No. 23-291

In the Supreme Court of the United States

EDWARD LITTLE,
Individually and on Behalf 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

JEFF LANDRY
Attorney General

ELIZABETH MURRILL*
Solicitor General
**Counsel of Record*

LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, LA 70802
(225) 326-6766
murrille@ag.louisiana.gov

QUESTIONS PRESENTED

Under *Younger v. Harris*, principles of equity and comity require federal courts to abstain from adjudicating claims seeking to restrain ongoing state criminal prosecutions when the movant has an adequate remedy at law and will not suffer irreparable injury if denied relief. 401 U.S. 37, 43–44 (1971). Like the petitioners in another case currently pending before this Court—*Daves v. Dallas County*, No. 23-97 (petition for cert. filed July 31, 2023)—Petitioner Edward Little seeks to impose a host of mandatory procedural requirements on state officials making bail decisions. The federal district court denied relief on the merits of Little's claims. While the appeal of this case was pending, the full Fifth Circuit, sitting en banc, issued a decision in *Daves* explaining *Younger*'s application in the bail context. The Fifth Circuit panel in this case then applied *Daves* and dismissed this case. The questions presented are:

(1) Should federal courts entertain claims demanding they oversee the procedures state courts follow in making bail determinations, where state law provides mechanisms for pretrial detainees to assert federal constitutional claims in state court to challenge their pretrial detention?

(2) In light of significant changes to the bail procedures of Louisiana's 15th Judicial District since Little's arrest and release, does the narrow exception to the mootness doctrine for claims capable of repetition, yet evading review apply to Little—who was not subject to the new procedures?

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INTRODUCTION

Petitioner Edward Little originally brought this class-action suit in 2017 with the hope of effectively ending cash bail for indigent arrestees in Louisiana's 15th Judicial District Court. Since Little filed this suit, the 15th JDC voluntarily revoked its bail schedule and changed its policy so that nearly all misdemeanor arrestees are automatically released with a summons. Today, only those who have committed serious crimes are subject to cash bail, and they each receive an individualized hearing from the 15th JDC Commissioner.

In this case, the Western District of Louisiana held a bench trial and rendered judgment in favor of the defendants. Before the Fifth Circuit could consider the merits of Little's appeal, however, the full Fifth Circuit issued an en banc opinion in *Daves v. Dallas County* that effectively mandated abstention under *Younger v. Harris*, 401 U.S. 37 (1971) in this case. *Daves v. Dallas Cnty.*, 64 F.4th 616, 620 (5th Cir. 2023) (en banc).

Although Louisiana law is different from Texas law, Little employs his petition to challenge the Fifth Circuit's en banc decision in *Daves*. The Court should reject Little's challenge, largely for the reasons that it should reject the petitioners' challenge in *Daves*, which is currently pending before the Court. *See* Brs. in Opp'n., *Daves v. Dallas Cnty.*, No. 23-97 (petition for cert. filed July 31, 2023).

In all events, the reasons for abstaining under *Younger* are even stronger in this case than they are in *Daves*. Louisiana law provides more opportunities

for pretrial detainees to challenge bail proceedings in criminal cases. If a detainee wants to challenge the Commissioner's bail decision, Louisiana law provides a mechanism to request relief from a judge of the 15th JDC. *See* La. Code Crim. Proc. art. 319A. If unsatisfied with the judge's ruling, the detainee can invoke the supervisory jurisdiction of a state appellate court to consider the bail decision. *Id.* art. 312H. All of this occurs within the criminal proceeding. Even outside of criminal proceedings, pretrial detainees can invoke state habeas and mandamus mechanisms to protect their rights.

In the Fifth Circuit, Little conceded that Louisiana's procedures are adequate under *Daves*, so the panel did not consider whether Louisiana's laws are sufficiently adequate for purposes of *Younger* abstention. *See* Pet. App. 12a–13a. If this Court grants certiorari here, it will be the *first* court to consider the adequacy of Louisiana's procedures. That is a problem because this is a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Finally, Little spent only a week in detention before he secured his release. Ordinarily, that would moot his claims. Little relies on the "transitory claims" exception to the mootness rule to maintain this suit in federal court. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). But since Little's release, the bail procedures in the 15th JDC have changed significantly. The narrow exception to the mootness rule should not apply because Little was never subjected to the procedures now in place.

STATEMENT

I. Bail Practices in Louisiana and the 15th JDC

1. In Louisiana, the law when Little filed suit was—and still is—that "[d]istrict courts and their commissioners" wield "the authority to fix bail." La. Code Crim. Proc. art. 314. The law charges them with setting bail at "an amount that will ensure the presence of the defendant and the safety of any other persons and the community." *Id.* art. 316. Article 316 of the Louisiana Code of Criminal Procedure lists ten factors for district courts and commissioners to consider when setting the amount of bail, including the seriousness of the offense, the defendant's prior criminal record, and "the defendant's ability to make bail."[1] *Id.*

When Little was arrested, the 15th JDC used a

[1] Here is the complete list:

(1) The seriousness of the offense charged, including but not limited to whether the offense is a crime of violence or involves a controlled dangerous substance.

(2) The weight of the evidence against the defendant.

(3) The previous criminal record of the defendant.

(4) The ability of the defendant to give bail.

(5) The nature and seriousness of the danger to any other person or the community that would be posed by the defendant's release.

(6) The defendant's voluntary participation in a pretrial drug testing program.

(7) The absence or presence in the defendant of any controlled dangerous substance.

