UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BRITTANY KNIGHT;

Petitioner,

v. Case No.: 4:17cv464

STATE OF FLORIDA; et al.;

Respondents.

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KNIGHT'S RESPONSE TO RESPONDENTS' MOTIONS TO DISMISS

Petitioner Brittany Knight ("Knight") responds to the motions to dismiss (ECF 23 & 24) of Respondents State of Florida ("Florida") and Sheriff for Leon County, Florida ("Sheriff") (collectively "government") as follows:

A. Knight named proper respondents.

1. Sheriff

Habeas actions must be maintained against the legal custodian. *Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004). The Sheriff is the legal custodian of the putative class members and thus is a proper respondent. *Id.*; Compl. (ECF 1) ¶ 8. Despite the Sheriff's contrary assertions, ECF 24 at 3, in habeas lawsuits, it is irrelevant whether the custodian caused the detention in violation of the Constitution. *Padilla*, 542 U.S. at 434 (ruling although Padilla alleges he was apprehended unconstitutionally by federal agents executing a material witness

warrant, he must pursue habeas relief against his current detainer, Commander Marr). Indeed, post-conviction federal habeas relief is nearly always sought against the secretary of corrections, even though the secretary played no part in the conviction. The Sheriff is a proper party.

2. Florida

Florida requests sovereign immunity protection. Florida's Mot. to Dismiss (ECF 23) at 5. However, Knight named Florida as a party not because it is the custodian, but because of its purported interest in the outcome of the lawsuit. *See* Fed.R.Civ.P. 19. Consequently, whether Congress has abrogated Florida's sovereign immunity for habeas relief or habeas relief may be obtained in federal court pursuant to the *Ex parte Young* exception is irrelevant. *See Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 378 n.14 (2006) (observing that "precedent today" supports the conclusion that a writ of habeas is "no infringement on state sovereignty"); *Brennan v. Stewart*, 834 F.2d 1248, 1252, n.6 (5th Cir. 1988) (habeas claims "pass muster under the Eleventh Amendment because the habeas theory of a civil suit against the bad jailer fits perfectly with the *Ex parte Young* fiction."). Given the Florida's assertion of an interest in continued detention in the

state habeas cases that Knight filed,[1] Florida's involvement in this federal lawsuit turns on whether Florida continues to claim an interest in the lawsuit's outcome.

In Florida, criminal cases are prosecuted on behalf of the state, not a particular county or a state official. As the real party in interest, only Florida has a purported interest at stake in bail determinations—public safety and the defendant's appearance at subsequent proceedings. *See United States v. Salerno*, 481 U.S. 739, 749 (1987). In fact, Florida asserted its "compelling" interest in pretrial detention. Florida's Mot. to Dismiss (ECF 23) at 22. And the interest is Florida's alone. The Sheriff, as the legal custodian, has no interest, as he merely detains and releases whomever a judge commands. Fed.R.Civ.P. 19 permits joinder of a party who "claims an interest" that may be impaired by the disposition of a lawsuit. For this reason, Knight sued the State of Florida as well.

Only if Florida expressly disclaims any interest in the disposition of a lawsuit—leaving no party to assert an interest in pretrial detention—may it be relieved of the burden of defending the unconstitutional detentions. However, if Florida continues to claim an interest and choses to remain a party, then it implicitly waives sovereign immunity. *See Clark v. Barnard*, 108 U.S. 436, 447

[1] Knight petitioned the state courts three times to challenge her pretrial detention through an unaffordable bail. *See* ECF 1-1, ECF 1-3, *Knight v. State*, No. 1D17-1630 (Fla. 1st DCA). Each time, Florida opposed relief and asserted its interest in Knight's continued detention.

(1883) (ruling that voluntarily appearing in federal court to assert an interest waives sovereign immunity).

B. The class has standing.

Knight is no longer in pretrial detention and she recognizes the relief she seeks no longer applies to her individually. *See* Notice of Voluntary Dismissal of Count 3 & 4 (ECF 16). However, she is the class representative and the U.S. Supreme Court has made clear that in some cases "the termination of a class representative's claim does not moot the claims of the unnamed members of the class." *County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991). So long as Knight had standing when she filed the lawsuit, the class claims are inherently transitory, and Knight continues to have a personal stake in the outcome, the Court may resolve the class claims. *Id*.

