No. 21-5777

In the Supreme Court of the United States

VANCE KEITH WILSON,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Did the state district court correctly interpret Louisiana Code of Criminal Procedure article 320(D) when requiring Petitioner Vance Wilson to pass a drug test to maintain bail?

(2) Did requiring Wilson to undergo a drug test to maintain bail violate Wilson's constitutional rights "to due process, privacy, and to be free from unreasonable search and seizure?"

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INTRODUCTION

Petitioner Vance Wilson was arrested and charged with resisting arrest and possessing methamphetamine. He was released on bail. But when his trial was delayed because of COVID-19, the trial judge ordered Wilson to take a drug test at the courthouse under the authority of Louisiana Code of Criminal Procedure article 320(D)—which sets conditions for bail. Wilson failed the test, and the judge revoked his bail.

Wilson sought supervisory writs from the state intermediate appellate court and the Louisiana Supreme Court, disagreeing with the district court's interpretation of article 320(D) and complaining that the court violated his constitutional rights. According to Wilson, article 320(D) did not give the district court authority to order him to take a random drug test as a condition for maintaining bail. Wilson also argued that requiring him to take a drug test violated his rights to "due process, privacy, and to be free from unreasonable search and seizure." Neither state appellate court granted review, and now Wilson petitions this Court for relief.

As an initial matter, whether the state district court misinterpreted article 320(D) is a question of state law. This Court does not review questions of state law. *See DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015).

The constitutional issues Wilson raises are novel, and this Court should allow further percolation in state and lower federal courts before addressing them. As even Wilson acknowledges, "no court has ever considered the legality of such a drug testing

regime." Pet. 14. It is not even clear whether the Louisiana Supreme Court will eventually adopt the district court's interpretation of article 320(D).

Indeed, in light of the procedural posture of this case, because Wilson sought supervisory writs, not even the state appellate courts *in this litigation* have addressed these issues. Although some federal courts have considered similar questions, no federal court has addressed an issue directly on point. The Court should reject Wilson's invitation to dive into these issues without the benefit of *any*—let alone robust—consideration by other courts. *See McCray v. New York*, 461 U.S. 961, 962–63 (1983) (Stevens, J., statement respecting the denial of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."); *accord Brown v. Texas*, 522 U.S. 940 (1997) (Stevens, J., statement respecting the denial of certiorari).

Finally, Wilson raises a few other claims—such as whether he should have been made to urinate in a courthouse bathroom for the drug test. But these claims have either been roundly rejected by lower federal courts or implicate only fact-bound issues not worthy of this Court's consideration. Wilson identifies no split of authority warranting review of any of his claims.

The Court should deny Wilson's petition for certiorari.

STATEMENT OF THE CASE

1. Authorities arrested Petitioner Vance Wilson for improper lane use,[1] resisting a police officer with force or violence,[2] possessing drug paraphernalia,[3] and battering a police officer.[4] Wilson posted a $2,500 bond and was released from jail several days later.[5] As part of the bond agreement, he promised to "appear at all stages of the proceedings in court . . . to answer that charge or any related charges." He also promised that he would "at all times hold amenable to the orders and process of the court . . . ."

The district attorney filed a bill of information charging Wilson with two felonies: possessing methamphetamine[6] and resisting a police officer with force or violence. Wilson pleaded not guilty, and the case was set for trial in early January 2021.

COVID-19 delayed trial. While Wilson was at the courthouse with his counsel around the time that trial would have begun if not for the pandemic, the trial judge announced, "[a]ll those individuals on the docket who are present and who are facing a charge under the Uniform Controlled Dangerous Substances law will be taking a drug test today."

Wilson's attorney was present and raised numerous objections. The judge

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[1] *See* La. R.S. 32:79.

[2] *See* La. R.S. 14:108.2.

[3] *See* La. R.S. 40:1023.

[4] *See* La. R.S. 14:34.2.

[5] He was arrested on June 22, 2020 and was released on June 27, 2020.

[6] *See* La. R.S. 40:967.

acknowledged that Wilson's bond agreement did not condition bail on court or pretrial drug testing, but the judge explained that random drug testing was authorized by Louisiana Code of Criminal Procedure article 320, which governs the conditions of bail. Specifically, the trial judge relied on article 320(D), which says that "[e]very person arrested for a violation of the Uniform Controlled Dangerous Substances Law . . . shall be required to submit to a pretrial drug test for the presence of designated substances in accordance with the provisions of this Article and rules of court governing such testing."

