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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11368

SHANNON DAVES; SHAKENA WALSTON; ERRIYAH BANKS; DESTINEE TOVAR; PATROBA MICHIEKA; JAMES THOMPSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; FAITH IN TEXAS; TEXAS ORGANIZING PROJECT EDUCATION FUND,
Plaintiffs—Appellants Cross-Appellees,

versus

DALLAS COUNTY, TEXAS; ERNEST WHITE, 194TH; HECTOR GARZA, 195TH; RAQUEL JONES, 203RD; TAMMY KEMP, 204TH; JENNIFER BENNETT, 265TH; AMBER GIVENS-DAVIS, 282ND; LELA MAYS, 283RD; STEPHANIE MITCHELL, 291ST; BRANDON BIRMINGHAM, 292ND; TRACY HOLMES, 363RD; TINA YOO CLINTON, NUMBER 1; NANCY KENNEDY, NUMBER 2; GRACIE LEWIS, NUMBER 3; DOMINIQUE COLLINS, NUMBER 4; CARTER THOMPSON, NUMBER 5; JEANINE HOWARD, NUMBER 6; CHIKA ANYIAM, NUMBER 7 JUDGES OF DALLAS COUNTY, CRIMINAL DISTRICT COURTS,
Defendants—Appellees Cross-Appellants,

MARIAN BROWN; TERRIE MCVEA; LISA BRONCHETTI; STEVEN AUTRY; ANTHONY RANDALL; JANET LUSK; HAL TURLEY, DALLAS COUNTY MAGISTRATES; DAN PATTERSON, NUMBER 1; JULIA HAYES, NUMBER 2; DOUG SKEMP, NUMBER 3; NANCY MULDER, NUMBER 4; LISA GREEN, NUMBER 5; ANGELA KING, NUMBER 6; ELIZABETH CROWDER, NUMBER 7; CARMEN WHITE, NUMBER 8; PEGGY HOFFMAN, NUMBER 9; ROBERTO

CANAS, JR., NUMBER 10; SHEQUITTA KELLY, NUMBER 11 JUDGES OF DALLAS COUNTY, CRIMINAL COURTS AT LAW,
Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CV-154

Filed March 31, 2023

Before RICHMAN, *Chief Judge*, and JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILLETT, HO, DUNCAN, ENGELHARDT, and WILSON, *Circuit Judges*.[*]

EDITH H. JONES, *Circuit Judge*:

In a second round of en banc review, we conclude that this case, whose aim was to revise by federal decree the Texas state court procedures for felony and misdemeanor pretrial bail, should never have been brought in federal court. We hold that a string of consistent Supreme Court authority commencing with *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971), requires federal courts to 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.

[*] Judge Ho concurs in the court's ruling on abstention only, and not in the court's ruling on mootness. Judge Oldham is recused and did not participate. Judge Douglas was not a member of the court when this case was submitted to the court en banc and did not participate in this decision.

Recent years saw a surge of interest in criminal procedure reform. Lawsuits have been filed nationwide seeking to mitigate state and local bail bonding requirements.[1] One such suit resulted in a decision by this court that approved broad changes to misdemeanor bail bond procedures in Harris County, Texas. *Compare ODonnell v. Harris Cnty.*, 882 F.3d 528 (5th Cir. 2018), *withdrawn and superseded on panel reh'g*, 892 F.3d 147 (5th Cir. 2018) (*ODonnell I*), *with ODonnell v. Goodhart*, 900 F.3d 220 (5th Cir. 2018) (*ODonnell II*) (trimming terms of original remedial order). This case followed in its wake. But *ODonnell*'s analysis was debatable, though it bound the district court and our initial three-judge appellate panel in regard to Dallas County procedures. *See Daves v. Dallas Cnty.*, 984 F.3d 381 (5th Cir. 2020), *vacated*, 988 F.3d 834 (5th Cir. 2021). The panel decision here affirmed in part preliminary injunctive relief mirroring that in *ODonnell* and remanded for further proceedings. *Id.* at 388, 414.

In due course, our court voted to reconsider this case en banc. *Daves v. Dallas Cnty.*, 988 F.3d 834 (5th Cir. 2021). While the en banc case was pending, the Texas legislature passed a new law (Act of August 31, 2021, 87th Tex. Leg. 2d C.S., S.B. 6) ("S.B. 6") that adopted some of *ODonnell*'s innovations while tightening other bonding requirements. With this complex backdrop, the en banc court resolved several issues raised by

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[1] *See, e.g.*, *H.C. v. Chudzik*, No. 5:22-cv-1588 (E.D. Pa. Apr. 25, 2022), ECF No. 1; *The Bail Project, Inc. v. Comm'r, Ind. Dep't of Ins.*, No. 1:22-cv-862 (S.D. Ind. May 4, 2022), ECF No. 1; *Allison v. Allen*, No. 1:19-cv-01126 (M.D.N.C. Nov. 12, 2019), ECF No. 1; *Ross v. Blount*, No. 2:19-cv-11076 (E.D. Mich. Apr. 14, 2019), ECF No. 1.

ODonnell,[2] deferred deciding others,[3] and remanded for the district court to consider two issues: whether the case has been mooted by the new law's taking effect, and whether the federal courts should have abstained pursuant to the body of caselaw rooted in *Younger v. Harris*.[4] The district court then declared moot the plaintiffs' challenge to Dallas County bail procedures, but it concluded the federal court should not have abstained.

This opinion completes our en banc review by addressing the district court's decisions on the remanded questions. Although the parties' dispute has become moot in light of S.B. 6, the antecedent question of federal jurisdiction remains.

BACKGROUND

A complete factual and procedural background appears in the initial en banc decision in this case. *Daves v. Dallas Cnty.*, 22 F.4th 522, 529-31 (5th Cir. 2022). A few relevant highlights may be recapitulated. The plaintiffs, proceeding as a class, comprised people who had been charged with misdemeanor and felony crimes in Dallas County and who were allegedly unconstitutionally

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[2] We held that district and county court at law judges are protected by state sovereign immunity in promulgating bail bond schedules and that plaintiffs lacked standing to sue them on that basis. *ODonnell I*'s contrary conclusions regarding county court at law judges were overruled. *Daves v. Dallas Cnty.*, 22 F.4th 522, 540, 544 (5th Cir. 2022) (en banc).

[3] The en banc decision did not resolve whether the Dallas County Sheriff and Dallas County are proper defendants, and it clarified that because only declaratory relief was issued by the district court against the magistrate judges, they did not appeal, and we issued no decision as to them. *Id.* at 545.

[4] The defendants have preserved the issue of abstention throughout this litigation.

incarcerated pretrial solely because they were financially unable to post required bail. Bail decisions, they claimed, were made via an offense-based schedule promulgated by the district and county court at law judges.[5] The schedule allegedly prevented consideration of the defendants' ability to pay, and it was rigidly enforced by the magistrate judges who initially make these decisions. The County Sheriff correspondingly violated arrestees' constitutional rights by jailing them for failure to make bail. Thus, the plaintiffs were all subject to ongoing state criminal proceedings.

Were the federal court to agree that pretrial incarceration despite inability to pay for bail is unconstitutional, the plaintiffs proposed a variety of fundamental alterations in the pretrial decisional process, including but not limited to obtaining detailed financial assessments from each arrestee, strict time limits for decisionmaking, and the possibility of immediate appeal. As had happened in the *ODonnell* case, the plaintiffs sought the appointment of a federal monitor over the Dallas County criminal justice system. Among other things, the monitor would receive periodic reports and be empowered to respond to any individual defendant or his counsel or family member who believed at any time that the federally installed bail procedures were not being followed. The district court held a hearing, found the local processes unconstitutional on the above-stated

[5] It bears noting that Texas law at the time this suit was filed plainly required bail decisions to rest on a number of factors, including, *inter alia*, the nature of the offense, the "future safety of a victim," the detainee's "ability to make bail," and a proscription against using bail "to make it an instrument of oppression." TEX. CODE CRIM. P. art. 17.15 (1993).

basis,[6] and ordered a preliminary injunction essentially in accord with plaintiffs' prescription.

After this court's en banc decision winnowed nonjusticiable claims and remanded, there remained potential liability of the Dallas magistrates (for declaratory relief only pursuant to Section 1983(e)), the Sheriff, and the County. The district court thoroughly considered the two issues we remanded. The district court now declared that the controversy had become moot by the passage and December 2, 2021, effective date of S.B. 6. Substantial changes to statewide bail bond procedures had been wrought, which directly affected the plaintiffs' claims.[7] Overall, the court found, it could not assess the impact of the statutory changes based on a superseded legal regime and proceedings that had occurred years earlier. S.B. 6 had mooted the controversy.

With respect to *Younger* abstention, the court focused on the doctrine's requirement that a plaintiff must

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[6] The court upheld plaintiffs' procedural due process and equal protection claims but denied claims sounding in substantive due process.

[7] Among other things, S.B. 6 requires "individualized consideration of all circumstances" and all statutory factors within 48 hours of arrest. TEX. CODE CRIM. P. art. 17.028(a). The magistrate must "impose the least restrictive conditions" necessary to "reasonably ensure the defendant's appearance in court" considering the safety of "the community, law enforcement, and the victim of the alleged offense." *Id.* art. 17.028(b). A financial affidavit is required to be provided for each arrestee charged with an offense punishable as a Class B misdemeanor or higher and who is unable to provide the amount of bail required by a schedule or judicial order. *Id.* art. 17.028(f). Any defendant who completes a financial affidavit and cannot pay the amount of bail is entitled to a "prompt review … on the bail amount." *Id.* art. 17.028(h). If the magistrate does not lower the bail for that defendant, the magistrate must make written fact-findings. *Id.*

have an "adequate opportunity" in the state proceedings to raise his constitutional challenges. The court relied on a statement in *Gibson v. Berryhill* that "[*Younger*] naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." 411 U.S. 564, 577, 93 S. Ct. 1689, 1697 (1973). The district court deduced, "for an alternative mechanism to press federal claims in state court to qualify as adequate, it must be *timely*." (emphasis original). But state habeas proceedings to challenge bail amounts would be "inadequate, i.e., too slow." The court therefore declined to abstain based on *Younger* and its progeny.

Having retained jurisdiction, the en banc court obtained supplemental briefing from the parties before reevaluating the remanded issues. Plaintiffs continue to contend that Dallas bail bond hearings fall short under the Constitution because there is no requirement of adversary procedures to determine bail, no requirement of factfindings on the record that pretrial detention is necessary to satisfy a compelling state interest, and no presumption against cash bail. The district court's decision on abstention is discretionary, but we review *de novo* whether the prerequisites of abstention have been satisfied. *See Tex. Ass'n of Bus. v. Earle*, 388 F.3d 515, 518 (5th Cir. 2004). A ruling on mootness is reviewed de novo.

DISCUSSION

1. *Abstention*

Despite the possibility of mootness, this court has discretion to determine whether a federal court should have proceeded to the merits of plaintiffs' bail "reform" lawsuit in the first place. Justice Ginsburg succinctly restated the applicable principles in *Sinochem*

International v. Malaysia International Shipping, 549 U.S. 422, 430-31, 127 S. Ct. 1184, 1191 (2007). To paraphrase her writing, a federal court may not rule on the merits of a case without first determining its jurisdiction,[8] but there is no mandatory "sequencing of jurisdictional issues,"[9] and a federal court has leeway "to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 431, 127 S. Ct. at 1191 (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585, 119 S. Ct. 1563, 1570 (1999)). As *Sinochem* further illustrated, "a federal court [need not] decide whether the parties present an Article III case or controversy before abstaining under *Younger v. Harris*." *Id.*

The imperative of reconsidering abstention here is clear. A number of cases in this circuit and others are asking federal courts to judicially order and enforce state court bail reforms. Several federal courts, including the *ODonnell I* court, have rejected abstention without exhaustive consideration. But if abstention is mandated by *Younger*'s rationale, much time and money, as well as judicial resources, will be saved on litigation in federal court. The complexity of handling claims for institutional state bail reform in federal court is well demonstrated by the justiciability issues we confronted, and avoided, in the initial en banc proceeding. Friction exists with state criminal courts where, overlooking or misinterpreting abstention, federal courts have forced

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[8] *See Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 93-95, 118 S. Ct. 1003, 1012-13 (1998).

[9] *Sinochem Int'l v. Malaysia Int'l Shipping*, 549 U.S. 422, 431, 127 S. Ct. 1184, 1191 (2007) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 119 S. Ct. 1563, 1570 (1999)).

bail bond changes.[10] Finally, the ultimate impact of abstention does not deprive plaintiffs of a remedy. If required by *Younger*, abstention means they must pursue their claims, or whatever remains of them after S.B. 6, in state courts, with the possibility of final oversight by the U.S. Supreme Court. Our Federalism, the guiding light behind *Younger*, seems to have been forgotten, especially in regard to this species of direct federal intervention into ongoing state criminal proceedings that already provide an opportunity to raise constitutional challenges.

To counteract judicial amnesia, it is necessary to recall the origin of the *Younger* abstention doctrine. By the early 1970s, federal courts were awash (by the standards of that day)[11] in adjudicating a heady mix of newly created constitutional rights. Naming just a few subjects of litigation, courts were reviewing collateral attacks on state criminal convictions, adjudicating the constitutionality of state jail and prison conditions, and addressing due process questions that arose in every public setting from elementary school discipline and welfare termination to employee disputes. Ideas of deference to state governmental systems or state courts seemed to have been overshadowed by the Supreme Court's

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[10] In the *ODonnell* case, for instance, the federal monitor for Harris County has determined "errors" made by judicial officers in setting bail and identified "violations" of the federal consent decree. *See, e.g.*, Fourth Six-Month Monitor Report, *ODonnell v. Harris County*, 4:16-cv-1414 (S.D. Tex. Mar. 3, 2022), ECF No. 732-1 at 15-18.

[11] *See, e.g.*, Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970); HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 15-54 (1973).

enthusiasm for effectuating novel notions of social justice and personal rights.

Most pertinent here, federal courts had begun hearing a variety of First Amendment challenges to various state criminal laws. Their direct incursions into state criminal proceedings were spurred by the Supreme Court's decision in *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116 (1965), where the Court held that an injunction could properly be issued against enforcement of certain state criminal statutes in the face of ongoing prosecutorial actions.

Six years later, however, the Court signaled a major retreat from *Dombrowski* in *Younger v. Harris*, an 8-1 decision with the principal opinion by Justice Black.[12] *Younger* rejected two notions: that adverse impacts on First Amendment rights alone could justify federal intervention, and that the ordinary pains of undertaking a defense against criminal charges could constitute sufficiently irreparable injury for equitable relief. 410 U.S. at 49, 53, 91 S. Ct. at 753, 755. Thus, as succinctly stated in a companion case, *Younger* held that "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury." *Samuels v. Mackell*, 401 U.S. 66, 69, 91 S. Ct. 764, 766 (1971).

Justice Black's opinion traces a "longstanding public policy against federal interference with state court proceedings," based in part on "the basic doctrine of equity

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[12] Technically, *Younger* was decided along with five companion cases: *Samuels v. Mackell*, 401 U.S. 66, 91 S. Ct. 764 (1971); *Boyle v. Landry*, 401 U.S. 77, 91 S. Ct. 758 (1971); *Perez v. Ledesma*, 401 U.S. 82, 91 S. Ct. 674 (1971); *Dyson v. Stein*, 401 U.S. 200, 91 S. Ct. 769 (1971); *Byrne v. Karalexis*, 401 U.S. 216, 91 S. Ct. 777 (1971).

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." *Younger*, 401 U.S. at 43-44, 91 S. Ct. at 750.[13] The Court's opinion relied heavily for this proposition on *Fenner v. Boykin*, 271 U.S. 240, 244, 46 S. Ct. 492, 493 (1926) ("The 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."). Citing *Fenner* in an earlier case, Justice Frankfurter emphasized that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies … [relating to] … the enforcement of the criminal law." *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500, 61 S. Ct. 643, 645 (1941) (citations omitted). The legacy of federal court noninterference in equity with state proceedings is over a century old.

But there is also a deeper reason for restraining federal courts acting in equity from getting involved in state criminal prosecutions. Justice Black explained

> the notion 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

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[13] The Court distinguished cases filed under the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), because, "when absolutely necessary for the protection of constitutional rights," "under extraordinary circumstances, where the danger of irreparable loss is both great and immediate," federal courts may enjoin *potential* state prosecutions. *Younger*, 401 U.S. at 45, 91 S. Ct. at 751 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243-44, 46 S. Ct. 492, 493 (1926)).

> 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, 91 S. Ct. at 750. This arrangement he deemed "Our Federalism," with roots in the profound debates and compromises that shaped the Constitution. *Id.*

Controversial as *Younger* has seemed to those steeped in the judicial activism of the last half century,[14] the Supreme Court, far from disavowing or materially narrowing the doctrine, repeatedly expanded its reach in the succeeding cases.[15] The doctrine remains

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[14] "There is no more controversial, or more quickly changing, doctrine in the federal courts today than the doctrine of 'Our Federalism,' which teaches that federal courts must refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its laws in its own courts." 17B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & VIKRAM D. AMAR, FEDERAL PRACTICE & PROCEDURE § 4251 (3d ed.) (April 2022 Update) (footnotes omitted).

[15] *See, e.g.*, *Samuels*, 401 U.S. 66, 91 S. Ct. 764 (extending *Younger*, in the state criminal prosecution context, to actions seeking declaratory relief); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S. Ct. 1200 (1975) (extending *Younger* to civil proceedings in which important state interests are involved); *Kugler v. Helfant*, 421 U.S. 117, 95 S. Ct. 1524 (1975) (prohibiting federal court intervention in state criminal proceedings to suppress illegally obtained evidence); *Juidice v. Vail*, 430 U.S. 327, 97 S. Ct. 1211 (1977) (extending *Younger* to state civil contempt procedures); *Trainor v. Hernandez*, 431 U.S. 434, 97 S. Ct. 1911 (1977) (extending *Younger* to state civil enforcement proceedings); *Moore v. Sims*, 442 U.S. 415, 99 S. Ct. 2371 (1979) (extending *Younger* to state child welfare proceedings); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S. Ct. 2515 (1982) (*Younger* applied to attorney discipline proceeding); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S. Ct. 1519

controlling today, with particular application to interventions into state criminal procedures. *Younger* requires federal court abstention when three criteria are met: "(1) the federal proceeding would interfere with an 'ongoing state judicial proceeding'; (2) the state has an important interest in regulating the subject matter of the claim; and (3) the plaintiff has 'an adequate opportunity in the state proceedings to raise constitutional challenges.'" *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 716 (5th Cir. 2012) (quoting *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S. Ct. 2515, 2521 (1982)).[16]

Rather than expound on unrelated nuances of *Younger*, we principally rely on the Supreme Court's decision in *O'Shea v. Littleton*, 414 U.S. 488, 94 S. Ct. 669 (1974), which is closely on point.[17] In *O'Shea*, the Court

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(1987) (extending *Younger* to prevent federal court interference with the posting of bond pending appeal).

[16] Further, although none is applicable here, there are three exceptions to *Younger*: "(1) the state court proceeding was brought in bad faith or with the purpose of harassing the federal plaintiff, (2) the state statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it,' or (3) application of the doctrine was waived." *Tex. Ass'n of Bus.*, 388 F.3d at 519 (quoting *Younger*, 401 U.S. at 53-54, 91 S. Ct. at 755).

[17] Judge Southwick's solo opinion purports to be agnostic on whether *Younger* abstention ought to apply to constitutional challenges to bail bond procedures, which he considers somehow severable from a state's overall criminal process. In light of that threshold ambiguity, it seems unnecessary to discuss his lengthy *arguendo* reasoning as to why *Younger* should not apply in this case. Suffice it to say, first, that categorically excluding from the ambit of *Younger* abstention (other abstention prerequisites being present) constitutional claims involving bits and pieces of the criminal

held that a group of plaintiffs had no standing to challenge various Cairo, Illinois criminal practices, notably including the imposition of excessive bail, which were alleged to be racially discriminatory and discriminatory against indigents. *Id.* at 498, 94 S. Ct. at 677. The Court alternatively held that even if some plaintiffs had standing, the principles of *Younger* mandated that no federal equitable relief could be granted in the absence of irreparable injury "both great and immediate." *Id.* at 499, 94 S. Ct. at 678 (quoting *Younger*, 401 U.S. at 46, 91 S. Ct. at 751).[18]

In *O'Shea*, "[t]he Court of Appeals disclaimed any intention of requiring the District Court to sit in constant day-to-day supervision of these judicial officers, but the 'periodic reporting' system it thought might be warranted would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity." *Id.* at 501, 94 S. Ct. at 679 (footnote omitted). The Supreme Court also pointed out that any person charged with crime, who became dissatisfied with the officials' compliance with a federal injunction, would have recourse to federal court seeking compliance or even contempt. Enforcement of the injunction would mark "a major continuing intrusion …

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process, e.g., bail bonding or public defenders appointments, is fundamentally at odds with comity and federalism. In addition, the remainder of this opinion explains why Judge Southwick's *arguendo* assertions denying application of *Younger* here are in error: A federal equitable remedy for allegedly unconstitutional bail bond procedures would seriously interfere with ongoing criminal proceedings. And requiring "timeliness" of bail bond review to forestall abstention is not supported by any *Younger* precedent, is contradicted by *O'Shea* and other precedent, and is contraindicated by a multitude of available, adequate Texas procedures.

[18] Note the procedural similarity between *O'Shea* and this case: standing was at issue as well as *Younger* abstention.

into the daily conduct of state criminal proceedings." *Id.* at 502. Such extensive federal oversight would constitute "an ongoing federal audit of state criminal proceedings … indirectly accomplish[ing] the kind of interference that *Younger v. Harris* … and related cases sought to prevent." *Id.* at 500, 94 S. Ct. at 678.[19]

The Supreme Court coupled its concerns about the interference with ongoing criminal proceedings with its description of various adequate legal remedies available to the plaintiff class members in the course of criminal defense. *Id.* at 502, 94 S. Ct. at 679. These included, *inter alia*, direct or postconviction collateral review; disciplinary proceedings against judges; and federal habeas relief. The Court did not engage in extensive factbound review of the "adequacy" or "timeliness" of state procedures in practice.

Only a few years after *O'Shea*, this court found it controlling when faced with a Galveston County, Texas prisoner's complaint on behalf of himself and others against a bevy of local pretrial practices, including allegedly excessive bail determinations made against indigent defendants. *See Tarter v. Hury*, 646 F.2d 1010, 1013 (5th Cir. Unit A June 1981) (discussing *O'Shea*). This court affirmed the dismissal of the plaintiff's complaint. The court held that "[b]ecause *O'Shea* involved a challenge to the imposition of excessive bail, it is conclusive as to Tarter's claim for equitable relief based on that ground." *Id.* (footnote omitted). Just before stating this

[19] Judge Southwick avers that the proposed injunction in *O'Shea* seems far broader than whatever relief might be ordered in this case. His surmise is contradicted by the actual injunction ordered in *ODonnell I* and copied by the district court here, and by the plaintiffs' continued insistence on monitoring the details of bail bond procedures, i.e., adversary hearings, written factfindings, and the enforcement of a presumption against cash bail.

conclusion, the panel had recapitulated that the Supreme Court refused to consider declaratory or injunctive relief in *O'Shea* that would "require excessive federal interference in the operation of state criminal courts." *Id.*[20]

Together, *O'Shea* and *Tarter* supply compelling precedent for withholding federal adjudication of the bail complaint in both *ODonnell I* and *Daves*. Yet *ODonnell I* held these decisions inapposite for two reasons. First, after listing the three prerequisites for *Younger* abstention,[21] the court held the third prong—adequate opportunity to raise constitutional questions in the state proceedings—was unsatisfied due to the Supreme Court's decision in *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854 (1975). Second, dispatching *Younger*'s first prong, *ODonnell I* held that the abstention principles of comity and federalism were not implicated because "[t]he injunction sought by ODonnell seeks to impose

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[20] In Judge Southwick's view, the en banc decision in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc), is our court's "last word" on *Younger* although it does not mention *Younger*. Besides the obvious paradox, which probably arises from the litigation relationship between *Gerstein* and *Pugh*, that view is counterintuitive because two of the judges who sat on the *Pugh* en banc court joined in *Tarter*. It is also irrelevant, because *Pugh*, if it represented a *decision* not to abstain, was superseded by *O'Shea*, which bound the *Tarter* panel.

[21] The plaintiffs in *ODonnell I* conceded that the second prong of *Younger* is met. Indeed, states have a vital interest in regulating their pretrial criminal procedures including assessment of bail bonds. *See Pugh*, 572 F.2d at 1056 (holding that a state has "a compelling interest in assuring the presence at trial of persons charged with crime"); *see also Stack v. Boyle*, 342 U.S. 1,4, 72 S. Ct. 1, 3 (1951) ("The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty.").

'nondiscretionary procedural safeguard[s],' … [and] will not require federal intrusion into pre-trial decisions on a case-by-case basis." *ODonnell I*, 892 F.3d at 156 (citing *Tarter*, 646 F.2d at 1013-14; *O'Shea*, 414 U.S. at 499-502, 94 S Ct. at 677–79). Both of these reasons are incorrect.

Gerstein at first blush appears inconsistent with *Younger* abstention because the Supreme Court there upheld a federal court injunction requiring a judicial hearing in Florida courts on probable cause for pretrial detention. *Gerstein*, 420 U.S. at 125, 95 S. Ct. 868-69. And in footnote nine, the Court's opinion states that abstention was inappropriate.[22] The *ODonnell I* panel relied on this footnote almost exclusively. *ODonnell I* interpreted this footnote to find *Younger* inapt because "the Supreme Court has already concluded, the relief sought by ODonnell—i.e., the improvement of pretrial procedures and practice—is *not properly reviewed* by criminal proceedings in state court." *ODonnell I*, 892 F.3d at 156 (emphasis added).

But *Gerstein* is distinguishable on a number of grounds. As the Second Circuit noted, "it is elementary that what the Court said must be viewed in the light of the factual and legal setting the Court encountered." *Wallace v. Kern*, 520 F.2d 400, 406 (2d Cir. 1975). The

[22] *Gerstein*'s footnote nine states, "The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971). The injunction 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. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits." *Gerstein*, 420 U.S. at 108 n.9, 95 S. Ct. at 860 n.9 (citing *Conover v. Montemuro*, 477 F.2d 1073, 1082 (3d Cir. 1972); *Perez*, 401 U.S. 82, 91 S. Ct. 674; *Stefanelli v. Minard*, 342 U.S. 117, 72 S. Ct. 118 (1951)).

Wallace court explained in detail why, under principles established in *Younger* and its progeny, *Gerstein* did not authorize a New York federal district court to require an evidentiary hearing on bail determinations within a certain period of time. *See id.* at 404-08. *Wallace* accordingly reversed the lower court's injunction. Like *Tarter*, *Wallace* is directly on point.

