No. 23-

IN THE

Supreme Court of the United States

SHANNON DAVES, *et al.*,
on behalf of themselves and others similarly situated;
FAITH IN TEXAS; AND TEXAS ORGANIZING PROJECT,
Petitioners,

v.

DALLAS COUNTY, TEXAS, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ALEC KARAKATSANIS
ELIZABETH ROSSI
SUMAYYA SALEH
CIVIL RIGHTS CORPS
1601 Connecticut Ave. N.W.
Suite 800
Washington, D.C. 20009
(202) 844-4975

ADRIANA PIÑON
BRIAN KLOSTERBOER
ACLU FOUNDATION OF
TEXAS, INC.
P.O. Box 8306
Houston, TX 77288
(713) 942-8146

DANIEL S. VOLCHOK
Counsel of Record
KEVIN M. LAMB
BRITANY RILEY-SWANBECK
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave. N.W.
Washington, D.C. 20037
(202) 663-6000
daniel.volchok@wilmerhale.com

BRANDON J. BUSKEY
ANDREA R. WOODS
TRISHA TRIGILIO
AMERICAN CIVIL
LIBERTIES UNION
125 Broad St., Suite 18
New York, N.Y. 10004
(202) 549-2500

QUESTIONS PRESENTED

1. Whether *Younger* v. *Harris*, 401 U.S. 37 (1971), and its progeny require federal courts to abstain from adjudicating petitioners' constitutional challenges to respondents' pretrial detention of many thousands of presumptively innocent people.

2. Whether, under this Court's precedent, legislation enacted during a lawsuit renders the asserted claims moot if the legislation does not provide the relief sought in the litigation, such that the courts could still provide the plaintiff with effectual relief.

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiff-appellants/cross-appellees below, are Shannon Daves, Shakena Walston, Erriyah Banks, Destinee Tovar, Patroba Michieka, James Thompson, on behalf of themselves and others similarly situated.

Respondents, who were defendant-appellees/cross-appellants below, are Dallas County, Texas, and Dallas County Criminal District Court Judges Ernest White, Hector Garza, Raquel Jones, Tammy Kemp, Jennifer Bennett, Amber Givens-Davis, Lela Mays, Stephanie Mitchell, Brandon Birmingham, Tracy Holmes, Tina Yoo Clinton, Nancy Kennedy, Gracie Lewis, Dominique Collins, Carter Thompson, Jeanine Howard, and Chika Anyiam, in their official and individual capacities.

Other defendants-appellees below were Dallas County Sheriff Marian Brown, in her official capacity; Dallas County Criminal Court Judges Dan Patterson, Julia Hayes, Doug Skemp, Nancy Mulder, Lisa Green, Angela King, Elizabeth Crowder, Carmen White, Peggy Hoffman, Roberto Canas, Jr., and Shequitta Kelly, in their official and individual capacities; and Dallas County Magistrate Judges Terrie Mcvea, Lisa Bronchetti, Steven Autry, Anthony Randall, Janet Lusk, and Hal Turley.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 23-

SHANNON DAVES, *et al.*,
on behalf of themselves and others similarly situated;
FAITH IN TEXAS; AND TEXAS ORGANIZING PROJECT,
Petitioners,

v.

DALLAS COUNTY, TEXAS, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioners brought this lawsuit challenging the constitutionality of Dallas County's practice of routinely jailing arrested people—for weeks or even months—solely because they cannot pay cash bail. This mass deprivation of physical liberty occurs without any determination that detention is necessary to protect public safety or prevent flight. It occurs without the most basic procedural protections, such as an opportunity to be heard *at all*, including regarding why detention is not necessary. It inflicts irreparable harm, cutting people

off from their jobs, homes, families, medical care, and houses of worship. And it curtails people's ability to defend against the charges, of which they are of course presumed innocent.

Holding that petitioners would likely succeed with several of their constitutional claims, the district court entered a preliminary injunction. A Fifth Circuit panel largely affirmed but the en banc court held that in cases like this, *Younger* v. *Harris*, 401 U.S. 37 (1971), requires federal courts to abstain from adjudicating the claims. The court also held that petitioners' claims were mooted by legislation Texas enacted during the litigation—even though the legislation indisputably does not provide the relief sought.

This Court's review of both holdings is warranted. The *Younger* holding deepens an established circuit conflict, and both the *Younger* and mootness holdings flout this Court's precedent. For example, in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), this Court held that a similar challenge to pretrial detention did *not* trigger *Younger* abstention, *see id.* at 108 n.9. The Court has also long held that a case is moot only if a court cannot grant the plaintiff any effective relief. That standard is not met here—indeed, the Fifth Circuit never asserted otherwise. Instead, it substituted a different standard, looking at whether intervening legislation made "substantial changes," App.28a, and mischaracterizing this case as a challenge to that legislation rather than to Dallas County's actual bail practices. Finally, both questions presented are recurring and important. Every year governments arrest and detain thousands of people for weeks or months before affording them a meaningful opportunity to challenge whether there is any need for them to be deprived of their fundamental right to physical liberty.

OPINIONS BELOW

The Fifth Circuit's en banc opinions (App.1a-77a, App.79a-165a) are published at 64 F.4th 616 and 22 F.4th 522. Its order granting rehearing (App.199a-200a) is published at 988 F.3d 834.

The district court's opinion addressing abstention and mootness (App.167a-180a) is available at 2022 WL 2473364. Its opinion entering a preliminary injunction (App.181a-197a) is published at 341 F.Supp.3d 688.

JURISDICTION

The Fifth Circuit entered judgment on March 31, 2023. On May 30, Justice Alito extended the time to file this petition through July 29. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Texas Senate Bill 6 (87th Tex. Leg. 2d C.S., Aug. 31, 2021) is reproduced in the appendix (App.201a-238a).

STATEMENT

A. Background On *Younger* Abstention

Younger held that federal courts, as a matter of comity, must sometimes abstain from hearing claims that would interfere with pending state proceedings. But in its most recent in-depth discussion of *Younger*—*Sprint Communications, Inc.* v. *Jacobs*, 571 U.S. 69 (2013)—this Court stated that "abstention … is the 'exception, not the rule.'" *Id.* at 81-82; *accord New Orleans Public Service, Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 368 (1989). Specifically, *Younger* abstention is not required unless: (1) federal adjudication would unduly interfere with an ongoing state-court proceeding that (2) implicates an important state interest and (3) gives

the plaintiff an adequate opportunity to raise the federal claim. *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423, 432 (1982).

In *Gerstein*, this Court held that *Younger* abstention was not required with claims challenging pretrial detention without a prompt probable-cause finding. *See* 420 U.S. at 108 n.9. The *Gerstein* plaintiffs (Florida arrestees) were subject to weeks of pretrial detention before they could challenge the probable cause underlying their arrests. *Id.* at 105-106. The district court invalidated this practice, ordering prompt probable-cause hearings. *Id.* at 107-108. Regarding *Younger*, this Court explained that the lawsuit would not unduly interfere with pending prosecutions because it "was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution." *Id.* at 108 n.9. Accordingly, "[t]he order to hold [prompt] hearings could not prejudice the conduct of the trial on the merits." *Id.* Abstention was therefore not appropriate.