(8) 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.

bail schedule. Unless bail was "fixed by a schedule," then the law required—and still does—that "the amount of bail shall be specifically fixed in each case." La. Code Crim. Proc. art. 315. A bail schedule operated "like a menu, associating various prices for release with different types of crimes and arrestees." *Daves v. Dallas Cnty.*, 22 F.4th 522, 530 (5th Cir. 2022). At the time of Little's arrest and incarceration, a bail schedule applied to many misdemeanor offenses in Lafayette. Judge Kristian Earles—former chief judge of the 15th JDC—promulgated the schedule in 2013. Under the schedule, for example, the misdemeanor of simple battery carried a price of $500.

If somebody was arrested on a warrant in the 15th JDC, the bail amount was initially determined by the Commissioner before the warrant was issued. If the crime was a misdemeanor governed by the bail schedule, the Commissioner would set bail in accordance with the schedule. If the warrant was for a person who committed a felony, or some other offense not listed on the bail schedule, the Commissioner would determine an initial bail amount consistent with Article 316 of the Louisiana Code of Criminal Procedure.

For people arrested without a warrant, the Commissioner would call the parish jail each day of the year to set their bonds. *See* Pet. App. 4a. An employee of the Lafayette Parish Sheriff's Office at the jail would describe the facts leading to the arrest to

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(9) Any other circumstances affecting the probability of defendant's appearance.

(10) The type or form of bail.

La. Code Crim. Proc. art. 316.

the Commissioner, who then would set bail over the phone after deciding if probable cause supported the arrest and continued detention.

The Commissioner also would conduct First Appearance hearings by video conference every Tuesday and Friday. Those hearings would provide the Commissioner with the opportunity to verify the name and address of the arrestee, among other things.

After their First Appearances, arrestees could file a motion to modify the bail amount to a judge of the 15th JDC. *See* La. Code Crim. Proc. art. 319. And a person held without bail or unable to post bail could invoke the supervisory jurisdiction of the court of appeal. *See id.* art. 312H.

2. Since Little initiated this class-action litigation in mid-2017, the bail practices of the 15th JDC have changed significantly. For example, in 2018, the judges of the 15 JDC issued an en banc order rescinding the bail schedule (which, again, only applied to misdemeanor offenses). In its place, the en banc court ordered the Sheriff to *automatically release* most misdemeanor arrestees with a summons. *See* Pet. App. 4a. That automatic-release provision remains in force today.

There are two exceptions to the automatic-release provision. First, arrestees who have been arrested three times or more in the past six months are not automatically released. And, second, people who had been arrested for a certain set of serious misdemeanors—including battery on a police officer, sexual battery, and carnal knowledge of a juvenile—are not automatically released. The misdemeanor

arrestees subject to those two exceptions have their bail bonds set by a judge or the Commissioner using the factors under Article 316 of the Louisiana Code of Criminal Procedure, in the same manner as for felony arrests.

Even for arrestees not subject to automatic release, *i.e.*, felony arrestees and misdemeanor arrestees subject to one of the two exceptions, there have been very significant changes to the jail procedures. Today, the Commissioner still uses the Article 316 factors and also can receive financial information from arrestees prior to their First Appearances, via a "Pretrial Indigency Determination Affidavit" (PIDA), which collects financial information from the arrestee. The Commissioner also has started using a form entitled "Release Order in Lieu of/as Modification to Money Bond" during First Appearances. Pet. App. 5a. The purpose of the form is to provide another means for people to obtain release if they cannot post bond. The form lists several alternatives to money bail, including (1) release on "personal surety," an "adjusted" bond amount, (2) "[r]elease on Court-approved home monitoring via GPS system," (3) referral to the Sheriff's Office to see if they qualify for the Sheriff Offender Tracking Program ("STOP"), and (4) an "other" category. Pet. App. 25. According to the Commissioner, in the "other" category he can, for example, refer the arrestee to an inpatient drug treatment program. Pet. App. 27a.

II. Procedural History

1. Little is a felony arrestee who was never subject to the bail schedule. He was arrested for felony

theft on June 3, 2017, and the authorities held him at the Lafayette Parish Correctional Center. The next day, the Commissioner set Little's bail as a $3,000 secured bond. Little did not have $3,000, or $375 to pay a bonding agent, and so he remained in the correctional facility for about a week, until June 10, 2017.

2. During the week he was in the parish jail in 2017, Little filed a class-action complaint in the United States District Court for the Middle District of Louisiana against former 15th JDC Commissioner Frederick, former 15th JDC Chief Judge Earles, and Lafayette Parish Sheriff Mark Garber.[2] Little contended that they violated his "fundamental right to pretrial liberty" by conditioning his freedom on paying money "without inquiry into and findings concerning [his] ability to pay or non-financial alternative conditions." Pet. App. 17a. This, according to Little, violated the Fourteenth Amendment's Due Process and Equal Protection clauses.

The day after filing his complaint, Little moved the district court to certify a class of people "who are or will be detained in the Lafayette Parish Correctional Center because they are unable to pay a sum of money required by post-arrest secured money bail setting procedures." Pet. App. 16a. Ultimately, Defendants did not oppose the certification of the class, and the district court granted Little's motion to certify.

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[2] Today, André Doguet is the Commissioner and Laurie Hulin is the Chief Judge.

The Commissioner and former Judge Earles (Judicial Defendants)—who are represented by the Louisiana Attorney General's office—moved to dismiss the complaint. Among other arguments, they urged the Court to abstain under *Younger*. The district court denied the Judicial Defendants' motion to dismiss. Sheriff Garber also moved to dismiss, urging the application of *Younger* abstention and explaining that liability cannot attach under 42 U.S.C. § 1983 because the Sheriff has no role in setting the amount of bail.