To explain *Younger*, the *Wallace* court regarded as insupportable "[t]he proposition that the principles underlying *Younger* are applicable only where the federal court is seeking to enjoin a pending state criminal prosecution." *Id.* at 405. Observing that the Supreme Court had extended *Younger* to civil cases in which the state has a "particular interest," *Wallace* reasoned that it would be anomalous to require abstention in such civil cases "but not [in] a bail application proceeding in which the people of the State of New York have a most profound interest." *Id.*[23] The court moved on to discuss *O'Shea*'s rebuke to the lower courts against conducting an "ongoing federal audit of state criminal proceedings." *Id.* at 406 (quoting *O'Shea*, 414 U.S. at 500, 94 S. Ct. at 678). The *Wallace* court commented:

> This is precisely the mischief created by the order below. Having provided for new bail hearing procedures which fix the time of, the nature of and even the burden of proof in the evidentiary hearings, the order would permit a pretrial detainee who claimed that the order was not complied with to proceed to the federal court for interpretations thereof. This would constitute not only an interference in state bail

[23] Further, "[t]he assurance that a defendant who has been indicted for a crime be present to stand his state trial and be sentenced if convicted is patently of prime concern to the state." *Id.*

> hearing procedures, but also the kind of continuing surveillance found to be objectionable in *O'Shea*.[24]

The *Wallace* court further distinguished *Gerstein* legally and factually. *Gerstein*, the court noted, is literally surrounded by other Supreme Court decisions extending the principles of *Younger* abstention, two of which were decided within a few months of *Gerstein*.[25] Accordingly, the *Wallace* court found *Gerstein* "clearly not decisive" due to the Supreme Court's explanation that in Florida, "the federal plaintiffs there had *no right* to institute state habeas corpus proceedings … and that their only other state remedies were a preliminary hearing which could take place only after 30 days or an application at an arraignment, which was often delayed a month or more after arrest." *Id.* (emphasis added). The *Wallace* court stated, "[w]e do not consider this discussion feckless." *Id.* New York law, in contrast, was not bereft of remedies allowing defendants timely to challenge bail determinations. *Id.* at 407. Thus, *Younger* controlled, and the *Wallace* court reversed injunctive relief that would have compelled federal oversight of New York state bail procedures. *Wallace* remains good law in the Second Circuit. See *Kaufman v. Kaye*, 466 F.3d 83, 86 (2d Cir. 2006).

Not only did *ODonnell I* misperceive the context and limited implications of *Gerstein*, but the court also strayed far off the mark in asserting *Younger* abstention is avoidable if the state court review procedures are not "properly" addressing certain constitutional claims. As

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[24] *Id.* at 406.

[25] *See Huffman*, 420 U.S. 592, 95 S. Ct. 1200; *Schlesinger v. Councilman*, 420 U.S. 738, 95 S. Ct. 1300 (1975).

the Supreme Court later explained, "the teaching of *Gerstein* was that the federal plaintiff must have an opportunity to press his claim in the state courts." *Moore v. Sims*, 442 U.S. 415, 432, 99 S. Ct. 2371, 2381 (1979) (citing *Juidice v. Vail*, 430 U.S. 327, 336-37, 97 S. Ct. 1211, 1217–18 (1977)). *Juidice* had applied *Younger* where "it is abundantly clear that appellees had *an opportunity* to present their federal claims in the state proceedings. *No more is required* to invoke *Younger* abstention. … [F]ailure to avail themselves of such opportunities does not mean that the state procedures were inadequate." *Juidice*, 430 U.S. at 337, 97 S. Ct. at 1218 (emphases added).

As noted, *Gerstein* addressed detention without a probable cause finding and without any avenue for judicial review.[26] All that *Younger* and its progeny mandate, however, is an opportunity to raise federal claims in the course of state proceedings. Texas law expressly provides mechanisms for challenging excessive bail. A person may move for bond reduction, as one of the named plaintiffs in this case successfully did. *See* TEX. CODE CRIM. P. art. 17.09(3). Further, "[t]he accused may at any time after being confined request a magistrate to review the written statements of the witnesses for the State as well as all other evidence available at that time in determining the amount of bail." *Id.* art. 17.33. In addition, "[t]he accused in any felony case shall have the right to an examining trial before indictment in the county having jurisdiction of the offense … at which time the magistrate at the hearing shall determine the amount or sufficiency of bail, if a bailable case." *Id.* art.

[26] In *Middlesex County*, the Court stated that in *Gerstein*, "the issue of the legality of a pretrial detention *could not be raised* in defense of a criminal prosecution." 457 U.S. at 436 n.14, 102 S. Ct. at 2523 n. 14 (emphasis added).

16.01. And there appears to be no procedural bar to filing a motion for reconsideration of any of these rulings.

A petition for habeas corpus is also available. "Where a person has been committed to custody for failing to enter into bond, he is entitled to the writ of habeas corpus, if it be stated in the petition that there was no sufficient cause for requiring bail, or that the bail required is excessive." *Id.* art. 11.24. The remedy is release or reduction in bail. *Id.* This provision is no dead letter.[27] Texas courts have shown themselves capable of reviewing bail determinations. *See*, *e.g.*, *Ex parte Gomez*, 2022 WL 2720459 (Tex. App. July 14, 2022);[28] *Ex parte McManus*, 618 S.W.3d 404, 406-09 (Tex. App. 2021) (performing a holistic analysis of an excessive bail claim, including the ability to make bail); *Ex parte Robles*, 612 S.W.3d 142, 146-49 (Tex. App. 2020) (same); *Ex parte Castille*, No. 01-20-00639-CR, 2021 WL 126272, at *2-6 (Tex. App. Jan. 14, 2021) (same).

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[27] Plaintiffs argue that because *Younger*'s third prong requires that there be an adequate opportunity *in* the state proceedings to raise constitutional challenges, collateral proceedings like habeas cannot, by definition, qualify as adequate. This is refuted by *O'Shea*, which specifically referenced the availability of state postconviction collateral review as constituting an adequate opportunity. 414 U.S. at 502, 94 S. Ct. at 679; *see also Tex. Ass'n of Bus.*, 388 F.3d at 521 (referencing mandamus as an adequate opportunity to raise constitutional challenges).

[28] *Ex parte Gomez* is cited by plaintiffs for the proposition that Texas habeas courts will not review "procedural issues" related to bail. 2022 WL 2720459, at *5-6 (considering the procedural issue of the appointment of counsel at a bail hearing). But in that habeas case, the court adjudicated a defendant's challenge to his bail, which entailed review of the relevant factors, including ability to pay. That constitutes an adequate opportunity. *See O'Shea*, 414 U.S. at 502, 94 S. Ct. at 679.

Summing up why the *ODonnell I* court went wrong on the third *Younger* prong—adequacy of state remedies—is the response offered by the Supreme Court in *Middlesex County Ethics Committee*: "Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights." 457 U.S. at 431, 102 S. Ct. at 2521. That presumption was violated in *ODonnell I*'s rejection of adequate state remedies because Texas detainees have opportunities, beyond those deemed adequate in *O'Shea*, to raise their federal claims.

Moving to the first *Younger* factor—whether equitable relief by a federal court would interfere with ongoing state proceedings—the *ODonnell I* court concluded that the supervisory bail injunction at issue did not implicate concerns about comity and federalism because it "will not require federal intrusion into pre-trial decisions on a case-by-case basis." *ODonnell I*, 892 F.3d at 156 (comparing with *O'Shea*, 414 U.S. at 499-502, 94 S. Ct. at 678-79). But the injunction issued in *ODonnell I*, and mirrored by *Daves*, flatly contradicts the very language in *O'Shea*. The *ODonnell I* "model injunction" expressly mandated the type of "periodic reporting" scheme the Supreme Court precluded. *Compare id.* at 164-66 ("To enforce the 48-hour timeline, the County must make a weekly report to the district court of misdemeanor defendants identified above for whom a timely individual assessment has not been held."), *with O'Shea*, 414 U.S. at 501, 94 S. Ct. at 679 ("'periodic reporting' … would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity").[29] And it opens the federal courts any

[29] The district court in *Daves* implemented the same reporting requirement authorized in *ODonnell I*.

time an arrestee cries foul. *ODonnell I*, 892 F.3d at 165-66. Even before this court reconsidered *ODonnell I*'s rulings en banc, we found it necessary to disapprove several of that decision's overreaching injunctive provisions. *See ODonnell II*, 900 F.3d at 224-28 (overruling provisions that would have freed defendants for technical noncompliance with federal orders).

In addition to these requirements, considerable mischief remains.[30] To paraphrase *Wallace*, "[t]his is precisely the mischief created by the order below … . [T]he order would permit a pre-trial detainee who claimed that the order was not complied with to proceed to the federal court for interpretations thereof." 520 F.2d at 406. Such extensive federal oversight constitutes "an ongoing federal audit of state criminal proceedings … indirectly accomplish[ing] the kind of interference that *Younger v. Harris* … and related cases sought to prevent." *O'Shea*, 414 U.S. at 500, 94 S. Ct. at 678.

For all of these reasons, we hold that pursuant to *Younger*, *O'Shea*, *Tarter*, and *Wallace*, neither *ODonnell I* nor this case should have been adjudicated in federal court. We overrule *ODonnell I*'s holding against abstention.[31] The injunctions issued in Houston and Dallas plainly show federal court involvement to the point of ongoing interference and "audit" of state criminal procedures. Further, in stark contrast to *Gerstein*, Texas courts are neither unable nor unwilling to reconsider bail determinations under the proper circumstances, thus

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[30] In fact, in their supplemental briefing, plaintiffs' 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.

[31] In line with Judge Southwick's agnosticism about abstention, he does not seem to disagree with overruling *ODonnell I*.

providing state court detainees the chance to raise federal claims without the need to come to federal court. The availability of state court remedies counsels that federal courts may not intervene under equity jurisprudence to decide these disputes.[32]

Plaintiffs and the district court raise objections to the requirement of *Younger* abstention. We address them in turn.

First, plaintiffs rely on decisions from other courts. The most significant appellate court decision that stands in tension with our conclusion is the Eleventh Circuit opinion in *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), which brushed away *Younger* because "[a]bstention … has become disfavored in recent Supreme Court decisions." *Id.* at 1254. This is very strange. The case cited for that proposition involves state administrative litigation, not interference in criminal proceedings. *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72, 134 S. Ct. 584, 588 (2013). The Court in *Sprint* detracted not a whit from *Younger*'s ongoing force in respect of criminal adjudication. *See Sprint*, 571 U.S. at 78, 134 S. Ct. at 591 (reaffirming that *Younger* continues to preclude "federal intrusion into ongoing state criminal prosecutions").[33] Additionally, the

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[32] For those concerned that no final federal remedy is available, please recall that the relevant Supreme Court decisions prohibiting incarceration of indigent defendants for their inability to pay post-conviction fines arose, respectively, from direct appeal (*Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018 (1970)) and state habeas (*Tate v. Short*, 401 U.S. 395, 91 S. Ct. 668 (1971)). Indeed, *Tate*'s ruling issued only a week after *Younger* itself.

[33] *Pace* the *Walker* court, WRIGHT & MILLER's long and detailed section on *Younger* abstention nowhere implies that the

Walker court distinguished *O'Shea* on the basis, contrary to this case, that the injunction sought by the *Walker* plaintiffs did not contemplate ongoing interference with the prosecutorial process. *Walker*, 901 F.3d at 1255. Finally, because the *Walker* court ended up vacating a "modest" remedial injunction ("modest" in comparison with those imposed in *ODonnell I* and *II* and in *Daves*),[34] it may not have viewed *Younger* abstention as a decisive threshold issue.[35]

We disagree with some or all of the reasoning in other appellate court cases where *Younger* abstention was rejected, but in any event, they are factually far afield from this one. *Arevalo v. Hennessy*, for example, is factually distinguishable because the plaintiff challenging a bail determination had fully exhausted his state remedies without success, so there remained no state remedies available in which to raise his individual constitutional claims. *See* 882 F.3d 763, 767 (9th Cir. 2018). Two other cases found *Younger* inapplicable where plaintiffs challenged law enforcement practices that, in parallel with *Gerstein*, essentially prescribed pretrial detention without probable cause. *See Stewart*

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doctrine has become "disfavored," and the paper supplements continue to cite cases applying *Younger*. *See generally* §§ 4251-55.

[34] *See Walker*, 901 F.3d at 1255 ("Walker does not ask for the sort of pervasive federal court supervision of State criminal proceedings that was at issue in *O'Shea*."). Notably, the district court injunction contained no ongoing reporting or supervisory components. *See Walker v. City of Calhoun*, No. 4:15-CV-0170, 2017 WL 2794064, at *4-5 (N.D. Ga. June 16, 2017), *vacated*, 901 F.3d 1245 (11th Cir. 2018).

[35] A recent Eleventh Circuit decision also rejected a challenge to bail bond procedures but of course followed *Walker* on *Younger* abstention. *See Schultz v. Alabama*, 42 F.4th 1298, 1312 (11th Cir. 2022).

v. Abraham, 275 F.3d 220, 225-26 (3d Cir. 2001) (no abstention for "rearrest" policy implemented despite magistrates' denials of probable cause); *Fernandez v. Trias Monge*, 586 F.2d 848, 851-53 (1st Cir. 1978) (rejecting abstention in the face of a law requiring juvenile detentions without probable cause). The Sixth Circuit's decision in *Habich v. City of Dearborn* is inapposite because, as the defendant city conceded, the plaintiff there could not assert any of her constitutional claims in the course of a wholly distinct local administrative matter. 331 F.3d 524, 530-32 (6th Cir. 2003). Without any available state law remedy, *Younger* did not apply. *Id.*[36]

Second, the plaintiffs, the district court, and Judge Southwick fix talismanic significance on one line in one Supreme Court case: "[*Younger*] materially presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson*, 411 U.S. at 577, 93 S. Ct. at 1697. They would infer that *timeliness* of state remedies is required to prevent *Younger* abstention. But *Gibson* did not find an exception to *Younger because of* untimely state remedies. Instead, the case represents an exception to abstention predicated on the bias of a state administrative tribunal. In context, the quoted sentence reiterated that *Younger* contemplated alternative mechanisms for raising federal claims in ongoing state proceedings before a *competent* state tribunal. *See id.*; *see also Juidice*, 430 U.S. at 337, 97 S. Ct. at 1218 ("Appellees need be

[36] Plaintiffs' citation to *DeSario v. Thomas* is misleading because, despite the court's apparently belittling *Wallace* (on which we rely), the court also made clear that *Younger* abstention is required where a plaintiff may avail himself of remedies in an ongoing state criminal proceeding. 139 F.3d 80, 85, 86 n.3 (2d Cir. 1998). *See also* the Second Circuit's subsequent express approval of *Wallace* in *Kaufman*, 466 F.3d at 86.

accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings." (citing *Gibson*)).

More to the point, neither the plaintiffs nor the district court nor Judge Southwick cite a single case in which the alleged untimeliness of state remedies rendered *Younger* abstention inapplicable. The reason for this seems plain: *Younger* holds that "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution" cannot amount to irreparable injury. 401 U.S. at 46, 91 S. Ct. at 751. A few years after *Gibson*, the Supreme Court clarified that state remedies are inadequate only where "state law *clearly bars* the interposition of the constitutional claims." *Moore*, 442 U.S. at 425-26, 99 S. Ct. 2379 (emphasis added); *see also Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14, 107 S. Ct. 1519, 1528 (1987); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1292 (10th Cir. 1999). Even more specifically, the Court holds that arguments about delay and timeliness pertain not to the adequacy of a state proceeding, but rather to "conventional claims of bad faith," a well-established exception to *Younger* abstention. *Moore*, 442 U.S. at 432, 99 S. Ct. at 2382. Here, plaintiffs do not allege bad faith. And it bears repeating that Texas state court procedures do not clearly bar the raising of federal claims regarding bail because Texas requires that bail be set individually in each case rather than on a mechanical, unalterable basis. TEX. CODE CRIM. P. art. 17.15(a).

Plaintiffs' broadside against all the available state remedies ultimately rests on the incorrect assumption that each moment in erroneous pretrial detention is a constitutional violation. But this case does not present the situation that arose in *Gerstein*, where preliminary detention could occur without any judicial finding of probable cause and without legal recourse. An order for

cash bail accompanies a judicial determination of probable cause, which means that the defendant has presumably violated the criminal law. At that point, the question becomes how to balance the interests of the defendant in being released pending trial against society's need to enforce the law, protect innocent citizens, and secure attendance at court proceedings. *See*, *e.g.*, TEX. CODE CRIM. P. art. 17.15(a). Certainly, any kind of error in assessing excessive bail is lamentable, whether it pertains to the defendant's criminal history, the nature of the instant charge, the protection of potential victims, or his ability to pay cash bail. Even more unfortunate is the plight of a person unconstitutionally convicted who remains incarcerated pending the outcome of appeal or postconviction remedies; yet that is precisely what *Younger* held despite the "untimeliness" of the state criminal process. The gist of *Younger*'s test for availability, however, lies in the fact that errors can be rectified according to state law, not that they must be rectified virtually immediately.

2. *Mootness*

The preceding discussion suffices to explain why federal courts must abstain from invoking equity to interfere with ongoing state criminal proceedings where plaintiffs have adequate opportunities to raise constitutional issues. A coequal ground for dismissing this case is mootness. The substantial changes made by the Texas legislature to procedures for assessing bail have been outlined above. S.B. 6 was enacted after the initial panel decision in this case and pending our en banc review. Referencing these changes on remand from the en banc court, the district court analyzed mootness as follows:

> There is more than one way to ensure that a bail system upholds due process rights. Texas has

> chosen its way, and Plaintiffs are not entitled to have this Court immediately intervene to tinker with the rules that the Legislature has just recently enacted. Accordingly, the Court holds that Plaintiffs' request for injunctive relief should be dismissed as moot. *Accord* [13C WRIGHT & MILLER], FEDERAL PRACTICE AND PROCEDURE [§ 3533.6], at Supp. 73 ("A challenge to the validity of a new enactment, however, may be deferred to later litigation when the new enactment is amended while an appeal is pending and the record does not support adjudication as to the new enactment.") (citing *Am. Charities for Reas. Fund. Reg., Inc. v. O'Bannon*, 909 F.3d 329, 332–34 (10th Cir. 2018)).[37]

We substantially agree with the district court's analysis and add in support our previous en banc decision in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc). Like this case, *Pugh* addressed new bail legislation in Florida enacted during the pendency of the case on appeal. A panel of the Fifth Circuit held the new bail rules unconstitutional as "wealth-based" "discrimination." *Pugh v. Rainwater*, 557 F.2d 1189, 1198, 1201-02 (5th Cir. 1977), *reversed en banc*, 572 F.2d 1053 (5th Cir. 1978). The en banc court found the new law not facially unconstitutional and dismissed the case for mootness. The court considered plaintiffs' arguments against the operation of state bail procedures to be an as-applied challenge. But the evidence supporting that claim predated the new law. Consequently, "[a]s an attack on the Florida procedures which existed as of the time of trial,

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[37] The Tenth Circuit opinion states: "The law materially changed, fundamentally altering the issues that had been presented in district court. This change in the law renders the appeal moot." *O'Bannon*, 909 F.3d at 332-34.

the case has lost its character as a present, live controversy and is therefore moot." *Pugh*, 572 F.2d at 1058.

We are not bound by *Pugh*, but the resolution of that identical dispute is compelling. To rule on the status of S.B. 6 and its procedures at this point, based on evidence largely generated during proceedings that occurred pre-amendment, would constitute no more than an advisory opinion. Under Article III of the Constitution, federal courts may adjudicate only "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317, 108 S. Ct. 592, 601 (1988). That the named plaintiffs have not been subject to bail proceedings since years before the advent of S.B. 6 calls into question their ability to pursue this litigation for ongoing injunctive relief as injured parties, much less class representatives. And although the plaintiffs submitted some kind of video evidence purporting to demonstrate deficient proceedings in the immediate wake of the new law, we agree with the district court's statement that "there is minimal evidence in the record reflecting what actually happens in Dallas County after the effective date of S.B. 6." In sum, the case is moot because "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 726 (2013) (internal quotation omitted). Thus, even if federal courts were not compelled by *Younger* and *O'Shea* to abstain, the present controversy must be considered moot.

Plaintiffs challenge mootness in light of two Supreme Court cases. Neither is helpful to plaintiffs. One of these stated that a change in the law during litigation does not moot a claim unless it "completely and irrevocably eradicated the effects of the alleged violation." *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383 (1979). *Davis* recited the importance of completely eradicating the "effects of the alleged violation" where

the question was mootness owing to the city's voluntary cessation of racially discriminatory practices. As a general rule, voluntary cessation of illegal practices does not render a case moot. *See id.* On the facts before it, the Court held that the case had become moot under the high standard for voluntary cessation. Voluntary cessation is not involved here. More recently, the Supreme Court disclaimed mootness unless the new law affords plaintiffs "the precise relief … requested in the prayer for relief in their complaint." *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam). That case actually favors the defendants, as it held that the controversy before the Supreme Court became moot due to New York City's amendment of its ordinance "[a]fter we granted certiorari." *Id.* This suggests that this court was exactly right in *Pugh*.[38]

According to the plaintiffs, their complaint is not moot because it is essentially unrelated to the changes made by the Texas legislature. Dallas County's bail practices allegedly remain unconstitutional irrespective of S.B. 6 and irrespective of the existence of bail schedules. Plaintiffs argue that they seek relief "*beyond* what *ODonnell* held to be required," such that the legislature's adoption of measures originally required by *ODonnell* fails to assuage their demands for on-the-record hearings and detailed factfindings that prove in each bail proceeding whether pretrial "detention is necessary to further any state interest." This argument is incoherent. The overhaul accomplished by S.B. 6 specifically

[38] Plaintiffs' attempt to shoehorn *Pugh* within these two cases is quite misguided. They assert that the *Pugh* en banc court held that "a new state rule cured the alleged violations and there was no evidence that the challenged conduct persisted." As we explained above, *Pugh* did no such thing in simply holding the new law facially constitutional and declaring any further challenge to be moot.

requires, within 48 hours of arrest, a bail decision reflecting individual consideration of the relevant Article 17.15(a) statutory factors and "impos[ition of] the least restrictive conditions" that will "reasonably ensure the defendant's appearance in court as required and the safety of the community, law enforcement, and the victim of the alleged offense." TEX. CODE CRIM. P. art. 17.028(a), (b).[39] The crux of this case is now whether the new state law, if applied assiduously by Dallas County magistrates, measures up to plaintiffs' proffered constitutional minima.[40] S.B. 6 is heavily procedural in nature, just like the alleged claims of these plaintiffs. Thus, both the provisions of S.B. 6 and their implementation are alleged to raise constitutional issues beyond the scope of this case and the circumstances of the plaintiffs who filed it. The case is moot.[41]

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[39] In setting the amount of bail, the magistrate must consider: (1) the "nature of the offense"; (2) the detainee's "ability to make bail"; (3) the "future safety of a victim of the alleged offense, law enforcement, and the community"; (4) the detainee's "criminal history"; and (5) the detainee's "citizenship status." TEX. CODE CRIM. P. art. 17.15(a).

[40] If the Dallas County magistrates are not in compliance with state law, this raises issues for state courts to resolve. Pursuant to *Pennhurst State Sch. & Hosp. v. Halderman*, federal courts may not grant injunctive relief against the defendants on the basis of state law. 465 U.S. 89, 106, 121, 124, 104 S. Ct. 900, 911, 919, 920 (1984).

[41] Plaintiffs urge the court to vacate our previous en banc decision should the case be deemed moot. In *Daves* (en banc), the court considered only threshold questions of justiciability, rightly recognizing that "there is no mandatory sequencing of jurisdictional issues." *Daves*, 22 F.4th at 532 (quoting *Sinochem*, 549 U.S. at 431, 127 S. Ct. at 1191). Here, we resolve additional threshold questions—those of abstention and mootness—without reaching the merits. Vacatur of the previous en banc decision is unwarranted.

CONCLUSION

Exercising our discretion to review both justiciability issues following remand, we hold that *Younger v. Harris* and its progeny required the district court to abstain; that the *ODonnell I* decision to the contrary is overruled; and that the case is moot by virtue of intervening state law.

We REMAND with instructions to DISMISS.

PRISCILLA RICHMAN, *Chief Judge*, concurring in the judgment:

I concur in the judgment holding that this case is moot in light of new legislation passed by the Texas legislature. I would not reach whether *Younger* abstention[1] applies in the present case since the new statutory regime now governs and there is no live case or controversy before this court that requires us to determine whether pre-trial detainees in Texas had an avenue under the former bail regime to present federal claims in challenges to bail determinations and pre-trial detention.[2]

I cannot say, categorically, that *Younger* abstention will always be required when a defendant brings federal claims challenging bail bond procedures. If there is no adequate avenue under state law to challenge bail procedures or pre-trial detentions on federal grounds, then the *Younger* abstention doctrine would, in all likelihood, be inapplicable.[3]

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[1] *Younger v. Harris*, 401 U.S. 37 (1971).

[2] *See, e.g.*, *Juidice v. Vail*, 430 U.S. 327, 337 (1977) (holding that "it is abundantly clear that appellees had an opportunity to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention." (footnote omitted)).

[3] *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 106, 108 n.9 (1975) (holding that *Younger* abstention did not apply because defendants were detained without a timely judicial determination of probable cause and state courts had also "held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information").

LESLIE H. SOUTHWICK, *Circuit Judge*, concurring in judgment:

I start with expressing admiration for the clarity and erudition of the opinion for the court. Expected qualities for that author's writings, certainly, but worth noting. I differ with that opinion as to abstention, but I am able to join the majority in dismissing the suit.

My agreement with the majority is with the analysis of mootness. The Texas legislature's adoption of new rules for addressing bail in trial courts has entirely changed the relevant factual and legal underpinnings for the dispute. If a federal district court is the proper venue for a challenge to those procedures, it needs to be based on a new complaint in a new lawsuit.

Of course, the majority opinion also determined that challenges to bail practices under the new enactment may not properly be pursued in federal court. Abstention would block any decision. My view, though, is that we cannot decide in the abstract whether abstention would apply to future claims about bail. Specific claims made and facts shown will matter.

Preliminary to discussing abstention itself, I offer a word or two about whether we should even address the issue. Our holding that claims against Dallas County's former bail practices are moot resolves this appeal. An appeal that no longer contains a live controversy is an especially poor vehicle for issuing a significant additional holding. Several members of the court opine that we should leave the analysis of abstention for another day. In the main, I agree. Nonetheless, with a majority of the court reaching the abstention issue, then expressing a view that differs from my own, I hope there is some benefit in offering a contrasting, even if solitary, analysis.