The prior year, this Court held in *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), that *Younger* abstention was warranted in a case seeking federal oversight of virtually every aspect of a local criminal legal system, including arrest, bail, trial, and sentencing, *see id.* at 488, 491-492. In particular, the Court mandated abstention because the injunction that "the Court of Appeals thought should be available if [the plaintiffs] proved their allegations" was "aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials." *Id.* at 500. Abstention would be required in that circumstance, *O'Shea* stated, because "the normal course of criminal proceedings in the state courts would … be disrupted." *Id.*

B. Dallas County's Post-Arrest Practices

1. The district court in this case, after receiving thousands of pages of documents and hearing live testimony from numerous witnesses, made detailed factual findings about Dallas County's post-arrest detention practices. Those findings—which were not set aside or even challenged on appeal—include the following:

Dallas County's judges promulgate two secured-bail "schedules," one each for felony and misdemeanor charges. App.184a, 187a. ("Secured" bail means payment is required before release. App.184a) Each schedule lists the "'price[]' for release" for each charge and category of arrestee. App.185a. For example, secured bail for class B misdemeanors (e.g., trespass) is $500—whatever the arrestee's financial resources. *See* CA5 Record on Appeal ("ROA") 492.

County magistrates, who set bail in individual cases, "treat the[] schedules as binding," App.183a-185a, imposing the predetermined amount virtually every time. They do so during arraignments that typically last under 30 seconds, and at which arrestees lack counsel and cannot raise any challenges to bail. ROA.486, 6593-6594; App.185a. Arrestees who "can pay the sum" listed on the schedule "obtain release" immediately, while those who cannot are "confined in a cell until [their] first appearance." App.185a-186a. "Misdemeanor arrestees typically wait between four and ten days for their first appearance …. Felony arrestees who waive indictment typically wait two weeks …. Felony arrestees who do not waive indictment typically wait two to three months." App.186a.

2. A month after this case was filed, the county judges responsible for felony cases authorized magistrates to release certain arrestees on "unsecured" bail

(meaning money must be paid only if the person misses a required court appearance). App.184a-185a. But the district court found that this change "had minimal effect": Magistrates continue to "treat the[] schedules as binding," imposing secured-bail in the scheduled amount almost without fail. App.185a, 187a.

Because magistrates persist in following the schedules, the district court found, most arrestees still must pay the amount listed in the schedule or face prolonged pretrial detention. App.184a-186a. The court also found that the prospect of such detention—of being unable to go to work, practice one's religion freely, care for dependents, etc.—leads "[m]ost misdemeanor and low level felony arrestees … to plead guilty," whether or not they *are* guilty, because "[d]oing so most often results in … immediate release." App.186a.

C. Initial District-Court Proceedings

In 2018, petitioners filed this action under 42 U.S.C. §1983, challenging Dallas County's bail practices on due-process and equal-protection grounds. ROA.59-60. At a hearing on petitioners' preliminary-injunction motion, the parties presented live testimony from respondent judges and experts, documentary evidence, and videos of the arraignments. ROA.5702-5706. Based on the evidence, the district court made the factual findings recited above (and others), and issued a preliminary injunction. ROA.5974-5980. It also certified a class of "arrestees who are or will be detained in Dallas County custody because they [cannot] pay a secured financial condition of release." ROA.5981.

As to the injunction, the district court—following the Fifth Circuit's decision in a similar lawsuit in Houston, *ODonnell* v. *Harris County*, 892 F.3d 147 (5th Cir. 2018) (op. on reh'g)—concluded that petitioners would

likely succeed on both their equal-protection and procedural-due-process claims. App.189a-192a. It also found that an injunction was warranted because the county's mass detention of people inflicts irreparable harms, App.194a-195a. These "severe consequences" include not only the deprivation of physical liberty but also "loss of employment, loss of education, loss of housing and shelter, deprivation of medical treatment, inability to care for children and dependents, and exposure to violent conditions and infectious diseases in overcrowded jails." App.187a.

D. Panel Opinion

A Fifth Circuit panel affirmed the preliminary injunction with modifications not relevant here. *Daves* v. *Dallas County*, 984 F.3d 381, 414 (5th Cir. 2020) (subsequent history omitted). Regarding *Younger*, the panel noted that *ODonnell* had held that claims materially similar to petitioners' did not trigger abstention, a holding that could not "be reconsidered" by a different panel. *Id.*

The Fifth Circuit then granted rehearing en banc. App.200a.

E. Texas Senate Bill 6

After rehearing was granted, Texas enacted S.B. 6 (87th Tex. Leg. 2d C.S., Aug. 31, 2021), which made several changes to the state's bail laws. For example, S.B. 6 requires secured-money bail as a condition of release for anyone charged with an enumerated offense "involving violence," or any felony while released on bail or community supervision for such an offense. And S.B. 6 does not require (as petitioners seek) an on-the-record judicial finding that detention is necessary because no condition or conditions of release will protect public safety

or prevent flight. Nor does it require (as petitioners also seek) a hearing with counsel and an opportunity to present and challenge evidence regarding detention.

F. First En Banc Opinion

On rehearing, the en banc Fifth Circuit did not reach the merits of petitioners' claims. App.81a-82a. Instead, it made several rulings not directly related to this petition and remanded for the district court to "mak[e] detailed findings and conclusions concerning … *Younger*" (an issue not raised in any rehearing petition or en banc brief) and "the effect of Senate Bill 6" on the case. App.122a.

Judge Higginson, joined by two others, concurred in the judgment, stating that he "would do no more than remand for further proceedings to address *Younger*." App.126a.

Judge Haynes, joined by three others, dissented. App.128a-165a. She disagreed with the rulings the court made, App.136a-159a, and criticized its decision not to reach the merits. App.128a, 131a-134a. In her view, Dallas County's "bail system … blatantly violates arrestees' constitutional rights. Freedom should not depend entirely on the financial resources at one's disposal—and yet, in Dallas County, it does." App.165a.

As to abstention, Judge Haynes stated that numerous "authorities—especially the Supreme Court's *Gerstein* opinion—put beyond doubt that *Younger* abstention is completely unwarranted." App.163a. In disregarding those authorities, Judge Haynes added, "the majority … breaks with" other circuits that "have correctly held that abstention is inappropriate in the pretrial detention context in light of *Gerstein*." App.164a.

Lastly, Judge Haynes agreed that a remand was appropriate for the district court to address "any impact of [S.B. 6] on this case." App.128a n.1.

G. Remand Proceedings

On remand, petitioners submitted (and the district court admitted) additional evidence, including videos of Dallas County bail proceedings conducted after S.B. 6's enactment. App.169a n.3. These videos showed that the statute changed nothing about Dallas County's actual practices. D.Ct. Dkt. 278. Arraignments continue to be exceedingly brief (typically under a minute each), and defendants still lack counsel and cannot present evidence, challenge the government's evidence supporting detention, or otherwise explain why detention is unnecessary and hence unconstitutional. *See id.* at 21-22 n.5. In fact, people are still regularly told not to speak *at all*, ROA.9834, and to wait and file a bond-reduction motion if they want to seek relief from pretrial detention, ROA.9832—a process that means enduring weeks or months of pretrial detention, App.186a.