In light of the Sheriff's motion to dismiss, Little filed a motion to supplement his complaint, which the district court granted. In his supplemental complaint, Little provided detailed descriptions of the STOP Program. Little alleged that, through STOP, Sheriff Garber acts as a final policymaker in the screening, selection, and approval for release of pretrial detainees.

Sheriff Garber filed a new motion to dismiss. The matter was referred to a magistrate judge, who issued a report and recommendation concluding that Little failed to state a claim against Sheriff Garber. The judge reasoned that liability could not attach to the Sheriff (who was sued only in his official capacity) under § 1983 because he does not qualify as a municipal policymaker. The district court adopted the recommendation and dismissed Sheriff Garber from the suit.

The Judicial Defendants moved for summary judgment, and Little moved for partial summary judgment. For the first time, he raised a claim for the

provision of counsel in pretrial detention hearings under the Sixth Amendment. The district court denied the summary judgment motions of Little and the Judicial Defendants and scheduled the case for a bench trial.

After trial, the district court found that "Defendants have made significant changes in their bail procedures since this lawsuit was initiated." Pet. App. 47a. These changes to the procedures were not merely "cosmetic." Pet. App. 48a. Instead, they were "true possible alternatives to money bail, including recommendation to the Sheriff's STOP program, release on personal surety, ankle monitoring, home monitoring, or other options, including, for example, an inpatient drug treatment program." Pet. App. 48a. The Commissioner "now considers an arrestee's indigency or financial condition if the arrestee raises it." Pet. App. 48a–49a. "The current procedures now result in the automatic release of most misdemeanor arrestees, which is more than the Constitution requires." Pet. App. 49a. In light of the changes, the district court determined that any of Little's requests for declaratory or injunctive relief based on the 15th JDC's practices from 2017—including the use of the bail schedule—were moot. The district court also considered and rejected the merits of Little's claims as they relate to the Judicial Defendants' *current* practices. While the district court held that Louisiana's current bail practices do not violate the Fourteenth Amendment, the district court did not consider the adequacy of Louisiana's current practices because adequacy is not a merits question. Adequacy is part of the *Younger* abstention analysis, which was

not before the district court. *See Younger*, 401 U.S. at 43 ("[C]ourts of equity should not act . . . when the moving party has an adequate remedy at law . . . .").

3. Little appealed. After the parties briefed the case and the court heard oral argument, the en banc Fifth Circuit issued its opinion in *Daves v. Dallas County*. The *Daves* en banc opinion held that the plaintiffs' claims in that case—which are virtually identical to Little's claims—"should never have been brought in federal court" because federal courts should "abstain from revising state bail bond procedures on behalf of those being criminally prosecuted, when state procedures allow the accused adequate opportunities to raise their federal claims." 64 F.4th at 620.

The *Daves* en banc opinion prompted the Fifth Circuit panel in this case to call for post-argument supplemental briefing about the effect of *Daves* on this litigation. The Judicial Defendants and the Sheriff explained that Little's claims are virtually identical to the claims that the *Daves* plaintiffs made in their complaint. *See* Judicial Defendants/Appellees' Supplemental Brief at 2–4, *Little v. Doguet*, No. 20-30159 (5th Cir. Apr. 19, 2023). Moreover, the opportunities for detainees in Louisiana to raise constitutional claims are more robust than they are in Texas. Little conceded that *Younger* abstention here applies under *Daves*. *See* Pet. App. 12a.

Based in part on that concession, the panel ultimately concluded that *Younger* abstention was required in this case. The panel did not offer any analysis about the uncontested adequacy of

Louisiana's procedures for the purposes of *Younger*. Pet. App. 12a–13a.

4. Little petitions this Court for a writ of certiorari, focusing his arguments on the Fifth Circuit's en banc opinion in *Daves*.

REASONS FOR DENYING THE PETITION

I. THE *YOUNGER* QUESTION DOES NOT WARRANT THIS COURT'S REVIEW.

To start, as the respondents in *Daves v. Dallas County* recently explained in their briefs in opposition to this Court, nothing about the en banc Fifth Circuit's holding that requires *Younger* abstention in this case merits this Court's review. *See* Br. in Opp., *Daves v. Dallas Cnty.*, No. 23-97. The *Younger* abstention doctrine is grounded in "[t]he basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." 401 U.S. at 43–44. It also rests on principles of "comity": "that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 44.

Honoring these bedrock principles of equity and comity, this Court has required lower federal courts to abstain from adjudicating a case in which: (1) the

federal case would interfere with "an on-going state judicial proceeding"; (2) the state proceeding "implicate[s] important state interests"; and (3) "there [is] an adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

Little does not seem to dispute that the Fifth Circuit correctly identified this established standard. He does not even discuss the overarching standard at all. *Cf.* Pet. 12–31. Instead, Little jumps right to a putative circuit split regarding how the standard has been applied in the bail context. *See* Pet. 12–17. No such circuit split exists. And, both in *Daves* and in this case, the Fifth Circuit faithfully applied this Court's precedents.

A. No circuit split exists over whether *Younger* applies to programmatic challenges to state court bail practices.

Little's chief argument for review is that the en banc Fifth Circuit's holding in *Daves*—that lawsuits like this one interfere with ongoing state judicial proceedings—conflicts with the holdings of the Eleventh Circuit in *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), and the Ninth Circuit in *Arevalo v. Hennessy*, 882 F.3d 763 (9th Cir. 2018). There is no split.

