No. 23-291

IN THE

Supreme Court of the United States

EDWARD LITTLE,
on behalf of himself and all others similarly situated,
Petitioner,

v.

ANDRE' DOGUET; LAURIE HULIN; MARK GARBER,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

This litigation seeks to stop respondents from jailing presumptively innocent people for prolonged periods when detention is not necessary to serve any government interest, and when people must endure irreparable harm before having any chance to challenge their detention. Without ever defending their practices, respondents say federal courts must abstain from hearing claims like petitioner's. Neither this Court's cases nor basic concepts of justice and human dignity countenance that result.

ARGUMENT

I. *YOUNGER*

The decision below implicates an established 2-2 circuit split and flouts this Court's precedent. Respondents' counterarguments fail.

A. The judicial respondents (hereafter "judges") first cite (Opp.12-13) *O'Shea* v. *Littleton*, 414 U.S. 488 (1974). But *O'Shea* underscores the split: Whereas the Fifth and Second Circuits hold that *O'Shea* is the governing *Younger* precedent with claims like petitioner's (and requires abstention), the Ninth and Eleventh Circuits hold that *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), governs (and precludes abstention). Pet.12-17. That is the conflict requiring resolution.

The judges next argue (Opp.13-14) that the Ninth and Eleventh Circuit decisions are distinguishable because the plaintiffs there sought more limited relief than petitioner. *Accord* Sheriff Opp.6-8. That is incorrect.

The plaintiffs in the Ninth and Eleventh Circuit cases asserted the same equal-protection/due-process claim petitioner does: Governments cannot detain people pretrial unless a court finds (after providing certain procedural protections) that detention is necessary to

serve a government interest. *See Walker* v. *City of Calhoun*, 901 F.3d 1245, 1259 (11th Cir. 2018) (describing "Walker's allegation"); *Arevalo* v. *Hennessy*, 882 F.3d 763, 764-765 (9th Cir. 2018) (recounting Arevalo's "argu[ment]"); Pet.App.9a. And both circuits rejected abstention because adjudicating that claim would not—under *Gerstein*—"interfere with" state prosecutions. *Walker*, 901 F.3d at 1255; *Arevalo*, 882 F.3d at 766. The Fifth and Second Circuits held the opposite, based on *O'Shea*. Pet.App.129a; *Wallace* v. *Kern*, 520 F.2d 400, 406 (2d Cir. 1975). Again, that is the conflict needing resolution.

Respondents, moreover, mischaracterize petitioner's requested relief. It is not "an order mandating detailed structural changes." Judges' Opp.14. The complaint requests a declaration and an injunction prohibiting pretrial detention absent a necessity finding and procedural protections. CA5 Record on Appeal ("ROA") 44-45. That is just like both the relief sought in *Walker* and *Arevalo*, and the injunction *Gerstein* held did not unduly interfere with prosecutions (despite recognizing it might require states to change their practices), 420 U.S. at 108 n.9, 124-125.

The sheriff separately argues (Opp.7-8) that the relief in *Arevalo* was for an individual, not a class. But that is irrelevant (even putting aside that *Walker was* a class action); what matters is *Arevalo*'s holding rejecting abstention "because the issues raised" were "distinct from the underlying criminal prosecution." 882 F.3d at 766. The sheriff additionally asserts (Opp.7) that this case resembles *Luckey* v. *Miller*, 976 F.2d 673 (11th Cir. 1992) rather than *Walker*. *Walker* itself explained why that is wrong: Luckey's claims sought "to restrain … *prosecution[s]*." *Walker*, 901 F.3d at 1255 (emphasis added). Claims like petitioner's (and Walker's) instead seek "a

prompt pretrial determination of a distinct issue, which will not interfere with subsequent prosecution." *Id.*

Finally, the sheriff argues (Opp.10) that the Eleventh and Ninth Circuits might reverse themselves given the (8-7) *Younger* holding in *Daves* v. *Dallas County*, 64 F.4th 616 (5th Cir. 2023) (en banc) (subsequent history omitted). But the chances of both circuits convening en banc to effect such a double reversal are vanishingly small. Indeed, the sheriff cites nothing, from *either* court (no opinion suggesting the need for en banc review, no dissent from a rehearing denial, not even a call for an en banc vote), suggesting that en banc review is even remotely likely, much less that such review would lead to reversal of both circuits' precedent. That is not surprising: *Arevalo* and *Walker* each fully analyzed whether cases like this unduly interfere for *Younger* purposes. And as shown herein and in the petition—and in the amicus briefs, which respondents ignore—*Daves*'s *Younger* analysis is riddled with analytical flaws and rests on selective readings of this Court's precedent.

Put simply, the lower courts are intractably divided about whether claims like petitioner's trigger *Younger*.

