement for fees and fines violated due process. *See id.*

who cannot afford the financial conditions imposed.[3] *See* FED. R. CIV. P. 23(b)(2).

The lawsuit challenges two aspects of Judge Cantrell's bail practices. First, the complaint alleges that he was violating the Due Process and Equal Protection Clauses by setting bond without inquiring into an arrestee's ability to pay or considering the adequacy of nonfinancial conditions of release. This, Plaintiffs contend, results in keeping people in jail only because of their inability to make a payment. The second allegation relates to Cantrell's "dual role as a judge determining conditions of pretrial release and as an executive in charge of managing the Court's finances." To plaintiffs, the financial incentive to require secured money bonds is a conflict of interest that deprives arrestees of their due process right to an impartial tribunal. For both claims, the plaintiffs sought only declaratory relief.

This appeal concerns only the conflict-of-interest claim. A year after the case was filed, Judge Cantrell told the district court that he had altered his bail practices to consider ability to pay and argued that this change mooted the first claim. The district court disagreed and granted a declaratory judgment on both claims. But Judge Cantrell appeals only the determination that his setting the bonds that help fund his court violates due process.

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3. Although the named plaintiffs' state criminal cases are over, class certification means the case is not moot. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991).

Appendix F

II.

Unlike some of its legal ancestors, English common law assumed that judges could maintain impartiality in the face of most connections to a case. *See* John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947). It did not follow the path of Roman or Jewish law, both of which disqualified judges for a variety of reasons. *See* THE CODE OF JUSTINIAN 3.1.14 (S.P. Scott trans., 1932) (allowing litigants to "reject judges appointed to hear a case . . . [e]ven when the judge was appointed by the Emperor, for the reason that We have set our hearts upon all suits being conducted without any suspicion of unfairness"); THE CODE OF MAIMONIDES, BOOK FOURTEEN: THE BOOK OF JUDGES, ch. 23, at 68-69 (Abraham M. Hershman, trans., Yale Univ. Press 1949) (requiring disqualification even when a party performed minor tasks for the judge such as removing a bird's feather from the judge's mantle or helping the judge get out of a boat when it reached shore). Though medieval England had those who suggested it should likewise recognize bias as a basis for recusal,[4] by Blackstone's day the country had charted a different course:

> [J]udges or justices cannot be challenged. For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.

4. Thirteenth-century legal commentator Henry de Bracton argued that "[a] justiciary may be refused for good cause." *See* 6 Henry de Bracton, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 248-49 (Travers Twiss, trans., 1883).

3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 361 (1768). Trust in the impartiality of judges was carried to extremes. Judges could even hear cases involving close family members. *See Brookes v. Earl of Rivers*, Hardres 503, 145 Eng. Rep. 569 (Ex. 1668) (allowing a judge to hear a case involving his brother-in-law).

But the common law view that judges were incorruptible had a notable exception—when judges might benefit financially. *See Tumey v. Ohio*, 273 U.S. 510, 525, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927) ("There was at the common law the greatest sensitiveness over the existence of any pecuniary interest however small or infinitesimal in the justice of the peace."). Lord Coke's famous line reflected that view, as did his ruling that a judge could not issue a judgment while also taking a portion of the fine to pay his salary. *Dr. Bonham's Case*, 8 Co. Rep. 107a, 118a, 77 Eng. Rep. 638, 652 (C.P. 1610). Similarly, a judge could not rule on an ejectment proceeding when he was the landlord. *See, e.g., Anonymous*, 1 Salkeld 396, 91 Eng. Rep. 343 (K.B. 1698); *see also Earl of Derby's Case*, 12 Co. Rep. 114, 77 Eng. Rep. 1390 (K.B. 1614). There was even concern that a judge's role as a citizen and a taxpayer in a town might be disqualifying, *see Between the Parishes of Great Charte and Kennington*, 2 Strange 1173, 93 Eng. Rep. 1107, 1107-08 (K.B. 1726) (quashing order of removal of pauper made by two justices of the peace because one "was an inhabitant of the parish from whence the pauper was removed"), until Parliament passed a law rejecting that notion in an early example of the "rule of necessity"

that still applies to judicial recusal, *see* Frank, *supra*, at 610-11. The common law thus distinguished between "bias," which did not disqualify the judge, and "interest," which did. *Id.* at 611-12.

After Independence, American law reflected the same concerns about a judge's financial interest in a case. James Madison recited Lord Coke's maxim in the Federalist Papers. THE FEDERALIST NO. 10, at 47 (James Madison) (Clinton Rossiter ed., 1961). Justices recused themselves from early Supreme Court cases when they had a financial interest in the result. Frank, *supra*, at 615 (citing *Livingston v. Maryland Ins. Co.*, 11 U.S. 506, 7 Cranch (11 U.S.) 506, 3 L. Ed. 421 (1813); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603, 7 Cranch (11 U.S.) 603, 3 L. Ed. 453 (1813); *Martin v. Hunter's Lessee*, 14 U.S. 304, 1 Wheat. (14 U.S.) 304, 4 L. Ed. 97 (1816)).[5] But some nineteenth century state legislatures and courts tempered the common-law rule by not requiring recusal for an interest "so remote, trifling, and insignificant that it may fairly be supposed to be incapable of affecting the judgment of or influencing the conduct of an individual."

5. Chief Justice Marshall owned much of the land at issue in the *Hunter's Lessee* litigation. Joel Richard Paul, WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES 335 (2018). In contrast to his recusal in those cases, he famously did not recuse in *Marbury v. Madison* even though his failure as Secretary of State to deliver Marbury's commission started that controversy. *Id.* at 243-44. Marshall's recusal decisions illustrate the common law's almost exclusive concern with financial conflicts. *See* Frank, *supra*, at 611-12 (explaining that financial interest was the only basis for disqualification in this period; "relationship" to the case did not require recusal).

Tumey v. Ohio, 273 U.S. 510, 531, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927) (quoting T. Cooley, CONSTITUTIONAL LIMITATIONS 594 (7th ed. 1903)).

These principles, including the significance of the interest, inform the constitutional rules governing judge's financial conflicts. As is true for other areas of criminal procedure,[6] it was not until the increased law enforcement Prohibition brought that the Supreme Court addressed a due process challenge to a judge's financial conflicts. The first case involved a mayor's court used in Ohio villages to prosecute violations of the state Prohibition Act. *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927). On this "liquor court," the mayor was the judge and could convict without a jury. *Id.* at 516-17, 521. If the mayor found the defendant guilty, some of the fine the defendant paid would go towards the mayor's "costs in each case, in addition to his regular salary." *Id.* at 519 (quoting the local ordinance). Portions of the fines the village collected would also go to the prosecutor and officers who investigated the case. *Id.* at 518-19. If the mayor found the defendant not guilty, neither he nor anyone else working for the village would make money from the case. *Id.* at 523.

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6. *See, e.g., Nathanson v. United* States, 290 U.S. 41, 47, 54 S. Ct. 11, 78 L. Ed. 159 (1933) (holding that search warrant requires probable cause); *Olmstead v. United States*, 277 U.S. 438, 464-66, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (addressing whether wiretapping is a search); *United States v. Lanza*, 260 U.S. 377, 382, 43 S. Ct. 141, 67 L. Ed. 314, T.D. 3423 (1922) (applying "dual sovereign" principle of double jeopardy law to allow both state and federal prosecution of same bootlegging activity).

Relying on the legal tradition just outlined, the Court held that the liquor court judge's interest in the outcome violated due process. *Id.* at 531-32. It did not require a showing that the mayor was favoring the prosecution; the financial incentive itself was enough:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused, denies the latter due process of law.

Id. at 532; *see id.* at 525-26 (chronicling the rule at common law that judges not have any pecuniary interest in their rulings).

This "average man as judge" standard—focusing on the strength of the temptation rather than an actual showing of impartiality—has guided the due process inquiry ever since. Judge Cantrell tries to avoid it, arguing that *Tumey*'s "average man" standard is no longer good law. He contends later cases replaced it with an "average judge" standard that recognizes judges' greater capacity for impartiality. The supposed change comes from *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986), when the Court quoted *Tumey* but referred to "the average . . . judge," leaving out the original "man acting as" language. This argument makes a mountain out of an ellipsis. The Supreme Court never explained that it was creating a more deferential standard

in using the more concise language. Its most recent conflict-of-interest opinion uses both "average judge" and "average man" without indicating a difference between the two. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 878, 881, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009). Most fundamentally, Judge Cantrell's argument that judges have a knack for impartiality—and thus that the average judge is not as tempted as the average man—ignores that the law has long rejected that presumption for a judge's financial conflicts. Frank, *supra*, at 611-12; *compare Aetna*, 475 U.S. at 820-21 (bias against insurers did not disqualify judge), *with id.* at 821-25 (involvement in similar suits against insurers disqualified judge). We see no legal difference between the two formulations the Supreme Court has used. *See Cain*, 2019 U.S. App. LEXIS 25437, 2019 WL 3982560, at *5-6 (rejecting the same argument Cantrell advances).