This Court has already considered how *Younger* abstention applies in the context of structural federal court challenges to state bail practices. In *O'Shea v. Littleton*, a putative class of indigent plaintiffs claimed that several judges (among other defendants) had

violated their constitutional rights through the "discriminatory enforcement and administration of criminal justice," including in bond-setting hearings. 414 U.S. 488, 491–92 (1974). As relevant here, this Court held that "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials" violated the principles of equity, comity, and federalism announced in *Younger* just three years earlier. *Id.* at 499–500. Such relief, the Court explained, "would contemplate interruption of state proceedings to adjudicate assertions of noncompliance" and thus "require . . . continuous supervision by the federal court over the conduct of the [judges] in the course of future criminal trial proceedings," and effectively impose "an ongoing federal audit of state criminal proceedings." *Id.* at 500–01. "[S]uch a major continuing intrusion . . . into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint" embodied in our federal system generally and in *Younger* specifically. *Id.* at 502.

Five years ago, the Eleventh and Ninth Circuits concluded that *O'Shea* did not apply in the cases before them, which involved narrow procedural challenges to bail decisions made by state courts, because those more modest requests did not rise to the level of interference contemplated by *O'Shea*.

In *Walker*, the Eleventh Circuit declined to abstain under *Younger* because the plaintiff "merely [sought] prompt bail determinations for himself and his fellow class members." 901 F.3d at 1254. The plaintiffs did not "ask for the sort of pervasive federal

court supervision of State criminal proceedings that was at issue in *O'Shea*," but instead "a prompt pretrial determination of a distinct issue, which will not interfere with subsequent prosecution." *Id.* at 1255.

In *Arevalo*, the Ninth Circuit declined to apply *Younger* to a single detainee's petition for a writ of habeas corpus after the trial court summarily set his bail at $1.5 million. 882 F.3d at 764–65. Far from a class action seeking systemic change, the facts of *Arevalo* were so unique that the State of California agreed that the habeas petition should be granted. *Id.* at 765. It was the district court that raised *Younger* and chose *sua sponte* to abstain based on *O'Shea*. *Arevalo v. Hennessy*, No. 4:17-cv-06676-HSG, 2017 WL 6558596, at *2 (N.D. Cal. Dec. 22, 2017). The Ninth Circuit found *O'Shea* distinguishable precisely because the individualized relief requested—granting one writ of habeas corpus to a single prisoner—could "be achieved without an ongoing intrusion into the state's administration of justice." *Arevalo*, 882 F.3d at 766 n.2.

Contrary to Little's insistence , the en banc Fifth Circuit's *Daves* decision is entirely consistent with *Walker* and *Arevalo* for the simple reason that the relief Little seeks is different from the relief provided in *Walker* and *Arevalo*. *See* Pet. 12–16. Unlike the litigants in those cases, Little—who has not been subject to bail proceedings in years—seeks an order mandating detailed structural changes to bail practices on a class-wide basis without any regard to the current state of the law in Louisiana or the 15th JDC.

B. The Fifth Circuit's *Younger* abstention holding is correct.

Lacking any genuine circuit split, Little's petition amounts to little more than a request for error correction. But there is no error for this Court to correct. Both the panel here and the en banc Fifth Circuit in *Daves* properly held that the first, second, and third prongs of the *Younger*-abstention test were met in this case and that abstention was warranted.

As the Court explained in *O'Shea*, "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials" is precisely the type of relief that the principles of equity and comity undergirding *Younger* forbid. 414 U.S. at 500. That is because such an injunction would "require for its enforcement the continuous supervision by the federal court over the conduct of" state courts because "any member of [the] class who appeared as an accused" could assert that the state-court judge was "in contempt of the federal court's injunction. *Id.* at 501–02. But "such a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized." *Id.* at 502.

And, as even Little appears to concede, the Fifth, Ninth, Eleventh Circuits all agree that, under *O'Shea*, such an intrusion is only exacerbated when the federal district court backs up its order by imposing ongoing reporting or supervisory components. *See* Pet. 13–14. So does the Second

Circuit. *See Wallace v. Kern*, 520 F.2d 400 (2d Cir. 1975).

Like the plaintiffs in *O'Shea*, Little has asked the federal courts to overhaul the bail rules in the 15th JDC. Specifically, Little seeks a mandate, enforceable by a federal judgment for contempt, that any state-court bail hearing include an "inquiry into or findings concerning ability to pay," "consideration of non-financial alternatives" to cash bail, and substantive findings that a particular disposition "is necessary to meet a compelling government interest." *See* Pet. App. 9a; *see also* Pet. 15 n.2. That substantive finding is, according to Little, operationalized through written findings on the record stating that no condition or combination of conditions could reasonably assure the appearance of the person in court and the safety of any other person or the community. *See* Pet. App. 110a.

As a result, not only does Little seek to impose the kind of "procedures which fix the time of, the nature of and even the burden of proof," in bail hearings, *see Wallace*, 520 F.2d at 406, but he also aims to create a novel substantive right that would dictate (at minimum) the content of judicial decisions concerning bail, Pet. 15 n.2. If granted, Little's requested injunctive relief "would contemplate interruption of state proceedings to adjudicate assertions of noncompliance" with federal-court-mandated procedures, *O'Shea*, 414 U.S. at 500, and thereby "open[] the federal courts any time an arrestee cries foul," *Daves*, 64 F.4th at 630.