Having received this and other evidence, the district court ruled that *Younger* abstention was unwarranted. App.167a. Petitioners' criminal proceedings, the court explained, do not provide an "adequate" opportunity to raise petitioners' federal claims. App.171a-173a. And under *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), it noted, an opportunity "must be *timely*" to justify abstention. App.172a. But here, arrestees must endure "days or weeks (sometimes months)" in jail, and the severe harm that inflicts, before they have an opportunity to raise their federal claims. *Id.* That, the court concluded, means the state "proceedings want for adequacy because they are untimely." *Id.*

The court concluded, however, that S.B. 6 moots petitioners' claims. App.174a-179a. Ignoring the videos showing that the challenged practices had not changed post-S.B. 6, the court reasoned that the law "replaced" Dallas County's procedures with "statewide statutory procedures," and hence that "the subject matter of this lawsuit—Dallas County's home-grown procedures …—is no more." App.176a. The court also rejected petitioners' argument "that this case is not moot because [petitioners] seek greater remedies than those afforded by S.B. 6," asserting that mootness is not about "whether the Texas Legislature gave Plaintiffs everything on their wish list." App.179a. The court did not reconcile that assertion with this Court's holding that "[u]nder settled law, [courts] may dismiss [a] case [as moot] only if 'it is impossible for a court to grant [the plaintiff] any effectual relief.'" *Mission Products Holdings* v. *Tempnology, LLC*, 139 S.Ct. 1652, 1660 (2019) (quoting *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013)).

H. Second En Banc Opinion

1. The en banc court held that *Younger* required abstention and that S.B. 6 moots petitioners' claims. App.7a-32a.

Regarding abstention, the Fifth Circuit followed *O'Shea* (which as noted included challenges to myriad aspects of a criminal-justice system) rather than *Gerstein* (which post-dated *O'Shea*, and which other circuits have followed in cases like this because it involved a challenge only to pretrial detention). App.15a-16a. The court also rejected the district court's view that *Younger* applies only if the relevant state proceedings provide a *timely* opportunity to raise the federal claim. "[A]ll that *Younger* … mandate[s]," the Fifth Circuit stated, "is an opportunity to raise federal claims in the course of state

proceedings." App.20a. The court deemed this requirement satisfied because people arrested in Dallas County can (after enduring weeks or months in jail) challenge their pretrial detention by filing a bond-reduction motion or a separate habeas case. App.20a-21a.

The court also ruled that the injunctions issued here and in *ODonnell* constitute "federal court involvement to the point of ongoing interference and 'audit' of state criminal procedures," App.23a, thereby satisfying the other abstention prerequisite disputed here: undue interference with state prosecutions.

Lastly on *Younger*, the court said that it "disagree[d] with some or all of the reasoning" of the circuits that had rejected abstention in similar cases, but also asserted that those cases "are factually far afield." App.25a.

The court next addressed mootness, labeling it a "coequal ground for dismissing this case." App.28a. The court did not hold (or even assert) that this Court's established mootness standard—that a court cannot grant the plaintiff any effectual relief—is met here. Instead, pointing to what it called "the substantial changes made by [S.B. 6] to procedures for assessing bail," App.28a, the court reasoned that a ruling on petitioners' claims "would constitute … an advisory opinion." App.30a. The court also dismissed as "minimal" the post-S.B. 6 videos showing unchanged practices, and questioned whether the named individual petitioners, having been jailed before S.B. 6's enactment, could press their claims post-S.B. 6. App.30a-32a.

Finally, the court rejected—without explanation—petitioners' argument that if it deemed the case moot, it should vacate its first en banc opinion, offering only the

conclusory statement that "[v]acatur … is unwarranted." App.32a n.41.

2. Six judges (across three opinions) disagreed with the court's choice to address abstention despite its mootness holding.

Chief Judge Richman and Judge Southwick each wrote a solo concurrence in the judgment, agreeing with the majority on mootness only. App.34a, 35a-73a. And Judge Higginson, joined by three others, concurred in part and dissented in part, similarly agreeing with the court on mootness but objecting to its decision to reach abstention. App.74a-77a.

Without opinion, Judge Ho joined the court's *Younger* ruling but not its mootness ruling. App.2a n.*.

Judge Graves dissented, stating that the case was not moot because petitioners challenge Dallas County's actual bail practices, not S.B. 6, and the videos in the record "showed that the alleged illegal practices continue post-S.B. 6." App.76a.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S *YOUNGER* RULING JOINS THE WRONG SIDE OF A CIRCUIT CONFLICT

The Fifth Circuit held that *Younger* closes the federal courthouse doors to claims that the Constitution forbids detaining individuals before trial unnecessarily, even when there is no opportunity to challenge that detention prior to enduring weeks or even months of it. Certiorari is warranted because that holding conflicts with other circuits' decisions and is wrong under this Court's cases.

A. The Fifth Circuit's Holding Deepens An Established Lower-Court Divide

Three other courts of appeals have addressed *Younger*'s applicability in cases like this. One of the three held (almost 50 years ago) that abstention is required; the other two (each five years ago) disagreed.

1. In conflict with the decision below, the Ninth and Eleventh Circuits have rejected *Younger* abstention with claims like petitioners'.

In *Walker* v. *City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), the plaintiff challenged Calhoun's practice of "jailing the poor [pretrial] because they cannot pay," *id.* at 1251-1252 (quotation marks omitted). Speaking through Judge O'Scannlain, the court held that "*Younger* d[id] not readily apply … because Walker is not asking to enjoin any prosecution." *Id.* at 1254. Rather, "[a]s in *Gerstein*, Walker merely asks for a prompt pretrial determination of a distinct issue, which will not interfere with subsequent prosecution." *Id.* at 1255; *see also id.* at 1254.

The Ninth Circuit reached the same conclusion in *Arevalo* v. *Hennessy*, 882 F.3d 763 (9th Cir. 2018). There too, a criminal defendant being detained pretrial solely because he could not pay brought a federal action, "argu[ing] that financial release conditions are unconstitutional absent both specific procedural protections and a finding that non-financial conditions could not reasonably serve the State's interest." *Id.* at 764. Relying on *Gerstein* to reject abstention, the court held that "the issues raised in the bail appeal are distinct from the underlying criminal prosecution and would not interfere with it." *Id.* at 766. "Regardless of how the bail issue is resolved," the court elaborated, "the prosecution will move forward unimpeded." *Id.*

2. The Fifth Circuit stated that it "disagree[d] with … the reasoning in … cases where *Younger* abstention was rejected." App.25a. But it also tried to obscure the circuit conflict by claiming that those cases were "factually far afield." *Id.* That is incorrect; *Walker* and *Arevalo* are each materially identical to this case.