I. Abstention — some background

"Jurisdiction existing," the Supreme Court explained, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). The abstention doctrine identified in *Younger v. Harris*, 401 U.S. 37 (1971), is an "exception to this general rule." *Id.* It provides that in suits requesting injunctive or declaratory interference with certain kinds of state adjudicatory proceedings, federal courts generally must "refus[e] to decide a case in deference to the States." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989).

As the majority opinion explains, *Younger* abstention was a fairly quickly imposed limit on the expansiveness of a right to enjoin state prosecutions that had been recognized just six years earlier in *Dombrowski v. Pfister*, 380 U.S. 479 (1965). *See* 17B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, ET AL., FED. PRAC. & PROC. § 4251, at 3 (3d ed. 2007). The *Dombrowski* Court held that overbroad state statutes that criminalized subversive activity had a chilling effect on the exercise of First Amendment rights, and that an injunction should be granted blocking pending and future prosecutions under the statutes. *Dombrowski*, 380 U.S. at 493-97. *Younger* was a "major retreat" from *Dombrowski*. 17B WRIGHT & MILLER, FED. PRAC. & PROC. § 4251, at 7.

The event that was a portent, at least to the discerning, that the Supreme Court would sound retreat was the federal court injunction obtained by John Harris and three other defendants barring Los Angeles County District Attorney Evelle J. Younger from prosecuting them under a statute the district court held was

unconstitutional. *Harris v. Younger*, 281 F. Supp. 507, 509-10, 516-17 (C.D. Cal. 1968) (citing *Dombrowski* and holding the statute violated the First Amendment), *rev'd*, *Younger*, 401 U.S. 37. The Supreme Court reversed, holding that principles of equity and comity prohibited federal judicial interference with the ongoing state-court prosecution. *Younger*, 401 U.S. at 43-44, 53-54. On equity, the Court adhered to "the 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." *Id.* at 43-44. On comity, "an even more vital consideration," the Court emphasized that the need for "proper respect for state functions" counseled against interference "with the legitimate activities of the States." *Id.* at 44.

In time, the Court announced that abstention is appropriate if: (1) the requested judicial relief would unduly interfere with the ongoing state proceeding; (2) the state proceeding implicates an important state interest in the subject-matter of the federal claim; and (3) the federal plaintiff has an adequate opportunity to raise the federal claim in state court. *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

More recently in its unanimous 2013 *Sprint* opinion, the Court summarized *Younger* abstention after 40 years. *See Sprint*, 571 U.S. 69. "The Court made clear that the circumstances fitting within the *Younger* abstention doctrine are exceptional and include: (1) state criminal prosecutions; (2) civil enforcement proceedings; and (3) civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." 17B WRIGHT &

MILLER, FED. PRAC. & PROC. § 4254 (Supp. 2022) (explaining *Sprint*, 571 U.S. at 69, 78). The *Younger* abstention doctrine goes "no further" than those three proceedings. *Sprint*, 571 U.S. at 82. As to the three *Middlesex* factors, they are "not dispositive" but are merely "*additional* factors appropriately considered by the federal court before invoking *Younger*." *Id.* at 81 (emphasis in original).

A gateway question for us is whether the *Sprint* Court's category of "state criminal prosecutions" includes preliminary proceedings such as deciding on bail. One reason to say bail determinations are subject to abstention is the Court's reasoning for applying *Younger* to some state civil proceedings. The Court stated that *Younger* principles apply to state civil proceedings "'akin to a criminal prosecution' in 'important respects.'" *Id.* at 79 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)).

It could be argued that disruptions of state procedures regarding bail are different only in degree from disruptions to the prosecution, and the state interests are of similar weight. As the majority here puts it, the "mischief" arising from detailed equitable relief that "fix[es] the time of, the nature of and even the burden of proof in the evidentiary hearings … would permit a pretrial detainee who claimed that the order was not complied with to proceed to the federal court for interpretations thereof." *Majority op.* at 16-17 (quoting *Wallace v. Kern*, 520 F.2d 400, 406 (2d Cir. 1975)). Supportive of the majority's view is the statement in one of the preeminent federal procedure treatises that a federal court should abstain if relief "would intrude on a *state's administration of justice*, even in the absence of a particular, individual, ongoing state proceeding." 17A JAMES W. MOORE, ET AL., MOORE'S FED. CIV. PRAC.

§ 122.72[1][c], at 122-10 (Rev. 2022) (emphasis added). If that phrasing accurately captures the doctrine, abstention certainly could extend beyond the prosecution itself.

On the other hand, *Dombrowski* and *Younger*, though having much different results, both address whether the unconstitutionality of a criminal statute supporting a state prosecution can be presented in federal court. Constitutional arguments can be presented in a prosecution and have the potential to alter its result. *Dombrowski* held the prosecution could be blocked before it even began if the criminal statute were unconstitutional, while *Younger* said the constitutional arguments needed to be presented in the state criminal proceedings. Certainly, *Younger* has been stretched beyond that, as the majority opinion discusses, and so will I. Those extensions, though, are more similar to criminal prosecutions than is the bail determination. In those extensions, the constitutional claims can be part of the principal proceedings and will thwart those proceedings if accepted. Hence, abstention makes sense at least at the level of not having duplicative forums for the same claims.

Rather differently, the validity of equal protection claims about bail would not affect the validity of or intrude into the criminal prosecution. Even so, depending on the complexity of the relief a court orders as to bail, the courts that handle the prosecutions could be significantly burdened.

I conclude inconclusively. The applicability of *Younger*'s abstention to bail proceedings has no clear answer. One reason I hesitate to agree with the majority that the *Younger* analysis should be applied to bail proceedings is that a clear purpose of *Sprint* was to stop abstention proliferation. "Divorced from their quasi-

criminal context," the Court wrote, "the three *Middlesex* conditions would extend *Younger* to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest." *Sprint*, 571 U.S. at 81. That must not occur, because "abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" *Id.* at 81-82 (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984)). Certainly, *Sprint* did not announce that *Younger* was dying. Instead, the Court was saying *Younger* had gotten older; its reach had fully matured; it should not be given more tasks.

For me, then, whether abstention could apply here turns on whether bail decisions are in *Sprint*'s category of "criminal prosecutions." In order to engage with the majority and show how my analysis differs, I assume for purposes of this case that abstention is not categorically inapplicable to bail proceedings. I start with the assumption that bail proceedings are "exceptional circumstances." Abstention still must be justified by the "*additional* factors appropriately considered by the federal court before invoking *Younger*." *Sprint*, 571 U.S. at 81 (emphasis in original). The *Sprint* Court stated that these factors are not "dispositive," *id.*, but absent some significant overriding factual or legal considerations in the case, I treat them as guiding the result.

In the following analysis, whether abstention applies here turns on two of the *Middlesex* factors.[1] First, would injunctive or other relief from the federal court impermissibly interfere with ongoing state-court proceedings? *Middlesex*, 457 U.S. at 431-32, 437. Further,

[1] I will not discuss whether the proceedings involve important state interests, as the state's interests in its own bail proceedings are certainly substantial.

"is there an adequate opportunity in the state proceedings to raise constitutional challenges"? *Id.* at 432. My separate analysis of each factor follows.

II. Impermissible interference with ongoing state proceedings

"Our Federalism" is the rubric Justice Hugo Black used for *Younger* abstention. *Younger*, 401 U.S. at 44. We must avoid both "blind deference" to states and "centralization of control over every important issue." *Id.* Even though the *Younger* doctrine has expanded since its 1971 origin, federalism remains key.

As I begin, I request forbearance. My effort to explain some of the caselaw requires me to detail what those cases actually involved and, thus, how to interpret their wording. Though I seek to give context without overburdening, the direction I am willing to err will become obvious.

One case that began in the Fifth Circuit, with multiple opinions including one from the Supreme Court and one from our *en banc* court, is a good source for early and still applicable analysis of prohibited interference with state courts. *See*, *e.g.*, *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (*en banc*).[2] The case led to one of the earliest Supreme

[2] I offer an explanation about shortform case names used in my opinion. In following what I consider to be the proper convention, the usual one-party names for some opinions are spurned. I believe proper practice is *not* to use the name of the governmental official. For example, multiple opinions arose from litigation brought by plaintiff Robert Pugh after he was detained in Dade County jail. *Gerstein v. Pugh*, 420 U.S. at 105-06. Defendant Richard E. Gerstein was the State Attorney for Dade County, Florida, *id.* at 107, while James Rainwater was one of three defendant Small Claims Court judges. *See* Complaint at 2-4, *Pugh v. Rainwater*, No. 71-CV-448 (S.D. Fla. Mar. 22, 1971), in Appendix filed with Petitioner's

Court opinions rejecting *Younger* abstention. The case began as a class-action challenge in the former, six-state Fifth Circuit that had Florida within its boundaries. The named plaintiffs were arrested and detained in Dade County, Florida, based solely on a prosecutor's information[3] charging them with offenses. The lead plaintiff was Robert Pugh, jailed at the time of the complaint on an information charging him with robbery and other offenses. *Gerstein v. Pugh*, 420 U.S. at 105 n.1.

One defendant was Richard Gerstein, the State Attorney (*i.e.*, chief prosecutor) for the judicial circuit containing Miami and Dade County. *Id.* at 107. Gerstein had statutory authority to file an information against those alleged to have committed a crime under state law, leading to a suspect's detention based on Gerstein's own, unreviewed determination about probable cause. *Id.* at 105-06. Plaintiffs asserted that Gerstein's policy was "to refuse to provide a defendant in custody by virtue of a directly filed information an opportunity for a binding preliminary hearing to determine probable cause for his incarceration." Complaint at 28, *Pugh v. Rainwater*, *supra* n.2. The relief sought against Gerstein included a declaratory judgment that a prompt probable-cause hearing was constitutionally necessary, and an

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Brief after grant of Writ of Certiorari, *Gerstein v. Pugh*, 420 U.S. 103 (No. 73-477). Thus, *Pugh* is my shortform. In order to combine the exigencies of reader clarity with the eccentricities of writer preference, I will refer to both parties when rejecting a standard shortform for a case. Yet, I do not wish to be ridiculous. The governmental party was Younger, the private party Harris, but I refer to that case as *Younger*.

[3] "Information. A formal criminal charge made by a prosecutor without a grandjury indictment." BLACK'S LAW DICTIONARY 795 (8th ed. 2004).

injunction requiring such hearings. *Id.* at 11-13.[4] Prosecutor Gerstein's part of the case would be considered by the Supreme Court.

Relief was also sought against eight state-court judges. *Id.* at 4. Three were Small Claims Court judges, James Rainwater being the first named. *Id.* The other five were Justices of the Peace. *Id.* Plaintiffs asserted that the eight judges unconstitutionally set monetary bail for all arrestees, regardless of the arrestee's ability to pay. *Id.* at 10. The plaintiffs alleged that the practice "discriminates against poor persons solely because of their poverty without any rational basis," in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* On that claim, the plaintiffs requested a declaratory judgment that secured money bail for indigent arrestees was discrimination under the Fourteenth Amendment, and an injunction prohibiting the use of monetary bail in this manner. *Id.* at 13. The Supreme Court did not consider the Rainwater bail issues.

The district court ruled for the plaintiffs on the probable-cause issue but for the defendants on the bail issue. *Pugh v. Rainwater*, 332 F. Supp. 1107, 1115 (S.D. Fla. 1971). That decision led to separate appeals to this court. In the probable-cause appeal, we upheld the district court's injunction and declined to abstain. *Pugh v. Rainwater*, 483 F.2d 778 (5th Cir. 1973). State Attorney Gerstein then petitioned the Supreme Court for a writ of certiorari; we held the issue of bail in abeyance. With some modifications to the Fifth Circuit decision, the

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[4] The complaint also alleged that the defendant judges had authority to provide preliminary hearings but would not do so for "persons incarcerated in the Dade County Jail by virtue of a direct information filed by defendant Gerstein." *Id.* at 4, 7-8.

Supreme Court affirmed and remanded for further proceedings. *Gerstein v. Pugh*, 420 U.S. at 126.

The *Gerstein v. Pugh* Court's discussion of *Younger* was relegated to a footnote; there, the Court rejected abstention:

> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The injunction 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. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits.

Id. at 108 n.9. This language certainly supports that *Younger* is inapplicable to bail. Even so, a legal doctrine can evolve from its original terms.

Because the Supreme Court stated the district court "correctly held" that the claims were not barred by *Younger*, I examine the district court's holding. The district court quoted *Younger* as permitting an injunction when there is "'great and immediate' 'irreparable injury' other than the 'cost, anxiety, and inconvenience of having to defend against a single criminal prosecution,' and the injury must be one that cannot be eliminated by the defense therein." *Pugh v. Rainwater*, 332 F. Supp. at 1111 (quoting *Younger*, 401 U.S. at 46). This is the district court's description of Pugh's injury:

> Plaintiffs at bar are challenging the validity of their imprisonment pending trial with no

> judicial determination of probable cause. These facts present an injury which is both great and immediate and which goes beyond cost, anxiety, and inconvenience. Furthermore, the state has consistently denied the right asserted, so that the injury is irreparable in that it cannot be eliminated either by the defense to the prosecution or by another state proceeding.

Id.

The district court's correct understanding of *Younger* was that injury arising from being detained without a probable cause hearing cannot be dismissed as simply the "cost, anxiety, and inconvenience" of a criminal prosecution. *Id.* Generally, a prosecution does not violate someone's constitutional rights even when the result is an acquittal. Cost, anxiety, and inconvenience are inherent in being prosecuted for a crime. *Gerstein v. Pugh*, though, supports that detention without any judicial determination that there is probable cause causes an injury that is not inherent, and indeed is abhorrent, to our criminal justice system. The Court elaborated in 1979 by stating that "the injunction [in *Gerstein v. Pugh*] was not addressed to a state proceeding and therefore would not interfere with the criminal prosecutions themselves." *Moore v. Sims*, 442 U.S. 415, 431 (1979). More on *Sims* later.

After the Supreme Court's *Pugh* opinion but before this court made its final decision as to the bail portion of the suit, the Florida Supreme Court promulgated a new rule concerning bail. *See Pugh v. Rainwater*, 557 F.2d 1189, 1194, 1200-01 (5th Cir. 1977). After a panel decision, we reheard the bail issue *en banc*. *See Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (*en banc*). The *en banc* court held that the plaintiffs' original bail

challenge was mooted by the new Florida rule. *Id.* at 1058. We then held that the new Florida rule was not facially unconstitutional. *Id.* at 1059. We explained that the automatic detention of indigent arrestees "without meaningful consideration of other possible alternatives" would violate the Fourteenth Amendment, but that the new Florida rule did not facially preclude meaningful consideration. *Id.* at 1057-59. The *en banc* opinion remains valid that indigents' constitutional rights can be violated by bail decisions.

We did not discuss *Younger* in the panel or *en banc* *Pugh v. Rainwater* opinions as to bail following the Supreme Court's *Gerstein v. Pugh* opinion concerning probable-cause determinations. Reasons for the failures can be proposed now, but I conclude that silence should be accepted as our court's last word in the *Pugh* collection of opinions on *Younger*.

I have discussed the series of *Pugh* decisions first because of the litigation's origins in this circuit and the importance of the decisions to our subsequent jurisprudence. The lodestar precedent for the majority here, though, is a decision three years after *Younger*, namely, *O'Shea v. Littleton*, 414 U.S. 488 (1974).[5] Plaintiffs were 17 black and two white residents of Cairo, Illinois, and its surrounding county; they were not detainees. *Id.* at 491. They brought a class action to challenge alleged racial discrimination in the setting of bail, imposing of fines, and sentencing in a municipal court system. *Id.* at 490-91. The Seventh Circuit gave substantial detail about their claims and categorized them by groups of defendants such as the local prosecutor Berbling,

[5] Yet again, I will apply my convention to this opinion and use plaintiff Littleton's name as the shortform, not the governmental defendant Judge O'Shea's.

magistrate judge O'Shea, trial judge Spomer, and the prosecutor's investigator Shepherd. *Littleton v. Berbling*, 468 F.2d 389, 392-93 (7th Cir. 1972). Claims against the prosecutor included discriminating against black arrestees in multiple ways, while those against the investigator were conspiring with the prosecutor to discriminate. *Id.*

Importantly for us, the claims against the judges were broad, including their use of a bond schedule that did not consider the individual defendant:

> Spomer and O'Shea, as judges, engage in a pattern and practice of discriminatory conduct based on race as follows: They set bond in criminal cases by following an unofficial bond schedule without regard to the facts of a case or circumstances of an individual defendant. They sentence black persons to longer criminal terms and impose harsher conditions than they do for white persons who are charged with the same or equivalent conduct. They require plaintiffs and members of their class, when charged with violations of city ordinances which carry fines and possible jail penalties, if the fine cannot be paid, to pay for a trial by jury.

Id. at 393.

The Seventh Circuit reversed the district court's dismissal of the suit and gave guidance on potential remedies:

> Obviously, since this case is before us on a motion to dismiss, it would be improper for us to attempt to spell out in detail any relief the district court might grant if the plaintiffs can prove what they allege. Nevertheless, as this appears

> to be a case of first impression as to the type of relief approved, we feel obligated to give the district court some guidelines as to what type of remedy might be imposed. *We do not mean to require the district court to sit in constant, day-to-day supervision of either state court judges or the State's attorney.* An initial decree might set out the general tone of rights to be protected and *require only periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of complaints.*

Id. at 414-15 (footnotes omitted; emphasis added). The italicized statement about periodic reports was quoted disapprovingly by the Supreme Court when it reversed. *See Littleton*, 414 U.S. at 493 n.1.

The Seventh Circuit's allowing a federal court to get periodic reports and then to inject itself even further into the operation of local criminal courts was central to the Supreme Court's reversal. The plaintiffs had requested "an injunction 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. "An injunction of the type contemplated by respondents and the Court of Appeals would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim *ab initio*." *Id.* at 501. Such an injunction "would require for its enforcement the continuous supervision by the federal court over the conduct of the petitioners in the course of future criminal trial proceedings involving any of the members of the respondents' broadly defined class." *Id.*

My difference with the majority on what to make of the combination in *Littleton* of extravagantly broad

intrusion into state court functions, and the fact that one of the intrusions concerned bail, is mirrored in different views expressed by other circuit courts. The First Circuit distinguished *Littleton* as involving "continuing federal judicial supervision of local criminal procedures" and found no *Younger* barrier in its case because the plaintiff's "challenge to pretrial detention procedures could not be raised as a defense at trial." *Fernandez v. Trias Monge*, 584 F.2d 848, 851 n.2, 853 (1st Cir. 1978). The Ninth Circuit distinguished the broad relief sought in *Littleton* from an exclusive challenge to bail procedures. *See Arevalo v. Hennessy*, 882 F.3d 763, 766 n.2 (9th Cir. 2018). It concluded that abstention would be inappropriate when the claims solely concern bail. *Id.* at 766. The Eleventh Circuit reached a similar conclusion in a decision I will discuss in more detail later. *See Walker v. City of Calhoun*, 901 F.3d 1245, 1254-55 (11th Cir. 2018). For now, I state only that I largely agree with *Walker*.

The Fifth Circuit stated a different view of *Littleton* from that of the just-cited opinions. *See Tarter v. Hury*, 646 F.2d 1010 (5th Cir. Unit A June 1981). After describing abstention in *O'Shea v. Littleton*, we held: "Because *O'Shea* involved a challenge to the imposition of excessive bail, it is conclusive as to Tarter's claim for equitable relief based on that ground." *Id.* at 1013. With trepidation, I am bold to say I disagree with that opinion's author, one of the ablest of judges ever on this court, John Minor Wisdom. Of course, I have already been worrisomely bold by disagreeing with able current colleagues. *Tarter* seems to mean that abstention categorically applies to claims about bail in state court. Even if it does, Judge Wisdom detailed a narrower understanding of *Littleton*:

> The plaintiffs sought declaratory and injunctive relief. The Supreme Court held that dismissal of those claims was appropriate because the granting of such equitable relief would require excessive federal interference in the operation of state criminal courts. The enforcement of any remedial order granting the relief requested would require federal courts to interrupt state proceedings to adjudicate allegations of asserted non-compliance with the order.

Id. at 1013. That quotation supports that the claims were dismissed not simply because they dealt with bail but because of how they dealt with bail.

Though I have acknowledged what is contrary to my views about *Tarter*, I close with what I find quite accurate. After resolving the claim about bail, the court stated that a different request for relief—"an injunction requiring clerks to file all *pro se* motions [—] would not require the same sort of interruption of state criminal processes that an injunction against excessive bail would entail." *Id.* Here, Judge Wisdom made a fact-based analysis and found certain relief would not be improperly intrusive. In my view, that also should have been the form of analysis applied to bail.

Another opinion that the majority here embraces is one in which the Second Circuit abstained. *See Wallace v. Kern*, 520 F.2d 400 (2d Cir. 1975). That court held that abstention was rejected in *Gerstein v. Pugh* because the plaintiffs had no opportunity to raise their federal claims in the state-court system, whether directly or collaterally. *Id.* at 407. Collateral opportunities to present federal claims such as in state *habeas*, the court stated, provide adequate opportunities for abstention purposes. *Id.* at 406-07.

Because of the importance the majority here gives to the *Wallace* opinion, I will analyze it in detail. The claims in that suit by indigent pretrial detainees in a Brooklyn jail were extensive: legal aid attorneys had staggering caseloads they could not possibly handle; plaintiffs' speedy trial rights were denied by lengthy delays; "bail [was] denied where no imposition of money conditions [was] reasonably necessary"; lengthy pretrial detention caused loss of employment and other harms; and several other claims concerning the effects of delay. *Wallace v. McDonald*, 369 F. Supp. 180, 184 (E.D.N.Y. 1973).[6] District Judge Orrin Judd, in a series of decisions, generally accepted each of the plaintiffs' claims. In a slightly later series of decisions, the Second Circuit reversed them all, one by one.[7]

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[6] The lead defendant was Miles F. McDonald; he was dismissed from the case because he had retired as a trial judge before suit was even filed. *Wallace v. McDonald*, No. 72-C-898 (E.D.N.Y. Feb. 27, 1973), at *16, *18-19 (the published opinion cited in the text redacted these details). The full 1973 opinion and a 1975 unpublished opinion I cite later are no longer in the district court records. They were provided by Sarah Wharton of the Harvard Law School Library after being located in Historical & Special Collections; Orrin Grimmell Judd papers; Opinions & Speeches, Sept. 1972-July 1973, and Aug. 1974-Aug. 1975. A Fifth Circuit librarian, Judy McClendon, was the intermediary. My thanks to both. Justice Michael Kern was the lead defendant in subsequent opinions.

[7] Judge Judd's boldness more generally is shown by his order of July 25, 1973, two months after his first *Wallace* injunction, enjoining the Secretary of Defense from conducting combat operations in Cambodia, Vietnam, and Laos. *See Holtzman v. Schlesinger*, 361 F. Supp 553, 565-66 (E.D.N.Y. 1973). On July 27, the Second Circuit stayed the injunction; on August 1, the Second Circuit Justice, Thurgood Marshall, refused to vacate the stay; heedless, on August 3, Justice William Douglas vacated the stay; and on August 4, the full Court stayed the injunction. *See Holtzman v. Schlesinger*, 414 U.S. 1304, 1304-05, 1316, 1321 (1973). On August 8,

The Second Circuit summarized this history in its third opinion:

> In *Wallace I*, Judge Judd had granted an application for a preliminary injunction against the Legal Aid Society's acceptance of any additional felony cases in the Kings County Supreme Court if the average caseload of its attorneys exceeded 40. The district court also had ordered the Clerk of the Criminal Term of the Kings County Supreme Court to place on the calendar all *pro se* motions filed by inmates of the Brooklyn House of Detention.

Wallace v. Kern, 520 F.2d at 401 (summarizing *Wallace v. Kern*, 392 F. Supp. 834 (E.D.N.Y. 1973), *rev'd*, 481 F.2d 621 (2d Cir. 1973)) (*Wallace I*). The circuit court was so insistent about vacating the injunction that its opinion was delivered from the bench after argument. *See Wallace I*, 481 F.2d at 622. The court did not cite *Younger*, indeed, it cited only one precedent, but it did say that "under the principle known as comity a federal district court has no power to intervene in the internal procedures of the state courts." *Id.*

The circuit court in 1975 described the second rejected order this way:

> In *Wallace II*, Judge Judd had granted an application for a preliminary injunction ordering that each detainee held for trial for more than six months be allowed to demand a trial and be

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the Second Circuit reversed and ordered dismissal. *Holtzman v. Schlesinger*, 484 F.2d 1307, 1314-15 (2d Cir. 1973). A lot happened fast, but the Supreme Court's message to all judges (and to Justice Douglas, too) was—stay in your lane. How that obligation applies to bail is the central issue before us.

> released on his own recognizance if not brought to trial within 45 days of his demand. This court reversed on the ground that questions concerning the right to a speedy trial are properly to be determined on a case-by-case basis rather than by a broad and sweeping order.

Wallace, 520 F.2d at 401 (summarizing *Wallace v. Kern*, 371 F. Supp. 1384 (E.D.N.Y. 1974), *rev'd*, 499 F.2d 1345 (2d Cir. 1974)) (*Wallace II*). "Relief from unconstitutional delays in criminal trials is not available in wholesale lots," the court stated. *Wallace II*, 499 F.2d at 1351. *Younger* was not cited.

Finally, *Wallace III* dealt with bail. The relief ordered was extensive, including time limits for bail determinations, granting a right to an evidentiary hearing, and requiring consideration of other forms of release:

> Judge Judd ordered that an evidentiary hearing be had on demand at any time after 72 hours from the original arraignment and whenever new evidence or changes in facts may justify. At the hearing, the People would be required to present evidence of the need for monetary bail and the reasons why alternate forms of release would not assure the defendant's return for trial, and the defendant would be permitted to present evidence showing why monetary bail would be unnecessary. The defendant was also held to be entitled to a written statement of the judge's reasons for denying or fixing bail.

Wallace v. Kern, 520 F.2d at 403 (*Wallace III*) (summarizing and reversing *Wallace v. Kern*, No. 72-C-898 (E.D.N.Y. Feb. 14, 1975)).

The *Wallace III* opinion accurately equated the Wallace injunction to the remedy in *Littleton* of having periodic reporting to the federal court on state court proceedings. The *Wallace* district court had "provided for new bail hearing procedures which fix the time of, the nature of and even the burden of proof in the evidentiary hearings." *Id.* at 406. That "order would permit a pretrial detainee who claimed that the order was not complied with to proceed to the federal court for interpretations thereof." *Id.* The similarities to *Littleton* are highlighted by the fact the *Wallace* district court cited the not-yet-reversed Seventh Circuit *Littleton* opinion four times to justify refusing to dismiss the suit, then the Second Circuit's *Wallace III* opinion cited the Supreme Court's *Littleton* opinion eight times when it reversed the district court. *See Wallace v. McDonald*, 369 F. Supp. at 186-87 (citing *Littleton v. Berbling*, 468 F.2d 389); *Wallace III*, 520 F.2d at 404-08 (citing *O'Shea v. Littleton*, 414 U.S. 488).