Little admittedly seeks relief just like "the 'periodic reporting' system" that this Court in *O'Shea*

held "would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity" under *Younger*. 414 U.S. at 501.

Little insists that he is merely seeking a "negative injunction, leaving jurisdictions ample flexibility regarding implementation." Pet. 30. Not so. As in *O'Shea*, Little's requested relief is "aimed at controlling or preventing the occurrence of specific events that might take place" at future bail hearings in the 15th JDC. 414 U.S. at 500. After all, any class member who believes the Commissioner's bail hearing or subsequent bail order did not comply with the injunction would presumably be empowered to seek a federal-court determination of whether a cash-bail requirement was truly necessary. *See id.* at 502. This is precisely the "untoward interference with the state judicial system [that] violates [the] established principles of comity and federalism" announced in *O'Shea* and *Younger*. *Wallace*, 520 F.2d at 404.

Little maintains that, notwithstanding *O'Shea*, programmatic challenges to state bail practices are exempt from *Younger* because of a single footnote in *Gerstein v. Pugh*, 420 U.S. 103 (1975). Pet. 17–20. But that brief, two-sentence footnote does not aid him.

The holding of *Gerstein* is that "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to [pretrial] detention." 420 U.S. at 126. But in a footnote, the Court stated that the district court correctly determined that *Younger* abstention was not warranted because (1) "[t]he injunction [seeking a

timely probable-cause hearing] was not directed at the state prosecutions as such," (2) a challenge to pretrial detention could not be raised "in defense of the criminal prosecution," and (3) "[t]he order to hold preliminary hearings could not prejudice the conduct of the trial on the merits." *Id.* at 108 n.9. Little's efforts to apply that reasoning here takes that footnote out of context: the statement was made while rejecting the district court's view that a probable-cause hearing must "be accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses." *Id.* at 119. The Court rejected that view because "state systems of criminal procedure vary widely," "[t]here is no single preferred pretrial procedure," and because of the "desirability of flexibility and experimentation by the States." *Id.* at 123. These are precisely the type of comity-based concerns that animated the Court's decision in *Younger* itself. *Cf.* 401 U.S. at 44. And even the authority on which petitioners rely to manufacture a circuit split could not "agree that the *Gerstein* Court intended to overrule *O'Shea* in a footnote which does not even discuss it." *Wallace*, 520 F.2d at 408.

Rather than merely asking for a timely probable cause hearing like in *Gerstein*, 420 U.S. at 126, Little seeks to dictate the conduct of bail hearings and the outcome of bail decisions. That request is more akin to the relief that *Gerstein* rejected based on comity-based considerations. *See id.* at 119, 123. The Fifth Circuit was correct to do the same here.

C. Louisiana law affords detainees ample opportunities to raise their constitutional claims.

When determining whether a detainee has an adequate opportunity to challenge the legality of his detention, "[t]he pertinent issue is whether [a federal plaintiff's] constitutional claims could have been raised in the pending state proceedings." *Moore v. Sims*, 442 U.S. 415, 425 (1979). "[T]he burden on this point rests on the federal plaintiff to show 'that state procedural law barred presentation of [its] claims.'" *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987) (quoting *Moore*, 442 U.S. at 432). "[A]bstention is appropriate unless state law clearly bars the interposition of the constitutional claims." *Moore*, 442 U.S. at 425–26. As this Court explained in *Younger* itself, "[t]he accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection." 401 U.S. at 45; *accord Pennzoil*, 481 U.S. at 17.

Little has never argued that "state law clearly bars" presentation of his constitutional claims. *Moore*, 442 U.S. at 425–26. Nor could he. Louisiana law provides adequate opportunities to raise constitutional claims. Little's petition exclusively targets *Daves*, which arose in Texas, and offers no discussion whatsoever of the unique procedural tools available to detainees in Louisiana.

As discussed below, Little *conceded* that Louisiana's procedures were adequate under the Fifth Circuit's en banc decision in *Daves*. The Fifth Circuit accepted this concession without conducting any of its own analysis on the point. For the following reasons, Little's concession and the Fifth Circuit's acceptance of it were right.

i. Pretrial detainees can move the state district court for reconsideration of the bail amount.

To begin, it is worth reiterating that most misdemeanor detainees now go free immediately in the 15th JDC. But even when the 15th JDC Commissioner sets money bail for a detainee, a panoply of procedural tools remains available under state law to raise state and federal challenges to the bail amount and incarceration.

The Louisiana Code of Criminal Procedure provides that "the court having trial jurisdiction over the offense charged, *on its own motion or on motion of the prosecuting attorney or defendant*, for good cause, *may either increase or reduce the amount of bail, or require new or additional security*." La. Code Crim. Proc. art. 319(A) (emphasis added). In other words, if a pretrial detainee believes that the Commissioner set her money bail too high, she can move the trial court to reduce the amount of bail. *See State v. Neisler*, 633 So. 2d 1224, 1229 (La. 1994) ("[I]nherent in the authority to fix bail is, in general, the authority to modify bail if necessary.").

And if the pretrial detainee or his surety is unhappy with the *type* of security, she can move the

trial court to substitute it with another form of security. *Id.* art. 319(B) ("The defendant or his surety may . . . with approval of the court in which the prosecution is pending, substitute another form of security authorized by this Code.").

ii. Pretrial detainees can invoke the supervisory jurisdiction of appellate courts within bail cases.

If a pretrial detainee is "held without bail or unable to post bail," Louisiana law expressly allows her to "invoke the supervisory jurisdiction of the court of appeal on a claim that the trial court has improperly refused bail or a reduction of bail in a bailable case." *Id.* art. 312. This article of the Louisiana Code of Criminal Procedure provides pretrial detainees with an exceptionally powerful tool to raise state and federal claims relating to bail.