Regarding *Walker*, the Fifth Circuit stated that, "contrary to this case, … the injunction sought" there "did not contemplate ongoing interference with the prosecutorial process," App.25a, by which the court apparently meant "ongoing reporting or supervisory components," App.25a n.34. Not so: Petitioners' operative complaint requests an injunction that (as relevant here) bars Dallas County from detaining people pretrial solely because they are poor, absent a finding—made after providing essential procedural safeguards—that detention is necessary to serve a government interest. ROA.475. Like the analogous relief in *Gerstein* that this Court held did not trigger abstention, that relief involves no "ongoing reporting or supervisory components." App.25a n.34. Nor does it "contemplate ongoing interference with the prosecutorial process," App.25a, certainly not to any greater degree than the injunction sought in *Walker*.[1]

---

[1] Relatedly, respondents have at times suggested that the relief petitioners seek would allow federal judges to second-guess the amount of money bail set in individual cases. In reality, the relief sought would simply prohibit pretrial detention absent the constitutionally required substantive findings and procedural safeguards. ROA.475. That, again, is directly analogous to *Gerstein*, where the injunction mandated certain procedural safeguards and a substantive finding if a state chose to impose pretrial detention but did not authorize federal courts to review the *correctness* of probable-cause findings in individual cases.

As to *Arevalo*, the Fifth Circuit deemed it "distinguishable because the plaintiff … had fully exhausted his state remedies …, so there remained no state remedies available in which to raise his individual constitutional claims." App.25a. *Arevalo*, however, rejected abstention not because of the lack of an adequate opportunity to raise the federal claim, but because federal adjudication would not unduly interfere with state prosecutions. *See supra* p.13 (quoting *Arevalo*, 882 F.3d at 766). The Fifth Circuit said nothing about *that* holding, which conflicts with the decision below.

Put simply, the Fifth Circuit failed to distinguish the other circuits' decisions that reached the opposite holding regarding *Younger*.

3. The lone circuit to reach the same conclusion as the decision below is the Second Circuit. It held in *Wallace* v. *Kern*, 520 F.2d 400 (2d Cir. 1975), that abstention was required on claims asking federal courts to "mandat[e] a variety of new bail procedures in" New York state courts, *id.* at 400. *Wallace* concluded that an injunction governing bail proceedings constituted impermissible "continu[ous] surveillance" of state prosecutions. *Id.* at 406. The court attempted to reconcile its decision with *Gerstein* by stating that the only available state remedy for most arrestees in *Gerstein* was "a preliminary hearing which could take place only after 30 days or an application at arraignment, which was often delayed a month or more after arrest." *Id.* *Wallace*, that is, asserted that *Gerstein*'s holding—that abstention was not required because adjudicating pretrial-detention challenges "could not prejudice" any pending prosecution, 420 U.S. at 108 n.9—depended on the unrelated fact (one never mentioned in *Gerstein*'s *Younger* discussion) that no adequate opportunity existed there.

Courts have criticized *Wallace*'s holding. The First Circuit, for example, explained that *Gerstein* "did not reject *Younger* … because state habeas relief was unavailable." *Fernandez* v. *Trias Monge*, 586 F.2d 848, 851-854 (1st Cir. 1978); *accord* App.55a (Southwick, J., concurring). And although *Wallace* has not been overruled, another Second Circuit panel explained that "*Wallace* cannot be squared with more recent Supreme Court authority." *DeSario* v. *Thomas*, 139 F.3d 80, 86 n.2 (2d Cir. 1998) (subsequent history omitted); *accord id.* at 85.

B. The Fifth Circuit's *Younger* Holding Is Wrong

The Fifth Circuit held that adjudicating petitioners' claims would unduly interfere with state prosecutions and that Texas law provides an adequate opportunity to *eventually* raise those claims in state proceedings. Each holding departs from this Court's precedent. The Fifth Circuit's additional *Younger* rationales, meanwhile, are infirm.

1. Undue Interference

a. *Gerstein* held that abstention was not required with claims much like petitioners', claims challenging the constitutionality of pretrial detention without a prompt probable-cause finding. *See* 420 U.S. at 108 n.9. In *Gerstein*, Florida arrestees were subject to weeks of pretrial detention before they could challenge the probable cause underlying their arrests. *Id.* at 105-106. The district court invalidated this practice, ordering prompt probable-cause hearings. *Id.* at 107-108. On appeal, this Court explained that the lawsuit would not unduly interfere with pending prosecutions because it "was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal

prosecution." *Id.* at 108 n.9. "The order to hold [prompt] hearings," *Gerstein* elaborated, "could not prejudice the conduct of the trial on the merits." *Id.* Abstention was therefore not appropriate.[2]

Gerstein's reasoning applies equally here. Petitioners seek an order that Dallas County cannot continue detaining arrested individuals without a finding (made after providing essential procedural safeguards) that detention is necessary to protect public safety or prevent flight. ROA.475. Such an order—like the one in *Gerstein* barring pretrial detention absent a prompt probable-cause finding—is not "directed at the state prosecutions as such, but only at the legality of pretrial detention without" an appropriate "judicial hearing," *Gerstein*, 420 U.S. at 108 n.9. As in *Gerstein*, then, adjudicating petitioners' claims cannot "prejudice the conduct of the trial on the merits," *id.* Indeed, pretrial detention's separateness from criminal prosecutions is why federal bail orders are immediately appealable. *See Stack* v. *Boyle*, 342 U.S. 1, 6 (1951).

Because there is no meaningful distinction for purposes of *Younger*'s undue-interference prong between a probable-cause determination and a bail determination, *Gerstein* precludes abstention here.

The Fifth Circuit asserted, however, that "*Gerstein* is distinguishable on a number of grounds." App.17a. But it never offered any distinction. It recited the Second Circuit's conclusion that "*Gerstein* did not authorize a … district court to require an evidentiary hearing on

---

[2] This Court later elaborated on *Gerstein*'s holding that the Fourth Amendment required a "prompt[]" probable-cause finding, 420 U.S. at 125, ruling that the finding presumptively must be made within 48 hours of arrest, *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 56 (1991).

bail determinations within a certain period of time." App.18a. But that does not show any distinction between this case and *Gerstein*. The Fifth Circuit also stated that "other Supreme Court decisions extend[] the principles of *Younger* abstention, two of which were decided within a few months of *Gerstein*." App.19a. Neither of those two, however, affects *Gerstein*'s *Younger* holding. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), held that *Younger* can apply in some civil cases, *see id.* at 603-605. And *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), held that *Younger* can apply to federal courts-martial, *see id.* at 753-760. Neither holding relates to *Gerstein*'s rejection of abstention in cases like this. Finally, the Fifth Circuit quoted this Court's observation in *Moore* v. *Sims*, 442 U.S. 415 (1979), that "the teaching of *Gerstein* was that the federal plaintiff must have an opportunity to press his claim in the state courts," *id.* at 432, *quoted in* App.20a; *see also* App.20a n.26 (citing *Middlesex* in similarly trying to limit *Gerstein*'s *Younger* holding to the lack of an adequate opportunity). An adequate opportunity is indeed a requirement, as later *Younger* cases confirm. But *Moore* was not abrogating the separate *Younger* prerequisite that federal adjudication would interfere with the state proceeding. That is clear from the fact that this Court has repeatedly stated since *Moore*—including in *Middlesex*—that *both* requirements must be met for *Younger* to even potentially apply.