The cases applying the *Tumey* standard can be sorted into two groups. A few address one-off situations when the financial incentive is unique to the facts of the case. Examples are cases when the judge had a substantially similar case pending against one of the parties, *Aetna*, 475 U.S. at 821-25, or when a party had contributed more to the judge's election campaign than all other donors combined, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881-87, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009). This case is not like those.

Instead, the challenge to Judge Cantrell's dual role fits into the line of cases addressing incentives that a court's structure creates in every case. *Tumey*, 273 U.S.

510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236; *Dugan v. Ohio*, 277 U.S. 61, 48 S. Ct. 439, 72 L. Ed. 784 (1928); *Ward v. Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972). The incentives that most obviously violate the right to an impartial magistrate are those that, like *Tumey* and its English predecessors, put money directly into a judge's pocket. *See Tumey*, 273 U.S. at 523 (holding that the judge receiving a portion of the fines "certainly" violated due process). It also violates due process when rulings indirectly funnel money into a judge's bank account. *See Brown v. Vance*, 637 F.2d 272, 284-86 (5th Cir. 1981). We thus held unconstitutional the statutory fee system for compensating Mississippi justices of the peace because those judges' compensation depended on the number of cases filed in their courts. As a result, they were incentivized to rule for plaintiffs in civil cases and the prosecution in criminal ones to encourage more filings. *Id.* at 274. Again, it was the mere threat of impartiality that violated due process. As Judge Wisdom explained, it did not matter that "there must be many, many judges in Mississippi, as in any other state, pure in heart and resistant to the effect their actions may have on arresting officers and litigating creditors," because "the temptation exists to take a biased view that will find favor in the minds of arresting officers and litigating creditors. This vice inheres in the fee system. It is a fatal constitutional flaw." *Id.* at 276.

Unlike the *Tumey* or *Brown* judges, Judge Cantrell does not receive a penny, either directly or indirectly, from his bail decisions. But requiring a secured money

bond provides him with substantial nonmonetary benefits. Most significantly, money from commercial surety bond fees helps pay the judge's staff. Without support staff, a judge must spend more time performing administrative tasks. Time is money. And some important tasks cannot be done without staff. Judge Cantrell cannot simultaneously preside as judge and court reporter (he employs two). Office supplies also promote efficiency. The fees the Orleans Parish Criminal District Court receives from commercial sureties thus help fund critical pieces of a well-functioning chambers. And if an elected judge is unable to perform the duties of the job, the job may be at risk. So we do not think it makes much difference that the benefits Judge Cantrell and his colleagues receive from bail bonds are not monetary.

Having decided that the "average man as judge" standard applies and that significant nonmonetary benefits can create a conflict, we turn to the crux of the dispute: Does Judge Cantrell's dual role violate due process? In addition to *Tumey*, two other Supreme Court cases that again looked at Ohio mayors' courts flesh out when the structural temptation of a dual role creates an unconstitutional conflict. The first, decided the term after *Tumey*, considered another liquor court. *See Dugan v. State*, 277 U.S. 61, 48 S. Ct. 439, 72 L. Ed. 784 (1928). Dugan was the mayor of a small town, empowered to run a mayor's court and convict those who possessed liquor. *Id.* at 62. Unlike the *Tumey* mayor, he did not receive an additional fee for convictions; the fines went to the town's general fund which paid his fixed salary. *Id.* at 62-63. And despite the "mayor" title, Dugan was not the chief

executive of the city; a city manager was. *Id* at 63. Dugan was, however, one of five members of the city commission, a legislative body with power to decide how city funds were spent, but he could not vote on his own salary. *Id.* at 62-63. The Court held that although a judge might be tempted to rule in a way that would increase fines were he also a "chief executive . . . responsible for the financial condition of the village," that was not Dugan's situation. *Id.* at 65. His role as a nonexecutive, and as only one of five votes on financial policy, meant any benefit he received from the fines he levied was "remote." *Id.*

Forty-five years later, an Ohio mayor's court returned to the Supreme Court's docket. *See Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972). With Prohibition long ended, this mayor's court assessed traffic fines. *Id.* The traffic court provided about 40% of the village's revenue. *Id.* at 58. That created a constitutional problem because, unlike the *Dugan* mayor, the *Ward* mayor was the city's chief executive, tasked with "general overall supervision of village affairs." *Id.* The "temptation" resulting from this executive responsibility for village finances created an unconstitutional conflict when he presided over the fine-generating traffic court. *Id.* at 60.

The parties focus on the differences between Judge Cantrell's roles and those of the mayors in *Dugan* and *Ward*. Both sides can point to certain features that help them. The *Dugan* mayor was one of five officials making spending decisions, while Judge Cantrell has an even less influential 1/13 vote on decisions about the Judicial

Expense Fund. But the *Dugan* mayor, despite his title, had no executive responsibilities. As a result, maintaining the financial health of the village provided only a "remote" benefit to Dugan. *Ward*, 409 U.S. at 61. In contrast, because the *Ward* mayor ran the town, he had a direct and personal interest in the finances of the civic institution. *Id.* at 60-61.

We conclude that Judge Cantrell is more like the *Ward* mayor than the *Dugan* mayor. Because he must manage his chambers to perform the judicial tasks the voters elected him to do, Judge Cantrell has a direct and personal interest in the fiscal health of the public institution that benefits from the fees his court generates and that he also helps allocate. And the bond fees impact the bottom line of the court to a similar degree that the fines did in *Ward*, where they were 37-51% of the town's budget. *Ward*, 409 U.S. at 58. The 20-25% of the Expense Fund that comes from bond fees is a bit below that percentage but still sizeable enough that it makes a meaningful difference in the staffing and supplies judges receive. The dual role thus may make the magistrate "partisan to maintain the high level of contribution" from the bond fees. *Ward*, 409 U.S. at 60.

Our holding that this uncommon arrangement violates due process does not imperil more typical court fee systems. Our reasoning depends on the dual role combined with the "direct, personal, [and] substantial" interest the magistrate has in generating bond fees. *Tumey*, 273 U.S. at 523. To take one example, none of these features are present for fines in federal criminal cases. Judges do not

have a say in how those funds are spent. The amount of the fines—which is supposed to take into account the costs of incarceration and thus, if anything, fund the Bureau of Prisons rather than the judiciary, U.S.S.G. § 5E1.2(d)(7)—are not set aside for judicial operations even on a national level, let alone for the handful of federal judges who sit on a local district court. The benefits are so diffuse that a single judge sees no noticeable impact on her chambers from the fines she imposes and thus feels no temptation from them.

The temptation facing the Orleans Parish magistrate is far greater. His dual role—the sole source of essential court funds and an appropriator of them—creates a direct, personal, and substantial interest in the outcome of decisions that would make the average judge vulnerable to the "temptation . . . not to hold the balance nice, clear, and true." *Tumey*, 273 U.S. at 532. The current arrangement pushes beyond what due process allows. *Cf. Cain*, 2019 U.S. App. LEXIS 25437, 2019 WL 3982560, at *6 (holding that Orleans Parish judges' role in both imposing and administering court fees and fines violated due process).

III.

After recognizing this due process violation, the district court issued the following declaration: "Judge Cantrell's institutional incentives create a substantial and unconstitutional conflict of interest when he determines [the class's] ability to pay bail and sets the amount of that bail."

That declaratory relief was all plaintiffs sought. They believed that section 1983 prevents them from seeking injunctive relief as an initial remedy in this action brought against a state court judge. *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 . . . .").[7]

That statutory requirement reflects that declaratory relief is "a less harsh and abrasive remedy than the injunction." *Steffel v. Thompson*, 415 U.S. 452, 463, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974) (quotation omitted); *see also Robinson v. Hunt Cty.*, 921 F.3d 440, 450 (5th Cir. 2019); RESTATEMENT (SECOND) OF JUDGMENTS § 33 cmt. c ("A declaratory action is intended to provide a remedy that is simpler and less harsh than coercive relief . . . ."). Principal among its advantages is giving state and local officials, like Judge Cantrell, the first crack at reforming their practices to conform to the Constitution. *Steffel*, 415 U.S. at 470.

One response to the declaratory judgment would be eliminating Judge Cantrell's dual role, a role that is not mandated by Louisiana law. In contrast, because Louisiana law does require that the bond fees be sent to the Judicial Expense Fund, LA. R.S. 13:1381.5(B)(2)(a), the declaratory judgment cannot undo that mandate.

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7. This provision is implicated only if the conflict claim challenges actions undertaken in Judge Cantrell's judicial capacity, as opposed to his administrative capacity. Because the plaintiffs sought only declaratory relief, we need not reach this question.