The *Wallace III* court interpreted *Littleton* to invalidate the restrictions on state court bail procedures imposed by the district court because they were an "ongoing federal audit of state criminal proceedings." *Id.* at 405-06 (quoting *Littleton*, 414 U.S. at 500). Indeed, the district court's "order created an intrusion upon existing state criminal process which is fissiparous and gratuitous and it further ignored the prior rulings of this court on appeals in this case." *Id.* at 408. My vocabulary is not as extensive as that court's, but the obvious point is that the district court order was overly intrusive. The district court had rejected abstention, though, because "[i]mproper pre-trial confinement would not be an issue on a defendant's trial on the criminal charge." *Wallace*, No. 72-C-898 (Feb. 14, 1975), at *62.

The *Wallace III* opinion distinguished *Gerstein v. Pugh*, which had rejected abstention in the (in)famous footnote 9. *Wallace III*, 520 F.2d at 406-07. To remind, that footnote relied on the absence of a direct challenge to any specific prosecution and the fact the claims were only about "the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution." *Gerstein v. Pugh*, 420 U.S. at 108 n.9. The *Wallace III* court determined that in the context of the Florida procedures at issue, the Supreme Court was implicitly relying on its statement earlier in its opinion that no adequate procedures were available under state law to contest the absence of a judicial determination of probable cause. *Wallace III*, 520 F.2d at 406.

I doubt, though, that the Supreme Court in 1975 was incorporating by reference some implied factual limitation to its statement. Footnote 9 makes no hint of such reliance—to my eyes at least. It is a categorical statement, not qualified by earlier detailed factual background. I will discuss in the final section of this opinion how I would apply the factor of whether adequate procedures exist under Texas law in our case. Taken literally, the footnote means abstention does not apply to pretrial bail. I have conceded for purposes of analyzing *Younger* here that the force of the footnote has waned.

In summary, the three *Wallace* decisions from the Second Circuit are the seriatim equivalent of what the Supreme Court in Littleton dealt with in one decision. The *Wallace* district court entered orders that controlled how Legal Services would operate, including the number of cases individual attorneys could be assigned; controlled the court's *pro se* docket; required detainees to be tried or released on their own recognizance if not timely brought to trial after a demand; and, most

relevantly to us, required prompt evidentiary bail hearings, with the government needing to substantiate imposing bail as opposed to alternative release conditions and the court having to give written reasons for it decision. *Id.* at 401-03. This was a wholesale federal intrusion into the operation of state criminal prosecutions. The fact that some of the intrusion is pretrial, such as regarding bail, did not remove the considerations for abstention.

My key point, after all this discussion of the *Wallace* opinions, is that the intrusion into "the domain of the state," *id.* at 408, was indeed severe, not just as to bail but for the entire range of measures the district court imposed. What I see absent from the Supreme Court decisions and from the *Wallace* opinions is that if bail is involved, the *Middlesex* factor of undue interference with ongoing state proceeding is always satisfied. (Ironically, a fair interpretation of *Gerstein v. Pugh* footnote 9 is that this factor is never satisfied as to bail.) Instead, it is necessary to examine just what the plaintiffs are seeking as to bail. I accept the phrasing of some learned commentary that, under *Littleton*, it is proper to "rely on a fact-intensive evaluation of how state courts conduct their business and whether the federal exercise of jurisdiction would constitute an ongoing intrusion into the state's administration of justice." 17A MOORE'S FED. PRAC., § 122.72[1][c], at 122-107. We must focus on how a federal court is asked to exercise its jurisdiction as a fact-based issue. There is not a categorical answer just because bail is involved.

I give brief attention to the recent decisions from our court regarding injunctive relief governing bail in another large Texas county, the one containing the city of Houston. *See, e.g.*, *ODonnell v. Harris Cnty.*, 892 F.3d 147 (5th Cir. 2018). The majority opinion here overrules

ODonnell. The extent of injunctive relief granted there was arguably too similar to what the Supreme Court rejected in *O'Shea v. Littleton*.

Finally, I review an opinion with which I mostly agree. *See Walker*, 901 F.3d at 1255. Ninth Circuit Judge O'Scannlain, sitting by designation in the Eleventh Circuit, analyzed whether a federal court could enjoin a Georgia city's "policy of using a secured-money bail schedule with bond amounts based on the fine an arrestee could expect to pay if found guilty, plus applicable fees." *Id.* at 1252. I start with a mild disagreement. The court wrote that *Younger* abstention is now "disfavored." *Id.* at 1254 (citing *Sprint*, 571 U.S. at 77-78). It is true that *Sprint* sought to halt the expansion of *Younger*'s reach. *See Sprint*, 571 U.S. at 81 (stating that misapplying the "three *Middlesex* conditions would extend *Younger* to virtually all parallel state and federal proceedings"). Instead of indicating disfavor, I find *Sprint* simply announced that the doctrine was now fully defined.[8]

I return to *Walker*. The court implied that footnote 9 in *Gerstein v. Pugh* should be taken on its own terms: abstention "does not readily apply here because Walker

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[8] The Wright & Miller treatise described *Sprint* as a "clarification":

> The Court clarified the meaning of the *Middlesex* and *Dayton Christian Schools* cases in 2013 in *Sprint Communications, Inc. v. Jacobs*. The Court made clear that the circumstances fitting within the *Younger* abstention doctrine are exceptional and include: (1) state criminal prosecutions; (2) civil enforcement proceedings; and (3) civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.

17B WRIGHT & MILLER § 4254, at 79 & n.21 (Supp. 2022).

is not asking to enjoin any prosecution. Rather, he merely seeks prompt bail determinations for himself and his fellow class members." *Walker*, 901 F.3d at 1254 (citing *Gerstein v. Pugh*, 420 U.S. 103). The *Walker* court concluded that *Littleton* required abstention when broad relief was sought that "amounted to 'an ongoing federal audit of state criminal proceedings." *Id.* at 1254-55 (quoting *Littleton*, 414 U.S. at 500).

Much less was being sought in *Walker*:

> Instead, as in *Gerstein*, Walker merely asks for a prompt pretrial determination of a distinct issue, which will not interfere with subsequent prosecution. At the very least, the district court could reasonably find that the relief Walker seeks is not sufficiently intrusive to implicate *Younger*. Because we review a *Younger* abstention decision for abuse of discretion, we are satisfied that the district court was not required to abstain.

Id. at 1255 (citation omitted).

Charting that analysis, I conclude the *Walker* court found the plaintiffs were not seeking nearly as broad of relief as in *Littleton*, that the resulting potential intrusion on state procedures was not severe, and that without considering adequacy of other remedies or the significance of the state's interest, that the district court did not abuse its discretion by deciding the merits of the claims. *Id.* at 1256-57. The *Walker* court never held that abstention was categorially inapplicable, but the considerations I have highlighted allowed the claims to be resolved in that case.

Though the court addressed only the interference factor, *Sprint* stated that the three *Middlesex* factors

are not dispositive but are "appropriately considered by the federal court before invoking *Younger*." *Sprint*, 571 U.S. at 81. Further, the key justification for *Younger* abstention, *i.e.*, Our Federalism, is to allow state courts to function without federal court oversight absent exceptional circumstances. Once the *Walker* court concluded there was no interference, the federalism concerns were satisfied.

Equally significant is the *Walker* analysis after it refused to abstain. "Under the [City's] Standing Bail Order, arrestees are guaranteed a hearing within 48 hours of arrest to prove their indigency (with court-appointed counsel) or they will be released." *Walker*, 901 F.3d at 1265. The district court insisted that the hearing must be within 24 hours even though "[b]oth procedures agree on the standard for indigency and that those found indigent are to be released on recognizance." *Id.* at 1265-66. The Eleventh Circuit held that the district court's imposing the 24-hour obligation was an abuse of discretion. *Id.* at 1266-67.

The district court also had ordered the City to use an affidavit-based system to determine indigency, while the Standing Bail Order provided for judicial hearings. *Id.* The Eleventh Circuit rejected that judicial alteration to the City's policies. "Whatever limits may exist on a jurisdiction's flexibility to craft procedures for setting bail, it is clear that a judicial hearing with court-appointed counsel is well within the range of constitutionally permissible options. The district court's unjustified contrary conclusion was legal error and hence an abuse of discretion." *Id.* at 1268-69.

The circuit court vacated the preliminary injunction imposed by the district court and allowed the City's Standing Bail Order to stand. *Id.* at 1272.

Judge O'Scannlain has shown us our way. Well, obviously, he has shown only me the way. Abstention requires fact-based analysis on what the plaintiffs seek and how burdensome it would be. We know that injunctive relief cannot "require for its enforcement the continuous supervision by the federal court over the conduct of the [officials involved in setting bail] in the course of future criminal trial proceedings." *Littleton*, 414 U.S. at 501. Neither can the relief be "a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity." *Id.*

One difficulty in my conception is how to deal with the fact that plaintiffs' complaints often are excessive in their demands, anticipating being pared back as the case proceeds. Courts may grant relief that is far less than plaintiffs sought. That reality can be handled by courts' dismissing suits that require abstention unless plaintiffs can revise to curb their claims.

In conclusion on whether resolving claims about bail procedures on the merits automatically leads to an impermissible interference with ongoing state proceedings, I find the answer to be "no." A complaint seeking the kind of relief that was rejected in *Littleton* and *Wallace* should cause the court to abstain. Claims seeking some procedural safeguards, that do not require monitoring by the federal court and otherwise avoid the excessiveness of claims in caselaw discussed here, might not require abstention. That depends on the claims, the existing bail procedures, and other facts. We err to make a categorical ruling that all such claims would impermissibly involve the federal court in state criminal procedures.

III. Adequacy of opportunity to raise the federal claim in state court

A consideration for *Younger* abstention is whether the state provides an *adequate* opportunity to bring the same constitutional claims in state court. *Middlesex*, 457 U.S. at 432. It is not enough to identify a procedure. The procedure must be measured for adequacy. I will examine some of the caselaw already discussed to see how it addressed adequacy of state remedies.

Early in describing *Younger* adequacy is *Gerstein v. Pugh*, 420 U.S. 103. Of course, the opinion concerned determinations of probable cause to detain someone, not bail, but the adequacy of state procedures is equally relevant to both issues. The five-justice majority opinion stated that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Id.* at 114. Requiring judicial action before an "*extended* restraint of liberty" occurs means delay has significance. In addition, the Court reviewed the roadblocks for a detainee in getting judicial review of probable cause: the prosecutor's filing an information meant there would be no preliminary hearing, and *habeas corpus* was only available, if ever, in "exceptional circumstances." *Id.* at 106. "The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing *after 30 days*, and arraignment, which the District Court found was often *delayed a month or more* after arrest." *Id.* (citing *Pugh v. Rainwater*, 332 F. Supp. at 1110) (footnote and statutory citations omitted; emphasis added). The Court closed its summary by stating "a person charged by information could be detained for a substantial period solely on the decision of a prosecutor." *Id.* The Court's emphasis on timeliness is undeniable.

The four concurring justices stated they joined the part of the majority opinion I just detailed "since the Constitution clearly requires at least a *timely* judicial determination of probable cause as a prerequisite to pretrial detention." *Id.* at 126 (Stewart, J., concurring) (emphasis added). The majority did not take issue with the concurring justice's using the word "timely." The Court had not stated Florida detainees could never obtain judicial determinations of probable cause, only that it "often" would not be made for at least a month. *Id.* at 106. Thus, a lack of a timely determination was at least part of the reason the majority rejected abstention.

There are other Supreme Court opinions indicating the importance of timely remedies. One explicit statement is in an opinion analyzing abstention in the context of a state administrative scheme for disciplining optometrists. *See Gibson v. Berryhill*, 411 U.S. 564 (1973). Proceedings were ongoing against plaintiff Berryhill and others at a state administrative board. Berryhill and other optometrists sued board members in federal court, claiming that board members were biased against them. *Id.* at 570. The Supreme Court stated that dismissing a federal suit based on *Younger* abstention "naturally presupposes the opportunity to raise and have *timely decided* by a *competent* state tribunal the federal issues involved." *Id.* at 577 (emphasis added). The presupposition failed because of the district court's finding that the board members were biased. *Id.*[9] Admittedly, the timeliness portion of the presupposition did not come into play, only the competence factor. Nevertheless, Supreme Court *dicta* "is entitled to great weight." *Hignell-*

[9] In discussing whether state procedures were "adequate," the Court summarized that federal courts have found state agency remedies inadequate "on a variety of grounds. Most often this has been because of delay by the agency." *Id.* at 575 n.14 (emphasis added).

Stark v. City of New Orleans, 46 F.4th 317, 330 n.21 (5th Cir. 2022).

Berryhill is cited in later significant precedents. In *Middlesex*, the Court analyzed abstention in the context of disciplinary proceedings before an attorney-ethics committee. Such proceedings were held to involve "vital state interests." *Middlesex*, 457 U.S. at 432 (citing *Moore v. Sims*, 442 U.S. at 426). The Court then wrote that the "pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims." *Id.* (quoting *Moore v. Sims*, 442 U.S. at 430, then citing *Berryhill*, 411 U.S. 564). The Court found "the state court desired to give Hinds a *swift* judicial resolution of his constitutional claims." *Id.* at 437 n.16 (emphasis added). The Court closed with this:

> Because respondent Hinds had an 'opportunity to raise and have *timely* decided by a competent state tribunal the federal issues involved,' *Gibson v. Berryhill*, 411 U.S., at 577, 93 S.Ct., at 1697, and because no bad faith, harassment, or other exceptional circumstances dictate to the contrary, federal courts should abstain from interfering with the ongoing proceedings.

Id. at 437 (emphasis added).

The *Moore v. Sims* opinion cited in *Middlesex* analyzed abstention in a case involving the Texas Family Code, which allowed the state to take custody of abused children. *Moore v. Sims*, 442 U.S. at 418-19. The parents of children who had been taken into state custody brought suit in federal court; the district court enjoined the state from prosecuting any suit under the relevant statutory provisions pending a final decision on their constitutionality. *Id.* at 422. The Supreme Court disagreed, holding that "the only pertinent inquiry [for

Younger abstention] is whether the state proceedings afford an *adequate opportunity* to raise the constitutional claims." *Id.* at 430 (emphasis added). An earlier, similar statement was supported by the signal of "*see*" for *Berryhill*. *Id.* at 425 (citing *Berryhill*, 411 U.S. 564).

A phrase with a possibly different emphasis in both *Moore v. Sims* and *Middlesex* is that "a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.'" *Middlesex*, 457 U.S. at 432 (quoting *Moore v. Sims*, 442 U.S. at 426). Does that mean that absent a clear prohibition in the state proceedings to raising constitutional claims—regardless of questions about adequacy—abstention is required? That hardly makes sense, as the Court in both opinions included the analysis I have already detailed about adequacy and, in *Middlesex*, timeliness.

To understand the Court's use of "clearly bars," we need its context. In *Sims*, the facts about delay were detailed in the district court opinion. That factual recitation reveals the parents moved for a hearing in state court five days after a March 26 *ex parte* order that had removed their children. *Sims v. State Dept. of Public Welfare*, 438 F. Supp. 1179, 1184 (S.D. Tex. 1977), *rev'd*, *Moore v. Sims*, 442 U.S. 415. The judge was absent. *Id.* A hearing was held on April 5 on a newly filed writ of *habeas corpus*, but the court decided the matter needed to be transferred to another county. *Id.* A hearing was finally conducted there on May 5. *Id.* at 1185.

The federal district court stated that the 42-day delay for a hearing revealed that "in practice the state procedures operate in such a manner as to prevent or, at the very minimum, substantially delay the presentation of constitutional issues," which meant "abstention would be inappropriate." *Id.* at 1189. Obviously, there were

state procedures to hear the constitutional claims almost immediately after the children were taken from their parents, but it took over a month for a hearing finally to be held. The plaintiffs complained about not being "granted a hearing at the time that they thought they were entitled to one." *Moore v. Sims*, 442 U.S. at 430. The Supreme Court rejected that such episodic delays defeated abstention, as there was no indication of bad faith on behalf of anyone. *Id.* at 432. That is the context for the statement that abstention should apply "unless state law clearly bars the interposition of the constitutional claims." *Id.* at 425-26.

The use of that phrase in *Middlesex* had similar purposes. The attorney being disciplined argued there was no opportunity in the ethics proceedings to have constitutional issues considered. *Middlesex*, 457 U.S. at 435. The Supreme Court found no support for such a contention:

> [Attorney] Hinds failed to respond to the complaint filed by the local Ethics Committee and failed even to *attempt* to raise any federal constitutional challenge in the state proceedings. Under New Jersey's procedure, its Ethics Committees constantly are called upon to interpret the state disciplinary rules. Respondent Hinds points to nothing existing at the time the complaint was brought by the local Committee to indicate that the members of the Ethics Committee, the majority of whom are lawyers, would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees.

Id. (emphasis in original). The Court emphasized that a party must "'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*.'" *Id.* (*quoting Younger*, 401 U.S. at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 244 (1926)) (emphasis added).

There was no evidence in either *Middlesex* or *Moore v. Sims* that *adequate* consideration of constitutional challenges was generally unavailable in state court. Missteps along the way in receiving a hearing or failure even to use the available procedures did not show inadequacy. Each case cited *Berryhill*, which included timeliness as part of adequacy.

The necessity of taking advantage of available state procedures before claiming inadequacy is the point in other opinions. In one case, plaintiffs held in contempt by a state court sued in federal court to have the contempt statute declared unconstitutional; they had not made that claim in state court. *Juidice v. Vail*, 430 U.S. 327, 330 (1977). The Court held they "had an opportunity to present their federal claims in the state proceedings. No more is required" for abstention; the opportunity could not be flouted. *Id.* at 337. The Court discussed the state procedure, which seemingly could have provided effective relief. *Id.* at 337 n.14.

Another Supreme Court decision relying in large part on a party's shunning state procedures is *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). An historically large jury verdict of $10.5 billion was entered against Texaco after a jury trial in state court. *Id.* at 4. In Texas, an appellant had to post a bond in the amount of the judgment, plus interest and costs. *Id.* at 5. Texaco could not afford the bond; instead of seeking relief in the state court itself, it filed suit in federal court and alleged the

application of the requirement of so large a bond violated Texaco's constitutional rights. *Id.* at 6.

Texaco insisted "that *Younger* abstention was inappropriate because no Texas court could have heard Texaco's constitutional claims within the limited time available." *Id.* at 14. The Supreme Court responded: "But the burden on this point rests on the federal plaintiff to show 'that state procedural law barred presentation of [its] claims.'" *Id.* (quoting *Moore v. Sims*, 442 U.S. at 432). "Moreover, denigrations of the procedural protections afforded by Texas law hardly come from Texaco with good grace, as it apparently made no effort under Texas law to secure the relief sought in this case." *Id.* at 15. The Court also quoted the same *Younger* language I earlier quoted: "'The 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.'" *Id.* at 14-15 (quoting *Younger*, 401 U.S. at 45).

In sum, the Supreme Court did not say timeliness was irrelevant. It wrote that before arguments about adequacy would be entertained, the party seeking to avoid abstention must be able to prove the inadequacy of the state procedures. Texaco had failed even to try. Yes, the Court also again referred to whether state procedures "barred" the claims. Also, again, the context for the reference includes whether state remedies would "afford *adequate* protection." *Id.* (emphasis added).

Some of the circuit court opinions I discussed earlier are useful here too. In *Wallace III*, the Second Circuit highlighted the *Gerstein v. Pugh* concern about delay in Florida procedures:

> It is significant, therefore, that the Supreme Court's opinion in *Gerstein* emphasizes at the outset that the federal plaintiffs there had no right to institute state *habeas corpus* proceedings except perhaps in exceptional circumstances and that their only other state remedies were 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.

Wallace III, 520 F.2d at 406. The court then stated: "We do not consider this discussion feckless," *i.e.*, the discussion of limited procedures and inherent delays was meaningful; it affected the result. *Id.*

In "sharp contrast" to Florida procedures, the *Wallace III* court explained that New York procedures "provide that a pre-trial detainee may petition for a writ of *habeas corpus* in the [trial-level] Supreme Court, that its denial may be appealed and that an original application for *habeas* may be made in the Appellate Division of the Supreme Court." *Id.* at 407 (statutory citations omitted). The Second Circuit faulted the district court for first making a fact finding "that state *habeas* relief was available to the plaintiff class with provision for appeal to the Appellate Division," but then not discussing "the availability of this remedy in that part of the opinion which rejected" the application of *Younger* abstention. *Id.* at 404-05. In addition, the *Wallace III* opinion stated that the record supported that one remedy—an evidentiary hearing on bail—had never been requested by any prisoner, and had it been, a hearing would have been conducted. *Id.* at 407.

Though the *Wallace III* court identified delay as important in *Gerstein v. Pugh*, the Second Circuit was

silent on how quickly New York procedures could be employed.[10] The explanation in *Middlesex*, 457 U.S. at 435, may apply: inadequacy of state remedies must be *shown*. In *Wallace*, no one had even sought an evidentiary hearing on bail. In other words, available procedures were not tried and found wanting; they were not even tried.

A Second Circuit opinion relying on *Wallace III* held that timeliness mattered. *See Kaufman v. Kaye*, 466 F.3d 83 (2d Cir. 2006). Kaufman brought a federal suit to challenge the manner in which appeals were assigned among panels of judges in state court. *Id.* at 87. Abstention was necessary because "the plaintiff has an 'opportunity to raise and have *timely* decided by a competent state tribunal' the constitutional claims at issue in the federal suit.'" *Id.* (quoting *Spargo v. New York State Comm'n on Judicial Conduct*, 351 F.3d 65, 77 (2d Cir. 2003) (emphasis added).

The quoted *Spargo* case was brought by state judges claiming that judicial ethics rules restricted their First Amendment rights. *Spargo*, 351 F.3d at 69-70. The Second Circuit stated that "to avoid abstention, plaintiffs must demonstrate that state law bars the *effective* consideration of their constitutional claims." *Id.* at 78 (emphasis added). That decision quoted the Supreme Court that plaintiffs, if they have an "opportunity to raise and have *timely* decided by a competent state tribunal" their

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[10] I obtained the unpublished district court opinion reversed by *Wallace III* to see if it had fact-findings about delay. Findings included existence of lengthy pretrial detention, long delay in indicting those arrested for felonies, and substantial delays for trial. *Wallace*, No. 72-C-898 (Feb. 14, 1975), at *7-9. As to *habeas*, though, all the district court stated was that a prisoner could apply to the state trial court, and review of its decision would then be available in that court's appellate division. *Id.* at *9. Nothing useful there.

constitutional claims, the federal courts should abstain. *Id.* at 77 (quoting *Middlesex*, 457 U.S. at 437) (emphasis added). The court summarized by stating that plaintiffs can proceed in federal court if they can "demonstrate that state law bars the effective consideration of their constitutional claims." *Id.* at 78. The *Kaufman* court later quoted this statement in *Spargo* about "effective consideration." *Kaufman*, 466 F.3d at 87. Effectiveness, not just existence, of state procedures for raising constitutional claims is needed. Depending on the issue, effectiveness can turn on timeliness.

This review of the caselaw revealed no precedents that refused to abstain because of untimely state procedures as to bail. Even so, the Supreme Court in *Berryhill* and *Middlesex* and the Second Circuit in *Kaufman* and *Spargo* all explicitly required timely state procedures. The Court also held that the Fourth Amendment required judicial intervention before there was an "*extended* restraint of liberty following arrest." *Gerstein v. Pugh*, 420 U.S. at 114. Adequacy generally of the available state procedures was discussed by the Supreme Court in *Gerstein v. Pugh*, *Moore v. Sims*, and *Middlesex*, and by the Second Circuit in *Wallace III*, *Kaufman*, and *Spargo*. The adequacy, including timeliness, of state procedures did not require measurement in *Middlesex*, *Juidice*, *Texaco*, or in *Wallace III* because they had not been tried.

A distinction is appropriate here. Delays in a criminal prosecution do not allow a defendant to seek federal court relief unless there is bad faith in the proceedings. *Moore v. Sims*, 442 U.S. at 432. "[T]he cost, anxiety, and inconvenience of having to defend against a single criminal prosecution" cannot amount to irreparable injury. *Younger*, 401 U.S. at 46. The prosecution likely violates no rights, so its tribulations must be endured. Quite

differently, unconstitutional pretrial detention leads to injury that is different in kind as well as degree to the cost, anxiety, and inconvenience of being prosecuted. An unconstitutional pretrial detention is an immediate violation of a right. It should not have to be endured any longer than necessary. It is difficult for me to see, when dealing with a potentially unconstitutional "restraint of liberty following arrest," *Gerstein v. Pugh*, 420 U.S. at 114, how adequacy of a remedy can be divorced from its timeliness.

The majority discusses the statutory procedures available in Dallas County and in Texas. *See Majority op.* at 18-19. Of importance, though, the Supreme Court in 1975 stated that procedures available in Dade County and in Florida were too delayed to support abstention. *Gerstein v. Pugh*, 420 U.S. at 106, 123-25. The district court on remand in this case was not given much evidence, but it identified one example (from four decades ago) of quite slow *habeas* procedures. *See Ex parte Keller*, 595 S.W.2d 531 (Tex. Crim. App. 1980). Any future case regarding bail procedures should create a factual record that allows a determination of adequacy—including timeliness.

IV. Conclusion

This appeal is moot. Any future litigation about bail in Dallas County would need to address the new law labeled S.B.6. *See* Act of August 31, 2021, 87th Tex. Leg. 2d C.S., S.B. 6). Those procedures are the ones that now must provide adequate, timely mechanisms for adjudicating constitutional claims.

For purposes of this opinion, I accept that *Younger* analysis should be applied to claims about bail. I do not see that impermissible interference with state courts will always result if a federal court enters orders

regarding state court bail procedures and policies. We know that what some district courts have done, such as the relief granted in *Littleton* or in *Wallace*, is unacceptable. Those actions were impermissibly intrusive, and abstention was invoked. Lesser claims and remedies as in *Walker* might be permissible. There are guardrails for intrusions as to bail but not a locked gate.

As to the adequacy of state court remedies, a significant point of departure for me from the majority is that I believe the timeliness for any review of the constitutional claim is relevant. When dealing with whether someone is unconstitutionally being detained before trial, abstention due to too-slow-to-matter review in state court is an abdication of the federal court's "virtually unflagging obligation" to decide a case for which it has jurisdiction. *See Colorado River Water Conservation Dist.*, 424 U.S. at 817.