1. Knight had standing when she filed the lawsuit.

On October 13, 2017, Knight filed this lawsuit. This was 5 days before the state court approved her criminal plea bargain. ECF 16. Equally important, this was 11 days after she exhausted her state remedies by the state appellate court denying her May 2017 habeas petition. *Knight v. State*, 226 So. 3d 1082 (Fla. 1st DCA 2017).

The Respondents argue Knight did not have standing when she filed the lawsuit. Florida's Mot. to Dismiss (ECF 23) at 9. They reason that "as a practical matter [she] lost any personal stake" to pretrial release when she reached a plea agreement.[2] *Id*. They overstate the effect of a plea agreement.

A plea agreement, like scheduling a trial, certainly presumes that a case will soon be resolved. However, the criminal defendant moves from "pretrial" to "convicted" only with the state court's judgment. After all, the court enters the criminal judgment, not the prosecutor or the parties, and any plea agreement remains subject to the court's approval. *See Bradley v. State*, 727 So. 2d 1001, 1002 (Fla. 4th DCA 1999). There is no legal support for the proposition that the anticipated, more immediate resolution of a case eliminates any interest a defendant otherwise has in challenging pretrial detention, and defendants have not identified any. A court's entered order of conviction, not the proposed resolution, determines whether a defendant remains in "[p]retrial detention" or has been "released or convicted." *See Gerstein v. Pugh*, 420 U.S. 103, 111 n.11 (1975). Knight was not convicted until 5 days after she filed this lawsuit.

[2] The Respondents appear to recede from this reasoning when they argue that Knight's "change in detention status render[ed] her claims moot" after she was "incarcerated pursuant to her judgment and sentence." Florida's Mot. to Dismiss (ECF 23) at 11.

Because the Court could have ordered Knight released pretrial on the day she filed this lawsuit, she had and continues to have standing to assert the claims.

2. Class claims are inherently transitory.

The class claims are capable of repetition, yet evading review "because the passage of time inevitably moot[s] claims of [this] kind." *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 706 (11th Cir. 2014). Knight asserts that pretrial inmates are detained in violation of the U.S. Constitution. Compl. (ECF 1). They are detained through the imposition of an unaffordable bail with neither the "degree of confidence" required to deprive a person of liberty nor consideration of less-restrictive alternative measures to achieve the state's interests. *Id*., at 8-9, ¶¶ 31-32. Knight claims this is a common practice that will continue into the future without the Court's intervention. *Id*.

"Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted." *Gerstein*, 420 U.S. at 111 n.11. Most criminal charges are resolved within six months. Thomas Decl. (ECF 5-1) at 4, ¶ 6. Before reaching federal court, a pretrial inmate would have to first exhaust state remedies. This takes about five months. *Id*., ¶ 5(g). Even if a petitioner reached federal court before her criminal case was resolved, it is unlikely that the federal petition and appeal would be resolved before the state criminal case. It was only because

Knight spent an extraordinary time in pretrial detention—nearly 16 months—that she was able to reach federal court. The state appellate court took 151 days to deny her September 2016 habeas, and another 151 days to deny her May 2017 habeas. *See* Compl. (ECF 1) at 6-7, ¶ 26. Indeed, for Knight's May 2017 habeas, she had to petition the Florida Supreme Court for an order compelling the First District to issue a ruling before the First District actually did so. *See* ECF 23-2.

Therefore, unless Knight is allowed to present the class claims, the constitutional violations she alleges remain capable of repetition, yet evading review. Because of the slow and protracted process of challenging bail determinations in state court, Knight's case presents the best opportunity for a federal court to address the seriousness of the claims she presents on behalf of class members.

3. Knight is a sufficient representative.

"[T]he Supreme Court has made clear, more than once, that the necessary personal stake in a live class-action controversy sometimes is present even when the named plaintiff's own individual claim has become moot." *Stein*, 772 F.3d at 705. Knight, as argued in her Motion to Certify a Class (ECF 5), 10-13, will adequately present the class claims.

C. *Younger* abstention does not apply.

Abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), is inappropriate for three reasons. The Court should reject Respondents' arguments urging abstention. Florida's Mot. to Dismiss (ECF 23) at 11-18. First, the federalism concerns animating *Younger* are satisfied by habeas exhaustion. Second, the requested relief will not interfere with Florida's criminal prosecutions. Third, the putative class members have no adequate remedy in the criminal case to prevent irreparable injury. Accordingly, the Court should fulfill its "virtually unflagging obligation to hear and decide" claims of constitutional violations. *See Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (quotations omitted).