Furthermore, contrary to the Fifth Circuit's suggestion that *Younger* broadly forbids federal courts "from getting involved in state criminal prosecutions," App.11a, *Sprint* confirmed—by repeatedly describing *Younger* as barring federal courts from "enjoining" or "restraining" prosecutions, 571 U.S. at 72, 77—that such direct interference is what *Younger* forbids in the

criminal context, i.e., what *Gerstein* called "prejudic[ing] the conduct of the trial on the merits," 420 U.S. at 108 n.9. In other words, mere "[f]riction … with state criminal courts," App.8a, is insufficient to trigger *Younger*.

b. The Fifth Circuit also relied heavily on *O'Shea*, deeming it "closely on point." App.13a. But as the Ninth and Eleventh Circuits recognized, *O'Shea* is "easily distinguished." *Arevalo*, 882 F.3d at 766 n.2; *accord Walker*, 901 F.3d at 1255. As discussed, *O'Shea* involved challenges to almost every aspect of a local legal system, and this Court held abstention warranted because the posited injunction was "aimed at controlling or preventing the occurrence of specific events that might take place *in the course of future state criminal trials*." 414 U.S. at 500 (emphasis added). The claims there thus were "directed at the state prosecutions as such," *Gerstein*, 420 U.S. at 108 n.9. As explained, however, *Gerstein*—decided after *O'Shea*—made clear that claims directed "only at the legality of pretrial detention without a judicial hearing," cannot "prejudice the conduct of the trial on the merits," *id.*, i.e., "will not interfere with [the] prosecution," *Walker*, 901 F.3d at 1254-1255.

O'Shea, moreover, stated that the plaintiffs there had not shown "the likelihood of substantial and immediate irreparable injury," emphasizing what it called "the necessarily conjectural nature of the threatened injury." 414 U.S. at 502. Here, by contrast, the district court found (as had the district judge in *ODonnell*) that petitioners "have shown a risk of irreparable harm." App.194a (capitalization altered) (citing *ODonnell* v. *Harris County*, 251 F.Supp.3d 1052, 1157-1158 (S.D. Tex. 2017) (Rosenthal, C.J.) (subsequent history omitted)).

The Fifth Circuit, however, expressed concern that litigants who secured an injunction in a case like this and then "became dissatisfied with the officials' compliance with [the] federal injunction[] would have recourse to federal court seeking compliance or even contempt." App.14a. But that possibility—which was equally present in *Gerstein*—does not raise the federalism concerns that underlie abstention (nor does it constitute "considerable mischief," App.23a). It simply vindicates federal courts' jurisdiction and authority. Indeed, if that possibility sufficed, abstention would be widespread, because "[a]ny plaintiff who obtains equitable relief … enforcing his constitutional rights … may need to return to court to ensure compliance." *Courthouse News Service* v. *Planet*, 750 F.3d 776, 792 (9th Cir. 2014). Again, though, abstention "is the 'exception, not the rule.'" *Sprint*, 571 U.S. at 81-82.

c. Finally, the Fifth Circuit relied heavily on *Wallace*. As explained, however, courts have recognized that *Wallace* misread *Gerstein* and is inconsistent with this Court's recent precedent. *See supra* p.16. And the Fifth Circuit's only response was to deny that *Wallace* is no longer good law. *See* App.26a n.36. That does nothing to answer other courts' explanations of why *Wallace*'s *Younger* holding is wrong under this Court's precedent.

In sum, the Fifth Circuit failed to reconcile its *Younger* ruling with *Gerstein*'s holding that federal claims challenging pretrial detention do not unduly interfere with state prosecutions. Again, that holding alone precludes abstention here.

2. Adequate Opportunity

a. This Court held in *Gibson* that *Younger* abstention is available only if state proceedings provide an

"opportunity to raise *and have timely decided* ... the federal issues." 411 U.S. at 577 (emphasis added). The plaintiffs there were optometrists seeking to enjoin license-revocation proceedings before a state board, because the board was allegedly biased. *Id.* at 569-570. Although de novo appellate review by an impartial tribunal was available, this Court rejected abstention because there was no opportunity to have the federal claim "timely decided." *Id.* at 577 & n.16. The availability of unbiased appellate review was insufficient, *Gibson* held, because by then the "irreparable damage" to the optometrists (temporary loss of license and negative publicity) could not be undone. *Id.*

Likewise here, Dallas County does not provide arrested individuals a timely opportunity to raise federal constitutional challenges to pretrial detention. As the district court stated on remand, "[a]t the outset of the case, this Court made factual findings that delays of days or weeks (sometimes months) separate initial bail determination[s]"—when there is unquestionably no opportunity to raise federal claims (or sometimes to speak at all)—"and review before a judge," where there can be such an opportunity App.172a. The court also found that pretrial detention inflicts a variety of severe and irreparable harms. App.187a. Those harms occur soon after detention begins; indeed, this Court has explained that "*[a]ny* amount of actual jail time" imposes 'exceptionally severe consequences,'" *Rosales-Mireles* v. *United States*, 138 S.Ct. 1897, 1907 (2018). That is just commonsense: An inability to care for young children, for example, can be catastrophic even if it is "only" for a few days (let alone weeks or months). Similarly, "[m]any detainees lose their jobs even if jailed for a short time." Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1334, 1356-1357 (2014). Here, then,

as in *Gibson*, federal claims can be raised in the state proceedings only after the very harms challenged as unconstitutional have been inflicted. Under *Gibson*, that is not an adequate opportunity for *Younger* purposes. The lack of such an opportunity is an independent reason why abstention is unwarranted here.

The Fifth Circuit sought to brush aside *Gibson*, criticizing petitioners for supposedly "fix[ing] talismanic significance" (App.26a) on "one line in one Supreme Court case," namely *Gibson*'s statement that *Younger* "presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved," 411 U.S. at 577. That criticism was unfounded.

To begin with, the "line" does not appear in just "one Supreme Court case," App.26a. It was also quoted in *Middlesex* (a foundational *Younger* decision). And the way *Middlesex* invoked that "line" leaves no doubt that a timely decision in the state proceedings is indeed a prerequisite to abstention. In its concluding paragraph, *Middlesex* summarized its *Younger* holding as follows: "*Because* respondent … had an 'opportunity to raise and have timely decided by a competent state tribunal the federal issues involved,' and because no bad faith, harassment, or other exceptional circumstances dictate to the contrary, federal courts should abstain." 457 U.S. at 437 (emphasis added) (quoting *Gibson*, 411 U.S. at 577).