In closing, I acknowledge plaintiffs' goal in bail litigation may be to require release of almost all arrestees without money bail. Regardless, our *en banc* statement was correct that "[r]esolution of the problems concerning pretrial bail requires a delicate balancing of the vital interests of the state with those of the individual." *Pugh v. Rainwater*, 572 F.2d at 1056.

Indigents have constitutional rights after an arrest. *See id.* at 1056-59. States must strive to protect those rights. In populous jurisdictions such as Dallas County, individualized determinations of the need for bail for each arrestee may seem all but impossible. The record as to past practices supports that each arrestee was rapidly processed by a magistrate judge as to bail so the judge could then advance to the next arrestee. Even so, not releasing those who are dangerous or likely to

disappear, or at least not releasing without some form of restraint such as bail, are vital state interests.

Whether the constitutional rights of arrestees are protected while the state seeks to uphold its interests in Dallas County must now to be analyzed under the new legislation. Any litigation would need to be in state court if the conditions for abstention are met. We cannot answer now whether those conditions will be satisfied. Therefore, though I concur in judgment, I do not join the portion of the majority's opinion analyzing abstention.

STEPHEN A. HIGGINSON, *Circuit Judge*, joined by STEWART, DENNIS and HAYNES, *Circuit Judges*, concurring in part, dissenting in part:

Fifth Circuit precedent states, "*[I]n some limited instances*, 'a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits.'" *Env't Conservation Org. v. City of Dallas*, 529 F.3d 519, 525 (5th Cir. 2008) (emphasis added) (quoting *Sinochem Int'l v. Malaysia Int'l Shipping*, 549 U.S. 428, 431 (2007)). This is not "one of those instances." *Id.*

With our sister circuits, we have recognized that the leeway granted by *Sinochem* is not boundless, but "carefully circumscribed" to cases "'where subject-matter or personal-jurisdiction is difficult to determine,' and dismissal on another threshold ground is clear." *Snoqualmie Indian Tribe v. Washington*, 8 F.4th 853, 863 (9th Cir. 2021) (quoting *Sinochem*, 549 U.S. at 436), *cert. denied sub nom. Samish Indian Nation v. Washington*, 142 S. Ct. 1371 (2022), *and cert. denied*, 142 S. Ct. 2651 (2022); *accord Env't Conservation Org.*, 529 F.3d at 524-25 (Where a "res judicata analysis is no less burdensome than" an inquiry into mootness—the "doctrine of standing in a time frame"—we may not decide the case on grounds of res judicata.). One danger of the discretion *Sinochem* affords is that courts will "*use* the pretermission of the jurisdictional question *as a device* for reaching a question of law that otherwise would have gone unaddressed." *In re Facebook, Inc., Initial Pub. Offering Derivative Litig.*, 797 F.3d 148, 158-59 (2d Cir. 2015) (emphases added) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98 (1998)).

I would decline the narrow discretion *Sinochem* permits. It is notable that the majority's discussion of *Younger* spans more than *four times* the length of its

discussion of mootness. There is no plausible suggestion the court is motivated by judicial economy. Instead, I fear, our court today uses *Sinochem* as a device to expansively critique Supreme Court, prior Fifth Circuit, and sister circuit case law. *See ante*, at 17 (limiting *Gerstein v. Pugh*, 420 U.S. 103 (1975)); *id.* at 19-21 (criticizing then overruling *ODonnell v. Harris Cnty.*, 892 F.3d 147 (5th Cir. 2018)); *id.* at 21-22 (criticizing *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018)).[1]

I would hold that this case is moot and affirm on that basis alone.

[1] It is impossible to overlook that the important liberty versus public-safety controversy over pretrial detention and cash bail practices, first confronted in *ODonnell* and then here, did lead to Texas legislative reform. Federal court intervention appears to me to have been less an interference than a catalyst for state reform.

JAMES E. GRAVES, JR., *Circuit Judge*, dissenting:

"Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). "The burden of demonstrating mootness 'is a heavy one.'" *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)). Mootness can occur when "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* In *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525 (2020), the Court held that New York City's amended gun rule mooted the case because it was "the precise relief that petitioners requested in the prayer for relief in their complaint." *Id.* at 1526.

Plaintiffs here, however, are challenging the practices of bail determination in Dallas County. They are not challenging S.B. 6 or any other statute. On limited remand, the district court admitted into the record Plaintiffs' evidence, which showed that the alleged illegal practices continue post-S.B. 6. The case the district court relied on in finding the case moot, *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978), is distinguishable. While *Pugh* also dealt with pretrial bail issues, the court held that "[t]he record before the Court contains only evidence of practices under criminal procedures which predate the adoption of the current Florida rule." *Id.* at 1058. The court concluded that it "determined that on its face [the newly enacted statute] does not suffer such infirmity that its constitutional application is precluded." *Id.* It further expressed that any constitutional challenge to the newly enacted statute should wait until "presentation of a proper record reflecting application by the courts of the State of Florida." *Id.* 1058-59

Here, Plaintiffs provided evidence that the complained about practices persist despite S.B. 6's enactment. Plaintiffs describe post-S.B. 6 video evidence where the alleged unconstitutional practices continue. This case is not automatically mooted simply because S.B. 6 addresses bail practices. Plaintiffs allege that there remain continuing constitutional violations and that S.B. 6 does not provide the relief Plaintiffs requested in the prayer for relief in their complaint. Six months of post-S.B. 6 video evidence does not prevent the court from "meaningfully … assess[ing] the issues in this appeal on the present record." *Fusari v. Steinberg*, 419 U.S. 379, 387 (1975).

I would find that the case is not moot. Therefore, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11368

SHANNON DAVES; SHAKENA WALSTON; ERRIYAH BANKS; DESTINEE TOVAR; PATROBA MICHIEKA; JAMES THOMPSON, *On Behalf of Themselves and All Others Similarly Situated*; FAITH IN TEXAS; TEXAS ORGANIZING PROJECT EDUCATION FUND,
Plaintiffs—Appellants Cross-Appellees,

versus

DALLAS COUNTY, TEXAS; ERNEST WHITE, 194TH; HECTOR GARZA, 195TH; RAQUEL JONES, 203RD; TAMMY KEMP, 204TH; JENNIFER BENNETT, 265TH; AMBER GIVENS-DAVIS, 282ND; LELA MAYS, 283RD; STEPHANIE MITCHELL, 291ST; BRANDON BIRMINGHAM, 292ND; TRACY HOLMES, 363RD; TINA YOO CLINTON, NUMBER 1; NANCY KENNEDY, NUMBER 2; GRACIE LEWIS, NUMBER 3; DOMINIQUE COLLINS, NUMBER 4; CARTER THOMPSON, NUMBER 5; JEANINE HOWARD, NUMBER 6; CHIKA ANYIAM, NUMBER 7 JUDGES OF DALLAS COUNTY, CRIMINAL DISTRICT COURTS,
Defendants—Appellees Cross-Appellants,

MARIAN BROWN; TERRIE MCVEA; LISA BRONCHETTI; STEVEN AUTRY; ANTHONY RANDALL; JANET LUSK; HAL TURLEY, DALLAS COUNTY MAGISTRATES; DAN PATTERSON, NUMBER 1; JULIA HAYES, NUMBER 2; DOUG SKEMP, NUMBER 3; NANCY MULDER, NUMBER 4; LISA GREEN, NUMBER 5; ANGELA KING, NUMBER 6; ELIZABETH CROWDER, NUMBER 7; CARMEN WHITE, NUMBER 8; PEGGY HOFFMAN, NUMBER 9; ROBERTO

CANAS, JR., NUMBER 10; SHEQUITTA KELLY, NUMBER 11 JUDGES OF DALLAS COUNTY, CRIMINAL COURTS AT LAW,
Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CV-154

Filed January 7, 2022

Before OWEN, *Chief Judge*, and JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, and WILSON, *Circuit Judges*.[*]

LESLIE H. SOUTHWICK, *Circuit Judge*, joined by OWEN, *Chief Judge*[†] and JONES, SMITH, ELROD, HO, DUNCAN, ENGELHARDT, and WILSON, *Circuit Judges*:

This opinion partially resolves an interlocutory appeal of a preliminary injunction. Not everything in this opinion is unfinished, though. Two rulings now are to VACATE the preliminary injunction and REMAND for limited purposes. Our final resolution of remaining issues will follow the remand.

The United States District Court, Northern District of Texas, certified this suit as a class action challenging the bail system in Dallas County, Texas. According to the Plaintiffs, indigent arrestees are subjected to an unconstitutional "system of wealth-based detention." The

[*] JUDGE OLDHAM was recused and did not participate.

[†] CHIEF JUDGE OWEN joins all except Parts I.D. and II.C., which pretermit issues regarding the Sheriff.

claimed constitutional violation is that secured money bail is imposed without procedural safeguards or substantive findings that less intrusive conditions of release are inadequate to meet the state's interests in pretrial detention.

Our decision today does not reach the merits. We are at an earlier and required stage in the analysis applicable to litigation in federal court. Are there appropriate parties in the case to allow the validity of bail practices in Dallas County to be determined? Does a legal doctrine apply that instructs federal courts not to intervene? Members of this court have different understandings on how to resolve these threshold issues, but the importance of the Plaintiffs' claims is not among the disputes. Separate opinions can at times seem to be talking past each other. All of us have sought to avoid that.

The district court issued a preliminary injunction that required "notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decision-maker." *Daves v. Dallas Cnty.*, 341F. Supp. 3d 688,697 (N.D. Tex. 2018) (quoting *ODonnell v. Harris Cnty.*, 892 F.3d 147,163 (5th Cir. 2018)). Almost all parties exercised their right to bring interlocutory appeals or cross-appeals. *See* 28 U.S.C. § 1292(a)(1). A panel of this court affirmed most of the injunctive relief but disagreed with certain terms of the injunction and with holdings regarding which of the Defendants would be subject to the injunction. *Daves v. Dallas Cnty.*, 984 F.3d 381 (5th Cir. 2020). That opinion was withdrawn as a result of the court's voting to rehear the appeal *en banc*. *Daves v. Dallas Cnty.*, 988 F.3d 834 (5th Cir. 2021).

The district court issued the injunction without first ruling on several motions that presented significant

threshold questions, including abstention, judicial and legislative immunity, and standing. Pretermitting rulings on the motions may have resulted from the district court's understanding that our *ODonnell* precedents had already rejected similar arguments.

Some of those preliminary questions need answers now. We have authority to address them even when jurisdiction for the appeal is derived from a ruling on an injunction motion if the answers have significant bearing on that ruling:

> Appellate consideration of interlocutory injunction appeals under § 1292(a)(1) ordinarily focuses on the injunction decision itself, but the scope of appeal is not rigidly limited. Even with respect to preliminary injunction decisions, other matters may be inextricably bound up with the decision or may be considered in the wise administration of appellate resources.

16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3921.1 (3d ed. Apr. 2021 update); s*ee Association of Co-op. Members, Inc. v. Farmland Indus., Inc.*, 684 F.2d 1134, 1138 (5th Cir. 1982).

We agree with a sister circuit that, on the appeal from a preliminary injunction, issues relating to whether there is a proper suit at all can be decided, such as the existence of subject-matter and personal jurisdiction and questions regarding abstention. *Iantosca v. Step Plan Servs., Inc.*, 604 F.3d 24, 31 (1st Cir. 2010). One of our precedents explained that point but in more general terms: "Ordinarily the scope of appellate review under § 1292(a)(1) is confined to the issues necessary to determine the propriety of the interlocutory order itself." *Janvey v. Alguire*, 647 F.3d 585, 603-04 (5th Cir. 2011)

(quoting 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3921.1 (2d ed. 2011)).

In summary, our appellate role is to review what the district court has done, but on certain potentially determinative issues, the district court has yet to rule. We conclude it is possible on this record and briefing to make limited holdings now about whether any defendant was acting on behalf of Dallas County and about standing. As to abstention, though, briefing exists but is cursory. We order a limited remand for the district court to conduct such proceedings as it finds appropriate and decide whether abstention is required. Once that decision is made, we will complete our review.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2018, 6 indigent individuals arrested for misdemeanor or felony offenses in Dallas County filed a class action under 42 U.S.C. § 1983 against Dallas County; 17 Dallas County District Court and Criminal District Court Judges ("District Judges"), who handle felony cases; 11 Dallas County Criminal Court at Law Judges ("County Judges"), who handle misdemeanors; 6 of the Dallas County Magistrate Judges;[1] and the Sheriff of Dallas County.[2] The Plaintiffs allege that indigent

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[1] Although Texas law authorizes both District Judges and County Judges to appoint Magistrate Judges, TEX. GOV'T CODE § 54.301, the federal district court found that the six defendant Magistrate Judges were appointed by the District Judges, report directly to them, and are subject to their policies and guidance. *Daves*, 341 F. Supp. 3d at 691. The court found that these Magistrate Judges do not report to the County Judges, but they do routinely follow the guidance and policies the County Judges create. *Id.*

[2] Along with so much else in this case, the details of the Plaintiffs' claims against each defendant are complicated. First, the

arrestees in Dallas County are jailed without sufficient procedural safeguards and substantive findings that would justify detention. The claimed necessary findings are that less intrusive conditions of release are inadequate to meet the state's interests in pretrial detention. Based on those allegations, the Plaintiffs claim that the Defendants violate the Plaintiffs' Fourteenth Amendment rights to procedural due process, equal protection, and substantive due process.

Along with the complaint, the Plaintiffs filed a motion for class certification and one for a preliminary injunction. The requested preliminary injunction would prohibit Dallas County "from enforcing its wealth-based pretrial detention system" and require it "to provide the procedural safeguards and substantive findings that the Constitution requires before preventatively detaining any presumptively innocent individuals."

Early in the suit, the Defendants filed motions to dismiss due to a lack of jurisdiction, raising threshold defenses, and rejecting the case's merits. Among other points, Dallas County, the Sheriff, and the Magistrate Judges argued that none of the Defendants is a county policymaker sufficient for municipal liability. The District Judges argued that the Plaintiffs lack standing. The County Judges argued for abstention under

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Plaintiffs sued Dallas County as a municipal corporation for declaratory and injunctive relief. Second, they sued the Sheriff in her official capacity for declaratory and injunctive relief. Third, they sued the County Judges in their individual and official capacities for injunctive and declaratory relief. Fourth, they sued the District Judges in their individual and official capacities for injunctive and declaratory relief. Fifth, they sued the Magistrate Judges "for declaratory relief only," and did not indicate whether they sued the Magistrate Judges in their individual capacities, official capacities, or both.

Younger v. Harris, 401 U.S. 37 (1971), an argument incorporated by the District Judges and Magistrate Judges. No explicit ruling on the motions was made.

Central to this suit is that the District Judges in Dallas County promulgated a bail schedule for felony arrestees, which took effect in February 2017. In April 2017, the County Judges promulgated a bail schedule for misdemeanor arrestees. The district court explained that "[t]hese schedules operate like a menu, associating various 'prices' for release with different types of crimes and arrestees." *Daves*, 341 F. Supp. 3d at 692. Although the District Judges and County Judges insist that these schedules are non-binding recommendations,[3] the district court found that the "Magistrate Judges routinely treat these schedules as binding when determining bail" and that "[t]he schedules are the policy of Dallas County." *Id.* The Dallas County Sheriff implements Magistrate Judges' detention decisions at the facility where arrestees are detained. *Id.* at 691.

Soon after this suit was filed, this court issued opinions in an appeal from a preliminary injunction in a nearly identical challenge to the system of setting bail for misdemeanor arrestees in Harris County (in which Houston is located). *See ODonnell v. Harris Cnty.*, 882 F.3d 528 (5th Cir. 2018), *withdrawn and superseded on panel reh'g*, 892 F.3d 147 (5th Cir. 2018) (*ODonnell I*);

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[3] The felony bail schedule is labeled "Recommended Bond Schedule." The felony bail schedule also states: "These are recommended amounts. Bonds may be set higher or lower than the amounts shown if justified by the facts of the case and the circumstances of the defendant." The misdemeanor bail schedule is labeled as "Dallas County Criminal Courts Revised Misdemeanor Bond Guidelines." It instructs Magistrate Judges that they "may set a bond in proportion to the facts of the alleged offense after evaluating the special circumstances concerning each offense."

see also ODonnell v. Goodhart, 900 F.3d 220 (5th Cir. 2018) (*ODonnell II*). The analysis in those opinions largely controlled, necessarily so, what the district court concluded in the present suit.

After the first opinion in *ODonnell*, the district court in this case had a hearing on the Plaintiffs' motion for a preliminary injunction. A month later, the court issued a memorandum opinion and entered an injunction in a separate order. The same day, the court also issued a memorandum opinion and order granting the Plaintiffs' motion for class certification, permitting the Plaintiffs to proceed on behalf of themselves and "[a]ll arrestees who are or will be detained in Dallas County custody because they are unable to pay a secured financial condition of release."

The district court held that this case was materially indistinguishable from *ODonnell I*, thereby accepting the *ODonnell I* court's legal conclusions as controlling for this case. *Daves*, 341F. Supp. 3d at 691. The only threshold issue the court discussed was policymaking authority for municipal-liability purposes. *Id.* at 693. It did not make any holdings as to whether the Plaintiffs have standing, whether any Defendants were entitled to sovereign immunity, or whether to abstain under *Younger*.

The district court found that the bail system in Dallas County results in automatic detention for indigent arrestees that can last for months "solely because an individual cannot afford the secured condition of release," *i.e.*, money bail. *Id.* Consequently, the district court held that the Plaintiffs demonstrated a likelihood of success on their procedural-due-process and equal-protection claims. *Id.* at 694-95. It rejected the Plaintiffs' claim that substantive due process requires a finding that no

less intrusive condition of release would meet the state's interests in pretrial detention. *Id.* at 695-96.

The court then issued an injunction. Understandably, it was nearly identical to the *ODonnell* court's injunction. The County Judges and District Judges, along with Dallas County, were made subject to the injunction; the injunction stated, though, that no relief against the judges was granted "in their judicial or legislative capacities." The injunction required Dallas County to provide "an adequate process for ensuring there is individual consideration for each arrestee of whether another amount or condition provides sufficient sureties." Without being enjoined, the Sheriff was "authorized to decline to enforce orders requiring payment of prescheduled bail amounts as a condition of release … if the orders are not accompanied by a record showing that the required individual assessment was made and an opportunity for formal review was provided."

The Plaintiffs, Dallas County, and the District Judges, each filed notices of appeal.[4] There was no appeal by the Magistrate Judges. Our panel opinion made some revisions to the injunction, but, bound by the *ODonnell* opinions, we affirmed in most part. *See Daves v. Dallas Cnty.*, 984 F.3d 381 (5th Cir. 2020), *vacated on petition for reh'g en banc*, 988 F.3d 834 (5th Cir. 2021). Of course, we are now considering the appeal *en banc*.

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[4] Dallas County, the County Judges, the Magistrate Judges, and the Sheriff were represented by the same counsel in the district court. Counsel for those Defendants filed a single notice of appeal indicating that "Defendant Dallas County, Texas," was appealing to this court. In appellate briefing, this counsel argued that Dallas County, the County Judges, and the Sheriff had no liability, but there is no argument specifically relating to the Magistrate Judges. The District Judges have been represented separately by the State of Texas.

After the May 2021 *en banc* oral argument, legislation was enacted that created new rules for the imposition of bail. *See* Act of August 31, 2021, 87th Tex. Leg. 2d C.S., S.B. 6. We asked for supplemental letter briefs addressing this legislation. The Plaintiffs responded that the procedures for imposing bail on indigent pretrial arrestees remain constitutionally infirm, while Defendants argued that the new law makes it even clearer that the standards and procedures for imposition of pretrial bail are state-law matters. All we decide at this point is that the new legislation does not eliminate the need for us to analyze the threshold issues that follow. We will, though, also remand to the district court the initial resolution of the effect of this Senate Bill 6.

DISCUSSION

The district court issued the preliminary injunction without making explicit holdings about justiciability or *Younger* abstention. In fairness, the district court might reasonably have assumed that our then-recent opinions concerning Harris County bail practices had answered those questions. As an *en banc* court, we see a need to analyze those issues afresh in this context of suits regarding county bail practices.

Deciding if a case should be allowed to proceed in federal court at all is an issue that should not be postponed indefinitely. A federal "court has a continuing obligation to assure itself of its own jurisdiction, *sua sponte* if necessary." *Green Valley Spec. Util. Dist. v. City of Schertz*, 969 F.3d 460, 480 (5th Cir. 2020) (en banc). Our only question about analyzing these threshold questions concerns timing. We have decided the time is now for considering justiciability and abstention.

We must resolve jurisdictional questions before reaching the merits of the case, but "there is no

mandatory 'sequencing of jurisdictional issues.'" *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999)). Even though not a jurisdictional issue, a court may "abstain under *Younger v. Harris*, 401 U.S. 37 (1971), without deciding whether the parties present a case or controversy." *Ruhrgas*, 526 U.S. at 585. In addition, our sequencing of issues is affected by the fact this opinion is preliminary to and is intended to guide a limited remand. In other words, we do not resolve all jurisdictional and abstention issues at this time. We also consider it appropriate to analyze now whether any of the defendant officials were acting on behalf of Dallas County on bail matters. If none of them were, then there is no subject-matter jurisdiction under Section 1983 against the County, as it is only through the actions of these defendant officials that the County itself could be liable to the Plaintiffs.

We will proceed in this order: (1) Were any Defendants acting on behalf of Dallas County? (2) Do the Plaintiffs have standing to seek relief against any of the Defendants? (3) Do *Younger* abstention principles prohibit federal judicial intervention in the Dallas County bail system?

I. Were any Defendants acting on behalf of Dallas County?

Section 1983, which is the current version of Section 1 of the Civil Rights Act of 1871, allows suits against any "person" for violation of federal rights. Municipalities, which include counties and certain other local governmental bodies, are "persons" under Section 1983. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 & n.54 (1978). Suit may properly be brought against "those officials or governmental bodies who speak with final

policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). States and their officials are not "persons" under Section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Whether state sovereign immunity as signified by the Eleventh Amendment applies to bar suit and whether an official is acting for the state and thus exempt from suit under Section 1983 involve different analyses. *Id.* at 66. Both of those questions are asked in this case.

Between those two related questions, the one we should answer before a remand is whether any of the officials are "persons" for purposes of Section 1983. That question is particularly relevant now because if all the Defendants were acting for the State, there is no case or controversy with, and no Article III jurisdiction over, Dallas County. Despite that we will not resolve any Eleventh Amendment issues now, we will briefly contrast the analysis we would use for those issues to that we will use in our Section 1983 inquiry.

For Eleventh Amendment immunity purposes, we apply these factors when deciding if a governmental body acts for the state:

> 1. Whether the state statutes and case law view the agency as an arm of the state; 2. The source of the entity's funding; 3. The entity's degree of local autonomy; 4. Whether the entity is concerned primarily with local as opposed to statewide problems; 5. Whether the entity has the authority to sue and be sued in its own name; and 6. Whether the entity has the right to hold and use property.

Hudson v. City of New Orleans, 174 F.3d 677, 681 (5th Cir. 1999) (line breaks removed).[5] We have stated that the source of funding is the most important factor in the Eleventh-Amendment analysis. *Id.* at 686-87. That importance followed inexorably from our earlier analysis that "[t]he Eleventh Amendment was fashioned to protect against federal judgments requiring payment of money that would interfere with the state's fiscal autonomy and thus its political sovereignty." *Jagnandan v. Giles*, 538 F.2d 1166,1176 (5th Cir. 1976). Ten years later, we identified the six factors that would be concisely restated in *Hudson*. *See Clark v. Tarrant Cnty.*, 798 F.2d 736 744-45 (5th Cir. 1986). We held that "an important goal of the Eleventh Amendment is the protection of state treasuries." *Id.* at 744. We cited *Jagnandan* for its focus on the fiscal effects of a suit against the state. *Id.*

In contrast, Section 1983 litigation requires us to identify the level of government for which an official was acting when establishing the policy that is relevant to the claims. *Jett*, 491 U.S. at 737. For purposes of Section 1983 personhood, it is state law that determines whether an official with final policymaking authority as to the specific function involved in the litigation is acting for a local governmental unit or the state. *McMillian v. Monroe Cnty.*, 520 U.S. 781, 786 (1997). A determination "of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition

[5] Though the *Hudson* factors are not controlling on our issue, we mention that the state is required to provide funding to counties for judicial salaries: "Beginning on the first day of the state fiscal year, the state shall annually compensate each county in an amount equal to 60 percent of the state base salary paid to a district judge … for each statutory county court judge" who meets certain requirements. TEX. GOV'T CODE § 25.0015.

of the official's functions under relevant state law." *Id.* Taking advantage of the alliteration opportunity, we summarize that *McMillian* holds we examine function, not funding, when deciding whether an official is acting for the state or local government in a case brought pursuant to Section 1983.

It is true that we considered the six *Hudson* factors when deciding whether the actions of a county board created liability for the county or the state when suit was brought against that board under Section 1983. *See Flores v. Cameron Cnty.*, 92 F.3d 258, 264-65 (5th Cir. 1996). We find it clear from the subsequent *McMillian* opinion, though, that reliance on those factors can be misleading in Section 1983 analysis. *McMillian*, 520 U.S. at 786. The focus under Section 1983 must be on discerning what state law provides as to the specific relevant function, *i.e.*, the act that is being challenged in the litigation. If we instead prioritize identifying the source of the overall funding or the primary concern of the entity or official, as *Hudson* demands, we will be focusing on generalities and not on the specifics of the relevant act. The critical evidence from state law under *McMillian* is that relating to the specific conduct at issue in the lawsuit.

In *McMillian*, the parties agreed that an Alabama sheriff was a policymaker for law enforcement but disagreed about whether the sheriff made policy for the state or instead for the county. *Id.* at 785. The Court did not rely on the county's funding when determining the level of government for which policy was made; indeed, the Court held that the county's payment of the sheriff's salary and its providing "equipment (including cruisers), supplies, lodging, and reimbursement for expenses," were insignificant in the absence of showing the payments "translate into control over" the sheriff. *Id.* at 791. The Court referred for comparison to one of its

decisions about the Eleventh Amendment from earlier in the same term. *Id.* at 786 (citing *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425 (1997)). The reference followed the Court's holding that for purposes of Section 1983, state law would control as to the function of the official; it then cited the following *Regents* footnote stating a different standard for the Eleventh Amendment: "Ultimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore 'one of the United States' within the meaning of the Eleventh Amendment, is a question of federal law." *Regents*, 519 U.S. at 429 n.5 (cited but not quoted in *McMillian*, 520 U.S. at 786). Even that federal issue, though, "can be answered only after considering the provisions of state law that define the agency's character." *Id.*

Before concluding, we return to our *Hudson* opinion on the Eleventh Amendment. There we explained, similar to what the Supreme Court did in *McMillian*, that there are two different tests: "*McMillian* did not concern the Eleventh Amendment. Instead, it dealt with the issue of county liability in § 1983 lawsuits." *Hudson*, 174 F.3d at 681 n.1. We went on to hold that though "we look at the function of the officer being sued in the latter context, we do not in our Eleventh Amendment analysis." *Id.*

Finally, importantly, and obviously, the Supreme Court in *McMillian* stated how to determine in a Section 1983 suit whether an official was acting for a state or a local government. Even if the *Hudson* opinion itself claimed it had relevance to that determination, though we hold it did not, nothing there can override a Supreme Court decision.