Challengers did not seek to enjoin that statute, instead arguing only that the dual role violated due process. But given today's ruling and last week's in *Cain*, it may well turn out that the only way to eliminate the unconstitutional temptation is to sever the direct link between the money the criminal court generates and the Judicial Expense Fund that supports its operations.

* * *

The judgment of the district court is AFFIRMED.

APPENDIX G — DECLARATORY JUDGMENT OF THE UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF LOUISIANA, DATED AUGUST 14, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

No. 17-6197

SECTION "L" (5)

ADRIAN CALISTE *ET AL.*,

versus

HARRY E. CANTRELL.

DECLARATORY JUDGMENT

Named Plaintiffs, on behalf of those similarly situated, filed this suit against Magistrate Judge Harry E. Cantrell, challenging the constitutionality of Judge Cantrell's bail procedures in the Orleans Parish Criminal District Court ("OPCDC"). Evidence in the record demonstrates that Judge Cantrell's procedure does not include an inquiry into ability to pay or consideration of alternative conditions of release prior to his setting bail. Furthermore, because of Judge Cantrell's institutional conflict of interest, he fails to provide a neutral forum for determination of ability to pay or consideration of alternative conditions of release. The Fourteenth Amendment requires an inquiry into ability

to pay, including notice of the importance of this inquiry; consideration of alternative conditions of release, including findings on the record applying the clear and convincing standard and explaining why an arrestee does not qualify for alternative conditions of release; and representative counsel at such hearings. Additionally, the Fourteenth Amendment requires a neutral forum for consideration of ability to pay and alternative conditions of release. Considering the Court's Order & Reasons entered herein on August 6, 2018, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Adrian Caliste, Brian Gisclair, both individually and on behalf of all others similarly situated, and against defendant, Harry E. Cantrell, Magistrate Judge of Orleans Parish Criminal District Court. Plaintiffs are granted summary judgment on Count One and the following declaratory relief:

In the context of hearings to determine pretrial detention Due Process requires:

1) an inquiry into the arrestee's ability to pay, including notice of the importance of this issue and the ability to be heard on this issue;

2) consideration of alternative conditions of release, including findings on the record applying the clear and convincing standard and explaining why an arrestee does not qualify for alternative conditions of release; and

3) representative counsel.

Plaintiffs are also granted summary judgment on Count Two and a declaratory judgment that Judge Cantrell's institutional incentives create a substantial and unconstitutional conflict of interest when he determines their ability to pay bail and sets the amount of that bail.

IT IS FURTHER ORDERED that this matter be Dismissed with prejudice, with each party to bear his or its own costs.

New Orleans, Louisiana this 13th day of August, 2018.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX H — ORDER & REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED AUGUST 6, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION No. 17-6197 SECTION "L" (5)

ADRIAN CALISTE *et al.*,

versus

HARRY E. CANTRELL.

August 6, 2018, Decided
August 6, 2018, Filed

ORDER & REASONS

Before the Court are Plaintiffs' and Defendant's Cross-Motions for Summary Judgment. R. Docs. 116 and 121. The parties have also filed in opposition. R. Docs. 120 and 130. Having considered the parties' arguments and the applicable law, the Court issues this Order & Reasons.

I. BACKGROUND

On June 27, 2017, Plaintiffs Adrian Caliste and Brian Gizclair, individually and on behalf of others similarly situated, filed this action under 42 U.S.C. § 1983 against

Orleans Parish Criminal District Magistrate Judge Harry E. Cantrell, alleging violations of their rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses. R. Doc. 1 at 25. Plaintiffs are former criminal defendants who were in the custody of the Orleans Parish Sheriff's Office at the time the complaint was filed. R. Doc. 1 at 2-3. Defendant Cantrell is the Magistrate Judge for Orleans Parish Criminal District Court ("OPCDC"), where he is responsible for setting bail upon arrest and has a role in managing the expenditures of the Judicial Expense Fund. R. Doc. 1 at 3.

In Count One, Plaintiffs allege that Judge Cantrell routinely sets a $2,500 minimum secured money bond without first considering the facts of the case to determine whether a lower bond amount or an alternative condition of release might be appropriate. R. Doc. 1 at 6. Plaintiffs further aver that Judge Cantrell requires the use of a bail bond from a commercial (for-profit) surety and does not allow arrestees to post cash bail. R. Doc. 1 at 2. In Count Two, Plaintiffs contend that Judge Cantrell has a conflict of interest because under Louisiana law, 1.8% of a bond amount collected from a commercial surety is allocated directly to the Court for its discretionary use. R. Doc. 1 at 2.

Plaintiffs moved to certify a class of similarly situated plaintiffs. R. Doc. 5. On March 16, 2018, the Court granted this motion and certified the class. R. Doc. 99. Plaintiffs now seek a declaratory judgement that Judge Cantrell's bond policy, which they assert results in the creation of a modern "debtor's prison," and financial conflict of interest

are violations of Plaintiffs' constitutional rights. R. Doc. 1 at 26. Defendant, Judge Cantrell, denies Plaintiffs' allegations and seeks summary judgment dismissing Plaintiffs' complaint.

II. PRESENT MOTIONS

A. Plaintiffs' Motion for Summary Judgment (R. Doc. 116)

Plaintiffs have filed a Motion for Summary Judgment. R. Doc. 116. The Plaintiff Class seeks declaratory judgment on both of their claims. R. Doc. 116-1 at 4. First, Plaintiffs' argue that Judge Cantrell violates their Equal Protection and Due Process rights by jailing Plaintiffs when they are unable to pay set bonds. R. Doc. 116-1 at 5. Plaintiffs argue that Judge Cantrell's practice violates their rights against wealth-based detention and fundamental right to pretrial liberty because he sets bail without making findings that pretrial detention is necessary or making an inquiry into Plaintiffs' ability to pay. R. Doc. 116-1 at 6, 12, 26. Second, Plaintiffs argue that since Judge Cantrell shares executive control over funds that come partly from fees on the commercial surety bonds that he sets, he has a conflict of interest in the process of setting those bonds. R. Doc. 116-1 at 33. Plaintiffs allege that this conflict violates their due process right to a neutral and detached judge. R. Doc. 116-1 at 29. For these reasons, Plaintiffs move for summary judgment. R. Doc. 116-1 at 34.

Defendant responds in opposition. R. Doc. 120. First, Judge Cantrell argues that this Court lacks the power to

direct him in the performance of his duties. R. Doc. 120 at 1. Judge Cantrell argues that Plaintiffs have asked this Court to order him to follow certain protocols when he conducts bail hearings and that this Court lacks the power to direct him in this manner. R. Doc. 120 at 3. Second, regarding Plaintiffs' request for declaratory relief, Judge Cantrell argues that any such relief would be advisory because there is no justiciable controversy. R. Doc. 120 at 5. Judge Cantrell further argues that Plaintiffs' claims regarding his bail hearing protocol are moot because since this lawsuit he has in good faith changed his bail hearing procedures. R. Doc. 120 at 6. Understanding his heavy burden in proving mootness, Judge Cantrell has attached an affidavit describing his new colloquy and checklist used during bail hearings. R. Doc. 120-1.[1]

Third, Judge Cantrell argues that the procedures regarding management of the Judicial Expense Fund do not negate a fair tribunal because 1) the OPCDC can go to the state or parish if it needs more funds, 2) there is no quota or reward for adding to the fund, and 3) the judges have no personal interest in the money collected. R. Doc. 120 at 9-11. Additionally, Judge Cantrell argues that he benefits from a presumption of integrity and if this procedure makes him biased than all courts are biased

1. Although Judge Cantrell argues that he has already amended his bail procedures, there is some discrepancy between the statements in his affidavit where he uses language indicating in some places that he is currently following the new procedures and some language indicating that he will change his procedures in the future. Additionally, these statements contradict his current affirmation of Plaintiffs' statement of facts. R. Doc. 121-6, 121-7.

because all collect fees from defendants in some way. R. Doc. 120 at 13. Finally, Judge Cantrell also argues that the fees incurred under Louisiana's bail bond statutes do not create an impermissible bias because the Fifth Circuit has held that such fees are reasonable administrative fees. R. Doc. 120 at 18.

B. Defendant's Motion for Summary Judgment (R. Doc. 121)

In support of his motion for summary judgment, Defendant has submitted a memorandum identical to that submitted in response to Plaintiffs' motion for summary judgment. R. Doc. 121-1. In opposition, Plaintiffs have submitted a memorandum identical to that submitted in reply supporting their own motion. R. Doc. 130.