Wilson failed the drug test. He tested positive for methamphetamines and marijuana, among other drugs.[7] The trial judge placed the results of the test and the actual physical test into the record. Wilson was allowed to introduce evidence of a valid doctor-issued prescription that explained the presence of some of the drugs for which he tested positive.[8] But, of course, he could not account for the methamphetamine in his system. Article 320(K) warns: "Violation of any condition by the defendant shall be considered as a constructive contempt of court, and shall result in the revocation of bail and . . . remanding the defendant to custody." The trial judge revoked Wilson's bond for failure to meet bond conditions, then remanded Wilson to custody to await trial, and informed Wilson that he would address the setting of a new bail bond at a later date to be following the filing of an appropriate motion by his attorney. Wilson did move the trial court to set bail, but the trial court

[7] Wilson also tested positive for amphetamine, Oxys, and buprenorphine.

[8] The prescription explained why Wilson tested positive for amphetamine and buprenorphine, but not the methamphetamine, marijuana, or Oxys.

after a hearing denied that motion. Wilson did not seek review of the trial court's decision to deny bail. Wilson currently remains in jail pending trial.

2. Wilson sought a supervisory writ from the state intermediate appellate court. With the benefit of counsel, he raised the issues of whether the state district court correctly interpreted article 320(D), whether the district court's interpretation of article 320(D) violated his "constitutional rights to due process, privacy, and to be free from unreasonable search and seizure," and whether the district court abused its discretion by revoking Wilson's bail instead of imposing a lesser sanction. The Louisiana Court of Appeal for the First Circuit denied his application for a supervisory writ without opinion. (Wilson did not seek review of the trial court's denial of bail because, at the time of the Court of Appeal's decision, his motion to set bail was still pending.)

3. Wilson, still with the benefit of counsel, next sought a supervisory writ from the Louisiana Supreme Court. He again contended that the district court misinterpreted article 320(D) and that the lower court's interpretation of the provision violated his constitutional rights. The court denied his application for a supervisory writ without explanation. Two justices dissented from the denial because the State had failed to demonstrate which "'rules of court,' required by [article 320(D)], are applicable." (Wilson again did not seek review of the trial court's denial of bail; he could not have done so because it necessarily had not been addressed by the Louisiana First Circuit Court of Appeal)

4. Wilson, now without counsel, petitions this court for a writ of certiorari. He

again raises the issues of whether the district court misinterpreted article 320(D) and whether the court's application of article 320(D) violated his constitutional rights.

REASONS FOR DENYING THE PETITION

I. WHETHER THE STATE DISTRICT COURT CORRECTLY INTERPRETED THE LOUISIANA CODE OF CRIMINAL PROCEDURE IS A QUESTION OF STATE LAW.

Wilson contends that "the district court erred by interpreting [Louisiana Code of Criminal Procedure article] 320(D) to authorize drug testing every defendant on a trial docket charged with a UCDSL violation and to mandate revocation of bond as the only possible sanction for a positive drug test." Pet. 8. To the extent Wilson is asking the Court to resolve a matter of Louisiana law, this Court should deny his petition because it does not consider matters of state law.

This Court has said many times that States alone have the power to determine the content, meaning, and application of state law. *See, e.g., DIRECTV, Inc. v. Imburgia*, *supra*, 577 U.S. at 54 ("State courts are the ultimate authority on that state's law." (cleaned up)); *Dickerson v. United States*, 530 U.S. 428, 431 (2000) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."); *Huddleston v. Dwyer*, 322 U.S. 232, 233 (1944) ("The decisions of the highest court of a state on matters of state law are in general conclusive upon the Supreme Court of the United States."). If a state-law basis for the judgment is adequate and independent, then this Court lacks jurisdiction because its review of the federal question would be purely advisory. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

Because the proper interpretation of article 320(D) is a question of Louisiana

law, this Court should not delve into the issue. Instead, it should allow the Louisiana courts to resolve the question.