1. Exhaustion satisfied *Younger's* federalism concerns.

Younger "[a]bstention is based upon the theory that '[t]he accused should first set up and rely upon his defense in the state courts … .'" *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982) ("*Middlesex*") (quoting *Younger*, 401 U.S. at 45). The same federalism concerns animating *Younger* underpin the habeas exhaustion doctrine. *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973). However, the federalism concerns weigh differently in habeas and § 1983 civil rights lawsuits. In habeas cases, federalism is "careful[ly] balance[d]" with "the need to preserve the writ of habeas corpus as a swift and

imperative remedy in all cases of illegal restraint or confinement." *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490 (1973) (framing the abstention discussion entirely in terms of habeas exhaustion while citing to and giving the same justifications animating *Younger*) (quotation omitted). Section 1983 lawsuits do not "challenge[] the very fact or duration of his physical imprisonment," *Preiser*, 411 U.S. at 500, and thus need not balance an "imperative remedy," *Braden,* 410 U.S. at 490. Accordingly, most decisions to abstain pursuant to *Younger* foreclose § 1983 lawsuits, not properly exhausted habeas claims. Indeed, in our circuit, *Younger* has applied to habeas relief that lies at the heart of Younger—relief that indirectly seeks to enjoin a prosecution*Younger's* heart. *See Hughes v. Attorney Gen. of Florida*, 377 F.3d 1258 (11th Cir. 2004) (petitioner on bail asserted "that the Florida statutes at issue are preempted by federal law"); *Kolski v. Watkins*, 544 F.2d 762, 766 (5th Cir. 1977)[3] (abstaining per *Younger* in pretrial habeas action to invalidate criminal statute).

Here, after three habeas petitions in one year, Knight exhausted state remedies. Compl. (ECF 1) at 6-7, ¶ 26. Knight's exhaustion applies to other class members. *St. Jules v. Savage*, 512 F.2d 881, 882 (5th Cir. 1975) (holding where a

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

state court "rejected, without opinion" the "single constitutional challenge" of an individual, the class claims were also exhausted because "individual consideration of each petition would serve no useful purpose"). The federalism concerns animating *Younger* have been satisfied.

2. *Younger* standards

If the Court concludes that the exhaustion does not satisfy the federalism concerns animating *Younger*, it should proceed to its analysis.

Only the satisfaction of three elements warrant *Younger* abstention: (1) the state proceedings "constitute an ongoing state judicial proceeding"; (2) the state proceedings "implicate important state interests"; (3) the parties had an "adequate opportunity in the state proceedings to raise constitutional challenges." *31 Foster Children v. Bush*, 329 F.3d 1255, 1274 (11th Cir. 2003) (quoting *Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432 (1982)). Here, the first and third elements foreclose *Younger* abstention

3. Knight's requested relief will not interfere with ongoing criminal prosecutions.

Middlesex's first element includes "whether the federal proceeding will *interfere* with an ongoing state court proceeding." *31 Foster Children*, 329 F.3d at 1276 (emphasis added). The "relief requested and the effect it would have on the state proceedings" determine interference. *Id.* "If there is no interference, then

abstention is not required." *Id.* Here, Knight's requested relief will not interfere with the ongoing criminal prosecutions to warrant abstention.

The binding panel decision in *Pugh v. Rainwater*, 483 F.2d 778 (5th Cir. 1973), disposes of Respondents' abstention arguments. In *Rainwater*, a class of pretrial inmates brought a § 1983 lawsuit against the state attorney, state judge, and police. *See Gerstein v. Pugh*, 420 U.S. 103, 420 U.S. at 107-08, 107 n.5 (1975) (describing the *Rainwater* claim on appeal). The inmates "sought declaratory and injunctive relief entitling them to preliminary hearings." *Rainwater,* 483 F.2d at 781. In deciding that *Younger* abstention did not apply, the court reasoned that the suit "sought no relief which would impede pending or future prosecutions on various charges in the state courts" because the class action was not "against any pending or future court proceedings *as such*." *Id.*, at 781-82. The challenge to pretrial detention did not affect the merits of any subsequent criminal prosecution. Accordingly, district courts may resolve questions that "affect state procedures for handling criminal cases" unrelated to the merits of the prosecution itself. *Id*., at 781-82.