III. LAW AND ANALYSIS

The present motions raise questions of justiciability, the constitutionality of Judge Cantrell's bail procedures, and his conflict of interest when he has both judicial and executive power regarding revenues of the Judicial Executive Fund. The Court acknowledges the similarities between this case and *Cain v. City of New Orleans*, 281 F. Supp. 3d 624 (E.D. La. 2017) (Vance, J.). The Court draws as relevant from Judge Vance's excellent and thorough opinion, particularly as it relates to analysis of judicial conflict of interest.

Appendix H

A. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (citing Fed. R. Civ. P. 56(c)). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Id.* A party moving for summary judgment bears the initial burden of demonstrating the basis for summary judgment and identifying those portions of the record, discovery, and any affidavits supporting the conclusion that there is no genuine issue of material fact. *Id.* at 323. If the moving party meets that burden, then the nonmoving party must use evidence cognizable under Rule 56 to demonstrate the existence of a genuine issue of material fact. *Id.* at 324.

A genuine issue of material fact exists if a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1996). "[U]nsubstantiated assertions," "conclusory allegations," and merely colorable factual bases are insufficient to defeat a motion for summary judgment. *See Hopper v. Frank*, 16 F.3d 92, 97 (5th Cir. 1994); *Anderson*, 477 U.S. at 249-50. In ruling

on a summary judgment motion, a court may not resolve credibility issues or weigh evidence. *See Int'l Shortstop, Inc. v. Rally's Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991). Furthermore, a court must assess the evidence, review the facts and draw any appropriate inferences based on the evidence in the light most favorable to the party opposing summary judgment. *See Daniels v. City of Arlington, Tex.*, 246 F.3d 500, 502 (5th Cir. 2001); *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986). With these legal principles in mind, the Court turns to the parties motion which will be discussed in turn.

B. Justiciability

Defendant Cantrell's motion for summary judgment raises several justiciability questions. First, Judge Cantrell argues that the claims in Count One are moot due to his voluntary cessation of the challenged bail procedures. Second, Judge Cantrell argues that Plaintiffs improperly seek a writ of mandamus compelling the actions of a state official. Finally, Judge Cantrell argues that the Court should abstain from granting declaratory relief in this case. The Court will discuss each argument in turn.

i. Mootness

The Constitution limits the jurisdiction of federal courts to cases or controversies. U.S. Const. art. III, § 2. To satisfy this requirement, a plaintiff must have a personal interest in the case, not only at the outset, but at "all stages" of the lawsuit. *Davis v. FEC*, 554 U.S. 724,

732-33, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)). If a plaintiff begins a case with a sufficient personal interest but lacks that interest later in the case, the plaintiff's claims are moot. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000).

This Court has held that Plaintiffs had the requisite personal interest for standing to bring these claims. R. Doc. 44 at 5-6. In this motion, Judge Cantrell argues that Plaintiffs have lost this personal interest and their claims are now moot. Judge Cantrell argues that since this lawsuit he intends to cease the allegedly unconstitutional bail procedures thus mooting Count One.

"Generally, any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006). When an action is rendered moot it must be dismissed. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990). However, "[i]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Laidlaw*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982)). Accordingly, the Supreme Court has placed a "heavy burden of persuasion" on a defendant attempting to show mootness by voluntary cessation. *United States*

v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968).

Judge Cantrell has filed an affidavit stating that since the inception of this litigation he has "revised the protocol [he] follow[s] in setting bail and now take[s] into consideration the following factors":[2]

- There will be no minimum monetary bail amount utilized when assessing and setting bail.
- The seriousness of the offense charged, including but not limited to whether the offense is a serious crime of violence or involves a controlled dangerous substance.
- The weight of the evidence against the defendant.
- The previous criminal record of the defendant.
- The ability of the defendant to give bail.
- The nature and seriousness of the danger to any other person or the community that would be posed by the defendant's release.
- The defendant's voluntary participation in a pretrial drug testing program.
- The absence or presence in the defendant of any controlled dangerous substance.

2. *See* FN 1 *supra*.

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

- Any other circumstances affecting the probability of defendant's appearance.

- The type or form of bail.

- Amount and source of defendant's income.

- Defendant's employment status.

- Number and type of defendants.

- Recommendations of pre-trial services report.

- Should a defendant be unable to afford the amount set, they will be entitled to an adversarial hearing, wherein they have the right to be represented by counsel and to present any evidence and/or testimony and traverse (or deny) any evidence and/or testimony presented against them concerning the previously stated factors in determining the amount of bail.

R. Doc. 120-1 at 2-3. Judge Cantrell further avers that he will now state on the record his reasoning when setting bail. R. Doc. 120-1 at 3.

The Court does not doubt that Judge Cantrell is earnest in his present intent to modify his bail procedures. However, "allegations by a defendant that its voluntary conduct has mooted the plaintiff's case require closer examination than allegations that 'happenstance' or official acts of third parties have mooted the case." *Fontenot v. McCraw*, 777 F.3d 741, 747-48 (5th Cir. 2015) (quoting *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 528 n.4 (5th Cir. 2008)). Accordingly, the Court has closely examined Defendant's claims and is not satisfied that the voluntary conduct has mooted Plaintiffs' claims regarding the alleged bail practices. Unlike cases where there has been a "formally announced change[]" regarding official policy, *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009), here the Court and Plaintiffs must rely solely on Judge Cantrell's statement that he has changed his procedures and will not change them back again. Judge Cantrell has submitted no evidence of the implementation of these new bail procedures. These changes were made only after this litigation was commenced and Judge Cantrell's affidavit is not binding on his future procedures. For these reasons, the Court finds that Judge Cantrell has not met his heavy burden of convincing the Court that the challenged bail procedures could not reasonably be expected to recur. Therefore, Plaintiffs' claims are not moot.[3]

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3. Additionally, the Court notes that Judge Cantrell's affidavit, if it were sufficient to meet his heavy burden, does not resolve all of the issues before the Court regarding the Count One allegations. Specifically, Judge Cantrell's affidavit does not provide a standard to be applied when determining whether a defendant qualifies for alternative conditions of release, nor does it provide that defendants will have a right to representative counsel at initial bail hearings.

ii. Mandamus

Next, Judge Cantrell argues that Plaintiffs' have requested a writ of mandamus disguised as a request for declaratory relief. "[F]ederal courts have no general power to issue writs of mandamus to direct state courts and their judicial officers in the performance of their duties where mandamus is the only relief sought." *Lamar v. 118th Judicial Dist. Court of Tex.*, 440 F.2d 383, 384 (5th Cir. 1971). However, federal judges have the power to provide declaratory and injunctive relief against state judicial officers and these remedies are unequivocally available via § 1983. *See* 42 U.S.C. § 1983 ("[I]n an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."); *Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984); *Holloway v. Walker*, 765 F.2d 517, 525 (5th Cir. 1985).

Judge Cantrell claims that Plaintiffs are asking the Court to direct him in the exercise of his judicial duties, specifically to order him to change his bail procedures in specific ways. However, Plaintiffs' complaint and motion for summary judgement merely asks the Court to provide declaratory relief regarding Judge Cantrell's bail procedures.

> A writ of mandamus compels the defendant to perform a certain act. *See Mandamus*,

> Black's Law Dictionary (10th ed. 2014). By contrast, the declaratory judgments plaintiffs seek . . . would merely state that certain of defendant['s] practices are unconstitutional. The Supreme Court has recognized the authority of federal courts to issue such relief against state judges. *See Pulliam*, 466 U.S. at 526 (affirming attorneys' fees award in case where district court declared magistrate's practice of "require[ing] bond for nonincarcerable offenses . . . to be a violation of due process and equal protection and enjoined it"). Thus, the Court rejects defendant['s] argument that plaintiffs' claims for declaratory relief are in fact requests for a writ of mandamus.

Cain, 281 F. Supp. 3d at 645-46 (footnotes omitted). Because here the alleged acts were omissions taken in Judge Cantrell's judicial capacity, this Court has authority under § 1983.

iii. Declaratory Judgment Act

Judge Cantrell further argues that it would be inappropriate for the Court to grant a declaratory judgment because the ruling would be merely advisory. The Declaratory Judgment Act is "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995) (quoting *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241, 73 S. Ct. 236, 97 L. Ed. 291 (1952)). As an initial step

in a declaratory judgment suit, the Court must determine "whether the declaratory action is justiciable." *Sherwin-Williams Co. v. Holmes Cty.*, 343 F.3d 383, 387 (5th Cir. 2003). Defendant argues that the Count One claims are not justiciable because there is no "actual controversy." However, the Court has already found that Plaintiffs' claims are not moot. Accordingly, the Court may consider Plaintiffs' claims for declaratory relief.

iv. *Brillhart-Wilton* Abstention

Finally, Judge Cantrell argues that the Court should abstain from deciding this case under the *Brillhart-Wilton* doctrine. Judge Cantrell argues that while the Declaratory Judgment Act grants federal courts discretion, the Court should decline to exercise this discretion. However, the cases cited by Judge Cantrell narrowly apply to situations where a federal court sitting in diversity is asked to grant declaratory judgment on a state law matter. *Wilton*, 515 U.S. at 280, 290; *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 493, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942). Additionally, the Court has already considered and rejected Defendant's previous abstention arguments under the *Younger* doctrine. R. Doc. 44 at 6-8.