Our contrasting of analyses concluded, we now address the Section 1983 issues by examining the roles of the judges of the statutory county courts and of the district courts, and of the Sheriff. Because the Magistrate Judges are not parties to this interlocutory appeal, we discuss them only briefly.

A. County Judges

Deciding if judges act for Texas or Dallas County when establishing a bail schedule for their court is a question of state law as applied to that specific function. *See McMillian*, 520 U.S. at 786. We restate that principle because the following reveals different results depending on context to the task of classifying statutory county court judges as county or state officers.

Our analysis of the role of the defendant County Judges proceeds in three steps. First, we examine sections of the Texas constitution that designate county judges as "county officers" for certain purposes. We explain that the judges named in the constitution are not the defendant County Judges, then show the connection between the two. Second, we explain that the state constitution and statutes compel a finding that defendant County Judges act for the state at times. Finally, we determine that creation of a bail schedule is one of those times.

1. Relationship of constitutional and statutory county judges

The Texas constitution provides for one county court with one judge in each county. TEX. CONST. art. V, § 15 (1876). Another section of the constitution lists those judges as among the "county officers" who are subject to a specific removal procedure:

> County Judges, county attorneys, clerks of the District and County Courts, justices of the peace, constables, and other county officers, may be removed by the Judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

Id. § 24. The county judges named there are not the County Judges sued here. The Texas constitution's county judges have such "judicial functions as provided by law." *Id.* § 16. The judge also presides over the county's five-member governing body. *Id.* § 18(b). Thus, that county judge "is not a judicial officer only. … [T]here are various executive and ministerial functions conferred" as well. *Clark v. Finley*, 54 S.W. 343, 347 (Tex. 1899).

In contrast, the 11 defendant County Judges[6] hold judicial, not hybrid, statutory offices: "the Legislature has created statutory county courts at law in more populous counties to aid the single county court in its *judicial* functions."[7] Indeed, "the judge of a statutory county court has no authority over the county's administrative business that is performed by the county judge."[8] TEX.

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[6] They are Dallas County *Criminal* Court judges. *See* TEX. GOV'T CODE § 25.0591(b). Categories of statutory county courts are listed in TEX. GOV'T CODE § 21.009(2).

[7] *About Texas Courts, County Courts at Law*, TEXAS JUDICIAL BRANCH, https://www.txcourts.gov/about-texas-courts/trial-courts/ (emphasis added).

[8] This statutory sentence begins: "Except as provided in Subsection (e)"; the proviso allowed delegation of authority to a statutory county judge to hear applications for permits under three sections of the Alcoholic Beverage Code. TEX. GOV'T

GOV'T CODE § 25.0004(d). The first statutory county court in the state was created in 1907 because "the business of the County Court of Dallas County is so large as to render it impossible for said court to dispose thereof"; the constitutional county court's jurisdiction over its court cases except for probate matters was given to the new court. Act approved April 3,1907, 30th Leg., R.S., ch. 52, §§ 1-3 & 14,1907 TEX. GEN. LAWS 115-17; *see Camacho v. Samaniego*, 831 S.W. 2d 804, 810 (Tex. 1992) (stating that this Act created the first statutory county court). In 2021, 91 of the state's 254 counties had statutory county courts with varied jurisdiction.[9]

We must decide, then, whether statutory and constitutional county judges are sufficiently similar to make Article V, Section 24's label of "county officers" apply to both. We start with the fact that statutory county courts originated under legislative authority to create new courts and change "the civil and criminal jurisdiction" of a constitutional county court. *See Johnson v. City of Dallas*, 78 S.W. 2d 265, 268 (Tex. Civ. App.—Dallas 1934, writ ref'd) (holding that "no special county court is given powers other than were committed to [constitutional] county courts").[10] It was said that

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CODE § 25.0004(d) & (e). Those three sections were repealed, making the exception vestigial. *See* Acts 2019, 86th Tex. Leg., R.S., ch. 1359, § 411(a), 2019 TEX. GEN. LAWS 4992, 5120-21.

[9] *Court Structure if Texas*, TEXAS JUDICIAL BRANCH, (Sept. 2021), https://www.txcourts.gov/media/1452712/court-structure-chart-september-2021.pdf. Those 91 counties have 255 statutory county courts; three more counties share a single such court. *Id.*; *see* TEX. GOV'T CODE § 25.2702.

[10] Citing TEX. CONST, art. V, §§ 1 & 22 (as amended 1891). Section 22, allowing the Legislature to "increase, diminish or change the civil and criminal jurisdiction of County Courts," was repealed when voters endorsed Tex. S.J. Res. 14, § 9, 69th Leg., R.S., 1985

statutory courts "are not courts 'other' than those named in the Constitution, in the sense that they are of wholly differing functions, but rather courts of the same kind, but with divided powers." State ex rel. *Peden v. Valentine*, 198 S.W. 1006, 1008 (Tex. Civ. App.—Fort Worth 1917, writ ref'd). Statutory county courts "are essentially … county courts within the meaning of the Constitution." *Id.*; *accord Johnson*, 78 S.W. 2d at 267.

As those cases indicate, jurisdiction legislatively given to statutory county courts "was for many years confined to a portion of that constitutionally granted to constitutional county courts"; the legislature later abandoned those limits. *Camacho*, 831 S.W. 2d at 810. However, even when the legislature grants jurisdiction to a statutory county court that is beyond that of a constitutional county court, its judge is still a county officer subject to provisions such as those for removal and requiring residence in the county. *Jordan v. Crudgington*, 231 S.W.2d 641, 645-46 (Tex. 1950).

We rely on *Valentine*, *Johnson*, and *Jordan* to conclude that the defendant County Judges are "county officers" at least for purposes of removal under the above-quoted Section 24 of the judicial article, either because their judgeships are derivative of those for the "county judges" named first in that section or because they are among the "other county officers" named last.

TEX. GEN. LAWS 3355, 3359, & C-20. *See* Tex. Gov. Proclamation No. 41-2057 (Dec. 13, 1985) (declaring that the constitutional amendment proposed by S.J. Res. 14 was approved in the Nov. 5, 1985 election) (from records of Tex. Sec. of State, on file at Tex. State Archives; located with assistance of Nicholas de la Garza, Texas Legislative Council).

2. County Judges can act for the State

The second step in our analysis is to determine if the defendant County Judges can act for the state and, if so, when. The *ODonnell* court relied solely on the state constitution's section on removal of county officers to conclude that "Texas law explicitly establishes that the [statutory County] Judges are 'county officers.'" *ODonnell I*, 892 F.3d at 155 (citing TEX. CONST. art. V, § 24). We agree that these statutory judges are county officers under some of the Texas constitution's organizing directives such as being placed with local officials removable by a district judge. Removal of certain other officials — including judges of the district and all higher-level courts — requires legislative action. TEX. CONST. art. XV, § 2. Our question, though, is for whom statutory county judges act as to bail. The answer is not found by grouping these judges in an "'all or nothing' manner." *McMillian*, 520 U.S. at 785. Long ago, we rejected "all or nothing" when we held that a single county judge under the constitution, there grouped with "county officers," acted for the state when using authority delegated by state statute to compel disclosure of the names of those who had organized a school boycott. *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980).[11]

[11] No comparable ruling by the Supreme Court of Texas regarding county judges seems to exist, but that court has held that even when the judicial article of the constitution classified officials as "county officers," they could be "in fact officers of the state" when exercising some of their powers. *See Clark*, 54 S.W. at 347; *see also Fears v. Nacogdoches Cnty.*, 9 S. W. 265, 266 (Tex. 1888) (holding that a justice of the peace when serving as an *ex officio* coroner "acts for the state, and not for the county"). Similarly, a county treasurer is a state official when exercising certain powers. *Jernigan v. Finley*, 38 S.W. 24, 25 (Tex. 1896).

A helpful foundation for our analysis is that local judges are part of a state system: "in a general sense, and perhaps for special purposes, all the [statutory county and district] courts named [in the opinion] are state courts, and their presiding judges state officers." *Valentine*, 198 S.W. at 1008. The contested issue in that case, though, was whether the statute for filling vacancies in state offices or the one for vacancies in county offices applied to a specific statutory county court judgeship. *Id.* at 1007-08. The court held that it was the statute for county offices. *Id.* at 1009.

To determine whether the defendant statutory County Judges can act for the State, we apply guidance from *McMillian*. There, the strong connection between Alabama sheriffs and their counties was undeniable: the county paid the sheriff's salary and provided vehicles; the sheriff's jurisdiction was limited to the county; county voters elected the sheriff. 520 U.S. at 791. Here, the Plaintiffs identify strong, related connections between the statutory County Judges and their county. The Supreme Court, though, held that more important than such matters as funding and limits on jurisdiction is that the Alabama constitution provided that county sheriffs were part of the executive department of state government, meaning that they acted for the state when exercising their law enforcement powers. *Id.* at 788 (citing ALA. CONST. art. V, § 112 (1901)).

We find a similarly edifying structural plan in the Texas constitution, applicable both to county and district judges when they exercise judicial powers. Most relevant, and analogous to the Alabama provision for sheriffs, is that Texas law divides *state* judicial power among the different courts:

> Sec. 1. *The judicial power of this State* shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in *County Courts*, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.
>
> The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.

TEX. CONST. art. V, § 1 (emphasis added).

Learned commentary — and learned colleagues in dissent — assert that the list in the first paragraph of Section 1 of those who have judicial power is over-inclusive.[12] We agree, up to a point. The commissioners court, which is a county's chief administrative body, is not generally, if ever, exercising judicial power. Even if

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[12] A book-length examination of every section of the 1876 Texas Constitution was prepared by a legal consultant and a small group of law professors and attorneys to assist a state constitutional convention held in 1974; the new constitution drafted by the convention was not adopted, but the commentary was later published. *See* GEORGE D. BRADEN, ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS v-viii (1977). The commentary viewed the list in the first paragraph of Article V, section 1, as being both over-and under-inclusive. *Id.* at 365. Only the commissioners court was identified as not being part of the "state judicial system." *Id.* The commentary then stated that the statutory county courts are among those not named that do exercise "judicial power." *Id.* at 365-66. The commentary did not spend time on whether county courts exercise *state* judicial power, but neither did it question the accuracy of the language of Article V, section 1 that state judicial power was assigned to the courts that were correctly named or were later provided by law.

there is another listed court not exercising judicial power, we can see no distinction on this point among the appellate courts, the District Courts, and the statutory County Courts. We explain.

We start with the fact that once again, the county courts named there are those established by the constitution. However, statutory county courts are also vested with state judicial power. That was clear when the first statutory county court in the state was granted "jurisdiction in all matters … over which, by the general laws of the State, the County Court of said county would have jurisdiction," with exceptions. 1907 TEX. GEN. LAWS 115. That was a grant of part of the constitutional court's state judicial power. More generally, when the legislature creates statutory county courts, defines their jurisdiction, then "conform[s]" other courts' jurisdiction to that of the new courts, the state's judicial power is being "vested … in such other courts as may be provided by law." *See* TEX. CONST, art. V, § 1.

A few other statutes are also relevant in understanding the level of government for which these courts act. First, though, a caveat — individual statutory county courts are created by their own, separate legislation. Accordingly, a general section of the Government Code begins by stating that the Code "applies to each statutory county court in this state. If a provision of this subchapter conflicts with a specific provision for a particular court or county, the specific provision controls." TEX. GOV'T CODE § 25.0001(a). The only *en banc* brief to cite specific statutes for Dallas County was for the District Judges, but it identifies no conflicts with the general statutes. Thus, we consider general statutes with the exception that we begin by quoting the specific statute that establishes the defendant County Judges' jurisdiction.

"A county criminal court in Dallas County has the criminal jurisdiction, original and appellate, provided by the constitution and law for county courts." *Id.* § 25.0593(a). The jurisdiction prescribed by law for the constitutional county courts includes "exclusive original jurisdiction of misdemeanors" with some exceptions. *Id.* § 26.045(a). Bolstering our understanding that statutory county courts occupy an independent level of the state judicial hierarchy is that appeals from their decisions in criminal cases are taken to a state court of appeals. TEX. CODE CRIM. PROC. art. 4.03. Thus, it is clear that the defendant County Judges have authority over a category of criminal offenses established by state statutes.

Even the *McMillian* dissent supports this analysis. Though disputing that Alabama sheriffs were state officials, Justice Ginsburg readily agreed to the placement of the different levels of judges within the state judicial system:

> *Unlike judges who work within the State's judicial hierarchy*, or prosecutors who belong to a prosecutorial corps superintended by the State's Attorney General, sheriffs are not part of a state command and serve under no "State Sheriff General."

McMillian, 520 U.S. at 796, 797 (Ginsburg, J., dissenting) (emphasis added). We have expressed a similar understanding: "a municipal judge acting in his or her judicial capacity to enforce state law does not act as a municipal official or lawmaker." *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992). This holding confirms the "general sense" that when judges are engaged in their judicial functions, they are state actors. *See Valentine*, 198 S.W. at 1008.

3. Creation of bail schedule was a judicial act for the State

The final step in our analysis is to decide if creating this bail schedule was a judicial act that applied state law. Adversary proceedings commence when an arrestee appears before a judicial officer and "learns the charge against him and [that] his liberty is subject to restriction." *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 213 (2008). A judge's setting an arrestee's bail at that time is part of the state adversary proceedings and a judicial function. The question for us is whether creating a bail schedule for later application to specific arrestees is also a judicial act that enforces state law.

The precedent that provides the most assistance on this issue involved a county's trial judges' creation of a system for selecting attorneys for later appointment to felony criminal cases. *See Davis v. Tarrant Cnty.*, 565 F.3d 214, 218-19 (5th Cir. 2009). In determining whether the judges had engaged in a judicial act as opposed to an administrative or other category of action, we considered "the particular act's relation to a general function normally performed by a judge." *Id.* at 221-22 (quoting *Mireles v. Waco*, 502 U.S. 9, 13 (1991)). We then mentioned four factors the circuit has used "for determining whether a judge's actions were judicial in nature": was a "normal judicial function" involved; did the relevant act occur in or adjacent to a court room; did the "controversy" involve a pending case in some manner; and did the act arise "directly out of a visit to the judge in his official capacity." *Id.* at 222. The factors were taken from a precedent analyzing whether a judge was entitled to absolute judicial immunity for her actions. *Id.* at 222-23 (citing *Ballard v. Wall*, 413 F.2d 510, 515 (5th Cir. 2005)).

Though identifying four factors, we used only the first one and held that the "appointment of counsel for indigent defendants in criminal cases is a normal judicial function." *Id.* at 223. We acknowledged that the challenged act in the case was not a single appointment of an attorney in a single case. *Id.* Nonetheless, "the act of selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case, which is clearly a judicial act." *Id.* at 226.

The *Davis* opinion was correct in its approach. Implicitly, it concluded that there are factual situations in which it makes sense not to consider multiple factors[13] but just to focus on an overarching point: when judges decide on a procedure for taking what indisputably will be judicial acts in the future, that decision is so intertwined with what will follow as to be a judicial act as well. That form of analysis applies equally here. The creation of bail schedules was no more or less divorced from setting bail in a specific case than establishing a method for selecting counsel was divorced from appointment of counsel in a specific case. We do acknowledge one difference: in *Davis*, the judges establishing the procedure were also the ones appointing counsel. Here, the bail schedules were created by judges other than those

[13] We trace the origin of the factors to another judicial immunity case, which prefaced the enumeration by saying "we discern in this case four factors that, when taken together, compel the conclusion" that the judge was acting in a judicial capacity. *McAlester v. Brown*, 469 F.2d 1280,1282 (5th Cir. 1972). Originally, then, these four factors were case-specific and not a generic test. As the *Davis* court seemingly recognized, the test will not always apply beyond evaluating a judge's actions in one case or in other limited circumstances.

who would later set bail for individual arrestees. A difference, but we see no distinction. The unbroken linkage conceptually remains between the two. Thus, the act of creating guidance for setting bail is "inextricably linked" to the subsequent setting of bail and is a judicial act. *Id.*

We also conclude that it was the judicial power of the state that was being used: the Texas constitution provides that judges exercise state judicial power generally, TEX. CONST. art. V, § 1; bail is a right granted by the state constitution, *id.* art. I, § 11; and the process for determining bail is controlled by state statutes, *see*, *e.g.*, TEX. CODE CRIM. PROC. art. 17.01-17.49 (detailing rights and procedures regarding bail).

In summary, if the issue were the removal, replacement, or required residence of statutory county judges, the laws about county officers would control. Instead, we are concerned with decisions made in a judicial capacity by judges "within the State's judicial hierarchy" to develop a bail schedule applicable at the "start of adversary judicial proceedings." *See Rothgery*, 554 U.S. at 213. It does not matter that the schedule applies only to one county. The geographic limit of their action does not define the level of government for which the judges acted. *See McMillian*, 520 U.S. at 791 (holding that even though "the sheriff's jurisdiction is limited to the borders of his county," the sheriff was a state official). We hold that, under the Texas constitution, the judges were exercising state judicial power and thus acting for the state.

We reverse the district court's holding that these 11 defendant County Judges were acting for Dallas County when addressing issues of bail. We also overrule the *ODonnell* opinions on this issue.

B. District Judges

Much of the foregoing analysis concerning County Judges applies to the District Judges as well. There is, though, a different constitutional section to consider. It makes clear that district courts are part of a statewide system: "The State shall be divided into judicial districts, with each district having one or more Judges as may be provided by law or by this Constitution." TEX. CONST. art. V, § 7.

Additional relevant analysis was in the panel opinion in this case. *Daves*, 984 F.3d at 397, *vacated*, 988 F.3d 834. We do not see error in the panel's discussion. We summarize some of it here. It is evident that the state district courts are one level of the state judicial system, with appeals in most cases to a state court of appeals and possible review by Texas's Supreme Court or Court of Criminal Appeals. For an understanding of district courts, we quote the official Texas Judicial Branch website, which states:

> The district courts are the trial courts of general jurisdiction of Texas. The geographical area served by each court is established by the Legislature, but each county must be served by at least one district court. In sparsely populated areas of the State, several counties may be served by a single district court, while an urban county may be served by many district courts.

About Texas Courts, *District Courts*., *supra* note 7. Ten of the seventeen defendant District Judges are identified in the pleadings as judges of District Courts and seven as judges of Criminal District Courts.

Also relevant is our earlier holding that for purposes of appointing counsel for indigent criminal defendants,

the state district court judges act for the State. *See Clanton v. Harris Cnty.*, 893 F.2d 757, 758 (5th Cir. 1990). We relied on a precedent which held that Texas district judges "are undeniably elected state officials." *Id.* (quoting *Clark v. Tarrant Cnty.*, 798 F.2d 736, 744 (5th Cir. 1986)).

We conclude that when these district judges made a bail schedule, they acted as officers of the state judicial system. The federal district court, though, held that these judges were county officers. The court relied on our earlier rulings about statutory county judges in Harris County and found no need to reason further about this additional category of judges. *See ODonnell I*, 892 F.3d at 155-56. We have already explained our disagreement with the *ODonnell* holding, and we reject applying similar reasoning to District Judges. Because these District Judges acted for the State when addressing bail, we reverse the lower court's contrary holding.

C. Magistrate Judges

The federal district court found that the six defendant Magistrate Judges are hired, and can be fired, by the state District Judges. *Daves*, 341 F. Supp. 3d at 691. That court also found that these six Magistrate Judges routinely follow the guidance and policies the District Judges distribute. *Id.*

These six Magistrate Judges were not made subject to the preliminary injunction. That could be the reason those judges did not join in the current interlocutory appeal. Regardless, the Magistrate Judges are not parties to this appeal, and we do not determine whether they are state or county officials.

D. Dallas County Sheriff

The current version of the Texas constitutional provision providing for the position of sheriff is this:

> There shall be elected by the qualified voters of each county a Sheriff, who shall hold his office for the term of four years, whose duties, qualifications, perquisites, and fees of office, shall be prescribed by the Legislature, and vacancies in whose office shall be filled by the Commissioners Court until the next general election.

TEX. CONST. art. V, § 23. We have found no provision in Texas law comparable to what the *McMillian* Court used in explaining that Alabama sheriffs were part of the state executive department.

We examine the appellate briefing to see if any party analyzed how to classify the Sheriff. The section of Defendants' panel brief discussing the Sheriff does not analyze how to determine if she is a state or county official. It does remark that one of the *ODonnell* opinions had held that "the Sheriff was not a municipal policymaker, a point which the Plaintiffs do not contest." The brief also argues that the Sheriff does not make bail policy. That is an argument about causation and redressability, which are components of standing. The closest to an argument that the Sheriff is a state actor is that Dallas County's *en banc* brief responds to the panel's consideration of *Ex parte Young*, which is inapplicable except to suits against those acting on behalf of the State. In summary, the primary argument is that inclusion of the Sheriff in the suit is unnecessary for injunctive relief.

Plaintiffs do not provide any analysis about the Sheriff in their *en banc* briefing. To the panel, Plaintiff's' briefing contains only two pages about the Sheriff,

saying (without arguing the contrary) that even if the Sheriff is not a county policymaker as to bail, she can be enjoined under Section 1983 "from enforcing constitutional violations." In the absence of any helpful briefing on whether the Dallas Sheriff for the purposes of the issues in this suit should be considered a state or county official, we leave the issue for later.

II. Are there proper defendants for declaratory or injunctive relief?

The subject-matter jurisdiction of federal courts is limited to "Cases" and "Controversies." U.S. CONST, art. Ill, § 2. "[A]n essential and unchanging part of the case-or-controversy requirement of Article III" is the requirement that the plaintiff establish standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, the plaintiff must show "(1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615,1618 (2020). Stated differently, the plaintiff must demonstrate "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

A plaintiff "bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561. At the preliminary-injunction stage, "the plaintiffs must make a 'clear showing' that they have standing to maintain the preliminary injunction." *Barbery v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017). Further, standing is not determined "in gross." *Davis v. Federal Elec. Comm'n*, 554 U.S. 724,

734 (2008) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). To the contrary, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* (quotation marks and citation omitted). In this class action, for each named defendant, at least one named plaintiff must have standing to sue. *See Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017); *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145,159 (2d Cir. 2012). Standing to sue one defendant does not, on its own, confer standing to sue a different defendant.

The Plaintiffs sued District Judges, County Judges, Magistrate Judges, the Sheriff, and Dallas County. Determining whether the Plaintiffs have standing to sue any of them is the task of this section. Of course, we have just held that the District and County Judges acted for the State when they created bail schedules and thus cannot create liability for Dallas County for those actions. We did not, though, then consider whether, to the extent of their acting for the State, the District and County Judges could be enjoined or become the subjects of declaratory relief under *Ex parte Young*, 209 U.S. 123 (1908). Consequently, standing to sue those two groups of judges remains relevant, as is standing to sue the other Defendants.

A. Standing to sue the District Judges and County Judges

We start with determining standing as to the claims against the District Judges and the County Judges. Of particular importance in our analysis is whether any plaintiff has claimed an injury that is "fairly traceable" to the unconstitutional conduct of one of these two groups of judges. *DaimlerChrysler Corp.*, 547 U.S. at 342. The Plaintiffs allege that: (1) the "Defendants"

violate equal protection and substantive due process by "jailing a person because of her inability to make a monetary payment"; and (2) the "Defendants" violate procedural due process by "depriving anyone of the fundamental right to pretrial liberty without" robust procedural safeguards. The injury that each named plaintiff claims is pretrial incarceration due solely to the inability to pay the automatically imposed amount of secured money bail.

We look at what the District and County Judges did, then decide whether the claimed injury is traceable to their actions. The claim is that bail schedules, made by these judges, were applied by the Magistrate Judges in a manner that causes constitutional injury. There is nothing unconstitutional about the mere promulgation and use of bail schedules. *See Pugh v. Rainwater*, 572 F.2d 1053,1057 (5th Cir. 1978) (en banc). As the district court found, these bail schedules offer only "recommended" amounts. The bail schedules are not the source of the Plaintiffs' injuries. Rather, as the district court also found, the claimed injury derives from the Magistrate Judges' "policy of routinely relying on the schedules."

Standing "is ordinarily 'substantially more difficult' to establish" when "a causal relation between injury and challenged action depends upon the decision of an independent third party." *California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (quoting *Lujan*, 504 U.S. at 562). The Supreme Court is "reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). In such circumstances, the plaintiff must show "that third parties will likely react in predictable ways." *California*, 141 S. Ct. at 2117 (quoting

Department of Com. v. New York, 139 S. Ct. 2551, 2566 (2019)).

Here, the district court found that Magistrate Judges "treat" the bail schedules as binding, despite that the schedules offer only recommendations. Yes, Magistrate Judges are surrogates; they assist the district judges; many of their decisions are tentative until reviewed. Those are not reasons that the Magistrate Judges could have been expected, after receiving bail schedules that were to be applied with discretion once the circumstances of the offense were considered, to feel free to apply them without discretion. The fact that a schedule could simplify the setting of bail when applied rigidly did not make such rigidity likely and therefore predictable. A reasonable prediction would have been just the opposite: if the District and County Judges told the Magistrate Judges to exercise discretion, they likely would react by doing so. Support for the latter prediction is that state law required, among other things, that any judge setting bail evaluate a detainee's "ability to make bail." TEX. CODE CRIM. PRO. art. 17.15. On this record, then, we cannot agree that it was predictable that the discretion urged by the schedules themselves and required by state law would not be exercised.

The Plaintiffs also rely on two Supreme Court opinions. The first case involved the Fish and Wildlife Service, which issued a "Biological Opinion explaining how the proposed action will affect the species or its habitat." *Bennett v. Spear*, 520 U.S. 154, 158 (1997) (parenthesis omitted). The Opinion had a "virtually determinative effect" on the actions of the third party to whom it was issued. *Id.* at 170. The Opinion informed the third party that "[t]he measures described [in the Opinion] are nondiscretionary." *Id.* (first alteration in original). Deviation from those terms subjected the third party "to

substantial civil and criminal penalties, including imprisonment." *Id.* Here, the bail schedules lack those coercive enforcement mechanisms, making *Bennett* quite relevant but only for its contrast to our facts.