B. Respondents' claim that the decision below follows this Court's *Younger* precedent fails.

1. Like their arguments about the circuit conflict, respondents' arguments regarding *Younger*'s undue-interference requirement mischaracterize the injunction petitioner requested.

The judges contend (Opp.16) that petitioner "seeks a mandate" regarding the details of what "state-court bail hearing[s must] include." In reality, the injunction sought would do what *Gerstein* did: delineate a constitutional prerequisite for pretrial detention and prohibit

governments from detaining people without satisfying that prerequisite (in whatever way each jurisdiction deemed fit). Pet.30. Like Florida in *Gerstein*, then, respondents would retain flexibility about the details of their bail proceedings. Respondents ignore this point.

The judges also wrongly claim (Opp.16-17) that petitioner "seeks relief just like 'the "periodic reporting" system'" in *O'Shea*. Petitioner's requested injunction (ROA.44-45) included no reporting requirement (although even if an injunction included provisions that *would* unduly interfere, the remedy would be to remove them, not dismiss the claim, Pet.29). Perhaps recognizing this, the judges suggest (Opp.16-17) that requiring just a hearing and relevant finding before detaining people pretrial would constitute undue interference. If that were true, *Gerstein* (where both were sought) would have required abstention.

Next, the judges contend (Opp.16) that petitioner's requested injunction "would contemplate interruption of state proceedings to adjudicate assertions of noncompliance." But nothing about the relief requested would require interruption; indeed, respondents never explain why claims of non-compliance with an injunction regarding pretrial release would interfere, not with "state proceedings," *id.*, but with "state prosecutions," *Gerstein*, 420 U.S. at 108 n.9. It would not interfere with prosecutions, because "the legality of pretrial detention without a judicial hearing" is separate from "the criminal prosecution," *id.*; *accord Younger* v. *Harris*, 401 U.S. 37, 46 (1971); Pet.19. By contrast, the hypothetical injunction addressed in *O'Shea could* have disrupted prosecutions, because it was "aimed at … events that might [occur] in … future state criminal trials." 414 U.S. at 500.

More generally, while petitioner could seek enforcement of any injunction issued, that is true of every injunction. If that triggered *Younger*, there would never be federal injunctions where related state proceedings were ongoing, i.e., abstention would be nigh-ubiquitous. This Court's most recent *Younger* precedent—which respondents ignore—rejects that regime. *Sprint Communications, Inc.* v. *Jacobs*, 571 U.S. 69, 81-82 (2013); Pet.3-4; *see also* Cato Br. 6-8.

As to *Gerstein*, the judges first assert (Opp.17) that its only "holding" concerned the Fourth Amendment. Wrong again: *Gerstein* "held" that abstention was unwarranted. *Moore* v. *Sims*, 442 U.S. 415, 431 (1979).

The judges next note (Opp.18) that *Gerstein* held that the Fourth Amendment does not require probable-cause hearings to include certain procedural protections. That validates *petitioner's* argument, because *Gerstein* rejected abstention *even though* those protections were sought, 420 U.S. at 108 n.9. *Gerstein*, that is, did not dismiss the claim (as respondents say should occur here), instead addressing it on the merits. Hence, even if petitioner had sought the detailed injunction respondents suggest, abstention still would not be required, for the reason *Gerstein* deemed dispositive: Petitioner's claim (and any resulting injunction) are "not directed at the state prosecutions as such." *Id.*

The same point also disposes of the sheriff's argument (Opp.6) that *Gerstein* is distinguishable because there the court of appeals had "rejected" the proposed injunction's "mandate [for] immediate release of an arrestee if a magistrate had not found probable cause within a certain period" (citing *Pugh* v. *Rainwater*, 483 F.2d 778, 790 (5th Cir. 1973)). Putting aside that no similar mandate is involved here, *Gerstein* rejected

abstention not because that mandate was absent but because "the legality of pretrial detention … could not prejudice the conduct of the trial on the merits." 420 U.S. at 108 n.9. The same is true here.

The judges also cite (Opp.18) the Second Circuit's view that *Gerstein* could not have intended to overrule *O'Shea*. That is not petitioner's argument. *O'Shea* and *Gerstein* addressed different circumstances: *O'Shea* a challenge to essentially an entire criminal-justice system, *see* 414 U.S. at 492, and *Gerstein* a challenge "only [to] the legality of pretrial detention," 420 U.S. at 108 n.9. Cases like this are akin to (and hence governed by) *Gerstein*, not *O'Shea*.