The Supreme Court endorsed the *Rainwater* holding in *Gerstein*, 420 U.S. 103. It unequivocally concluded that the "District Court correctly held" that the "injunction was not directed at the state prosecutions" and "could not prejudice the

conduct of the trial on the merits." *Id*., at 108 n.9. Accordingly, *Younger* did not apply. *Id*.

The *O'Shea v. Littleton,* 414 U.S. 488 (1974), branch of the *Younger* abstention does not apply here. In *O'Shea*, the plaintiffs sued a "county magistrate and judge" pursuant to § 1983 to enjoin their racially discriminatory bail, sentencing, and jury trial practices. *Id*., at 490-92. The contemplated relief involved periodic reports, continuous supervision, and possible contempt proceedings against judges. *Id*., at 501-02. Although the high Court determined the plaintiffs lacked standing, it continued its consideration. *Id*., at 499. It ruled *Younger* applied because the federal judges should not conduct "continuous or piecemeal interruptions of the state proceedings", "adjudicate assertions of noncompliance", or tell judges how to conduct criminal trials. *Id*., at 500. It was particularly concerned about "proving noncompliance" in individual cases, sanctioning disobeying judges, and the need for relief. *Id*., at 502-503. The Court correctly reasoned that federal court intervention in that context against state officials would be "unworkable" because it would require an "ongoing federal audit" of the entire criminal justice system, including by requiring state court judges to defend "their motivations" in adjudicating individual cases. *O'Shea*, 414 U.S. at 493 n.1, 500, 510.

Thus, the high Court draws a distinction. District courts may abstain pursuant to *O'Shea* from hearing requests for an injunction that dictate criminal trial outcomes, contemplate *individualized* interruptions and ongoing corrections of pretrial practices, or require reporting. However, pursuant to *Gerstein*, federal courts may impose uniform, pretrial procedural mandates applicable to all cases. This is substantially the same distinction *Braden* recognized. Federalism bars federal courts from adjudicating the "merits of an affirmative defense to a state criminal charge" before judgment, but not to demand the enforcement of an "affirmative constitutional obligation" that is both exhausted and incurable after judgment. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 489–90 (1973); *Dickerson v. State of La.*, 816 F.2d 220, 226 (5th Cir. 1987) ("[D]emands to enforce a "constitutional obligation" (speedy trial) are acceptable.").

The relief Knight seeks falls under *Gerstein*. Knight requests the release of those pretrial inmates who have not been afforded due process and, thus, are detained in violation of the U.S. Constitution. Compl. (ECF 1) at 18-20. Two features of the requested relief make *Younger* inapplicable. First and principally, Knight does not seek to enjoin a state judge or prosecutor. *See News–Journal Corp. v. Foxman,* 939 F.2d 1499, 1511 (11th Cir.1991) (ruling *Younger* applied to newspaper's effort to enjoin a state court's gag order needed to impanel an

impartial jury). Much like federal postconviction review that declares a state criminal law unconstitutional, a state court is not bound by a federal declaration (although its convictions would similarly be overturned). The Court need not answer whether it is "willing to jail the state judge for contempt?" *Pompey v. Broward County*, 95 F.3d 1543, 1550 (11th Cir. 1996). State court judges are not parties and cannot face contempt here. Only the Sheriff as custodian can physically release a class member held in violation of the constitution.

Furthermore, the relief will not have the effect of restraining the prosecution from bringing a case to trial. *See Luckey v. Miller*, 976 F.2d 673, 677 (11th Cir. 1992) (ruling *Younger* applied where relief would have had the effect of restraining every indigent prosecution until the systemic improvements they wanted were in place). Florida may and will continue to prosecute persons released pretrial. That pretrial release may enable the criminal defendant to better prepare for trial[4] and not be forced to accept a plea of time served[5] does not impede the prosecution. It ensures fair trials. If Florida has a concern, it "could simply hold another (constitutionally adequate) detention hearing." *Reem v. Hennessy*, No. 17cv6628

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[4] Pretrial release "permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." *Pugh v. Rainwater*, 572 F.2d 1053, 1056-57 (5th Cir. 1978) ("*Rainwater II*").