The second precedent concerned a citizenship inquiry on the 2020 census questionnaire; some states and other plaintiffs claimed they would be injured because the inclusion of the citizenship question would suppress participation and reporting. *Department of Com.*, 139 S. Ct. at 2562-65. The Department argued there was no causation because the plaintiffs' injuries were traceable only to the actions of the people who chose not to respond to the census. *Id.* at 2565. The Court disagreed and held that the plaintiffs "met their burden of showing that third parties will likely react in predictable ways to the citizenship question" by providing studies showing a statistical likelihood of under-participation due to the citizenship question. *Id.* at 2566. As a result, the plaintiffs' theory of standing did "not rest on mere speculation about the decisions of third parties" but "on the predictable effect of Government action on the decisions of third parties." *Id.* The Plaintiffs discern similar predictive effects here based on the District Judges' power to remove these Magistrate Judges, causing the latter to feel pressure to apply the schedules rigidly. We earlier observed that any implicit pressure on the Magistrate Judges from those who could remove them would reasonably have been to comply with guidance to use discretion as to bail.

In summary, the Plaintiffs offer no evidence or law that the District and County Judges should have predicted that the Magistrate Judges would have treated the bail schedules as binding. The Plaintiffs' theory of causation applicable to the District Judges and the County Judges is too speculative to support standing.

See California, 141 S. Ct. at 2117. Justiciability, if it exists, must be based on claims against another defendant.

In light of our rejection of the Plaintiffs' standing regarding these two categories of judges, we now address the preliminary injunction. The only parties enjoined were the District Judges, the County Judges, and Dallas County, as well as their "respective officers, agents, attorneys, and employees, and all those acting in active concert with them." An injunction must be vacated when the plaintiffs lack standing to sue any defendant against whom injunctive relief can be given. *See Barber*, 860 F.3d at 358 (reversing grant of preliminary injunction because the plaintiffs lacked standing).

Because the Plaintiffs in this case lack standing to sue the District and County Judges, there can be no liability for Dallas County arising from their actions. We therefore need not consider, had they as state actors been properly joined, how to apply *Ex parte Young*, 209 U.S. 123. The dissent addresses the recent Supreme Court opinion that sheds further light on *Young*. *See Whole Women's Health v. Jackson*, 142 S. Ct. 522 (2021). Due to the limits of what we resolve, we need not discuss that case.

The current injunction cannot stand against the only officials subject to it. Accordingly, the district court's preliminary injunction is vacated.

B. Standing to sue the Magistrate Judges

The Plaintiffs sued the Magistrate Judges only for declaratory relief. The only declaratory relief sought as to the Magistrate Judges is the same declaration sought against all Defendants, namely:

> Defendants violate the Named Plaintiffs' and class members' constitutional rights by

> operating a system of wealth-based detention that keeps them in jail because they cannot afford to pay a secured financial condition of release required without an inquiry into or findings concerning ability to pay, without consideration of nonfinancial alternatives, and without findings that a particular release condition — or pretrial detention — is necessary to meet a compelling government interest.

The district court declined to determine whether the Magistrate Judges were proper defendants. Further, the Magistrate Judges were not made subject to the injunction. Instead, the district court concluded in its opinion issued the same day as the injunction that because those judges were acting on behalf of the county, any injunctive relief "against the County would reach the Magistrate Judges." *Daves*, 341 F. Supp. 3d at 693. We express no opinion on whether that conclusion was correct.

Our analysis so far suggests that causation for the claimed injuries might be traced to the Magistrate Judges. No party, though, has briefed on appeal whether federal jurisdiction exists over the claims against the Magistrate Judges. In district court, the Magistrate Judges filed their own motion to dismiss. There they argued that the "Plaintiffs fail to identify the capacity in which the Magistrate Judges are sued," and asserted they were not policymakers as to bail and just followed the direction of the District and County Judges. They also adopted by reference the arguments in the County Judges' motion to dismiss. Among other arguments, the County Judges sought abstention under *Younger*, 401 U.S. 37; by adoption, the Magistrate Judges did too. The district court, of course, has not yet resolved the issue of *Younger* abstention.

We close this section with an observation. Available relief against any defendant judge is limited by a 1996 amendment to Section 1983 "that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983 (amended by Pub. L. No. 104-317, tit. III, § 309(c), 110 Stat. 3847, 3853 (Oct. 19, 1996)). How, if at all, that limitation affects the analysis of abstention can be considered on remand.

C. Standing to sue the Sheriff and Dallas County

As to the Sheriff, the Plaintiffs sought injunctive relief and the same declaration that we earlier quoted. The district court held that the Sheriff was not a proper defendant. *Daves*, 341 F. Supp. 3d at 694. The panel opinion, now withdrawn, held she was a proper defendant. *Daves*, 984 F.3d at 405. Whether the sheriff should be party will primarily turn on whether injury is traceable to the Sheriff and can be redressed. Regarding Dallas County, if there is no defendant county official who acts as a policymaker as to the function at issue, then the County must be dismissed as a party. *See McMillian*, 520 U.S. at 783. There is no need now to resolve whether there is standing to sue the Sheriff or to make the County a party. We will analyze that issue after the case returns to us following our remand on abstention.

III. Younger *abstention*

A. Waiver of abstention

Our final discussion concerns abstention. We start with whether that issue is even before us. One result of the principle that abstention under *Younger* is not jurisdictional is that application of the doctrine can be

waived. *See Texas Ass'n of Bus. v. Earle*, 388 F.3d 515, 519 (5th Cir. 2004). When a "[s]tate voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Ohio Bureau of Emp. Servs. v. Hodory*, 431 U.S. 471, 480 (1977). "Voluntarily" would also be the correct concept for when a state argument about abstention in district court is inconsequential.

Certainly, *Younger* has been barely mentioned in most of the briefing. Working backward temporally, none of the parties' *en banc* briefing cited Younger, though the brief for the Defendants cited a Fifth Circuit opinion that analyzed abstention by discussing a post-*Younger* opinion. *See Tarter v. Hury*, 646 F.2d 1010, 1013-14 (5th Cir. Unit A June 1981) (citing *O'Shea v. Littleton*, 414 U.S. 488 (1974)). In light of the apparent lack of anticipation of the issue, we notified counsel before oral argument to be prepared to discuss *Younger*.

In the briefing before the panel, Dallas County argued that comity bars the Plaintiffs' requested relief and attempted to distinguish *ODonnell I*. The District Judges argued, in a footnote of their brief, that Plaintiffs' requested relief "runs headlong into *Younger* abstention." The Plaintiffs responded that abstention was improper and foreclosed by *ODonnell I*, because the Magistrate Judges' bail determinations are not properly reviewable in the state criminal proceedings.

The earliest briefing was in district court. Only the County Judges meaningfully briefed *Younger* as a threshold defense. Perhaps the relative silence as to abstention can be explained by the fact that our court's first *ODonnell* opinion, which rejected *Younger* abstention in the similar context of bail practices in Harris County, was handed down on February 14, 2018, a

month after this suit was brought but before motions to dismiss were filed. *See ODonnell*, 882 F.3d at 538-39, *withdrawn and superseded on panel reh'g*, *ODonnell I*, 892 F.3d 147. We rejected abstention because we found arrestees did not have an adequate opportunity to make constitutional challenges in the state criminal proceedings. *ODonnell*, 882 F.3d at 539. The Defendants' motions to dismiss in this case were filed six weeks later on April 2, 2018.

The County Judges made *Younger* a significant part of their motion to dismiss. They sought to distinguish *ODonnell* by arguing that, because this case involves felony arrestees and *ODonnell* dealt only with misdemeanants, the lengthier time those accused of felonies would be in jail would give them "ample opportunity to avail [themselves] of *habeas corpus*."

The District Judges filed three motions to dismiss. The first two were filed on the same day as the County Judges' motion but made no similar argument about *Younger*. The third, an "amended motion to dismiss," adopted and incorporated by reference the County Judges' arguments in favor of dismissal. All the motions made the same two indirect arguments about abstention. First, each motion stated that "[f]ederal courts have long recognized that state courts are just as capable of adjudicating federal constitutional issues as are federal courts," citing *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). Second, each motion insisted that "[s]tate judges are not presumed to be incapable of understanding or applying the federal constitution," citing *Middlesex* and in a long string cite with brief parentheticals referring to cases such as *Moore v. Sims*, 442 U.S. 415 (1979). Explicit analysis of *Younger* abstention was absent. The

district court has not ruled on any of the motions to dismiss.

In deciding whether *Younger* is properly before us, we start with this court's rejection of any bright-line rule for when waiver blocks an issue and when waiver has been evaded. *First United Fin. Corp. v. Specialty Oil Co.*, 5 F.3d 944,948 n.9 (5th Cir. 1993). We determine, first, whether the issue was presented to the district court in a manner sufficient to give that court an opportunity to rule on it. *Rosedale Missionary Baptist Church v. Nena Orleans City*, 641 F.3d 86, 89 (5th Cir. 2011). The issue must then be "press[ed]" on appeal. *Texas Democratic Party v. Abbott*, 978 F.3d 168,177 (5th Cir. 2020).

In summary, one group of Defendants in this case argued in district court a distinction from *ODonnell's* holding about *Younger*. Other Defendants' motions buried the abstention argument but did cite caselaw of secondary importance. The district court's rejection of any argument under *Younger* would reasonably have appeared preordained, making pursuing an early ruling on abstention in district court seemingly futile.

Further, before us now are only those matters related to an interlocutory appeal from the grant of a preliminary injunction, when no ruling on abstention has yet been made. It was necessary to raise the issue in district court even if foreclosed, but on these facts, we do not see that any party needed to do more to have preserved the issue.

As to briefing for the interlocutory appeal, it was potentially unclear whether *Younger* would concern the panel, bound as it was by *ODonnell*. Even so, *Younger* was discussed in the initial briefing. Finally, though *en banc* is the quintessentially appropriate time to

challenge a precedential Fifth Circuit opinion's holding about any relevant issue, our order granting rehearing in this appeal stated that the briefing schedule is "for the filing of *supplemental* briefs." Whatever else that might mean, it supports that arguments do not need to be restated if they have been sufficiently pressed in the briefing to the panel. Minimal arguments were in the panel briefing.

We conclude that the *Younger* issue has not been waived.

B. Remand for consideration of abstention.

A few observations about abstention need to be made. "Jurisdiction existing," the Supreme Court has explained, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). The abstention doctrine identified in *Younger* is an "exception to this general rule." *Id.*

In *Younger*, a defendant in a pending state criminal prosecution filed a federal lawsuit challenging the facial constitutionality of the statute under which he was being prosecuted and moved to enjoin the prosecution. 401 U.S. at 38-39. The Supreme Court held that principles of equity and comity prohibited federal judicial interference with an ongoing state-court prosecution. *Id.* at 43-44,53-54. On equity, the Court adhered to "the 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." *Id.* at 43-44. On comity, "an even more vital consideration," the Court emphasized "proper respect for state functions" and avoiding

interference "with the legitimate activities of the States." *Id.* at 44.

Our remand is to allow the district court to consider the applicability of what we have identified here as *Younger* abstention. Potentially relevant is whether subsequent Supreme Court opinions have expanded the *Younger* doctrine and are doctrinally distinct in some respects. Among the subsequent key decisions is one that applied abstention to future criminal prosecutions. *See O'Shea*, 414 U.S. 488. This court later held that the concerns for comity discussed in *O'Shea* "defeat the claims based on the imposition of excessive bail." *Tarter*, 646 F.2d at 1013. A year after *O'Shea*, the Supreme Court did not abstain in a case brought by pre-trial detainees to require a judicial determination of probable cause for their detention. *Gerstein v. Pugh*, 420 U.S. 103,108 n.9 (1975). Much more recently, the Court has made general pronouncements about *Younger* abstention. *See Sprint*, 571 U.S. at 78. Other authorities will be valuable as well.

After the remand, the *en banc* court will take a fresh look at *Younger*, at which time we will have authority to re-evaluate our own precedent. The issue received little attention in the case by the district court or by counsel. We have already held, on the unusual facts of this court's rejection of abstention in the related Harris County case just as this Dallas County case was getting underway, that the issue is not waived. Yet, like the Supreme Court, we are "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Though we have considered some foundational issues that the district court pretermitted, we conclude that the abstention issue is one which will particularly benefit from a first view in district court.

The only judges left as potentially proper parties are the Magistrate Judges. We also have not yet made a ruling about the inclusion of the Sheriff as a defendant. Our limited remand will give the district court the opportunity, through such proceedings as it directs, to have abstention fully explored, both factually and legally. The *ODonnell* court's *Younger* analysis is not binding on this remand. When the case returns, none of our precedent will be binding on us. Thus, in light of the district court's consideration of the issue after the *en banc* court has received the case, we give the district court authority on remand to reach the result it considers appropriate even if it is inconsistent with any of this court's precedent. What we have actually held in this opinion to be the law, though, must be applied as precedent.

* * *

We VACATE the preliminary injunction. We REMAND to the district court for the limited purpose of conducting such proceedings as it considers appropriate and making detailed findings and conclusions concerning abstention under *Younger v. Harris*, 401 U.S. 37 (1971), and related caselaw, and on the effect of Senate Bill 6 on the issues in this case. Once the district court has entered findings and conclusions on those issues, the case will return to this court. No other issues in this case are part of the remand. We retain jurisdiction over both the appeal and the cross-appeal during the remand to district court. Further instructions will be given to the parties after the district court has concluded its work.

STEPHEN A. HIGGINSON, *Circuit Judge*, with whom DENNIS and WILLETT, *Circuit Judges*, join, concurring only in judgment to remand:

Permitting the district court to address *Younger* abstention in the first instance[1] is warranted because, when *Younger*'s three conditions[2] are met, absent extraordinary circumstances, a district court is required to abstain. *Hicks v. Miranda*, 422 U.S. 332, 350 (1975).

This court previously addressed a similar but distinct challenge to bail proceedings in Harris County. *ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018) (*ODonnell I*). In concluding that *Younger* did not bar federal court review in the Harris County case, our court held *only* that *Younger*'s third prong—whether the plaintiff has an "adequate opportunity in the state proceedings to raise constitutional challenges," *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 716 (5th Cir. 2012) (quoting *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982))—had not been met. *ODonnell I*, 892 F.3d 147. Even that holding was

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[1] *See Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253, 1272-73 (10th Cir. 2002); *see also Dandar v. Church of Scientology Flag Serv. Org., Inc.*, 551 F. Appx. 965, 966-67 (11th Cir. 2013) (per curiam).

[2] Under abstention doctrine, as instructed in *Younger v. Harris* to "restrain[] courts of equity from interfering with [state] criminal prosecutions." 401 U.S. 37, 44 (1971). Federal courts generally decline to exercise jurisdiction when three criteria are met: "(1) the federal proceeding would interfere with an 'ongoing state judicial proceeding'; (2) the state has an important interest in regulating the subject matter of the claim; and (3) the plaintiff has 'an adequate opportunity in the state proceedings to raise constitutional challenges.'" *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 716 (5th Cir. 2012) (quoting *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)).

tentative because our court explicitly chose not to reach whether pretrial habeas in Texas provides such opportunity. *ODonnell I*, 892 F.3d at 156-157 & n.3. *But cf. Ex Parte Keller*, 595 S.W.2d 531, 532-33 (Tex. Crim. App. 1980); *Ex parte Anderson*, No. 01-20-00572-CR, 2021 WL 499080 (Tex. App. Feb. 11, 2021).

Significantly, the parties in the instant case dispute whether the plaintiffs could have challenged, or in fact did challenge, the bail deficiencies they allege here. Oral Argument at 2:41—6:26 (plaintiffs' argument), *Daves v. Dallas Cnty., Texas*, No. 18-11368 (5th Cir. 2021);[3] *id.* at 50:56—59:26 (Texas's argument) (Texas' counsel: "There surely was an adequate, effective way to raise these kinds of questions in state court."); *id.* at 1:08:05—1:12:05 and 1:13:30—1:17:36 (plaintiffs' rebuttal); *id.* at 1:15:14—1:15:22 (Plaintiffs' counsel: "I submit, if you're considering making a ruling about adequacy of opportunity, you remand to the district court, so that the district court can make these findings.").

Because *ODonnell I* did not resolve *Younger*'s prong three analysis, we would leave for the district court to determine whether and to what extent plaintiffs have an adequate opportunity to challenge the bail proceedings at issue here. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987) ("[T]he burden on this point rests on the federal plaintiff to show 'that state procedural law barred presentation of [its] claims'" (quoting *Moore v. Sims*, 442 U.S. 415, 432 (1979))) (alteration in original); *see also Wallace v. Kern*, 520 F.2d 400, 407-408 & nn. 14—16 (2nd Cir. 1975).

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[3] *Available at* https://www.ca5.uscourts.gov/OralArgRecordings/18/18-11368_5-26-2021.mp3.

In turn, the district court then would have opportunity to apply, also for the first time, fact-specific *Younger* prong *one* caselaw. That is particularly important here since Texas has revised its criminal procedure code specifically as to bail procedure, timely bail hearings, and assessment of arrestees' financial circumstances. *See* Damon Allen Act, 2021 Tex. Sess. Law Serv. 2nd Called Sess. Ch. 11 (S.B. 6). In the bail context, Supreme Court caselaw delineates that federal courts *should* abstain where granting equitable relief requires an "ongoing federal audit of state criminal proceedings" or "when the normal course of criminal proceedings in the state courts would otherwise be disrupted," *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974); *see also Tarter v. Hury*, 646 F.2d 1010,1013 (5th Cir. Unit A 1981) ("An injunction against excessive bail, no matter how carefully limited, would require a federal court to reevaluate de novo each challenged bail decision."); *Gardner v. Luckey*, 500 F.2d 712, 715 (5th Cir. 1974) (same). However, federal courts need *not* abstain where such relief merely contemplates procedural safeguards that are not "directed at the state prosecutions as such" and "could not be raised in defense of the criminal prosecution," *Gerstein v. Pugh*, 420 U.S. 103,108 n.9 (1975); *see also Tarter*, 646 F.2d at 1013 ("The *O'Shea* rubric does not apply, however, to the refusal to docket and hear pro se motions. … [A]n injunction requiring that all pro se motions be docketed and considered by the court … would add a simple, nondiscretionary procedural safeguard to the criminal justice system.").[4]

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[4] Consistently, our sister circuits have reached legally reconcilable, but necessarily fact-developed, conclusions as to whether federal court intrusion into state bail proceedings is permissible. *See*, *e.g.*, *Walker v. City if Calhoun*, 901 F.3d 1245,1255 (11th Cir. 2018), *cert*, *denied*, 139 S. Ct. 1446 (2019); *Arevalo v. Hennessy*, 882

In summary, this case vitally implicates state criminal bail proceedings and the constitutional rights of pretrial detainees, yet everyone agrees there has been no analysis of circumstances which may be determinative of *Younger* abstention. Obtaining threshold *Younger* analysis from a district court in the first instance is more than prudent inquiry into Supreme Court abstention doctrine. Getting that analysis, threshold to reaching other difficult and outcome-determinative issues, is crucial to proper adjudication of those same issues, above all to avoid foreclosing avenues for vindicating the constitutional rights of pretrial detainees. By contrast, not remanding for threshold, first-time abstention inquiry hardens premature resolution of far-reaching issues the majority and dissent would reach, in this instance contracting constitutional guarantees federal courts should vindicate.

Having clarified that our court's minimal discussion in *ODonnell I* of *Younger* gives no conclusive answer to abstention in this case—either prong one or prong three—we would do no more than remand for further proceedings to address *Younger*, permitting the district court to develop the factual record and determine whether this case should be resolved in federal or state courts. This judicial restraint—a limited remand for application of *Younger*—is especially compelling in light of Texas's intervening passage of Senate Bill 6, revisiting the very bail procedures and guarantees challenged in this litigation, *see Gerstein*, 420 U.S. at 109 (intervening amendments to pretrial procedures warranted remand before resolution), as well as because the Supreme Court, since our Court's en banc argument, has

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F.3d 763, 765-67 (9th Cir. 2018); *Kaufman v. Kcye*, 466 F.3d 83, 87 (2d Cir. 2006); *Wallace v. Kern*, 520 F.2d 400, 404-08 (2d Cir. 1975).

highlighted the difficult matter of federal courts enjoining state judges. *See Whole Women's Health v. Jackson*, 595 U.S. __ (2021) (No. 21-463).

Although we offer no view on whether abstention or dismissal of the action is appropriate at this juncture, should the district court decide that it is, it would enter an appropriate order. Similarly, if the district court were to resolve *Younger* in favor of federal court adjudication, it would be within the scope of this limited remand to entertain any appropriate motion, notably related to SB6, which would warrant revisiting the scope and basis for injunctive relief.

HAYNES, *Circuit Judge*, joined by STEWART, GRAVES, and COSTA *Circuit Judges*, dissenting:

Lost in the shuffle of the majority opinion is this case's bottom-line issue: in many circumstances, only those with money can get out of jail before trial. So, if you can pay for your crime of arrest, you're free. If you can't, you're not. That is the core of the problem presented here.[1]

Plaintiffs—a class of arrestees who can't pay—claim the bail system violates their due process and equal protection rights. Their arguments are supported by guarantees of individually determined bail enshrined in the Texas Constitution and by landmark Supreme Court opinions putting beyond all doubt that wealth-based detention is unconstitutional. But the majority opinion reframes the merits as jurisdictional issues and goes on to dismiss them. Then, without any party asking the en banc court to do so, the majority opinion remands on the question of abstention.

The majority opinion errs in its treatment of these issues and reaches holdings inconsistent with binding decisions from the Supreme Court, with undisputed fact-finding from the district court, and with basic logic. In the process, it overrules our precedents—precedents

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[1] As noted by the majority opinion, after the oral argument before the en banc court, the Texas Legislature passed a bill, signed into law by the Governor, which has commonly been called Senate Bill 6. *See* Act of August 31, 2021, 87th Tex. Leg. 2d C.S., S.B. 6. At the request of our court, the parties filed letter briefing about the statute, which goes into effect, for the most part, in January 2022. The parties do not agree on its interplay with the issues here, so I agree with the majority opinion that any impact of this bill on this case should, in the first instance, be assessed by the district court.

designed to protect people from being locked up just because they're poor. I respectfully dissent.

I. Background

A. *ODonnell*

To understand the situation presented in this case, we need to look at how we got here. Although this case is captioned as *Daves*, the majority opinion uses it to overrule much of the *ODonnell* cases, a series of decisions in which we addressed the constitutionality of Harris County's bail system and found it lacking.

In *ODonnell* I, we concluded that indigent misdemeanor arrestees are denied procedural due process and equal protection of the laws by automatic application of bond schedules without an individualized consideration of their ability to pay. *ODonnell v. Harris Cnty.*, 892 F.3d 147, 157, 161, 163 (5th Cir. 2018) ("*ODonnell I*").

We first concluded:

- that there was no need to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), because the pending criminal proceedings did not provide an adequate opportunity for arrestees to raise their constitutional claims, *ODonnell I*, 892 F.3d at 156-57;
- that the County Judges were acting as county policymakers in promulgating the bond schedule such that they and the county for which they worked could be sued under 42 U.S.C. § 1983, *see id.* at 155-56; and
- that the county sheriff could not create county liability under § 1983 because the sheriff did not set policy (the sheriff was

simply "legally obliged" to follow the judges' orders and warrants), *id.* at 156.

We then addressed the merits of the procedural due process and equal protection claims. As to procedural due process, we concluded that the plaintiffs had a state-created liberty interest in bail upon sufficient sureties—that is, in having bail considered in relation to a number of factors, ability to pay being only one. *See id.* at 157-58 (citing TEX. CONST, art. 1, § 11 ("All prisoners shall be bailable by sufficient sureties.")). We reasoned that, because the bond schedules were imposed "almost automatically" *without* consideration of other factors, the county's procedures violated the plaintiffs' due process rights. *Id.* at 158-61.

We reached a similar conclusion on the equal protection issue. We determined that the district court did not err in applying intermediate scrutiny, *id.* at 161-62 (citing *Tate v. Short*, 401 U.S. 395, 397-99 (1971), and *Williams v. Illinois*, 399 U.S. 235, 241-42 (1970)), and that, although counties have a compelling interest in setting conditions under which arrestees will show up for court dates, the procedures then in effect in Harris County were not narrowly tailored to achieve that interest, *id.* at 162. The bottom-line, we reasoned, was that a system that treats two otherwise identical arrestees differently "simply because [one] has less money" (as mechanical application of the bond schedule did) violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 163.

Consequently, we held, procedural reforms were necessary to ensure that arrestees have a hearing shortly after arrest to determine their financial status and to offer them an opportunity for non-cash bail, as the district court in that case had similarly concluded. *Id.* at

164-66. To help ensure that arrestees' rights were protected, we provided a model injunction that would require the defendants to abandon their automatic application of the bond schedule and to conduct an individualized review of each arrestee's ability to pay before setting a bail amount. *Id.*

ODonnell came back to our court two more times to address implementation questions concerning that model injunction. In *ODonnell II*, we clarified that *ODonnell I* did not allow for automatic release of indigent arrestees that were unable to post cash bail, and we stayed the district court's injunction to the extent it did so. *ODonnell v. Goodhart*, 900 F.3d 220, 22526, 228 (5th Cir. 2018) ("*ODonnell II*"). In *ODonnell III*, we declined to vacate that stay following the voluntary dismissal of the appeal.[2] *ODonnell v. Salgado*, 913 F.3d 479, 482 (5th Cir. 2019) (per curiam) ("*ODonnell III*"). But *ODonnell I*'s key holdings remained—automatic application of the bond schedule was unconstitutional, and plaintiffs were well within their rights to sue the judges who wrote the schedule to stop it.

B. Dallas County's Bail System

Dallas County's bail system is much like Harris County's. Per the district court's exhaustive (and unchallenged) fact-finding, the post-arrest system in Dallas County chiefly involves four entities:

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[2] The original defendants-appellants in *ODonnell* were voted out of office in 2018, and the newly elected judges moved to voluntarily dismiss the appeal. The new Harris County judges have since entered into a consent decree that contains materially similar requirements to the model injunction we provided in *ODonnell I*, among other provisions. *See* Consent Decree, *ODonnell v. Harris Cnty.*, No. 4:16-CV-1414 (S.D. Tex. Nov. 21, 2019) (Dkt. No. 708). That consent decree is obviously not at issue here.

- Criminal District Court Judges (the "District Judges");
- Dallas County Criminal Court at Law Judges (the "County Judges");
- Magistrate Judges; and
- the Dallas County Sheriff.

The Magistrate Judges routinely follow policies set by both the District Judges (who can fire the Magistrate Judges) and the County Judges (who cannot). *See* Tex. Gov't Code Ann. §§ 54.301, 305 (appointment and termination authority).