Accordingly, this analysis is inapplicable to the matter at hand. Furthermore, even if this analysis were applicable, the Fifth Circuit reasoning under *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585 (5th Cir. 1994), and *Sherwin-Williams Co. v. Holmes Cty.*, leads the Court away from abstention. In *Brillhart* the Court was concerned with whether a federal suit "can be better settled in the

state court." 316 U.S. at 495. The Fifth Circuit employs seven nonexclusive factors for this purpose, which it first fashioned in *St. Paul Ins. Co. v. Trejo*.[4] These factors are:

> 1) Whether there is a pending state action in which all of the matters in controversy may be fully litigated, 2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant, 3) whether the plaintiff engaged in forum shopping in bringing the suit, 4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist, 5) whether the federal court is a convenient forum for the parties and witnesses, . . . 6) whether retaining the lawsuit in federal court would serve the purposes of judicial economy, and [7)] whether the federal court is being called on to construe a state judicial decree . . . .

Trejo, 39 F.3d at 590-91 (internal citations omitted). The Fifth Circuit has since updated its *Trejo* analysis to include: 1)"[t]he presence of federal law questions, [2)] their relationship to state law questions, [3)] the ability of the federal court to resolve state law issues, and [4)]the ability of a state court to resolve the federal law issues." *Sherwin-Williams*, 343 F.3d at 396. "'The presence of federal law issues must always be a major consideration

4. *Trejo* was decided prior to the Supreme Court's decision in *Wilton*. However, the Fifth Circuit continues to apply the *Trejo* factors with some additional and/or clarified considerations laid out in *Sherwin-Williams*.

weighing against surrender' of federal jurisdiction." *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). "The presence of federal law issues is especially important when there is no pending state court proceeding to which the federal district court can defer." *Id.*

Here, the issue before the Court is a federal law issue and there are no pending state court proceedings to consider. Plaintiffs have filed a § 1983 claim requesting declaratory relief recognizing their Constitutional rights. None of the above factors apply to this situation or suggest that this suit would be "better settled in state court."

Accordingly, the Court finds that the matters before it are justiciable and finds no reason to abstain from ruling. The Court now moves to a consideration of the Plaintiffs' substantive arguments seeking summary judgment.

C. Count One: Judge Cantrell's Bail Procedures

In Count One, Plaintiffs' main argument is that Judge Cantrell's bail procedures violate their constitutional rights because he imprisons criminal defendants solely based on their inability to pay the set bail. Plaintiffs specifically challenge Defendant's practice of setting bail without considering alternative conditions of release or ability to pay.

The facts regarding Judge Cantrell's bail procedures are undisputed. R. Docs. 121-6, 121-7. Judge Cantrell agrees that the following are standard practices for setting bail in his court:

- Introduction and overview of bail setting process.

- Qualification of defendants for public defender services, including questions regarding employment, income, and dependents.

- Time for defendants to meet with their attorneys.

- Judge Cantrell uses the background information provided by the public defender to determine the conditions of release or detention; "he does not ask additional questions."

- Judge "Cantrell has told public defenders that he would hold them in contempt when they have attempted to argue for lower bond amounts or RORs for their clients."

- Judge "Cantrell does not determine whether the financial condition of release that he imposes will result in pretrial detention."

R. Doc. 121-7 at 3-6.

It is clear that under these procedures Judge Cantrell does not request much financial information from criminal defendants prior to determining the amount of their bail. Nor does he "consider or make findings concerning alternative conditions of release when he requires secured financial conditions, and does not make any findings that pretrial detention is necessary to serve any particular government interest if a secured financial condition will

result in detention." R. Doc. 121-7 at 6-7. Transcript evidence in the record confirms these facts. R. Docs. 121-7. Plaintiffs in this case were imprisoned prior to trial because they were unable to pay the set bail. Transcripts from their bail hearings demonstrate that Judge Cantrell did not inquire regarding their ability to post bail, nor did he provide reasoning for his rejection of alternative conditions of release.

As an example, Ms. Mishana Johnson was detained prior to trial on a charge of simple battery. R. Doc. 121-7 at 4. Judge Cantrell appointed a public defender to represent Ms. Johnson after learning that she did not have counsel and worked at McDonald's. R. Doc. 121-7 at 4. Her appointed counsel requested $1000 bail based on employment status and lack of risk factors. R. Doc. 121-7 at 4. Judge Cantrell set bail at $5000 without inquiry into Ms. Johnson's ability to pay and informed the public defender that he does not set bail lower than $2500. R. Doc. 121-7 at 5. Judge Cantrell later reprimanded another public defender for requesting release on recognizance ("ROR") or a $1000 bond. R. Doc. 121-7 at 5. The attorney argued that his client was employed in a low-wage job and was a college student. R. Doc. 121-7 at 5. Judge Cantrell again set a $5000 bond without inquiry into the defendant's ability to pay or providing reasoning for his rejection of alternative conditions of release. R. Doc. 121-7 at 5.

More disturbing is the colloquy regarding bail set for Ms. Ashley Jackson on June 12, 2017. R. Doc. 121-7 at 5. Judge Cantrell had agreed to an ROR for this defendant until he realized that her listed address was a homeless

shelter. R. Doc. 121-7 at 5. Subsequently, stating his concerns regarding the court's ability to contact Ms. Jackson, he set a secured $2500 bond. R. Doc. 121-7 at 5. After argument with defense counsel, Judge Cantrell stated that he was "not punishing [the defendant] for being poor [but that he was] punishing her because [the court could] not get in touch with her." R. Doc. 121-7 at 6.

This evidence suggests that Judge Cantrell regularly sets bail without considering the defendant's ability pay or qualification for alternative conditions of release and that these practices regularly result in pretrial detention based on inability to pay bail. Judge Cantrell has not argued that these descriptions of his practices are inaccurate and has made no substantive constitutional arguments in defense of these practices.

Plaintiffs argue that these practices violate their due process and equal protection rights under the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment provides that "[n]o state . . . shall deprive any person of life, liberty, or property without due process of law . . . ." U.S. Const. Amend. XIV. It protects individuals against two types of government action. "Substantive Due Process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952), or interferes with rights "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S. Ct. 149, 82 L. Ed. 288 (1937). "Procedural Due Process" ensures that government action depriving a person of life, liberty, or property is implemented in a fair manner.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

> Although "[d]ue process and equal protection principles converge" in cases involving the criminal justice system's treatment of indigent individuals, *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), plaintiffs' argument sounds in procedural due process. Thus, the familiar framework set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), applies. *See Turner v. Rogers*, 564 U.S. 431, 444-45, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011) (applying *Mathews v. Eldridge* to civil contempt proceedings).

Cain, 281 F. Supp. 3d at 649.

"[S]tandard analysis under [the Due Process Clause] proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient." *Swarthout v. Cooke*, 562 U.S. 216, 219, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011). Here, Plaintiffs successfully assert that they have been deprived of a liberty interest based on "the well-established principle that an indigent criminal defendant may not be imprisoned solely because of her indigence." *Cain*, 281 F. Supp. 3d at 649 (citing *Tate v. Short*, 401 U.S. 395, 398, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971); *United States v. Voda*, 994 F.2d 149, 154 n.13 (5th Cir. 1993)). Additionally, Plaintiffs have been deprived of

their fundamental right to pretrial liberty. *United States v. Salerno*, 481 U.S. 739, 750, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); *see also Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); *Jones v. United States*, 463 U.S. 354, 361, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983) (quoting *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)) ("It is clear that 'commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'").

Under *Mathews*, courts consider three factors to identify the requirements of procedural due process when the state endeavors to deprive someone of these rights:

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

424 U.S. at 335. The Supreme Court has discussed the types of procedural safeguards required to authorize pretrial detention under the Bail Reform Act. *Salerno*, 481 U.S. at 751-52 (finding that the procedures under

the Bail Reform Act were "specifically designed to further the accuracy of th[e] determination" of "the likelihood of future dangerousness" and did not violate due process). Among the valuable procedural safeguards noted in *Salerno* were "right to counsel at the detention hearing"; the opportunity to testify, present evidence, and cross-examine witnesses; standards for the judicial officer "determining the appropriateness of detention"; government burden of clear and convincing evidence; and requirement of findings of fact and reasons for detention from the judicial officer. *Id.*

The Supreme Court has also articulated additional procedural safeguards in several different contexts including pretrial and post-conviction detention.[5] In *Bearden v. Georgia*, the Supreme Court held that "a sentencing court can[not] revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate." 461 U.S. 660, 665, 673-74, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983). There, the state court had imprisoned Bearden for his inability to pay a fine but had not asked why he was unable to pay or considered other alternative means of enforcing the fine. *Id.* at 674. The Court reasoned that for the state court to simply convert the fine into a prison sentence without

5. This Court finds that the post-conviction detention cases, while not directly on point, are highly relevant because the liberty interests of presumptively innocent, pretrial detainees cannot be less than, and are generally considered greater than, those of convicted defendants.