II. THE CONSTITUTIONAL ISSUES WILSON RAISES REQUIRE PERCOLATION.

Wilson contends that the state district court's interpretation and application of article 320(D) violated his constitutional rights to "due process, privacy, and to be free from unreasonable search and seizure." According to Wilson, the district court violated his right to due process "because it imposed a severe criminal penalty without any notice of basic procedural fairness." Pet. 8. And his "rights to privacy and to be free from unreasonable search and seizure" were violated when the court ordered him to take a test "without any individualized suspicion of criminal wrongdoing." Pet. 9.

Even if the Court is interested in these issues as a general matter, it should wait to allow percolation in state and federal courts. As Wilson pointed out in his briefing before the Louisiana Supreme Court, "no appellate court has ever reviewed La. C.Cr.P. art 320 or its predecessor La. C.Cr.P. art. 336 in light of a similar assertion of authority by a district court [under article 320(D)]." *See* Pet. 14 ("It appears that no court has ever considered the legality of such a drug testing regime.").

Here, Wilson points out that "[n]o federal appellate court had weighed in on the [Fourth Amendment] issue either until the Ninth Circuit found a particular pretrial drug test unconstitutional." Pet. 13 (citing *United States v. Scott*, 450 F.3d 863, 865 (9th Cir. 2006)). But the Ninth Circuit case he cites—*United States v. Scott*—presented a different question than the one here. In *Scott*, the Ninth Circuit was asked—as a matter of first impression—whether the government could, without

express statutory authority and without a warrant, as a condition of bail, randomly search an accused person's house and subject him to a drug test, even though the accused person had not been arrested for a drug offense. The Ninth Circuit found that search was unconstitutional. But in Wilson's case, the drug test occurred in the courthouse and Wilson was accused of committing a drug offense.

This Court has observed that "[t]he government's interest in preventing crime by arrestees is both legitimate and compelling." *United States v. Salerno*, 481 U.S. 739, 749 (1987) (citing *De Veau v. Braisted*, 363 U.S. 144, 155 (1960)). And, when "the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, [this Court] believes that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat." *Id.* at 751. But no court has considered how these principles work in the context of a requiring a random drug test in a courthouse to maintain bail for a person accused of a drug offense.

It bears emphasis that, in light of the procedural posture of this case, not even the state appellate courts *in this litigation* have considered these issues. Wilson sought *supervisory* writs from the state appellate courts because he was not entitled to invoke their appellate jurisdiction. *See Bd. of Sup'rs of La. State Univ. & Agric. & Mech. Coll. v. Mid City Holdings, L.L.C.*, 2014-0506 (La. App. 4 Cir. 10/15/14), 151 So. 3d 908, 910–11 (internal quotation marks omitted) ("[T]he difference between supervisory jurisdiction and appellate jurisdiction is that the former is discretionary on the part of the appellate court while the latter is invocable by the litigant as a

matter of right."). Although two justices of the Louisiana Supreme Court expressed an interest in hearing this case, there may have been some reason unrelated to the merits that caused the state appellate courts to deny supervisory review. *See Herlitz Const. Co. v. Hotel Invs. of New Iberia, Inc.*, 396 So. 2d 878, 878 (La. 1981) (per curiam) (listing factors Louisiana appellate courts should consider when deciding whether to exercise their supervisory jurisdiction). In any event, the denial of a writ application is non-precedential in the way that this Court's denial of certiorari is non-precedential. *Compare In re Quirk*, 97-1143 (La. 12/12/97), 705 So.2d 172, 181 n. 17 ("A denial of supervisory review does not constitute the court's considered opinion on the allegations made in a writ application but is merely a decision not to exercise the extraordinary powers of supervisory jurisdiction in that case.") *with Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (explaining that "all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted" and "such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review").

Members of this Court have recognized that the absence of state court and federal court opinions on an issue creates a "valid reason[]" not to grant certiorari. *Riggs v. California*, 525 U.S. 1114 (1999) (Stevens, J., statement respecting the denial of certiorari) ("Neither the California Supreme Court nor any federal tribunal has yet addressed the question."); *see Carpenter v. Gomez*, 516 U.S. 981 (1995) (Stevens, J., respecting the denial of the petition for a writ of certiorari) (observing that a state's

supreme court's expressed intention to review a question further provides a "prudential ground" for declining to grant certiorari). Allowing an issue to percolate in state courts and lower federal courts provides this Court "with a means of identifying significant rulings as well as an experimental base and a set of doctrinal materials with which to fashion sound binding law." *California v. Carney*, 471 U.S. 386, 401 (1985) (Stevens, J., dissenting). And "the principle of percolation encourages the lower courts to act as responsible agents in the process of development of national law." *Id.* (citing Estreicher & Sexton, *New York University Supreme Court Project, A Managerial Theory of the Supreme Court's Responsibilities* (1984)).