In Louisiana, the supervisory writ is a potent procedural mechanism that grants an appellate court "plenary power in its discretion to intervene at any stage of a proceeding in a trial court." *Mangin v. Auter*, 360 So. 2d 577, 577 (La. Ct. App. 1978); *see* La. Const. art. V, § 10 (granting an appellate court "supervisory jurisdiction over cases which arise within its circuit"); Albert Tate, Jr., *Supervisory Powers of the Louisiana Courts of Appeal*, 38 Tul. L. Rev. 429, 430 (1964) ("This constitutional grant of supervisory authority has always been held to be plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court."); *accord In re: Judge Guy E. Bradberry*, 2022-01828, 2023 WL 2212198 at *1 (La. 2/24/23) (Crichton, J., concurring).

A pretrial detainee need not, indeed must not, wait until final judgment in the trial court before invoking the supervisory jurisdiction of the appellate court. *See Herlitz Const. Co. v. Hotel Invs. of New Iberia, Inc.*, 396 So. 2d 878 (La. 1981) ("A court of appeal has plenary power to exercise supervisory jurisdiction over district courts and *may do so at any time*, according to the discretion of the court." (emphasis added)). If a pretrial detainee waits to challenge a trial court's bail decision until the appellate court gains appellate jurisdiction (as opposed to supervisory jurisdiction) through the usual appellate process, the detainee's bail claim becomes moot. *See State v. Edwards*, 2013-0665 (La. App. 4 Cir. 1/22/14), 133 So. 3d 132, 134 ("[T]he issue of the amount of her bail on appeal is now moot."); *State v. Landry*, 583 So.2d 911 (La. App. 1st Cir.1991); *State v. Gamberella*, 633 So. 2d 595, 608 (La. Ct. App. 1993). Moreover, a litigant invoking the supervisory jurisdiction of an appellate court can seek expedited review. *See* La. Unif. R. Ct. App. 4-4. Thus, a pretrial detainee can gain immediate appellate review of a trial court's bail decision.

Louisiana appellate courts routinely exercise their supervisory jurisdiction to grant relief in bail cases via supervisory writ. *See, e.g.*, *State v. Halverson*, 2021-01592 (La. 12/21/21), 329 So. 3d 276, 278 ("We find that, pursuant to the dictates of [La. Code Crim. Proc.] art. 316, as well as the constitutions of Louisiana and the United States, defendant's total bail obligation should not exceed $200,000."); *State v. Collins*, 19-429 (La. App. 5 Cir. 10/25/19), 2019 WL 5538575 (finding that, after balancing the ten bail

factors of La. Code Crim. Proc. art. 316, "Relator's $250,000 bond [is] excessive"); *State v. Chester*, 18-504 (La. App. 5 Cir. 9/6/18) ("[W]e hereby grant this writ application, vacate the trial court's ruling that summarily denied relator's Motion for Bail, and remand the matter to the trial court to conduct a contradictory hearing on relator's Motion for Bail within five days . . . ."); *State v. Golden*, 546 So. 2d 501, 504 (La. Ct. App.) ("We grant the application in each instance insofar as the bail is limited to being cash only."), *writ denied*, 547 So. 2d 365 (La. 1989); *State v. Robinson*, 360 So. 2d 880, 881 (La. 1978) (granting writ and reinstating bail when trial judge erred by revoking bail after a grand jury indictment); *State v. Jones*, 252 La. 903, 908–09, 215 So. 2d 108, 110 (1968) (granting a supervisory writ after observing that the trial "judge violated two fundamental protections extended by the State and Federal Bill of Rights").

Even when denying relief, state appellate courts regularly issue thorough and well-reasoned decisions on the merits—which further demonstrates the adequacy of the supervisory writ mechanism for safeguarding detainees' state and federal rights. *See, e.g.*, *State v. Poirier*, 2018-467 (La. App. 3 Cir. 7/11/18), 251 So. 3d 486, 493 (concluding "trial court did not abuse its discretion in denying bail to Defendant"); *State v. Helaire*, 2017-802 (La. App. 3 Cir. 10/25/17), 230 So. 3d 253, 255; *State v. Goodie*, 2017-693 (La. App. 3 Cir. 8/23/17), 226 So. 3d 1130, 1138 (concluding the record demonstrated no error in the trial court's determination that the detainee "pose[d] an imminent danger to the victim"); *State v. Chivers*, 198 La. 1098, 1104, 5 So. 2d 363, 364 (1941) (ordering the trial court

"to send up the record in the case and to show cause why the amount of the bond should not be reduced as prayed for" but ultimately concluding that "the defendant has not made a reasonable showing that he is unable to make bond in the amount fixed by the judge").

In sum, the supervisory writ is a powerful tool that allows Louisiana state courts to speedily safeguard the state and federal rights of pretrial detainees. Louisiana appellate courts can and do regularly use the supervisory writ in bail cases to preserve those rights.

iii. Pretrial detainees can seek a writ of habeas corpus.