"inquir[ing] into the reasons for the failure to pay" or finding that "alternate measures [we]re not adequate to meet the State's interests . . . would deprive [Bearden] of his . . . freedom simply because, through no fault of his, he [could not] pay the fine." *Id.* at 672-73.

Moreover, in *Turner v. Rogers*, the Supreme Court held that court-appointed counsel was not required in a civil contempt proceeding if sufficient alternative procedures were provided "equivalent to . . . adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings." 564 U.S. 431, 448, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011). There, the Court reasoned that "[g]iven the importance of the [liberty] interest at stake, it is obviously important to assure accurate decisionmaking in respect to the key 'ability to pay' question." *Id.* at 445.

While there are clear differences between the facts of these cases and the facts at issue here, what is manifest and pertinent is the Supreme Court's emphasis on the due process requirements of an informed inquiry into the ability to pay and findings on the record regarding that ability prior to detention based on failure to pay. Accordingly, the Court finds that these cases are useful here because Plaintiffs have been subjected to pretrial imprisonment, as a result of their inability to pay a court ordered sum.

With the principles of *Salerno, Bearden*, and *Turner* in mind, the Court applies the *Mathews* factors to the present facts.

> First, plaintiffs' interest in securing their "freedom 'from bodily restraint[ ]' lies 'at the core of the liberty protected by the Due Process Clause.'" *Turner*, 564 U.S. at 445 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)). Plaintiffs' liberty interest weighs heavily in favor of procedural safeguards provided before imprisonment.

Cain, 281 F. Supp. 3d at 651.

"Second, the risk of erroneous deprivation without an inquiry into ability to pay is high." *Id.* The record suggests that many criminal defendants, including Named Plaintiffs, have been imprisoned solely because they are unable to pay the bail amount set by Judge Cantrell. These are criminal defendants who have been found to be indigent for the purpose of appointing counsel. Accordingly, the inquiry into the ability to pay "must involve at least notice and opportunity to be heard, [and express findings in the record] as suggested by *Turner*; an ability-to-pay inquiry without these basic procedural protections would likely be ineffective." *Id.*

Third, Judge Cantrell has not suggested any government interest[6] that would prevent or discourage an inquiry into the ability to pay. Rather, he seems to agree that it is appropriate to consider "[t]he ability of the defendant to give bail." R. Doc. 120-1 at 2. However, this

6. Defendant has not made any constitutional arguments regarding the substance of Plaintiffs' Count One claims.

simple consideration is inadequate under the principles laid out by the Supreme Court. *Bearden* requires that this inquiry include court consideration of the reasons why a criminal defendant cannot pay and of alternative measures prior to imprisonment. 461 U.S. at 672; *see Cain*, 281 F. Supp. 3d at 652.

Here, it is clear that Judge Cantrell did not conduct an inquiry into ability to pay or include satisfactory procedural safeguards to that inquiry when setting bail. To satisfy the Due Process principles articulated by Supreme Court precedent, Judge Cantrell must conduct an inquiry into criminal defendants' ability to pay prior to pretrial detention. "This inquiry must involve certain procedural safeguards, especially notice to the individual of the importance of ability to pay and an opportunity to be heard on the issue. If an individual is unable to pay, then [he] must consider alternative measures before imprisoning the individual." *Cain*, 281 F. Supp. 3d at 652.

Plaintiffs suggest that due process requires additional procedures in order to "ensure the accuracy of [a] finding that pretrial . . . detention is necessary." R. Doc. 116-1 at 14. Plaintiffs cite *Salerno* and the safeguards provided under the Bail Reform Act as the standard for these additional procedural safeguards because they provide confidence that a sufficient inquiry into ability to pay is conducted prior to pretrial detention. In *Salerno*, the Court noted that the Bail Reform Act is "narrowly focuse[d] on individuals who have been arrested for a specific category of extremely serious offenses." 481 U.S. at 750. Even with this heightened government interest,

"[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.* The Court then praised other procedural safeguards found to be sufficient under Due Process including: findings of fact, statements of reasons for decisions, and the right to counsel." *Id.* at 750-51; *see also Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) (listing the minimum requirements of due process when revoking probation). These procedures are required for defendants charged with committing serious offenses. How much more important are these safeguards when considering pretrial detention for criminal defendants who may not be accused of committing extremely serious offenses?

First, Plaintiff suggests that Due Process requires proof under the clear and convincing standard "that pretrial detention is necessary to mitigate either a risk of flight or a danger to the community." R. Doc. 116-1 at 16. Beginning with *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979), the Supreme Court has held that, when scrutinized under procedural due process criterion, deprivation of liberty requires a heightened standard. There, when considering the government's interest in "protect[ing] the community from the dangerous tendencies of some who are mentally ill," the Court reasoned that the clear and convincing standard struck an appropriate balance between scrupulous protection of individual liberty interests and the government interest in public safety. *Id.* at 424, 426.

Appendix H

In cases where physical liberty is at stake in all kinds of situations, the Court consistently applies the clear and convincing standard. *Foucha*, 504 U.S. at 82; *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282-83, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990); *Santosky v. Kramer*, 455 U.S. 745, 756, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Addington*, 441 U.S. at 433; *see also Woodby v. INS*, 385 U.S. 276, 286, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966); *Schneiderman v. United States*, 320 U.S. 118, 123, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943). While this Court has not found a case requiring the clear and convincing standard in the particular circumstances of this case,[7] determining pretrial detention based specifically on risk of flight, the Court is convinced of the vital importance of the individual's interest in pretrial liberty recognized by the Supreme Court. In a *Mathews* analysis of the balance required by Due Process of the private liberty interest and interest of the government in ensuring that a criminal defendant appears in court, the Court agrees with the views expressed in the concurring opinion in *United States v. Motamedi*, 767 F.2d 1403, 1409 (9th Cir. 1985) (Boochever, J., concurring in part and dissenting in part).[8]

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7. Case law considering the standard required under the Bail Reform Act alone has held that the preponderance of the evidence standard is sufficient. *See e.g., United States v. McConnell*, 842 F.2d 105 (5th Cir. 1988). However, these cases did not consider the burden of proof require by the Due Process Clause of the Fourteenth Amendment. *See e.g., McConnell*, 842 F.2d 105; *United States v. Motamedi*, 767 F.2d 1403 (9th Cir. 1985).

8. In *United States v. Motamedi*, the Ninth Circuit was confronted only with the question of the proper standard required by the Bail Reform Act. The Court finds Judge Boochever's reasoning persuasive when conducting an analysis of the standard required by the Constitution.

> [T]he consequences to the defendant from an erroneous pretrial detention are certain and grave. The potential harm to society, although also significant, is speculative, because pretrial detention is based on the possibility, rather than the certainty, that a particular defendant will fail to appear. Moreover, society's interest in increasing the probability of detention is undercut by the fact that it has no interest in erroneously detaining a defendant who can give reasonable assurances that he will appear. I conclude therefore that the injury to the individual from an erroneous decision is greater than the potential harm to society, and that under *Addington* due process requires that society bear a greater portion of the risk of error: the government must prove the facts supporting a finding of flight risk by clear and convincing evidence.

Id. at 1415.

Second, Plaintiffs suggest that arrestees must be represented by counsel. R. Doc. 116-1 at 24. The importance of the right to counsel is evident from its inclusion in the Bill of Rights. The Sixth Amendment requires that the government provide counsel for those who cannot afford it at "critical stages" of criminal proceedings. *Bell v. Cone*, 535 U.S. 685, 695-96, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). The Supreme Court has held that "critical stages" are those that "h[o]ld significant consequences for the accused." *Id.* at 696; *Coleman v. Alabama*, 399

U.S. 1, 10, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970) (holding that a preliminary bail hearing is a "critical stage . . . at which the accused is . . . entitled to [counsel]"). There is no question that the issue of pretrial detention is an issue of significant consequence for the accused.

Under a *Mathews* analysis, the Court finds that without representative counsel the risk of erroneous pretrial detention is high. Preliminary hearings can be complex and difficult to navigate for lay individuals and many, following arrest, lack access to other resources that would allow them to present their best case. Considering the already established vital importance of pretrial liberty, assistance of counsel is of the utmost value at a bail hearing.