As this Court has explained, moreover, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [courts] are bound." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 67 (1996). The "timely decided" language was, as just shown, "necessary to th[e] result" in *Middlesex*. It was likewise necessary to the result in

Gibson, which held that abstention was not required because the plaintiffs would have had to wait too long to present their federal claim to an unbiased tribunal. *See* 411 U.S. at 570. Although the Fifth Circuit contended that *Gibson*'s holding rested on the alleged bias, not on "untimely state remedies," App.26a, that is untrue. Both sides in *Gibson* assured this Court that "Alabama law provide[d] for de novo court review of delicensing orders issued by the Board." 411 U.S. at 577 n.16. If *Gibson*'s *Younger* ruling had rested on the lack of "a *competent* state tribunal," App.26a, that review would have sufficed. But *Gibson* explained that that review did *not* suffice. 411 U.S. at 577 n.16. In short, *Gibson* refutes the Fifth Circuit's claim that petitioners never "cite[d] a single case in which the alleged untimeliness of state remedies rendered *Younger* abstention inapplicable." App.27a. *Gibson* is such a case. And again, given the district court's unchallenged findings about the lack of a timely opportunity to raise petitioners' federal claims in the state proceedings, *Gibson* forecloses abstention here independently of *Gerstein*.[3]

b. The Fifth Circuit offered several additional grounds for deeming the adequate-opportunity requirement satisfied here. But none of these additional grounds matters, given the lack of an opportunity to raise the federal claims before enduring weeks or months of the constitutional violation (and harm) alleged. In any event, none has merit.

For starters, the court stated—citing *Juidice* v. *Vail*, 430 U.S. 327 (1977)—that "[a]ll that *Younger* … mandate[s] … is *an* opportunity to raise federal claims

[3] Notably, in *Gerstein* itself, arrestees had to endure weeks of pretrial detention before having an opportunity to challenge that detention. 420 U.S. at 107.

in the course of state proceedings." App.20a (emphasis added). But *Moore* and *Middlesex* each explained (post-*Juidice*) that the "pertinent inquiry is whether the state proceedings afford an *adequate* opportunity to raise the constitutional claims." *Moore*, 442 U.S. at 430 (emphasis added), *quoted in Middlesex*, 457 U.S. at 432. *Juidice* itself, moreover, clarified in the same paragraph the Fifth Circuit quoted (in language the court replaced with an ellipsis, App.20a) that what is required is "an opportunity to *fairly* pursue the[] constitutional claims in the ongoing state proceedings." 430 U.S. at 337 (emphasis added). *Juidice* even supported this statement by citing *Gibson*'s discussion of a timely opportunity, *see id.*, confirming that there must be not just "an" opportunity, as the Fifth Circuit claimed, but a timely one. Under the reasoning of the decision below, by contrast, there would be an adequate opportunity even if a person could not challenge her pretrial detention until the middle of trial (or even at sentencing), long after any meaningful remedy could be provided. That cannot be correct.

Next, the Fifth Circuit held that Texas provides an "adequate opportunity" through separate state habeas proceedings. App.21a & nn.27-28. Such proceedings, however, are inadequate for *Younger* purposes not only because they do not allow federal claims to be *timely* raised and decided, as *Gibson* requires, but also because they require initiating a separate civil proceeding. Under *Younger*, the adequacy question is whether a federal claim can be raised in the "pending" state proceedings, not whether state law affords the opportunity to file a separate case. *Deakins* v. *Monaghan*, 484 U.S. 193, 202 (1988); *Steffel* v. *Thompson*, 415 U.S. 452, 460 (1974); *accord Middlesex*, 457 U.S. at 432. Indeed, this Court has *never* mandated abstention on the ground that the plaintiff could have filed a separate state proceeding—likely

because that rule would defy one of *Younger*'s purposes: "avoid[ing] a duplication of legal proceedings … where a single suit would be adequate to protect the rights asserted," *Younger*, 401 U.S. at 44.

Requiring the initiation of separate proceedings, in fact, would impose an exhaustion requirement on §1983 claims, which this Court has repeatedly rejected, *e.g.*, *Patsy* v. *Board of Regents of State of Florida*, 457 U.S. 496, 500 (1982). The Court has even reconciled *Younger* with §1983 by explaining that while a §1983 plaintiff "need not first initiate state proceedings," *Younger* deals with "state proceedings which have already been initiated." *Huffman*, 420 U.S. at 609 n.21. In addition, because most states provide *some* separate proceeding in which federal constitutional claims can eventually be raised, the Fifth Circuit's separate-proceeding ruling would obliterate this Court's command that *Younger* abstention "is the 'exception, not the rule,'" *Sprint*, 571 U.S. at 81-82. All this explains why the Fifth Circuit's treatment of a separate proceeding as "adequate" itself conflicts with other circuits' precedent holding that a separate proceeding cannot be adequate. *See Habich* v. *City of Dearborn*, 331 F.3d 524, 531-532 (6th Cir. 2003); *Fernandez*, 586 F.2d at 852-853.

3. Additional Flaws

Three other points regarding the Fifth Circuit's *Younger* analysis bear mention.

First, the Fifth Circuit repeatedly bemoaned the supposedly intrusive injunctions "imposed in *ODonnell*" and here. App.25a; *see also, e.g.*, App.22a. If an injunction is too broad, however, the remedy is not to abstain but to narrow the injunction—as, in fact, the court said happened in a later appeal in *ODonnell*, App.22a-23a. There was no basis for the Fifth Circuit's assumption

that *any* injunction in cases like this will necessarily be as intrusive as the court perceived the injunction here to be. For example, although the court stated that petitioners' "claims for relief including on-the-record hearings and detailed factual opinions concerning bail determinations reify how far federal courts would have to intrude into daily magistrate practices," App.23a n.30, accepting petitioners' claims would not require federal courts to order state courts to adopt or follow *any* particular bail "practices," *id.* It would require doing only what this Court did in *Gerstein*: delineating what the Constitution mandates to justify pretrial detention, and prohibiting jurisdictions from detaining people without complying with those requirements (in whatever way a particular jurisdiction deems fit). *See* 420 U.S. at 124-125. Such a negative injunction, leaving jurisdictions ample flexibility regarding implementation, is (as *Gerstein* confirms) not remotely intrusive enough to warrant abstention.

Second, the Fifth Circuit repeatedly mischaracterized petitioners' claims and arguments. For example, petitioners do not "insist[] on" any "presumption against cash bail," App.15a n.13, and petitioners never "sought the appointment of a federal monitor," App.5a. Nor is it true that the injunction here was "essentially in accord with plaintiffs' prescription," App.5a-6a; *compare* ROA.475 (operative complaint's prayer for relief), *with* ROA.5974-5970 (injunction). More generally, contrary to the Fifth Circuit's view, petitioners' claims are neither novel nor radical. In fact, what petitioners say the Constitution requires is largely the regime that has been in place—by statute—in the federal criminal system for nearly four decades, *see United States* v. *Salerno*, 481 U.S. 739, 742-743 (1987), as well as in other jurisdictions, *see, e.g.*, D.C. Code §§23-1321 to 23-1322.