[5] *See ODonnell v. Harris County, Texas*, 251 F. Supp. 3d 1052, 1107 (S.D. Tex. 2017) (accepting evidence that misdemeanor defendants who profess innocence commonly plead guilty "in order to be released much earlier that if they … challenged the prosecution's case.").

(N.D. Cal. Nov. 29, 2017), Order Denying Mot. to Dismiss (ECF 8)[6] at 4. Knight's relief is not directed at the criminal "proceedings *as such*." *Rainwater*, 483 F.2d at 781-82.

Second, the relief will not interpose the federal court's individualized judgment for the state court's view. Knight seeks no reassessment of the state court's factual findings. *See 31 Foster Children v. Bush*, 329 F.3d 1255, 1278 (11th Cir. 2003) (ruling *Younger* applied because a federal court may order a different plan for a *particular* foster child); *Pompey*, 95 F.3d at 1548-49 (ruling *Younger* applied to avoid "ensnar[ing] the federal district court in relitigation of the state contempt proceeding issues"). Instead, state courts are left to decide whether an accused can afford the monetary bail, whether less-restrictive alternatives to pretrial detention exist, and whether the government established its need by clear and convincing proof. Knight requests relief that may be uniformly applied to all class members, thus eliminating individualized findings of fact. Only where the government departs from the constitutional mandates and a class member continues to be held in violation of the U.S. Constitution would this Court be asked to order the release based on the state court's findings or failure to make any findings. Knight requests no relitigation of the facts.

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[6] Available from https://university.pretrial.org/viewdocument/order-in-reem-v-hennessy-us-dist

4. No adequate remedy in the criminal case exists

Pending state proceedings do not provide an adequate remedy (*Middlesex's* third element) for two reasons. First, unconstitutional pretrial detention "[can]not be raised in defense of the criminal prosecution." *Gerstein,* 420 U.S. at 108 n.9. Relief for unconstitutional pretrial detention cannot be obtained through direct appeal after judgment because the unconstitutional pretrial detention cannot invalidate a conviction and thus is it irrelevant to the appealable issues. As our Circuit noted, "If these plaintiffs were barred by *Younger* from this forum, what relief might they obtain in their state court trials? Since their pre-trial incarceration would have ended as of the time of trial, no remedy would exist." *Pugh v. Rainwater*, 483 F.2d 778, 782 (5th Cir. 1973).

Instead, in Florida, claims of unconstitutional pretrial detention require instituting a *new* habeas proceeding in the state district courts. *Norton-Nugin v. State*, 179 So. 3d 557, 559 (Fla. 2d DCA 2015). This habeas proceeding is an independent, original jurisdiction case. Art. V, § 4(3), Fla. Const. Although § 2241 requires the exhaustion of available state remedies, *Younger* focuses on the remedies available in the "ongoing state judicial proceeding." *Middlesex*, 457 U.S. at 432. *Younger* considers whether the adequate remedy exists in the "*single* pending or future state proceeding". *Rainwater*, 483 F.2d at 782. *Younger* does not require litigants to institute *new* proceedings. *Rainwater*, 483 F.2d at 782

(ruling there is no requirement that litigants initiate a "second state court proceeding to adjudicate a federal claim");[7] *see also Fernandez v. Trias Monge*, 586 F.2d 848, 852-853 (1st Cir. 1978) (even if state habeas relief is available, it is not a bar to federal court relief under *Younger*). In evaluating whether relief may be obtained in the ongoing state judicial proceeding, our circuit differentiates between the criminal prosecution and ancillary litigation. In *The News-Journal Corp. v. Foxman*, the Eleventh Circuit ruled "the district court acted appropriately under *Younger* to abstain from exercising jurisdiction … because [a] case was pending for review of the same federal issues in state court." 939 F.2d 1499, 1510 (11th Cir. 1991). Notably, the Court focused on the fact that the "petition for review of the restrictive order was pending before the intermediate Florida appellate court," and not the related criminal case, which was also pending. *Id.* *Younger* looks to whether the person has an adequate remedy in the pending criminal case, not a separate, new habeas proceeding. The putative class members have no ability to claim unconstitutional pretrial detention in their ongoing criminal prosecution or appeal of a conviction.