Judge Cantrell does not argue this point. In fact, the record shows that public defenders are regularly provided for those individuals found to be indigent at their initial appearance before Judge Cantrell. The Court commends this practice and encourages its continuance. Beyond this encouragement, the Court finds that the right to counsel at a bail hearing to determine pretrial detention is also required by due process. The interests of the government are mixed regarding provision of counsel at this stage. It is certainly a financial burden on the state to provide attorneys for the indigent. However, this burden is outweighed not only by the individual's great interest in the accuracy of the outcome of the hearing, but also by the government's interest in that accuracy and the financial burden that may be lifted by releasing those arrestees who do not require pretrial detention. Accordingly, the

Mathews test demonstrates that due process requires representative counsel at pretrial detention hearings.

As discussed above, the record indicates that Judge Cantrell's bail procedures have not provided notice of the importance of the issue of the criminal defendant's ability to pay, inquiry into the ability to pay, findings on the record regarding ability to pay and consideration of alternative conditions of release, or application of a legal standard in the determination of the necessity of pretrial detention. Accordingly, these procedures violate Plaintiffs' procedural due process rights; Plaintiffs' are entitled to summary judgment on Count One and it is appropriate to grant Plaintiffs' motion for declaratory judgment.

The Court commends Judge Cantrell's expressed willingness to mend the bail procedures in his court to comply with due process requirements. R. Doc. 120-1. As a summary of the above discussed *Mathews* analysis, the Court finds that in the context of hearings to determine pretrial detention Due Process requires:

> 1) an inquiry into the arrestee's ability to pay, including notice of the importance of this issue and the ability to be heard on this issue;
>
> 2) consideration of alternative conditions of release, including findings on the record applying the clear and convincing standard and explaining why an arrestee does not qualify for alternative conditions of release; and
>
> 3) representative counsel.

D. Count Two: Conflict of Interest

In Count Two, Plaintiffs argue that Judge Cantrell has an unconstitutional conflict of interest that violates due process when he sets bail. Plaintiffs challenge Judge Cantrell's multipurpose role in determining their ability to pay bail, the amount of bail upon which pretrial release is conditioned, and managing the Judicial Expense Fund, a portion of which comes from fees levied on commercial surety bonds. Plaintiffs argue that Judge Cantrell's management role over this fund creates an unconstitutional conflict of interest that deprives them of their right to a neutral fact finder in pretrial detention hearings.

i. The Judicial Expense Fund

Louisiana Revised Statute 13:1381.4 sets up the Judicial Expense Fund ("the Fund") for the Orleans Parish Criminal District Court ("OPCDC"). The Fund receives revenue from fines, fees, costs, and forfeitures imposed by the OPCDC. *See* La. Rev. Stat. § 13:1381.4. Approximately $1 million per year in revenue comes from fees levied on commercial surety bonds, representing roughly 20-25% of the total Fund in a given year. R. Doc. 121-7 at 9. The fund is controlled by the Judges of the OPCDC and "may be used for any purpose connected with, incidental to, or related to the proper administration or function of the court or the office of the judges . . . ." La. Rev. Stat. § 13:1381.4(C). However, the Fund may not be used to pay any judge's salary. *Id.* § 13.1381.4(D). Generally, the Fund is used to finance court operations

including, but not limited to, staff salaries and benefits, conferences and legal education, ceremonies, office supplies, law books, jury expenses, and other services. R. Doc. 121-7 at 8.

ii. Legal Standards

As discussed by the Court in *Cain v. City of New Orleans*, the unbiased judge or neutral fact finder has long been considered "essential to due process." *Pub. Citizen, Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2001) (quoting *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S. Ct. 1778, 29 L. Ed. 2d 423 (1971)). While disqualification of a judge is not common, the Supreme Court has held that when a judge has financial interests in the matter before him due process is violated. In *Tumey v. Ohio*, the Supreme Court "held that the mayor, acting as judge, was disqualified from deciding Tumey's case 'both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village.'" *Cain*, 281 F. Supp. 3d at 655 (quoting *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927)). There, the mayor acted as judge in courts that levied fines, some of which went to village funds. *Tumey*, 273 U.S. at 521-22. These funds covered some court expenses as well as some fees paid to the mayor himself. *Id.* at 522.

Later, in *Ward v. Village of Monroeville*, the Court held that a mayor's court violated due process when it financed a "major part" of the city funds that were also

managed by the mayor. 409 U.S. 57, 58, 60, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972). There, the Court reasoned that the principle articulated in *Tumey* did not rely on the mayor's personal interest in the funds. *Id.* at 60. Rather, the Court articulated the following test: "whether the . . . situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused.'" *Id.* at 60 (quoting *Tumey*, 273 U.S. at 532).

More recently, the Court has clarified that finding a conflict of interest in violation of due process "do[es] not require proof of actual bias." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 883, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009). Rather, when determining whether the Due Process Clause requires judicial recusal due to a conflict of interest, the correct question is "whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at 883-84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)).

The Fifth Circuit applied these principles in *Brown v. Vance*, 637 F.2d 272, 274, 282 (5th Cir. 1981), holding that a fee system that compensated justices of the peace based on volume of cases filed was unconstitutional. There, the Court reasoned that the Supreme Court's concern in *Tumey* and *Ward*

> was not . . . the probity of an individual judge or perhaps even, of the great majority of judges . . . rather [it was] in the inherent defect in the legislative framework arising from the vulnerability of the average man-as the system works in practice and as it appears to defendants and to the public.

Id. at 284. Accordingly, the Court found that the undeniable opportunity and "possible temptation to the average man as a judge to forget the burden of proof required" created by the system was sufficient to "deprive[] criminal defendants of their due process right to a trial before an impartial tribunal." *Id.* at 282 (quoting *Tumey*, 273 U.S. at 532).

Most recently, this Court applied this line of cases holding that collection of costs and fees by judges in Orleans Criminal District Court who also administer those monies as part of the Judicial Expense Fund had an "institutional incentive[that] create[d] an impermissible conflict of interest when they determine, or are supposed to determine, plaintiffs' ability to pay fines and fees." *Cain*, 281 F. Supp. 3d at 659. The *Cain* case dealt with the same Judicial Expense Fund at issue in this case and a different source of revenue also determined by judges. There, the relevant facts included the above discussed management of the Judicial Expense Fund by the judges and those same judges determination of ability to pay the fines and fees going to the Fund. *Id.* at 654.

The Court in *Cain* reasoned that "[b]y no fault of their own, the Judges' 'executive responsibilities for [court] finances may make [them] partisan to maintain the high level of contribution,' . . . from criminal defendants." *Id.* at 657 (quoting *Ward*, 409 U.S. at 60). For that reason, the Court found that the judge's "substantial" conflict of interest in adjudicating plaintiffs' ability to pay fines and fees "offend[ed] due process" "[s]o long as the Judges control and heavily rely on fines and fees revenue." *Id.* at 657-58.

iii. Analysis

Here, it is clear from the record that Judge Cantrell participates in the management of the Fund, sets the amount of bail, and determines arrestee's ability to pay bail. R. Doc. 121-7 at 8. As discussed above, the Fund is partially financed by fees levied on commercial surety bonds. Judges, including Judge Cantrell then use these funds to finance court operations. Approximately $1,000,000 gained from bond fees is deposited into the Fund each year.[9] This is roughly 20-25% of the Fund's total revenue in a given year.[10] R. Doc. 121-7 at 9. "This funding structure puts the Judges in the difficult position of not having sufficient funds to staff their offices unless

9. The Fund gained $821,371 in bond fees in 2012, $1,062,224 in 2013, $1,026,282 in 2014, $1,008,108 in 2015, $848,089 in 2016, and $839,006 in 2017. R. Doc. 121-7 at 9.

10. The revenue from bond fees represented 20% of the total Fund revenue in 2012, 25.9% in 2013, 26.1% in 2014, 25.5% in 2015, 21% in 2016, and 19% in 2017. R. Doc. 121-7 at 9.

they impose and collect sufficient [monies] from a largely indigent population of criminal defendants." *Cain*, 281 F. Supp. 3d at 655.

Judge Cantrell's participation in the management of bond fee revenue creates a conflict of interest because he is also responsible for determining whether a pretrial detainee is able to pay bail and the appropriate amount of bail. As stated above, due process requires that Judge Cantrell make an inquiry regarding an arrestee's ability to pay and consider alternative conditions of release. However, Judge Cantrell also has a financial interest in these determinations as well as the determination of the amount of bail because revenue collected as a percentage of the bail set by him is promptly sent to the Fund. *See id.* Accordingly, Judge Cantrell "ha[s] an institutional incentive to find that criminal defendants are able to pay bail" and to set higher bail amounts. *Id.*

> [Defendant Cantrell's] dual role, as [an] adjudicator who determine[s] ability to pay [and amount of bail] and as manager[] of the OPCDC budget, offer[s] a possible temptation to find that indigent criminal defendants are able to pay [bail and higher amounts of bail]. This "inherent defect in the legislative framework" arises not from the bias of any particular Judge, but "from the vulnerability of the average man—as the system works in practice and as it appears to defendants and to the public."