Finally, the Fifth Circuit's *Younger* holding means that federal courts are powerless to do anything about the many thousands of violations of individuals' core constitutional right to physical freedom that are committed every year by bail systems like Dallas's. The Fifth Circuit said not one word about the devastating harms to presumptively innocent individuals that the district court identified (*see supra* p.7), instead focusing on the supposed harm to state courts that comes from federal courts adjudicating federal constitutional claims. *See* App.9a-13a. But again, this Court's cases hold that there is no such harm in these circumstances, i.e., no undue interference with federal proceedings. The Fifth Circuit's holding that federal courts can do *nothing* about unconstitutional post-arrest detention is not only misguided as a matter of first principles, but also inconsistent with this Court's precedent: The Court has repeatedly explained that federal courts cannot allow rampant trampling of fundamental constitutional rights: "[J]udicial restraint cannot encompass any failure to take cognizance of valid constitutional claims.... When a ... practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier* v. *Martinez*, 416 U.S. 396, 405-406 (1974).

II. THE FIFTH CIRCUIT REFUSED TO APPLY THIS COURT'S ESTABLISHED MOOTNESS STANDARD, UNDER WHICH THIS CASE IS UNQUESTIONABLY NOT MOOT

For decades, this Court has consistently held that a case becomes moot only if a court cannot give the plaintiff any effective relief. A mid-litigation change in the law therefore cannot moot claims of constitutional violations unless it cures those violations. The Fifth Circuit never claimed that that happened here, yet it declared the case moot anyway. The court's refusal to apply this

Court's established mootness standard, together with the fact that that standard is not met here, justifies review.

A. The Fifth Circuit Did Not Apply This Court's "Settled" Mootness Test

1. "Under settled law, [courts] may dismiss [a] case [as moot] only if 'it is impossible for a court to grant [the plaintiff] any effectual relief.'" *Mission Products*, 139 S.Ct. at 1660 (quoting *Chafin*, 568 U.S. at 172). Legislation enacted mid-litigation meets that standard only if it "completely and irrevocably eradicate[s] the effects of the alleged violation[s]," *Los Angeles County* v. *Davis*, 440 U.S. 625, 631 (1971), or affords the plaintiffs the "precise relief … requested in … their complaint," *New York State Rifle & Pistol Association* v. *City of New York*, 140 S.Ct. 1525, 1526 (2020) (per curiam) ("*New York Rifle*"). And "the party who alleges that a controversy … has become moot has the 'heavy burden' of establishing that." *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1983).

The Fifth Circuit did not apply this settled standard.

The closest it came was a paragraph discussing *Davis* and *New York Rifle*. First, the court addressed *Davis*'s "completely eradicate" language, i.e., that a court cannot grant a plaintiff any effectual relief if newly enacted legislation completely eradicates the claimed violations. The Fifth Circuit asserted that the "completely eradicates" test applies only "where the question was mootness owing to … voluntary cessation." App.30a-31a. It cited no case supporting that limitation, however—and this Court has applied the completely-eradicates requirement *outside* the voluntary-cessation context, *see Golden State Transit Corporation* v. *City of Los Angeles*, 475 U.S. 608, 613 n.3 (1986). Nor did the Fifth

Circuit explain why its proposed cabining of *Davis* makes sense. It does not.

Second, the Fifth Circuit stated that *New York Rifle* "held that the controversy … became moot due to New York City's amendment of its ordinance '[a]fter we granted certiorari.'" App.31a (alteration in original). That is incorrect; this Court did *not* hold *New York Rifle* moot simply "due to" the amendment's enactment. It held the case moot because the Court's settled mootness standard was met, i.e., the amendment provided "the precise relief that petitioners requested in … their complaint." 140 S.Ct. at 1526. Again, the Fifth Circuit did not apply that "settled" standard, *Mission*, 139 S.Ct. at 1660.

2. The reasons the Fifth Circuit gave for deeming this case moot are, as explained in the paragraphs that follow, untenable. But the central point remains that the court departed from this Court's cases articulating the mootness standard.

a. The Fifth Circuit mischaracterized petitioners' challenge to Dallas County's bail *practices* as a challenge to a statute (S.B. 6). The court endorsed the district court's statement that petitioners "are not entitled to have [courts] immediately intervene to tinker with the rules that the Legislature has just recently enacted." App.29a. Petitioners, however, never challenged S.B. 6. They challenge Dallas County's actual bail *practices*—practices that the post-S.B. 6 videos show are no different than the pre-S.B. 6 practices. If courts had jurisdiction before S.B. 6 to hear petitioners' challenge to those practices (as no party has disputed), then courts likewise have jurisdiction after S.B. 6.

The same point answers multiple other statements the Fifth Circuit made, including:

- "The crux of this case is now whether [S.B. 6] … measures up to plaintiffs' proffered constitutional minima."
- "To rule on the status of S.B. 6 and its procedures [now], based on evidence largely generated … pre-amendment, would constitute … an advisory opinion."
- "That the named plaintiffs have not been subject to bail proceedings since years before … S.B. 6 calls into question their ability to pursue this litigation."

App.30, 32a. Again, the short answer to all these assertions is that petitioners are not challenging "S.B. 6 and its procedures." And the named petitioners were "subject to" the practices they *do* challenge, practices the videos show continue unchanged. The Fifth Circuit's repeated mischaracterizations of petitioners' claims is telling.

b. The Fifth Circuit dismissed petitioners' videos as "minimal evidence" regarding "what actually happens in Dallas County" post-S.B. 6. App.30a. That is doubly flawed. First, petitioners submitted *hundreds* of videos of bail hearings conducted by different magistrates over a five-month period. Even respondents have never claimed that those videos do not fully and accurately depict their post-S.B. 6 bail practices, nor did the Fifth Circuit. Second, if there weren't abundant record evidence about those practices, the proper course would be to remand for the development of such evidence, not to dismiss as moot.

c. Lastly, the Fifth Circuit derided as "incoherent" (App.31a) petitioners' argument that because they seek relief beyond what *ODonnell* held to be constitutionally

required, this case is not moot even if S.B. 6 provides that relief. That too is wrong. For starters, petitioners were, as indicated, responding to one of the district court's reasons for its mootness holding. And far from being "incoherent," the response straightforwardly explains that whether S.B. 6 does what *ODonnell* said the Constitution requires is irrelevant because "the precise relief that petitioners requested in … their complaint," *New York Rifle*, 140 S.Ct. at 1526, goes *beyond* what *ODonnell* required.

In sum, nothing the Fifth Circuit said justifies its failure to apply this Court's longstanding mootness standard, or otherwise justifies holding this case moot.

B. This Court's Mootness Standard Is Not Met Here

Had the Fifth Circuit applied this Court's "settled" (and "demanding") mootness test, *Mission*, 139 S.Ct. at 1660, it could not have held the case moot.

Even the district court acknowledged that—far from S.B. 6 "completely and irrevocably eradicat[ing] the effects of the alleged violation[s]," *Davis*, 440 U.S. at 631—Dallas County's bail practices may "today" have the same "constitutional deficiencies" petitioners alleged. ROA.9926. Indeed, respondents have never denied that they still commit the alleged constitutional violations: routinely detaining people pretrial by automatically imposing secured-money bail, without any finding that detention is necessary to serve the government's interest and without the procedural protections that petitioners say are constitutionally required (such as a hearing and counsel). Nor *could* respondents deny that, as the post-S.B. 6 videos in the record establish it beyond dispute. A court could thus grant petitioners effectual relief, namely, an injunction prohibiting respondents

from detaining people pretrial without the required findings and procedural protections.