Under Louisiana law, "[h]abeas corpus is a writ commanding a person who has another in his custody to produce him before the court and to state the authority for the custody." La. Code Crim. Proc. art. 351; *see State ex rel. Lay v. Cain*, 96-1247 (La. App. 1 Cir. 2/14/97), 691 So. 2d 135, 137. The Louisiana Code of Criminal Procedure defines "custody" as "detention or confinement as a result of or incidental to an instituted or anticipated criminal proceeding." *Id.*

Louisiana courts have explained that "habeas corpus is an action independent of the legal proceeding under which the detention is sought to be justified." *Madison v. Ward*, 2000-2842 (La. App. 1 Cir. 7/3/02), 825 So. 2d 1245, 1249 (citation omitted). "Both the [Louisiana] civil and criminal codes of procedure provide for habeas relief"—and so "it is essential that the individual habeas proceeding be appropriately classified." *Id.* "[W]here the custody being challenged

by a writ of habeas corpus arose from a criminal proceeding, the procedures set forth in [La. Code Crim. Proc.] art. 351 et seq. apply." *Id.*

Because the Louisiana Code of Criminal Procedure now expressly allows pretrial detainees to move state trial courts to lower bail and to invoke the supervisory jurisdiction of appellate courts to review claims related to bail, there are now fewer reported cases[3] in which pretrial detainees use habeas proceedings to raise bail claims. That is especially true because the Louisiana Code of Criminal Procedure does not allow any "appeal from a judgment granting or refusing to grant release upon a petition for a writ of habeas corpus." *Id.* art. 369. When a habeas petitioner mistakenly seeks to appeal a habeas decision, Louisiana courts often treat the appeal as though the petitioner invoked the appellate court's supervisory jurisdiction. *State ex rel. Lay v. Cain*, 96-1247 (La. App. 1 Cir. 2/14/97), 691 So. 2d 135, 138 ("Since we have the record before us, however, we shall treat this matter as a timely application for the exercise of our supervisory jurisdiction and decide the preliminary issue of venue."); *State ex rel. Smith v. Henderson*, 315 So. 2d 275, 275 (La. 1975) (same).

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[3] Years ago, however, Louisiana state courts regularly used habeas as a mechanism to lower bail and order detainees' release. *See, e.g.*, *State v. Wertheimer*, 183 La. 388, 390–91, 163 So. 545, 546 (1935) ("The relator's application to have the amount of bail reduced is granted to the extent of permitting him to obtain his liberty."); *State v. Glenon*, 164 La. 163, 167, 113 So. 803, 805 (1927); *see also State v. Gomilla*, 131 La. 286, 288, 59 So. 402, 402 (1912) (denying writ).

Pretrial detainees can use the writ of habeas corpus to ensure that they receive a bail hearing and other necessary procedures. The Louisiana Supreme Court's opinion in *State v. Chaney* demonstrates the power and usefulness of the writ of habeas for pretrial detainees. 384 So. 2d 442 (La. 1980). In that case, two men were arrested and incarcerated. *Id.* at 442. Three weeks went by, and they had not yet been brought before a judge as required by Louisiana Code of Criminal Procedure article 230.1. Under that article, a pretrial detainee must be brought before a judge or magistrate "within seventy-two hours from the time of the arrest." La. Code Crim. Proc. art. 230.1. As part of that hearing, a "court may also, in its discretion, determine or review a prior determination of the amount of bail." *Id.* If officials fail to adhere to these requirements or provide the hearing, the detainee "shall be released on his own recognizance." *Id.*

The two detainees sought a writ of habeas corpus and received a hearing before a judge. The trial judge denied the writ of habeas corpus, however, for reasons not relevant here. When the matter was eventually brought before the Louisiana Supreme Court, attorneys for the State argued the case was moot because the prisoners had since been released on bail. The court reversed and granted the writs for habeas corpus, explaining that the trial judge misinterpreted article 230.1. The court rejected the mootness argument because the plain language of article 230.1 did not condition release on bail. The court found it "impossible to believe that an accused who is unable to give bail should be granted a complete release,

while an accused with greater resources is only entitled to a conditional release." *Id.* at 446.

In accordance with the Supreme Court's decision in *Chaney*, lower state courts grant habeas applications when local officials fail to adhere to the requirements of article 230.1. *See, e.g.*, *State ex rel Wilson v. State*, 413 So. 2d 498 (La. 1982); *State v. Watkins*, 399 So. 2d 153, 155 (La. 1981) ("In response to a petition for habeas corpus, a hearing was held and defendants were ordered released from custody.").

In sum, Louisiana's writ of habeas corpus is an important tool that pretrial detainees can use to ensure that they receive the necessary process mandated in article 230.1 and other provisions of state law.

iv. Pretrial detainees can seek a writ of mandamus.

Finally, the writ of mandamus is yet another tool provided by Louisiana law that pretrial detainees can use to vindicate their state and federal rights. "Mandamus is a writ directing a public officer . . . to perform" certain ministerial duties. La. Code Civ. Proc. art. 3861. But mandamus "is not a proper procedure when the [official's] duty contains elements of discretion." *Ass'n of La. Bail Underwriters v. Johnson*, 615 So. 2d 1345, 1346 (La. Ct. App.) (citing *24th Judicial Dist. Indigent Def. Bd. v. Molaison*, 522 So.2d 177 (La. App. 5th Cir. 1988)), *writ denied*, 617 So. 2d 1184 (La. 1993).

In *Association of Louisiana Bail Underwriters v. Johnson*, an association of underwriters sued a sheriff because the sheriff allowed "both misdemeanor and

felony offense defendants to obtain pre-trial and post-conviction releases from custody by posting ten per cent of the set bail, in cash, with the Sheriff's office." *Id.* at 1345–46. The association believed that practice was illegal because it was not specifically provided in the bail statutes. *Id.* at 1346. The trial court rejected the association's challenge to the bail procedure for misdemeanor cases. The association appealed, seeking a writ of mandamus to compel the sheriff to cease its practice.