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[7] Notably, when the *Gerstein* district court first granted relief in 1971, *Pugh v. Rainwater*, 332 F. Supp. 1107 (S.D. Fla. 1971), the state district courts had jurisdiction to issue a writ of mandamus or habeas to compel the very probable cause hearings ordered by the federal court. Art. V, § 5(3), Fla. Const. (1968), available at http://fall.fsulawrc.com/crc/conhist/1968con.html.

Second, even if independent habeas lawsuits are considered part of the ongoing state judicial proceeding, class members would not have sufficient time to obtain relief of these constitutional claims in state court. "Pretrial detention is by nature temporary." *Gerstein*, 420 U.S. at 111 n.11. *Younger* "presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). Habeas actions take about five months and most criminal charges are resolved within six months or less. Thomas Decl. (ECF 5-1) at 4, ¶¶ 5(g), 6. Although resolution of habeas claims are supposed to be prompt, relief from unconstitutional pretrial detention—if it comes at all—comes too late to be meaningful. *See* Knight's Mandamus Petition (ECF 23-2) (requesting a prompt determination of her habeas petition that remained unresolved after 4 months).

5. Other district courts have refused to abstain.

Other district courts have ruled that *Younger* abstention is inappropriate in cases challenging bail or other pretrial release conditions. *See Holland v. Rosen*, CV 17-4317 (JBS-KMW), 2017 WL 4180003, at *22 (D.N.J. Sept. 21, 2017) (collecting cases and ruling *Younger* did not apply because mandating a procedure for bail determinations "could not prejudice the conduct of the trial on the merits"); *Walker v. City of Calhoun, Georgia*, 4:15-CV-0170-HLM, 2017 WL 2794064, at *3 (N.D. Ga. June 16, 2017) (ruling *Younger* did not apply because plaintiffs lack

an "adequate opportunity to raise their constitutional challenges" in the state proceeding) (appeal pending No. 17-13139 (11th Cir.)); *ODonnell v. Harris Cty.*, 227 F. Supp. 3d 706, 734 (S.D. Tex. 2016) (ruling *Younger* did not apply because the plaintiffs' requested relief would "not affect the merits of subsequent criminal prosecutions").

6. Conclusion

This Court should reach the same result as other federal district courts and rule *Younger* does not warrant abstention. Federalism concerns are satisfied. The requested relief will not interfere with Florida's criminal prosecutions. No adequate remedy exists in the criminal case.

D. <u>Knight states two claims for relief.</u>

Knight will first examine the scrutiny that the Court should apply to the government's deprivation of liberty through an unaffordable bail. Then, she will address the Respondents' arguments that Knight failed to state a claim for relief for a deprivation of substantive due process (Count 1) or procedural due process (Count 2). Knight relies on her Memorandum of Law (ECF 3) that briefs the causes of action in detail. She incorporates it by reference. Here, she focuses her argument on the Respondents' arguments raised in the motions to dismiss.

1. Strictly scrutiny applies.

The Due Process Clause of the Fourteenth Amendment provides that "No State person shall ... deprive any person of life, liberty, or property, without due process of law." Its substantive component forbids the government from infringing on "certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citing *Salerno*, 481 U.S. at 746); *see also Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (applying strict scrutiny to detention of those unable to pay fines).

The U.S. Supreme Court's analysis in *United States v. Salerno*, 481 U.S. 739, 750 (1987), reveals it determined pretrial detention was fundamental, thus warranting strict scrutiny. Two features support this conclusion. The mere fact that the Court analyzed the government interest and how the Court discussed the interest demonstrate that pretrial liberty is fundamental.

First, the Court noted the "fundamental nature" of the liberty interest. *Salerno*, 481 U.S. at 750. This characterization was important because the U.S. Supreme Court had long since limited the application of the due process clause to fundamental rights. *See, e.g., Snyder v. Com. of Mass*., 291 U.S. 97, 105 (1934), *cited with approval by Salerno*, 481 U.S. at 751. Unless a right is "fundamental," its transgression does not offend the U.S Constitution. *See Flores*, 507 U.S. at 303.

Consequently, the mere analysis in *Salerno* of whether the pretrial detention violated substantive due process implies that a person has a fundamental right to pretrial liberty.