Likewise unavailing is the sheriff's reliance (Opp.5-6) on *Pennzoil* v. *Texaco, Inc.*, 481 U.S. 1 (1987). *Pennzoil* held that federal courts could not enjoin enforcement of a state-court civil judgment during the appeal. *Id.* at 3-4, 10-14. The analogue in the criminal context to the injunction in *Pennzoil* would be a federal injunction against a state court enforcing a state conviction and sentencing pending appeal. That is quintessential relief "directed at … state prosecutions," which under *Gerstein* triggers *Younger*, 420 U.S. at 108 n.9. But it is entirely unlike petitioner's requested injunction.

In sum, petitioner seeks what *Gerstein* held does not trigger *Younger*: an injunction barring unconstitutional pretrial detention but leaving states flexibility regarding how to adhere to the Constitution's mandates. Respondents cannot reconcile the decision below with *Gerstein*'s holding. That holding alone precludes abstention.

2. As to *Younger*'s adequate-opportunity requirement, the judges never dispute that the decision below conflicts with holdings of the First, Fourth, and Sixth

Circuits. Pet.25-26, 29. That additional conflict confirms the need for review here.

The judges argue, however (Opp.19), that Louisiana law "provides adequate opportunities" to raise petitioner's claim in state court, via either a bond-reduction motion or a separate habeas case. But while the judges spill much ink simply *describing* those procedures, they never contest the district court's finding that it takes "a week or more" (and they admit it "typically takes more," ROA.39, 1606) just to get a motion *hearing*. Pet.App.55a. (Habeas proceedings, meanwhile, take far longer, as do "supervisory jurisdiction" appeals (Judges' Opp.21-24).) Nor do respondents deny that people suffer irreparable harm from such extended detention. Pet.2, 32-34. Under this Court's precedent, these facts mean that neither avenue respondents invoke constitutes an adequate opportunity. Pet.22-29.

Disputing this, the judges argue (Opp.19) that inadequacy can be shown *only* by proving that "state procedural law barred presentation of" the federal claim *altogether*. But if that were true, a state procedure would be adequate even if a criminal defendant could not challenge pretrial detention until sentencing (or even direct appeal). That cannot be right. And this Court's precedent shows it isn't: In *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), Alabama law *eventually* provided an opportunity to have the federal claims adjudicated in state court, *id.* at 577 & n.16. But *Gibson* held the opportunity there inadequate because it arose only after irreparable harm was inflicted. *Id.* This Court's precedent thus makes clear that abstention is inappropriate with challenges to

a period of irreparable harm that occurs before any opportunity to address it.*

The cases respondents cite do not show otherwise. For example, when *Pennzoil* stated that the plaintiff there (Texaco) had not demonstrated "that state procedural law barred presentation of its claims," it was responding to Texaco's *argument* that "Texas procedure" was "inadequa[te]," 481 U.S. at 14, 17. This Court disagreed, noting that state laws indicated the opposite. *Id.* at 15-16 & n.15. But *Pennzoil* did not hold that proving state procedural law bars any presentation of federal claims is the only way to show inadequacy. Here, what matters is that respondents' *practices* bar any adequate opportunity to be heard before suffering the harm of extended detention.

Similarly, *Moore* rejected a timeliness argument because the plaintiffs' removed children had been returned, so any delay would not cause irreparable harm. 442 U.S. at 431-434. *Moore* even distinguished *Gerstein* on that basis, *id.* at 431-432, reaffirming that where (as here) plaintiffs face irreparable harm *before they can raise their claims*, abstention is inappropriate.

The sheriff, meanwhile, faults petitioner (Opp.9) for supposedly not citing "unambiguous authority demonstrating that a week to hold a bail[-reduction] hearing" is untimely under *Younger*. But for starters, the district court did not find that it takes "only" a week to secure a bond reduction, as the sheriff suggests. Again, the court found that it takes "a week or more," Pet.App.55a, just

* While respondents are disturbingly blasé about presumptively innocent human beings being jailed *for no reason*—and thus separated from their homes, spouses, children, friends, jobs, houses of worship, and more for a week or longer—this Court should not be.

to get a bail-reduction hearing. Respondents do not dispute that a week or more of pretrial detention inflicts irreparable harm. Pet.32-34. And as explained, *Gibson* is "unambiguous authority" that an opportunity that arises only after irreparable harm is inflicted is inadequate.

The sheriff also implies (Opp.9) that *Arevalo* deemed a two-week delay for bail hearings unproblematic. Not so: As the sheriff admits, what *Arevalo* required was a constitutional bail hearing within fourteen days of the grant in that case of a conditional writ of habeas corpus. 882 F.3d at 767-768. That has nothing to do with—and *Arevalo* did not address—the adequacy under *Younger* of the timing of bail hearings for arrestees generally. Likewise, the fact that *Walker* held *on the merits* that the Constitution does not require initial bail hearings within one day of arrest (Sheriff Opp.9) says nothing about whether federal courts can hear claims challenging "a week or more," Pet.App.55a, of detention without any opportunity to be heard. Under *Gibson*, federal courts *must* hear such claims, even if they might ultimately conclude, as *Gerstein* did, that not all the relief sought is constitutionally required.