The sheriff objected to the use of the mandamus procedure "on the basis that the party responsible for the order is the district court and that he is simply following a judicial order." *Id.* at 1346. And so, the appellate court was obligated to answer the question of whether it could even consider the challenge through the mandamus procedure before turning to the merits of the association's challenge.

The appellate court explained that "mandamus may issue where the law provides no relief by ordinary means or where the delay involved in pursuing ordinary means may cause injustice." *Id.* (citing La. Code Civ. Proc. art. 3862). Because "in this case, the courts have delegated a duty to the Sheriff . . . to accept bail as provided in an order . . . [h]e is allowed no discretion." *Id.* Thus, the appellate court concluded that the "duty is ministerial" and "*the writ of mandamus was properly brought* by the Association to contest the manner in which the Sheriff performs the duty." *Id.* (emphasis added). On the merits, however, the appellate court rejected the association's argument that the trial court erred by allowing the

sheriff's "acceptance of a ten per cent cash bond in lieu of surety." *Id.* at 1347.

The important lesson to draw from *Association of Louisiana Bail Underwriters* is that state courts are willing to use the writ of mandamus to ensure that local officials, including sheriffs, adhere to the law when performing ministerial duties. A pretrial detainee could—like the association—invoke the mandamus mechanism if she believed that a sheriff or another local official was not performing a ministerial duty. This additional protection provides yet another reason to conclude that Louisiana procedures are adequate under the third *Younger* factor.

II. LITTLE'S PETITION HAS VEHICLE PROBLEMS.

A. Significant changes to the 15th JDC's bail procedures moot Little's claims.

When Little initiated this class-action litigation in 2017, and even when the class was certified in June 2018, the 15th JDC's bail procedures were significantly different from what they are today. At that time, a bail schedule established the amount of payment for most misdemeanor offenses. The Commissioner did not consider arrestees' individual financial situations when assigning bail, and he rarely considered non-financial alternatives to bail. Those are the practices that Little challenges, and all of that has changed. Not a single arrestee is subject to those practices today.

In August 2018, the 15th JDC acted en banc to rescind the bail schedule. Today, most misdemeanor arrestees are released immediately without money bail. By the time of trial in this case, any arrestees not

subject to automatic release receive individual hearings, in which the Commissioner considers their financial situations and alternatives to money bail. The district court found that these changes were not merely "cosmetic." Pet. App. 48a.

These changes impact the vitality of Little's claims. Little was released after a week of incarceration. His release would normally operate to moot his claims unless they are "capable of repetition, yet evading review." *Weinstein*, 423 U.S. at 149; *see also Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129–30 (1975) (holding that a class action becomes "moot unless it was duly certified as a class action pursuant to Fed. Rule Civ. Proc. 23, a controversy still exists between petitioners and the present members of the class, and the issue in controversy is such that it is capable of repetition yet evading review"); *O'Shea*, 414 U.S. at 495–96. This exception to the mootness doctrine is narrow: "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.'" *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)).

Allowing Little and his class to press their claims would allow the narrow mootness exception for transitory claims to swallow the rule that federal courts are limited to considering only cases and controversies. *See Sosna v. Iowa*, 419 U.S. 393, 402 (1975). In an analogous context, this Court has explained that "where a named plaintiff's individual claim becomes moot before the district court has an opportunity to rule on the certification motion, and the

issue would otherwise evade review, the certification might 'relate back' to the filing of the complaint." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75–76 (2013). A claim relates back only "where it is certain that other persons similarly situated will continue to be subject to the challenged conduct." *Id.* (cleaned up). In light of the significant changes to the 15th JDC's bail procedures—including the en banc order that put an end to the bail schedule—it is not "certain" that other persons situated similarly to Little will "continue to be subject to the challenged conduct." *Id.* The exception to the mootness rule should not apply in these circumstances.

B. Little conceded the adequacy of Louisiana's procedures under *Daves*, and the Fifth Circuit accepted his concession without any analysis.

In *Daves*, the full Fifth Circuit rightly concluded that the third *Younger* prerequisite was satisfied because Texas detainees have an "adequate opportunity" to present their constitutional claims in state court. *See Middlesex Cnty. Ethics Comm.*, 457 U.S. at 432. In light of the *Daves* en banc opinion, the Fifth Circuit panel in this case asked for supplemental briefing on whether Louisiana courts provide pretrial detainees adequate opportunities to present their constitutional claims.

The Judicial Defendants in this case filed a supplemental brief that elaborated in great detail about the many ways Louisiana state court detainees can raise constitutional claims during their state criminal proceedings. Little filed a supplemental brief

that, in light of the *Daves* en banc opinion, *conceded* the point without further elaboration. The Fifth Circuit panel in this case simply accepted his concession without deciding the question or analyzing it in any detail. Pet. App. 12a–13a.

This paucity of analysis on the key question in Little's petition is a good reason to deny his petition. This case's unusual procedural posture means that, if the Court grants certiorari here, it will be the *very first* court in this litigation to consider whether Louisiana's bail procedures are adequate for purposes of *Younger* abstention. This is a "court of review, not of first view." *Cutter*, 544 U.S. at 718 n.7. And so, even if the Court is interested in the issues Little raises, it should wait for further percolation in the lower courts before granting certiorari to consider them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JEFF LANDRY
Attorney General

ELIZABETH MURRILL*
Solicitor General
**Counsel of Record*

LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, LA 70802
(225) 326-6766
murrille@ag.louisiana.gov