Second, *Salerno* characterized the public safety interest justifying pretrial detention as "compelling"—a touchstone of strict scrutiny. *Salerno*, 481 U.S. at 749-750. That public safety was a compelling interest was neither new nor disputed. *Id*. (citing *De Veau v. Braisted,* 363 U.S. 144, 155, (1960)). Nevertheless, *Salerno* went to lengths to explain just how compelling the government's interest in pretrial detention was. "The Bail Reform Act of 1984" invoked a "more particularized government interest" than typical prevention crime. *Id*., at 750. The interest at stake was "overwhelming" because the pretrial detention statute "narrowly focuses on a particularly acute problem" and "operates only on individuals who … are far more likely to be responsible for dangerous acts in the community after arrest." *Id*. The Court concluded that for the pretrial detention at issue, "society's interest in crime prevention is at its greatest." *Id*. Ultimately, *Salerno* went to these lengths to justify its conclusion that the government interest at stake was "compelling" because this finding mattered. And it could only matter because the Court believed it must judge the pretrial detention statute with strict scrutiny.

Respondents argue that an intermediate scrutiny should apply. Florida's Mot. to Dismiss (ECF 23) at 20. They argue the government's detention through an unaffordable bail should be upheld if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id*. (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). However, *Bearden v. Georgia* flatly forecloses intermediate scrutiny for detention of the poor. 461 U.S. 660, 672-73 (1983). The constitutionality of detaining a person who cannot afford to pay a fine turns on whether no "alternate measures" exist to achieve the government's interests, *id*., not whether detention simply effectively aids those interests. Had intermediate scrutiny applied, *Bearden* might have permitted the detention as one way to achieve the government's interest.

The Court should apply strict scrutiny to Knight's claims.[8]

2. Substantive due process

Knight claims the government deprives class members of liberty through the imposition of unaffordable bail without a need. Other less-restrictive alternatives to detention exist. Compl. (ECF 1) at ¶¶ 44-48. Respondents justify the monetary bail as "reasonably calculated to fulfill" the government's interests, *Stack v. Boyle*,

[8] The Respondents' arguments about facial challenges appear out of place in a lawsuit that challenges a practice, not a law. Florida's Mot. to Dismiss (ECF 23) at 20. Knight does not address them.

342 U.S. 1, 5 (1951). *See* Florida's Mot. to Dismiss at 23-28. They argue the current state laws and rules ensure that the monetary bail is properly calibrated to the government's interest. *Id*., at 28. However, they ignore the question of the availability of less-restrictive alternatives to detention. In this way, they mistake Knight's claim for an excessive bail claim. Yet, in Count 1, Knight makes no argument that the bail is disproportionate to the government's interests. She just claims the government may achieve its interest with a less-restrictive alternative to detention.

Florida has an interest in an accused appearing at future criminal proceedings and public safety. Florida uses bail—broadly defined to embrace all conditions of pretrial release[9]—to reasonably achieve these interests. Knight claims that when pretrial defendants are detained because they cannot satisfy the chosen form of bail—monetary bail—other forms of bail must be considered and discarded as inadequate. Whether a properly tailored monetary bail would also achieve the Florida pretrial interests is irrelevant. Before the government deprives a person of her liberty through an unaffordable bail, it must explore and discount alternatives to detention. Here, no consideration is given to alternatives. Compl. (ECF 1) at 8-9, ¶¶ 30-32. The practice fails strict scrutiny. *See Parents Involved in*

[9] *See* § 903.011(1), Fla. Stat. (defining bail to "include any and all forms of pretrial release").

Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735 (2007) ("Narrow tailoring requires serious, good faith consideration of workable … alternatives.") (quotation omitted).

Amici Roche raises three additional arguments that may each be disregarded. First, it argues against an indigency exception to bail. ECF 26-1 at 4. However, this misreads the requested relief. Knight does not demand automatic pretrial release because a person cannot afford monetary bail. Instead, Knight seeks release only as a last resort when the government fails to provide constitutional due process after the defendant alerts it that the unaffordable bail results in pretrial detention. Compl. (ECF 1) at 19-20, ¶ C.