Finally, the judges assert (Opp.24-29) that separate state-court proceedings (like habeas or mandamus) can provide an adequate opportunity under *Younger*. But they largely ignore petitioner's arguments (Pet.26-29) about why that assertion conflicts with this Court's and other circuits' precedent. Specifically, they do not dispute either that this Court has *never* mandated initiating a separate proceeding, or that it has consistently described adequacy as an opportunity within the relevant state proceedings. *Id.* Instead, they again simply spend pages describing how Louisiana's habeas and mandamus procedures work. None of that matters for the reasons

petitioner has given (and which, again, respondents ignore).

In short, the Fifth Circuit has adopted an unprecedented adequate-opportunity rule: Federal courts cannot hear federal constitutional challenges to pretrial detention so long as state courts permit such challenges *later*, i.e., after it is too late to prevent the challenged irreparable harm. That rule is contrary to fundamental principles of justice. It should be rejected.

II. NO VEHICLE PROBLEM EXISTS

Respondents do not dispute that the question presented is important and recurring. Their two vehicle arguments fail.

A. This Court recently denied certiorari in *Daves*, which involved two questions presented because the Fifth Circuit held there not only that *Younger* abstention was required but also that the plaintiffs' claim was mooted by a new Texas statute. Seeking to evade review by making this case look like *Daves*, the judges raise the specter that mootness is present here too. That is meritless.

The judges' mootness argument rests on changes to respondents' bail practices made in "August 2018" (Opp.29). That was *a year before trial*. Pet.App.3a. The district court evaluated respondents' changes after trial and concluded that they did not moot petitioner's challenges to respondents' then-current—and since-unchanged—bail practices, addressing those challenges on the merits. Pet.App.3a-4a, 44a-51a. (This fact belies the judges' critical yet conspicuously citation-free assertion (Opp.29) that "Little challenges" *only* the pre-August-2018 practices.) The Fifth Circuit likewise did not embrace respondents' mootness argument, instead holding

that *Younger* required dismissal. That holding (again, regarding the practices respondents have employed since long before trial) is what petitioner asks this Court to review. Respondents cannot manufacture a vehicle problem based on a mootness argument that the lower courts heard but did not accept, when *nothing* has changed since long before the Fifth Circuit holding petitioner challenges. And because nothing *has* changed, this Court unquestionably has jurisdiction to review that holding.

In fact, respondents do not suggest otherwise. And they concede (Judges' Opp.31) that under this Court's precedent, there is no mootness problem if "'it is certain that other persons similarly situated [to petitioner] will continue to be subject to the challenged conduct'" (quoting *Genesis Healthcare Corporation* v. *Symczyk*, 569 U.S. 66, 75-76 (2013)); *see also County of Riverside* v. *McLaughlin*, 500 U.S. 44, 51-52 (1991); *Gerstein*, 420 U.S. at 110 n.11. That is the situation here because respondents' practices have not changed since a year before trial; those practices continue to this day in the same form as in late 2018 (and they do not comport with what petitioner says the Constitution requires). It is thus indeed "certain" that other individuals will be subjected to the conduct that was the subject of both the trial and the Fifth Circuit's *Younger* holding that petitioner challenges here.

If respondents are urging denial solely because the Fifth Circuit *could* agree with their mootness argument on remand, that is unavailing. This Court regularly grants review in such circumstances. *E.g.*, *Mont* v. *United States*, 139 S.Ct. 1826, 1831 (2019).

B. The judges also say (Opp.32) the Fifth Circuit "accepted" petitioner's "concession" that *Daves*

required it to hold Louisiana's procedures adequate "without deciding the question" itself. *See also* Opp.2, 10-11, 20. That is incorrect. The Fifth Circuit "agree[d]" that it had to "make the *needed* determination" of "whether… [Louisiana's] procedures provide an 'adequate opportunity.'" Pet.App.8a (emphasis added). And it did so, describing Louisiana's relevant procedures, Pet.App.10a-11a, and deeming them adequate under *Daves* because "the Plaintiffs here have failed to show that Louisiana is unable or unwilling to reconsider bail determinations," and "[h]ow quickly those can be reconsidered is irrelevant," Pet.App.12a.

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The abstention framework here should not obscure the concrete human stakes. The Constitution protects presumptively innocent people against *unnecessary* pretrial detention, as well as detention imposed without even the most fundamental procedural protections, such as any right to be heard. And this Court's *Younger* cases establish that federal courts can enforce that bedrock principle. This Court should reaffirm that principle here, and resolve the entrenched circuit conflicts over the question presented.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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