To be sure, S.B. 6 made changes to Texas law regarding pretrial release, including some that promote alternatives to detention. But these provisions in no way "completely and irrevocably eradicate" the constitutional violations alleged, *Davis*, 440 U.S. at 631, nor provide petitioners with the relief they seek. For example, the statute provides that it does not make an evidentiary hearing a prerequisite to pretrial detention, as petitioners claim is constitutionally required. S.B. 6, §5. Nor does it require many of the other procedural safeguards petitioners say are constitutionally required to impose pretrial detention. Nothing about these provisions (or any other) renders a court unable to grant petitioners effectual relief here.

This Court's cases confirm that. For example, in *North Carolina* v. *Covington*, 138 S.Ct. 2548 (2018) (per curiam), the Court held that a mid-litigation redrawing of challenged legislative districts did not moot claims "that [the plaintiffs] were organized into legislative districts on the basis of … race," *id.* at 2553. Because the plaintiffs claimed that they "remained segregated" based on "race," the dispute was still "live." *Id.* Likewise here, "plaintiffs assert[] that they remain[]" unconstitutionally detained despite S.B. 6. *Id.* Rather than eradicate the alleged violations, the law disadvantages plaintiffs "in the same fundamental way." *Northeastern Florida Chapter of Associated General Contractors of America* v. *City of Jacksonville*, 508 U.S. 656, 662 (1993).

Put simply, under this Court's established mootness test, and the Court's cases applying that test, S.B. 6 does not moot petitioners' claims, either by its terms or in practice. The Fifth Circuit was able to hold the case

moot (a holding that was in any event unnecessary given the court's *Younger* ruling) only by not applying that test.

III. THE QUESTIONS PRESENTED ARE RECURRING AND IMPORTANT

Certiorari is warranted because this case presents important and recurring issues regarding individuals' fundamental rights to pretrial liberty—and federal courts' obligation to safeguard those rights.

Hundreds of thousands of people are jailed every year in the United States. *See* Zeng, Bureau of Justice Statistics, *Jail Inmates in 2021*, at 1 (Dec. 2022), at https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ji21st.pdf. Hence, whether federal courts can hear claims regarding the constitutional limits on states' power to jail people for long periods absent conviction affects a huge number of Americans. Yet this Court has not addressed *Younger* in this context for decades—and as explained, *see supra* pp.13-16, lower courts have reached divergent conclusions.

The questions presented are also of paramount importance. Physical liberty is among the oldest and most precious of rights—lying at the "core of the liberty protected by the Due Process Clause." *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992). And as discussed, pretrial detention inflicts extraordinary harms. *E.g.*, *supra* p.7.

This Court, for example, has explained that pretrial detention can mean "loss of a job" and "disrupt[ion to] family life" for detainees. *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972); *accord Gerstein*, 420 U.S. at 114. Other courts have made the same point. *See ODonnell*, 892 F.3d at 154-155; *Curry* v. *Yachera*, 835 F.3d 373, 376-377 (3d Cir. 2016); *Lopez-Valenzuela* v. *Arpaio*, 770 F.3d 772,

781 (9th Cir. 2014) (en banc). And empirical research documents those harms (and many others). For instance, according to one study of several hundred thousand cases, an arrestee "detained for even a few days may lose her job, housing, or custody of her children." Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 713 (2017). The Justice Department has found, meanwhile, that jailed individuals suffer every major type of chronic condition and infectious disease at higher rates than others. Maruschak et al., *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*, at 2-3, Bureau of Justice Statistics (rev. Oct. 4, 2016), https://bjs.ojp.gov/content/pub/pdf/mpsfpji1112.pdf. Empirical research also indicates that those convicted following pretrial detention receive longer sentences than those convicted after being free pretrial. *See* Heaton, *supra*, at 747-748 & tbl. 3; Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. Econ. & Org. 511, 527-528 & tbl. 2 (2018). After they are freed, moreover, those detained pretrial earn less on average than arrestees who avoided pretrial detention—a 40% decrease in earnings, one study found, *see Collateral Costs: Incarceration's Effect on Effect on Economic Mobility* 11, The Pew Charitable Trusts (2010), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf.

Because of these and other dire consequences, pretrial detainees are more likely to plead guilty to gain speedy release—regardless of whether they *are* guilty. App.186a; *see also ODonnell*, 251 F.Supp.3d at 1157-1158. For those who don't plead, pretrial detention increases the likelihood of conviction, by hindering access to counsel, witnesses, and exculpatory evidence. *See Barker*, 407 U.S. at 533. In fact, one study found that,

controlling for other factors, pretrial detention is associated with a 25% increase in the likelihood of conviction, and leads to more crime in the future. Heaton, *supra*, at 744; *accord* D'Abruzzo, *The Harmful Ripples of Pretrial Detention*, Arnold Ventures (Mar. 24, 2022), https://www.arnoldventures.org/stories/the-harmful-ripples-of-pretrial-detention.

Nor are the harms from pretrial detention limited to those detained (and their loved ones). Detention also burdens "society[,] which bears the direct and indirect costs of incarceration." *Rosales-Mireles*, 138 S.Ct. at 1907. These costs—including the money needed to pay for mass jailing and the fact that those detained will more likely commit crimes in the future, *see, e.g.*, Lowenkamp, *The Hidden Costs of Pretrial Detention Revisited* 4 (2022), https://craftmediabucket.s3.amazonnaws.com/uploads/HiddenCosts.pdf—also come with little or no benefit, as experts agree there is no "link between financial conditions of release and appearance at trial or law-abiding behavior before trial," *ODonnell*, 892 F.3d at 162; *see also ODonnell*, 251 F.Supp.3d at 1121-1122, 1152.

All these harms—which as noted the Fifth Circuit said nothing about as it barred federal courts from hearing petitioners' constitutional challenges—underscore the importance of the questions presented. Given that importance, along with the circuit conflict that the decision below deepens and the Fifth Circuit's repeated disregard for this Court's precedent, certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ALEC KARAKATSANIS
ELIZABETH ROSSI
SUMAYYA SALEH
CIVIL RIGHTS CORPS
1601 Connecticut Ave. N.W.
Suite 800
Washington, D.C. 20009
(202) 844-4975

ADRIANA PIÑON
BRIAN KLOSTERBOER
ACLU FOUNDATION OF TEXAS, INC.
P.O. Box 8306
Houston, TX 77288
(713) 942-8146

DANIEL S. VOLCHOK
Counsel of Record
KEVIN M. LAMB
BRITANY RILEY-SWANBECK
WILMER CUTLER PICKERING HALE AND DORR LLP
2100 Pennsylvania Ave. N.W.
Washington, D.C. 20037
(202) 663-6000
daniel.volchok@wilmerhale.com

BRANDON J. BUSKEY
ANDREA R. WOODS
TRISHA TRIGILIO
AMERICAN CIVIL LIBERTIES UNION
125 Broad St., Suite 18
New York, N.Y. 10004
(202) 549-2500

JULY 2023