Second, the commercial bail industry touts the efficacy of monetary bail by comparing monetary bail against unconditional release. Roche's Br. (ECF 26-1) at 5-6. However, this is a false dichotomy. *Bearden v. Georgia* demands the government consider and discard *less-restrictive* alternatives to detention, not *unrestricted* alternatives. 461 U.S. 660, 672-73 (1983); *see also United States v. Ailemen*, 165 F.R.D. 571, 580 (N.D. Cal. 1996) ("[T]he issue is not how much threat the defendant would pose if he were as free as any law-abiding citizen, but how much threat he would pose if he were released on the most restrictive available conditions" short of detention.). Thus, the question is not whether

monetary bail outperforms unconditional release, but whether the government's interests may be achieved through a less-restrictive alternative to detention through an unaffordable bail.

Third, Roche argues that *Pugh v. Rainwater,* 572 F.2d 1053 (5th Cir. 1978) (en banc) ("*Rainwater II*") forecloses Knight's substantive claim. ECF 26-1 at 10. It misreads the opinion. *Rainwater II* held that a Florida rule was "not facially unconstitutional" when it did not favor other forms of release over monetary bail. *Id*., at 1056, 1059. Instead, the "rule [was] subject to constitutional interpretation and application," because it did not mandate "pretrial confinement for inability to post money bail." *Id*., at 1058. Although "[t]he incarceration of those who cannot, without meaningful consideration of other possible alternatives, [would] infringe[] on both due process and equal protection requirements," Florida's rule just did not "require such a result." *Id*., at 1057-58. Far from insulating Florida practice of failing to consider possible alternatives, *Rainwater II* expected alternatives to detention would be considered.

Knight stated a substantive due process claim for relief. The Court should deny the Respondents' motion to dismiss.

3. Procedural due process

Knight claims the class members held on an unaffordable bail have been deprived of liberty. Accordingly, the government must show the necessity for the unaffordable monetary bail that results in pretrial detention through clear and convincing evidence. Compl. (ECF 1) at ¶¶ 50-51. Furthermore, the bail hearing must substantially comply with the Bail Reform Act of 1984, 18 U.S.C. § 3142. *Id*., at ¶ 51. The Respondents contest that the federal bail law does not apply to state courts and postdeprivation remedies defeat any procedural claim. *See* Florida's Mot. to Dismiss at 29-31. However, they mistake the import of "substantially compel[ing] with the Bail Reform Act" and overplay the value of postdeprivation remedies.

Knight does not seek to impose the federal Bail Reform Act on state courts. Instead, Knight proposes the federal law as a clear outline for a constitutional hearing. The U.S. Supreme Court in *United States v. Salerno*, 481 U.S. 739 (1987), upheld the federal law as providing sufficient procedural due process. Accordingly, a district court declaring that a hearing resulting in pretrial detention in Florida must "substantially compl[y] with the Bail Reform Act," Compl. (ECF 1) at 18, ¶ B(3), would provide the government a specific and detailed guidance of what is constitutionally expected.

The "[U.S. Supreme] Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990) ("In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Id*., at 132). Postdeprivation remedies suffice when "they are the only remedies the State could be expected to provide." *Id*., at 128. Yet, this is not one of those times. Here, bail determinations are not only possible, but generally take place, before a person is detained after first appearance in state court. Knight claims those hearings are constitutionally deficient. Only the predeprivation procedures mandated by *Salerno* reduce the risk of erroneous deprivation of pretrial liberty. Accordingly, postdeprivation remedies do not defeat Knight's procedural due process claim.

CONCLUSION

For the foregoing reasons, Knight requests the Court deny the motions to dismiss.

N.D. FLA. LOC. R. 7.1(F) CERTIFICATE OF WORD LIMIT

This filing contains a total of 6,003 words—within the 8,000 word limit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered for this case, including any opposing counsel that have appeared.

Dec. 29, 2017

Respectfully Submitted,

s/Benjamin James Stevenson
Benjamin James Stevenson
Fla. Bar. No. 598909
ACLU Found. of Fla.
3 W. Garden St., Suite 712
Pensacola, FL 32502-5636
T. 786.363.2738
bstevenson@aclufl.org

Jacqueline Nicole Azis
Fla. Bar No.101057
jazis@aclufl.org
T. 786.363.2708
Nancy Abudu
Fla. Bar No. 111881
nabudu@aclufl.org
T. 786.363.2700
ACLU Found. of Fla.
4343 W. Flagler St., Suite 400
Miami, FL 33134

Counsel for Petitioner