This Court has "in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting) (collecting cases). "[F]urther consideration of the substantive and procedural ramifications of the problem by other courts will enable [the Court] to deal with the issue more wisely at a later date." *McCray*, 461 U.S. at 962–63 (Stevens, J., statement respecting the denial of certiorari).

At bottom, if this Court granted certiorari, it would be the first to weigh in on these constitutional issues. "This Court, however, is one of final review, 'not of first view.'" *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). This Court should reject Wilson's

invitation to address novel constitutional issues never addressed by any appellate court.

III. NONE OF WILSON'S OTHER ARGUMENTS WARRANT REVIEW.

Beyond his state law and federal constitutional claims, Wilson raises a few other issues, none of which merits review.

1. Wilson argues that he should not have been made "to urinate in front of a bailiff in a courthouse bathroom." But the Sixth Circuit rejected a very similar claim in *Norris v. Premier Integrity Solutions, Inc.*, 641 F.3d 695 (6th Cir. 2011). The question in that case was whether "requiring [the defendant] to provide a urine sample under [a] 'direct observation' method was reasonable." 641 F.3d at 698.[9] The court observed that "the government's interest in using direct observation is quite simple: to prevent cheating on drug tests." *Id.* at 695 (internal quotation marks omitted). And the defendant's privacy interests were diminished because he consented "to random drug testing" as a condition of bail. *Id.* at 699 (citing *United States v. Knights*, 534 U.S. 112, 118–120 (2001); *Samson v. California*, 547 U.S. 843, 852 (2006); *Scott*, 450 F.3d at 873; *Wilcher v. City of Wilmington*, 139 F.3d 366, 374 (3d Cir. 1998) (observing that firefighters who agreed to random drug testing had a diminished expectation of privacy)). The DC Circuit provided similar analysis in an analogous case. *See Id.* at 701–02 (discussing *BNSF Ry. Co. v. U.S. Dep't of Transp.*, 566 F.3d 200, 202 (D.C. Cir. 2009)).

To be sure, Wilson never expressly agreed to drug testing in his bail agreement.

[9] The defendant challenged only the method of the test, not the requirement that he undergo the test in the first place.

But the state district court interpreted article 320(D) as mandating a random drug test as a condition of bail. Although no state or federal appellate court has reviewed that interpretation, assuming it is correct, then by agreeing to bail, Wilson also assented to the drug test.

There is no split of authority on this issue—at least Wilson identifies none—and no reason to grant review. In any event, the Court would benefit from further percolation on this issue, for the reasons already discussed.

2. According to Wilson, he was not "given a fair opportunity to contest the result of the test." That factual claim is simply refuted by the record. The state district court entered both the test and the results of the test into the record. The court gave defense counsel the ability to investigate the drug test: "If you want to investigate, you can certainly feel free to do so. I'm introducing the results and the actual physical test into the record. What you want to do with them, certainly, I'll allow you to do with those within the operation of law." The court also allowed defense counsel to enter Wilson's doctor-issued prescription into the record to account for some of the positive results of the drug test.

In any event, this argument is fact-based and does not merit this Court's review. *See* Supreme Ct. R. 10.

3. Finally, Wilson contends that "[t]he district court attempted to coerce Mr. Wilson to take a guilty plea, using the drug test as a threat." Pet. 14. Wilson bases this claim on the fact that the court did not require those pleading guilty to take a drug test.

Once again, Wilson's argument is refuted by the record. According to the district court, those who plead guilty "are going to be tested when they do check in with the Department of Probation and Parole." Thus, the state district court did not "feel the necessity to pay for [the drug tests] through the court system if they are going to have to do it through probation and parole." Even those facing a jail sentence "generally go through a drug screening at the jail as well." So the court found "no use in paying for two separate tests."

Wilson cites no authority to support his position, let alone a split of authority. Thus, there is no reason to grant review on this issue.

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CONCLUSION

The State of Louisiana respectfully asks the Court to deny Wilson's petition for a writ of certiorari.

Respectfully submitted,

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