Id. (quoting *Brown*, 637 F.2d at 284).

The *Tumey* Court further reasoned that to offend due process the judicial conflict of interest must be substantial. 273 U.S. at 534 ("The minor penalties usually attaching to the ordinances of a village council, or to the misdemeanors in which the mayor may pronounce final judgment without a jury, do not involve any such addition to the revenue of the village as to justify the fear that the mayor would be influenced in his judicial judgment by that fact."); *Cain*, 281 F. Supp. 3d at 657. "[T]he proper question is 'whether the official motive here is "strong," so that it "reasonably warrants fear of partisan influence on the judgment."'" *Id.* (quoting *Alpha Epsilon Phi Tau Chapter Hous. Ass'n v. City of Berkeley*, 114 F.3d 840, 847 (9th Cir. 1997)).

Here, it is clear that Judge Cantrell's, as well as that of the OPCDC, institutional interest in the fees derived from commercial surety bonds is substantial. As discussed above, the percentage of the Fund derived from these fees is roughly 25% and these funds make up a considerable portion of the salaries and benefits for judicial employees. In *Cain*, the Court found that a similar percentage of the Fund was enough to make the judges' conflict of interest substantial. *Id.* at 657-58 ("Fines and fees revenue is obviously important to the Judges; fines and fees provide approximately 10% of the total OPCDC budget and one quarter of the Judicial Expense Fund.").

As explained by the Court in *Cain*, this conflict of interest is not created by Judge Cantrell, nor is it his fault. The conflict of interest is "the unfortunate result of the financing structure" and lack of sufficient funding from the state and local governments for the criminal justice

system. *Id.* at 658. However, the source of the conflict does not change the fact that as long as Judge Cantrell participates in the control of bond fee revenue and the OPCDC relies on it as a substantial source of funding, Judge Cantrell's determination of Plaintiffs' ability to pay bail and the amount of that bail is in violation of due process. *See id.*

Defendant makes several arguments that his dual role in setting bail and administering the Fund do not offend due process requirements. The Court will consider each in turn.

First, Judge Cantrell argues that the Fund system does not create a conflict of interest because if the OPCDC needs additional funds it can request them from the state legislature or local parish government. R. Doc. 120 at 9. The Court approaches this claim with some incredulity. Given the substantial percentage of the Fund coming from bond fees, the Court finds it implausible that these revenues would be easily replaced by solicitation of state and local officials. Furthermore, OPCDC officials themselves have noted the significance of this amount of revenue and its sources to the Fund. *See Cain*, 281 F. Supp. 3d at 658.[11]

11. The Court also notes that the Affidavit testimony submitted to support this argument is the same testimony provided to Judge Vance in the *Cain* case. R. Doc. 120-2. Judge Vance did not find the argument negated her finding that the "OPCDC depends heavily on fines and fees revenue" which also makes up approximately 25% of the Fund. *Cain*, 281 F. Supp. 3d at 658.

Second, Judge Cantrell argues that the revenues in the Fund are publically audited and used appropriately. The Court finds this fact irrelevant to the issues before it as Plaintiffs are not arguing that the use of the revenues violates their constitutional rights, but rather that the determination of those revenues and control over them by the same individual is the problem.

Third, Judge Cantrell argues that he is not subjected to a quota, receives no rewards based on amount of revenue collected, and has no personal interest in the Fund. The Court finds that it is not necessary for Judge Cantrell to have a quota, punishment, or reward associated with the Fund in order to have a conflict of interest. The significance of these funds for the payment of personnel salaries and other administrative needs, approximately $250,000 per chambers, is sufficient incentive to act as a "possible temptation" to the "average man." Additionally, "[t]hat [Judge Cantrell] ha[s] an institutional, rather than direct and individual, interest in maximizing [bond fee] revenue is immaterial." *Cain*, 281 F. Supp. 3d at 656. "*Ward* itself involved a mayor who had no direct, personal interest in traffic fine revenue; his interest related solely to his 'executive responsibilities for village finances.' 409 U.S. at 60. Likewise, [Judge Cantrell's] interest in [bond fee] revenue is related to [his] executive responsibilities for OPCDC finances." *Id.* at 656-57.

Fourth, Judge Cantrell argues that all courts are partially funded by fees from criminal defendants and if this funding offends due process then no courts will be functional. Defendant misses the point here because the

problem is not specifically with the fact that the court is partially funded by fees from criminal defendants and those that utilize the court system. Rather the problem lies with the inherent temptation and conflict of interest when the same official is determining ability to pay bail, and the amount of that bail, and also managing the funds collected from fees on that bail.

Fifth, Judge Cantrell argues that Plaintiffs cannot overcome the "presumption of honesty and integrity of judges." R. Doc. 120 at 13 (citing *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1052-53 (5th Cir. 1997)). However, in *Brown v. Vance*, when reviewing the district court's use of this standard, the Fifth Circuit found that the district court had erred. 637 F.2d at 283.

> There is no language in *Tumey* or *Ward* qualifying the "possible temptation" standard by the necessity of overcoming the presumption of probity in favor of adjudicators. That added burden comes from *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712, upon which the district court and the defendant strongly relied. But the question in *Withrow* was whether a board of physicians could exercise both investigative and adjudicative functions.

Id. Likewise, the case cited by Judge Cantrell involved the potential bias of a school board rather than a judge. *Valley*, 118 F.3d at 1049. Accordingly, the proper standard has been stated above, that the interest under *Tumey* and *Ward* is not the actual bias or integrity of an individual

judge, but rather "the vulnerability of the average man-as the system works in practice and as it appears to defendants and to the public [and] the possibility that judges will fail to hold 'the balance nice, clear and true.'" *Brown*, 637 F.2d at 284. Furthermore, it is not only important that justice be done; it is equally important that justice appear to be done. The appearance of justice is vital to perpetuation of the rule of law, a concept upon which our society is based.

Finally, Judge Cantrell raises *Broussard v. Parish of Orleans* arguing that the bail bond statutes do not create an unconstitutional bias. The Court has previously addressed the relevance of *Broussard* in the proper party defendant context. R. Doc. 81 at 6. The Court again finds that *Broussard* is not relevant to the issue of judicial conflict of interest in this case. In *Broussard* the plaintiffs challenged the constitutionality of Louisiana bail statutes rather than alleging bias of individual judicial officers. 318 F.3d 644, 647 (5th Cir. 2003). There, the Fifth Circuit affirmed the district court finding that *Tumey* and *Ward* did not apply because the defendants, sheriffs, were not exercising a judicial function. *Id.* at 662. In contrast, Judge Cantrell does exercise a judicial function when he, sitting as Magistrate Judge, determines Plaintiffs' ability to pay bail and the amount of that bail. Therefore, it is appropriate to apply the *Tumey* and *Ward* tests here when determining whether there is an unconstitutional conflict of interest.

The Court finds none of these arguments persuasive, and finds that Plaintiffs have succeeded in demonstrating

that Judge Cantrell's participation in the management of the Fund in conjunction with his determination of Plaintiffs' ability to pay bail and the amount of that bail is a substantial conflict of interest that produces a "possible temptation . . . not to hold the balance nice, clear, and true between the state and the accused." *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532). Accordingly, Plaintiffs are entitled to summary judgment on Count Two and are entitled to a declaratory judgment that Judge Cantrell's institutional incentives create a substantial and unconstitutional conflict of interest when he determines their ability to pay bail and sets the amount of that bail.

IV. CONCLUSION

As articulated above,

IT IS ORDERED that Plaintiffs' motion for summary judgment, R. Doc. 116, is hereby **GRANTED** and the Court provides declaratory relief as laid out above.

IT IS FURTHER ORDERED that Defendant's motion for summary judgment, R. Doc. 121, is hereby **DENIED**.

New Orleans, Louisiana, this 6th day of August, 2018.

/s/ Eldon E. Fallon
UNITED STATES DISTRICT JUDGE

APPENDIX I — DENIAL OF REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED OCTOBER 1, 2019

IN THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-30954

ADRIAN CALISTE, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED; BRIAN GISCLAIR,
INDIVIDUALLY AND ON BEHALF OF ALL
OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees

v.

HARRY E. CANTRELL, MAGISTRATE JUDGE OF
ORLEANS PARISH CRIMINAL DISTRICT COURT,

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion_____, 5 Cir.,_____, _____, F.3d_____)

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

Appendix I

PER CURIAM:

(✓) Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE