No. 23-291

In The
Supreme Court of the United States

EDWARD LITTLE, Individually and on Behalf of All Others Similarly Situated,

Petitioner,

v.

ANDRE' DOGUET, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT SHERIFF MARK GARBER

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STATEMENT

This case is very much like the case of *Daves v. Dallas County*, No. 23-97 on the docket of this Court. It is also very similar to the Fifth Circuit case of *ODonnell v. Harris Cnty.*, 882 F.3d 528 (5th Cir. 2018), *withdrawn and superseded on panel reh'g*, 892 F.3d 147 (5th Cir. 2018) (*ODonnell I*), though the *Little* case involves felony arrests rather than the misdemeanor arrests at issue in *ODonnell I*. Of course, the holding of *ODonnell I* that *Younger* abstention did not apply was overturned by the Fifth Circuit *en banc* in the *Daves* case and is the issue up for consideration in the present writ application.

Plaintiff/Petitioner, Edward Little, filed this suit alleging that Judges of Louisiana's Fifteenth Judicial District, and Sheriff Mark Garber of Lafayette Parish[1] within that Judicial District, utilize a bail system that does not consider an arrestee's financial condition or ability to pay bail. App.54a. If an arrestee considers bail to be set too high, he has recourse to a weekly bond reduction docket, or may try to reach an agreement with the State on a reduced bail amount. App.57a. Petitioner sought certification of a class of "All arrestees who are or will be detained by Defendants for any amount of time after arrest because they are unable to pay secured money bail." ROA.39-40. On behalf of the proposed class, Petitioner sought " . . . declaratory and injunctive relief to enjoin the Defendants from

[1] A Louisiana Parish is the equivalent of a County in other states.

continuing in the future to detain impoverished arrestees who cannot afford money payments." ROA.44. In his prayer, Petitioner sought an injunction to prevent Defendants from using money bail "without procedures that ensure an inquiry into and findings concerning the person's ability to pay any monetary amount set and non-financial alternative conditions of release." App.72a. In the Petition for a Writ of Certiorari, Petitioner explains that he sought an injunction against money bail unless a court finds, "after providing various procedural protections" that detention is necessary. Petition, p. 7.

The "various procedural protections" were spelled out by Petitioner in briefs to the Trial Court. In particular, in Petitioner's Memorandum in Support of Motion for Summary Judgment (ROA.958; ROA.979–994), Petitioner argued for an on-the-record hearing, with appointed counsel, prior notice of the issues to be decided, prior disclosure of the government's evidence, the opportunity to present evidence and cross examine the government's witnesses, where the court must make findings supported by clear and convincing evidence that the accused is a flight risk or a danger to the community if bail was more than the accused could immediately pay. Of course, the gravamen of Petitioner's complaint was that the week that it could take to get a bond reduction hearing was a violation of his right to equal protection. Indeed, any delay much longer than the time it took a non-indigent to post a scheduled bail

amount was argued to be a violation of Petitioner's rights.[2]

Petitioner argued that Sheriff Garber should be enjoined from enforcing any future bail orders from the State Court Judges that ran afoul of the requirements set forth above. ROA.251-252; ROA.260-266. Petitioner maintained that if, in the Sheriff's view, the State Court Judges did not comply with the requested injunction, the Sheriff should release Petitioner and the class members immediately with no bail, regardless of any State Court order to the contrary. The Federal District Court was to have continuing jurisdiction to enforce the proposed injunction, allowing any arrestee who claimed that the injunction was violated by the State Court Judges or the Sheriff to seek relief in Federal Court.

The Trial Court eventually granted the Sheriff's motion to dismiss under Rule 12(b)(6), finding that the Sheriff had no authority to set or alter bail, nor any authority to release an arrestee except pursuant to a court order, and that he could not be the moving force for any of the alleged violations regarding bail. ROA.1864; ROA.811; ROA.828–840.[3] The Sheriff's argument for dismissal based on *Younger* abstention was denied. App.67a; App.76a.

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[2] Petitioner's bail was posted at the original amount one week after his arrest. ROA.199, Stipulations.

[3] The Sheriff's initial Motion to Dismiss under Rule 12(b)(6) was denied due to a proposed amendment to the Complaint. App.67a.

The case went to trial on the claims against the State Court Judges. Petitioner presented the stipulated testimony of the Hon. Truman Morrison, III to describe the practices of the Washington D.C. District Court regarding issues of pretrial release and detention. App.30a. Petitioner appeared to argue that the Federal Bail Reform Act of 1984[4] set a constitutional minimum for procedures regarding pretrial release. The Trial Court found that Petitioner's original claims had been rendered moot by significant changes in bail procedures within the Fifteenth Judicial District Court since the suit had been filed. App.42a. Analyzing the current practices of the State Court Judges, the Trial Court found no violations of due process or equal protection. App.44a.

SUMMARY OF THE ARGUMENT

Petitioner argues that there is a conflict among the circuits when it comes to applying *Younger* abstention to cases involving procedures for setting pretrial bail or other conditions of releases. Petitioner argues that the first element of the abstention analysis is whether the requested relief would cause undue interference with State Court proceedings. Under Petitioner's analysis, however, differences in the relief at issue can account for differences in the abstention decision. The circuit conflict may be more apparent than real. Petitioner also argues that the third element of

[4] 18 U.S.C. §§ 3141-3150.

Younger abstention, an adequate opportunity to raise the issue in the State proceeding, is missing in this case because it can take a week to obtain a hearing for reduction of bail. But Petitioner did not avail himself of the opportunity for a hearing, and so it must be presumed that the State procedures are adequate to address his concerns, absent a showing of unambiguous authority to the contrary. Petitioner has no unambiguous authority to the contrary. Finally, to the extent that there may be a perceived conflict among the circuits, this Court may still allow time for the impact of the Fifth Circuit's *en banc* decision in *Daves* and its thorough discussion of the abstention issue to be felt among the other circuits. No other case has addressed *Younger* abstention in the bail context in such depth.

ARGUMENT FOR DENYING THE PETITION

When weighing whether to grant a writ in this case, perhaps the key consideration for this Court is whether the *en banc* decision of the Fifth Circuit in *Daves v. Dallas County*, 64 F.4th 616 (5th Cir. 2023), as applied to the present case, created or deepened a split among the circuits on the application of abstention under *Younger v. Harris*, 401 U.S. 37 (1971).

I. ANALYSIS OF THE "UNDUE INTERFERENCE" ELEMENT.

In *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), this Court was faced with a challenge to Texas' bond

requirements for an appeal in a civil case. This Court found that *Younger* abstention was required in that case. It would seem odd to require abstention in a case involving a civil bond, but not in a case involving a criminal bond. Petitioner has made no effort to address this issue.

In the Petition for Writ of Certiorari, Petitioner downplays the extent of ongoing interference with the State Court proceedings demanded in this suit. He likens the relief requested in this proceeding to that at issue in *Gerstein v. Pugh*, 420 U.S. 103 (1975), where the State Courts were instructed to have probable cause determinations made by a magistrate promptly after arrest rather than by a district attorney when an information was filed. Petition, p. 14. Petitioner does not mention that in the underlying case of *Pugh v. Rainwater*, 483 F.2d 778, 790 (5th Cir. 1973), the Fifth Circuit had already rejected that part of the proposed injunction that would mandate the immediate release of an arrestee if a magistrate had not found probable cause within a certain period. Petitioner does not discuss the injunction he requested against the Sheriff, nor that his desired injunction would require the Sheriff to disregard State Court bail orders that appeared to the Sheriff to have been imposed in violation of the procedures Petitioner desired. The interference requested in this case was very broad.

The scope of the relief demanded is very important in the analysis of what the Petition describes as the "undue interference" issue, the first element supporting *Younger* abstention. The Petition cites *Walker v.*

City of Calhoun, 901 F.3d 1245 (11th Cir. 2018) as being in conflict with the Fifth Circuit's decision on *Younger* abstention in this matter. Yet *Walker* noted with approval an earlier decision of the Eleventh Circuit in *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992), which involved a challenge to Georgia's indigent defender program. In that case, even though the relief was not aimed at any prosecution as such, the Court applied *Younger* abstention because of the pervasive impact of the requested relief on indigent prosecutions. By contrast, the injunction at issue in *Walker* dealt only with the "prompt pretrial determination of a distinct issue." 901 F.3d at 1255. Indeed, in *Walker*, only two aspects of the City's Standing Bail Order were modified: a) the time for an indigency hearing was reduced from 48 hours to 24 hours, and b) the bail hearing was replaced with an affidavit-based system. 901 F.3d at 1266–1268. The Eleventh Circuit found that these modifications were not so intrusive that the District Court had abused its discretion when it declined to abstain from hearing the case. 901 F.3d at 1255. Had the Eleventh Circuit been confronted with an injunction as broad as that proposed by Petitioner, it may have found abstention was required.

The other decision on which Petitioner relies for his argument that there is a circuit split that must be addressed is *Arevalo v. Hennessy*, 882 F.3d 763 (9th Cir. 2018). That case did not involve a class action nor any application to future arrestees. Mr. Arrevalo had exhausted all of his state remedies in his attempt to correct the bail process used in his case. He had been in

jail for several months. The case arrived in Federal Court via a writ of habeas corpus. The Ninth Circuit ordered the Federal District Court to grant a conditional writ of habeas corpus, issuing the writ if the State Court did not conduct a constitutionally compliant bail hearing within fourteen days of the District Court's order. The opportunities for an ongoing intrusion into or audit of the State Court under these circumstances were minimal, unlike the present case.

II. ANALYSIS OF THE "ADEQUATE OPPORTUNITY" ELEMENT.

In *Pennzoil*, this Court addressed the element of whether Texaco had an adequate opportunity to raise its constitutional concerns in the State proceedings. The Court noted that Texaco "apparently made no effort under Texas law to secure the relief sought in this case." 481 U.S. at 15. This Court held that under these circumstances there should be a presumption that the state procedures offer an adequate opportunity to address the issue. "Accordingly, when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Id.*

Petitioner made no effort to present his arguments about bail procedures to the State Court in this matter. Petitioner was arrested on Saturday, June 3, 2017. App.70a. This suit was filed two days later on Monday,

June 5, 2017. App.69a. Petitioner has never alleged or argued that he attempted to present his claims to the State Court.

Petitioner's argument concerning unavailability is that it can take a week to get a bail hearing in the Fifteenth Judicial District, and that each hour spent by an indigent in jail after a similarly charged non-indigent could have posted bail is a violation of his constitutional rights to due process and equal protection. See App.143a. Although the Ninth Circuit declined to abstain in *Arevalo*, it allowed the State Court to hold its bail hearing within fourteen days of the conditional habeas corpus order. This approach does not seem consistent with Petitioner's insistence that a one-week time frame to hold a bail hearing is far too long to constitute an available remedy. Likewise, the Eleventh Circuit in *Walker* found it unnecessary to have the City's Standing Bail Order reduce the time for a hearing to 24 hours. Petitioner does not have unambiguous authority demonstrating that a week to hold a bail hearing makes that state procedure inadequate for purposes of *Younger* abstention.

III. TO THE EXTENT THERE IS A CONFLICT BETWEEN THE CIRCUITS, THIS COURT SHOULD ALLOW TIME FOR THE OTHER CIRCUITS TO REACT TO THE FIFTH CIRCUIT'S *EN BANC* HOLDING.

It bears remembering that in the two Eleventh Circuit cases Petitioner relies upon to support a circuit conflict, *Walker* and *Schultz v. Alabama*, 42 F.4th 1298 (11th Cir. 2022), the Eleventh Circuit reversed the injunctions on the merits. The Eleventh Circuit has not seen the intrusive effects of a prolonged injunction in favor of a class of all future indigent arrestees. The Fifth Circuit has experience with the practical implementation of such an injunction in the *ODonnell* case. It drew upon that experience to analyze the impact of the injunction requested. App.121a; App.125a, fn. 10. It also carefully analyzed the application of *O'Shea v. Littleton*, 414 U.S. 488 (1974) to this case. App.129a. It appreciated the insight of Judge Wisdom's decision in *Tarter v. Hury*, 646 F.2d 1010, 1013 (5th Cir. Unit A 1981) and his discussion of *O'Shea*. App.131a. To the extent that there is a conflict between the circuits on this issue, it may be best to give the other circuits an opportunity to review their positions in light of the experience of the Fifth Circuit and its *en banc* decision in *Daves*. Any conflict may end up being resolved by the lower courts.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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