The Magistrate Judges are responsible for determining the conditions of release for arrestees in Dallas County, including the setting of bail. In exercising that responsibility, however, the Magistrate Judges rigidly follow preset secured bond schedules promulgated by the District Judges and the County Judges; in effect, the Magistrate Judges treat those schedules as binding. Per the district court, those schedules work "like a menu," with specified "prices" for release associated with "different types of crimes." The Magistrate Judges' bail determinations are, in turn, enforced by the Sheriff, who transports arrestees to and from the county jail and the judges' courtrooms. *Daves v. Dallas Cnty.*, 341 F. Supp. 3d 688, 692 (N.D. Tex. 2018).

Prior to February 2018, the Magistrate Judges did not consider an arrestee's ability to actually pay the applicable price on the menu at all when setting bail. In February 2018 (after this lawsuit was filed), the Magistrate Judges were instructed to start considering financial affidavits containing information on how much the arrestee could afford to pay. But that direction has not made a difference; the district court found as a question

of fact that the Magistrate Judges "still routinely treat the schedules as binding" even if they now also receive affidavits. Moreover, the Magistrate Judges apply the bond schedules at rote arraignment hearings where they merely: (1) call an arrestee by name; (2) tell the arrestee the crime he or she has been charged with; (3) state what price on the bail menu is associated with the arrestee's crime; and (4) ask the arrestee if he or she is an American citizen. That's it—most arraignments last under 30 seconds.

Unsurprisingly, the mechanical application of prescheduled prices affects rich arrestees differently than poor arrestees. Arrestees who can pay the scheduled bail amount can do so and be released. But those who cannot are kept confined until their first appearance before a judge—generally four to ten days after arrest for misdemeanor arrestees and several weeks or months after arrest for felony arrestees. Even at that first appearance, judges do not consider alternative conditions of pretrial release on their own accord; the arrestee must instead file a written motion and wait another week or more for a hearing to be scheduled on his or her continued detention. In short, the automatic application of the bond schedules keeps poor arrestees in jail—often for weeks or months—simply because they are poor, not because they present a greater risk to the public than rich arrestees.

As a result, poor arrestees are put in the position of having to plead guilty to misdemeanors and low-level felonies simply because doing so lets them walk free on time-served sentences. For those who do not plead out, however, it is an undisputed fact that they experience a range of other consequences solely because they cannot pay—by virtue of their detention, they face "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." Those who can pay can avoid most (if not all) of those consequences.

C. This Lawsuit

Turning to this lawsuit, Plaintiffs filed suit challenging Dallas County's bail system in January 2018 accompanied by motions for class certification and for a preliminary injunction. The district court conducted a hearing on the preliminary injunction motion, where it received live testimony from Defendants and various expert witnesses, reviewed video recordings of bail hearings, and considered thousands of pages of submitted declarations, academic studies, and records. Following the hearing, the district court certified Plaintiffs as a class, which the district court defined as "[a]ll arrestees who are or will be detained in Dallas County custody because they are unable to pay a secured financial condition of release."

The district court then issued a preliminary injunction, concluding that Plaintiffs were likely to succeed on their procedural due process and equal protection claims (but not on their substantive due process claim) because they were being detained solely on the basis of their indigency; that is, they could not pay the bail set by the mechanically applied bond schedules. *See ODonnell I*, 892 F.3d at 164-66 (outlining a materially similar model injunction). To redress those issues, the district court's injunction required various procedural reforms to the Dallas County bail system, including: that the judges not impose prescheduled bail amounts without considering individual arrestees' ability to pay; that the judges consider the arrestees' ability to pay within 48 hours of

arrest; that the District Judges and County Judges review bail decisions by the Magistrate Judges; and that the Sheriff not enforce detention orders made in violation of these conditions. The district court did not order that anyone conduct (or review) any substantive necessity findings prior to detention, nor that any pending or future state court prosecutions be stopped or altered on the merits. The case is now up on interlocutory appeal of the district court's injunction.

II. Discussion

Having just reviewed the undisputed facts of this case, two features of this litigation are obvious.

The first: nothing about the district court's injunction prevents the State from prosecuting Plaintiffs in any way. It merely orders a meaningful consideration of ability to pay as part of the pretrial detention process, something that Plaintiffs pointedly do not receive from the judges in Dallas County. Plaintiffs can still be charged, tried, convicted, and sentenced as before; all that the district court has ordered is that an arrestee's lack of assets not be the determining factor in whether they sit in jail throughout that process. Nothing affects the prosecutor's bottom line.

The second: the County Judges and the District Judges set the price that Plaintiffs must pay to gain release, making the Magistrate Judges feel compelled to charge that price in virtually every case—which the Sheriff must then enforce by keeping Plaintiffs in jail. All four actors work in tandem, the effect of which is the detainment of arrestees based solely on their wealth.

The majority opinion ignores these obvious features in its conclusions on municipal liability, state sovereign immunity, standing, and abstention—decisions that

divest a number of parties from the case. But wrongly so. All Defendants in this case can—and should—be included in the injunction. The County Judges and the District Judges set policies that are, in practice, the alpha and the omega of bail decisions in Dallas County—and the Sheriff is the backstop that keeps Plaintiffs in jail under those policies. They are all, therefore, proper parties in a case seeking to stop the routine practice of keeping poor arrestees in jail simply because they are poor.

A. Municipal Liability and State Sovereign Immunity

1. County Judges

The majority opinion concludes that the County Judges can assert state sovereign immunity. But they cannot. The County Judges are plainly county officials, incapable of asserting state sovereign immunity. Moreover, their conduct in promulgating the misdemeanor bond schedule is policymaking of the sort that can make Dallas County itself also liable.

i. County Officials

We must first determine whether the County Judges are county officials. The majority opinion concedes that sometimes they are county officials but puts them in the state-official bucket for this case. Interestingly, the County Judges' co-defendants—the District Judges—just come out and say it (with emphasis, no less): "The eleven [County] Judges … are elected county officials." I agree. They are *county* officials for both sovereign immunity purposes and for county liability purposes.

I recognize, of course, that state sovereign immunity under the Eleventh Amendment presents a different issue than county liability under § 1983—the first

concerns whether an individual is an arm of the state generally for constitutional purposes, while the second concerns whether an individual is a local policymaker "in a particular area, or on a particular issue" for statutory purposes. *See McMillian v. Monroe Cty., Ala.*, 520 U.S. 781, 785 (1997).

But the two matters are undeniably intertwined. Consider *McMillian*. "While *McMillan* arose in the context of whether a sheriff's decisions establish local policy for purposes of § 1983 and the Court did not discuss the Eleventh Amendment, the *obvious* implication is that the Eleventh Amendment applies once the sheriff is deemed a state officer." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 457 (7th ed. 2016) (emphasis added). Just as § 1983 decisions may invariably implicate the Eleventh Amendment, the inverse is also true—decisions regarding the Eleventh Amendment may invariably implicate § 1983. After all, both the Eleventh Amendment and § 1983 concern the categorization of individuals as state or local parties, and both require an assessment of state law in making that categorization.

Yet, the majority opinion concludes that our decision in *Hudson v. City of New Orleans*, 174 F.3d 677 (5th Cir. 1999), which set various factors for determining how to delineate state and local officials, has no bearing on this case because it arose in the context of the Eleventh Amendment. Majority Op. at 11-14 & n.5. In so concluding, the majority opinion misconstrues a statement from a footnote in *Hudson*—"While we look at the function of the officer being sued in the latter context, we do not in our Eleventh Amendment analysis." 174 F.3d at 682 n.l. This, of course, does not mean that the Eleventh Amendment analysis has no bearing on § 1983. Rather, because state official designation under the Eleventh

Amendment confers immunity for all purposes, whereas the state official designation under § 1983 confers immunity for only *some* purposes (like for the county sheriffs acting in their law enforcement capacity in *McMillian*), function only matters for § 1983. *Hudson* says nothing different and is certainly applicable to this case.

Our own court has previously considered these same arm-of-the-state factors for § 1983 county liability purposes. *See Flores v. Cameron Cnty.*, 92 F.3d 258, 264-69 (5th Cir. 1996). Yet, according to the majority opinion, *Flores* was superseded by *McMillian*, which was decided a year after *Flores* and made "clear … that reliance on those factors can be misleading" when deciding for whom an official is acting. Majority Op. at 12. Never mind that at least one of our sister courts recently considered these factors for § 1983 county liability purposes, s*ee Couser v. Gay*, 959 F.3d 1018, 1023, 1025-31 (10th Cir. 2020), and that *McMillian* did no such thing. Here's what *McMillian* says on considering how state law defines an actor (i.e., the first *Hudson* factor):

> This is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law.

McMillian, 520 U.S. at 786. This certainly doesn't suggest that "the *Hudson* factors are not controlling on our issue." Majority Op. at 11 n.5. Instead, *McMillian* is entirely consistent with *Hudson*—the *Hudson* analysis

does not stop at how state law treats the official but considers three other factors along the way.[3]

So, let's consider the *Hudson* factors: (1) whether state law treats the official as primarily local or as an arm of the state; (2) whether the official is paid from the local governmental unit; (3) whether the official has local autonomy—including whether it can hold property and sue and be sued in its own name;[4] and (4) whether the official is primarily concerned with local affairs. 174 F.3d at 681. Of those factors, it is "well established" that the second (source of funding) is "the most important." *Id.* at 682.

That funding question weighs heavily in favor of the County Judges being county officials here: unlike the District Judges (who are paid by the state), the County Judges are paid by the county. Tex. Gov't Code Ann. § 25.0593(c); *cf. id.* § 659.012(a)(1). The money also flows in the other direction, too; the fees they collect go straight into the county coffers. *Id.* § 25.0008. That

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[3] Of course, the en banc court is free to revise our previous decisions, but nothing in *McMillian* requires the court to do so. Nor would doing so be consistent with the intertwined nature of analyzing state sovereign immunity under the Eleventh Amendment and county liability under § 1983.

[4] We have sometimes described the ability to hold property and the ability to sue as separate factors, but those considerations more often than not crop up as manifestations of local autonomy. 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3524.2 (3d ed. 2018 & Update 2021) (acknowledging that courts sometimes discuss capacity to hold property and to sue as additional factors but noting that the "central factor[]" common to those considerations is "the degree of autonomy"). We have all but acknowledged as much by noting that they are typically analyzed "in a fairly brief fashion." *Hudson*, 174 F.3d at 681.

squarely puts them on the county official side of the line. *Hudson*, 174 F.3d at 682.

All the other factors also weigh in favor of them being county officials. Beyond the pay and fine aspects, state law treats the County Judges as local officials in a number of other ways. Unlike District Judges whose inter-term vacancies are filled by the Governor of Texas, vacancies of County Judges are filled by the County Commissioners Court.[5] *Id.* § 25.0009; *cf.* TEX. CONST. art. 5, § 28(a). Indeed, *Peden* (cited in the majority opinion), which held that the Governor's appointment was without authority, makes clear that this difference is "because of the distinct separation of county judges from judges of our other courts, state and district." State ex rel. *Peden v. Valentine*, 198 S.W. 1006, 1009 (Tex. App.—Fort Worth 1917, writ ref'd) (addressing a Tarrant County civil county court). The County Judges' statutorily close ties to the county do not end there; to take just a handful of examples, the County Commissioners Court can increase their salary, is in charge of providing their facilities and personnel, and can give them longer terms on the bench. *See* Tex. Gov't Code Ann. §§ 25.0005, .0010, .0016. If all that were not enough, Texas courts themselves also recognize that statutory county judges (like the County Judges here) are generally county officers. *See Peden*, 198 S.W. at 1008 (concluding that a statutory county judge is "a county officer as contradistinguished from a district judge or a state officer"); *see also Jordan v. Crudgington*, 231 S.W.2d 641, 646 (Tex. 1950) (concluding that judges of a court created for a single

[5] As is true in many states, judges in Texas are generally elected. But when a vacancy occurs during a judge's term, it has to be filled until the next election. The Governor does that for the District Judges; the Dallas County Commissioners Court does that for the County Judges.

county—like the County Judges here—are county officers). In short, state law definitively treats the County Judges as county-level officials.

The County Judges likewise have significant local autonomy in Dallas County. One need look no further than the facts of this case to reach that conclusion: exercising their local rulemaking powers under Texas Government Code § 74.093, the County Judges created a bond schedule that is, in practice, the final say on how much misdemeanor arrestees must pay to make bail in Dallas County.

The County Judges' primary area of concern is also local: their jurisdiction covers all misdemeanor offenses, but only within Dallas County. Tex. Gov't Code Ann. §§ 25.0593, 26.045. Obviously, state entities have to draw lines somewhere. But when those lines mirror county lines exactly,[6] one has to conclude that county-level affairs are the primary target.

The majority opinion focuses on Article V, section 1 of the Texas Constitution as providing that county

[6] There are a few statutory county judges who serve more than one county due to size, but the vast bulk are "county by county," and that is the limit of their authority. In any event, it does not matter that some *other* Texas judges serve multiple counties. The suggestion that the responsibilities of other judges inform whether *these* judges acted as county policymakers is at odds with *McMillian*'s admonition that the general responsibilities of a job are largely irrelevant to the policymaker inquiry. *See* 520 U.S. at 785. It is also irrelevant to the County Judges themselves, who serve only Dallas County—making it not at all strange to call them county policymakers insofar as they determine the amount of bail arrestees must pay in this county. Moreover, even if they served more than one county, there is no reason to think that a multi-county judge could not be a policymaker in whatever county or counties in which the judge sets a generally applicable bond schedule (or, for that matter, any other policy).

courts are "established by the constitution," which somehow makes them state actors. Of course, this citation overlooks the fact that the exact same paragraph also mentions Commissioners Courts, which are the Texas equivalent of a city council over the county. It is difficult to envision how anyone could term the Dallas County Commissioners as "state actors" when they run Dallas county. *Wichita Cnty. v. Bonnin*, 182 S.W.3d 415, 419 (Tex. App.—Fort Worth 2005, pet. denied) ("The Texas Constitution provides that the commissioners court 'shall exercise such powers and jurisdiction over all county business. …'" (quoting Tex. Const. art. V, § 18)). The same could be questioned about "justices of the peace" who are also mentioned in that same paragraph. Indeed, the Texas Constitution separates the discussion of county courts and county judges from district court and district judges.

Given that all these factors point in one direction, the answer is obvious: the County Judges are county officials.[7] They cannot assert state sovereign immunity

[7] The conclusion that parts of a state judicial system might include county-level officials is not revolutionary. We have, for instance, previously concluded that certain county-focused judicial structures cannot assert state sovereign immunity. *Skelton v. Camp*, 234 F.3d 292, 296-97 (5th Cir. 2000). So have other circuits. *See Chisolm v. McManimon*, 275 F.3d 315, 323-24 (3d Cir. 2001) (concluding that a set of county-level judges were not arms of the state); *Hyland v. Wonder*, 117 F.3d 405, 413-14 (9th Cir. 1997) (same); *see also Alkire v. Irving*, 330 F.3d 802, 812-13 (6th Cir. 2003) (indicating that a county court could not assert state sovereign immunity if its funding came from the county). Likewise, we and other circuits have also concluded that related entities intimately connected to courts cannot assert state sovereign immunity, including when the claims at hand arise in a carceral context. *See Flores*, 92 F.3d at 264-69 (holding that a juvenile probation board was a county agency for the purposes of county liability); *Crane v. Texas*, 766 F.2d 193, 194-95 (5th Cir. 1985) (per curiam) (holding that a Texas

and, as discussed below, can be appropriate officials for attaching municipal liability. *See Hudson*, 174 F.3d at 683.

ii. County Policymakers

The next question is just as important, at least insofar as its answer determines whether Dallas County itself should remain in the case: are the County Judges acting as county *policymakers* with respect to the bond schedule such that county liability can attach? Yes, they are.

As a preliminary point, the question of whether they are acting for the county here is resolved by the conclusion that they are county officials, but our analysis goes deeper. *Cf. Flores v. Cameron Cnty.*, 92 F.3d 258, 264-69 (5th Cir. 1996) (analyzing the county official state sovereign immunity factors in assessing whether an entity acted for the county for § 1983 county liability purposes). The majority opinion argues that we must determine whether the County Judges act for the county *in this particular context*, as local officials can sometimes act on behalf of the state if they are following some state law duty. *See McMillian v. Monroe Cnty.*, 520 U.S. 781, 784-

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sheriff was a county official); *Carter v. City of Philadelphia*, 181 F.3d 339, 347-55 (3d Cir. 1999) (holding that a DA's office was not an arm of the state for the purposes of claims arising from administrative and policymaking functions); *Kitchen v. Upshaw*, 286 F.3d 179, 184-85 (4th Cir. 2002) (holding that the Virginia Regional Jail Authority was a county agency for the purposes of a due process claim); *Streit v. Cnty. of Los Angeles*, 236 F.3d 552, 566-67 (9th Cir. 2001) (holding that the Los Angeles Sheriff's Department was not an arm of the state for the purposes of municipal liability).

There is, in other words, no "courts exception" to the arm of the state analysis.

85 (1997); *see, e.g.*, *Esteves v. Brock*, 106 F.3d 674, 677-78 (5th Cir. 1997).

The majority opinion then suggests that the County Judges are acting on behalf of the state. However, its apparent conclusion on that point rests on a flawed assumption about the nature of the challenged conduct: that the County Judges are merely setting bail per state law. *See* Tex. Code Crim. P. arts. 15.17, 17.15, 17.031(a). But that's not what the County Judges are doing—they're issuing generally applicable bond *schedules*, not holding bail hearings. Look high and low in the statutes cited by the majority opinion, there is no state directive on that.

So where does the County Judges' ability to issue bond schedules come from? They tell us that they're promulgating a local rule about how much bail all misdemeanor arrestees have to pay in their jurisdiction. *See* Tex. Gov't Code Ann. § 74.093 (allowing them to promulgate local rules). But that is not a state-imposed duty; Texas law *lets* them issue local rules, it does not *require* them to do so—and it certainly does not require them to issue local rules that set the bail applicable to every misdemeanor case that comes in the door.[8] Tex. Gov't Code Ann. § 74.093. So, when they promulgate local rules regarding bail for misdemeanor arrestees, they act on their own initiative. Since they are county officials while

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[8] I do not comment on whether a bond schedule is in fact a permissible local rule as a matter of state law. Nor do I comment on whether local rules generally constitute county policies.

I merely conclude that the County Judges have created county policy by purporting to issue a local rule that governs the bail set by other judges.

doing so, they cannot be reasonably described as acting on behalf of the state.

So, they are county officials acting on behalf of the county—but are they also engaged in *policymaking*? Yes. To be sure, most of the time and in most contexts, they are not; their primary job is to decide cases and controversies, a classic judicial function. *See Johnson v. Moore*, 958 F.2d 92, 93-94 (5th Cir. 1992); *see also*, *e.g.*, *Adams v. Governor of Del.*, 922 F.3d 166, 178-79 (3d Cir. 2019), *rev'd on other grounds and vacated sub nom. Carney v. Adams*, 141 S. Ct. 493 (2020). But the question here is conduct-specific. The operative inquiry focuses on whether, as a practical matter, the judges act as policymakers *in this particular context*—not whether the judges act as policymakers for Dallas County "in some categorical, 'all or nothing' manner." *McMillian*, 520 U.S. at 785. The question is simply whether they set policy "in a particular area, or on a particular issue." *Id.* Thus, we need not "make a characterization … that will hold true for every type of official action the [judges] engage in"—we must simply determine whether the County Judges are county policymakers with respect to the specific conduct at issue in this case. *Id.*

With that framing, the specific conduct at issue here—setting a bond schedule for *others* to apply and then acquiescing in its rigid application—is policy-setting conduct that is not undertaken in the County Judges' judicial capacity. Judges typically act beyond their judicial capacities (and thereby can both act as policymakers *and* be directly enjoined under § 1983) whenever their conduct is untethered from any particular "controversy which must be adjudicated." *Sup. Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 731 (1980) (internal quotation marks and citation

omitted); *cf. Davis v. Tarrant Cnty.*, 565 F.3d 214, 227 (5th Cir. 2009) (noting that acts taken in a judicial capacity do not create county liability). Consistent with these principles, in *Davis*, we identified a four-factor test for determining whether conduct is judicial in nature, looking to whether the conduct at issue: (1) is "a normal judicial function"; (2) "occurred in the courtroom or appropriate adjunct spaces"; (3) "centered around a case pending before the court"; and (4) "arose directly out of a visit to the judge[s] in [their] official capacity."[9] 565 F.3d at 222. We have likewise identified that issuing general orders regarding how to process stages of litigation does *not* qualify as a judicial act. *Id.* at 222 & n.3 (citing for that proposition *Morrison v. Lipscomb*, 877 F.2d 463, 465-66 (6th Cir. 1989)).[10]

Balancing the *Davis* factors, the County Judges were not engaged in judicial conduct here because they were merely directing other judges in a manner divorced from any given case. First, it is indisputable that setting bail in a particular case is a normal judicial function in the abstract. *See Garza v. Morales*, 923 S.W.2d

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[9] Texas state courts apply essentially the same test. *James v. Underwood*, 438 S.W.3d 704, 710 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (per curiam).

[10] The majority opinion notes that only the first factor is relevant because there are some "factual situations in which it makes sense not to consider multiple factors but just to focus on an overarching point." Majority Op. at 23 (footnote omitted). I disagree. Suggesting that factors can be ignored in some factual situations is an unworkable standard. Of course, as in any test where factors are weighed, some factors may weigh more heavily in a particular situation; but that doesn't mean that some factors should not even be considered. In my view, courts should apply all the factors and then reach a decision, as we have done previously. *See, e.g., Ballard v. Wall*, 413 F.3d 510, 515-16 (5th Cir. 2005).

800, 803 (Tex. App.—Corpus Christi, 1996, no writ). But it is not a normal judicial function *for the County Judges* to set generic bail for the Magistrate Judges, who are the ones who generally set conditions of release in Dallas County's bail system. S*ee Ex parte Clear*, 573 S.W.2d 224, 229 (Tex. Crim. App. 1978) (en banc) (noting that Magistrate Judges can have "[s]ole jurisdiction" over bail determinations in some circumstances). Second, nothing indicates that the bond schedules were prepared by the County Judges in the Magistrate Judges' chambers or any other "adjunct" spaces to the Magistrate Judges' courtrooms. *Davis*, 565 F.3d at 222. Perhaps most significant are the third and fourth factors: setting a generally applicable bond schedule is definitively not "centered around" any individual case and does not, as a consequence, result "directly out of a visit" to the County Judges in any sort of judicial capacity. *Id.* Considering these factors, the County Judges are not acting in a judicial function in this context; they are setting policy on how others should process cases. *Id.*; *see Consumers Union*, 446 U.S. at 731; *Morrison*, 877 F.2d at 465-66 (concluding that a presiding judge was acting in an administrative capacity when issuing a general moratorium on writs of restitution because doing so was a "general order, not connected to any particular litigation").

That conclusion flows naturally from how the County Judges actually act with respect to the Magistrate Judges. The district court found as a factual matter (which has not been challenged) that the County Judges issue the schedules that the Magistrate Judges "routinely treat … as binding."

The majority opinion overlooks that this is a factual finding and makes its own factual finding that the County Judges are somehow removed from the Magistrate Judges' work. That is not what the district court

found. That is, the schedules are applied as a matter of course across every applicable case in Dallas County. There is no indication that the bond schedules were issued to resolve any particular matter or, indeed, that they even appear on any specific criminal dockets. Because the Magistrate Judges mechanically follow their generally applicable bond schedules,[11] they are acting, in practice, as "the final authority" and "ultimate repository of county power" when it comes to the bail amounts misdemeanor arrestees must pay in Dallas County. *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980). That makes them county policymakers.

The County Judges attempt to analogize this case to *Davis* itself. In doing so, they correctly note *Davis*'s conclusion that certain conduct "inextricably linked" to specific cases falls on the judicial side of the judicial-policymaking line. 565 F.3d at 226. But *Davis* does not support their position that all "general guidelines for processing criminal cases" are judicial in nature. *Davis* merely concluded that selecting attorneys for an appointed counsel list was a judicial act and, even then, only because those decisions "functionally determine which attorney actually will be appointed in a particular case." *Id.* at 225-26. No such link exists between the bond schedules and individual cases here—there is, for instance, no evidence that the judges issued the schedules because they wanted *specific defendants* to pay a

[11] The majority opinion again engages in its own fact-finding here, taking issue with the district court's findings and issuing its own "reasonable prediction" regarding the treatment of bail schedules. Majority Op. at 29-30. The district court considered the proffered facts and made a different factual finding to which we should defer. Deciding what people are thinking is quintessential district court-level fact-finding not speculation for appellate courts to decide.

particular bail amount in the same way that the *Davis* judges wanted specific attorneys to appear in their courtrooms. Rather, the bond schedules were generally promulgated policies—policies which, as the majority opinion acknowledges, were set by judges other than the judges that actually executed the policies. *See* Majority Op. at 23 ("[I]n *Davis*, the judges establishing the procedure were also the ones appointing counsel. Here, the bail schedules were created by judges other than those who would later set bail for individual arrestees.").

The bottom line is that we have county officials, who are paid by the county, creating local rules that only apply to the county in which they sit. They are not acting under a state law duty or in a judicial capacity. They are county policymakers. *See ODonnell I*, 892 F.3d at 155-56. Accordingly, they can be enjoined with respect to their bond schedules, and for the same reasons, Dallas County is liable for their conduct.

2. District Judges

The District Judges are subject to a different analysis, given some differences in state law applicable to them. I agree that they are state officials rather than county policymakers, but they are nonetheless subject to the same ultimate conclusion: they can be prospectively enjoined in this case.

I, therefore, do not disagree with the majority opinion on the point that the District Judges are arms of the state, generally capable of asserting state sovereign immunity. Indeed, our case law suggests the same. *See Davis*, 565 F.3d at 228 (suggesting that state district judges like the District Judges are arms of the state); *Warnock v. Pecos Cnty.*, 88 F.3d 341, 343 (5th Cir. 1996) (same).

However, the fact that they are state officials does not exempt them from this case. That is because state sovereign immunity does not block the sort of injunctive relief sought here; the District Judges can be prospectively enjoined for their violations of federal law under the doctrine laid out in *Ex parte Young*, 209 U.S. 123, 157 (1908). *See Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 515-16 (5th Cir. 2017).[12]

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[12] The Supreme Court recently issued a decision in *Whole Woman's Health v. Jackson*, No. 21-463, 2021 WL 5855551 (U.S. Dec. 10, 2021), which concerned a pre-enforcement challenge to a Texas law (S.B. 8) wherein the plaintiffs sought to enjoin state court judges and their clerks from hearing or docketing cases seeking to enforce S.B. 8. The Court explained that state court judges "normally" may not be enjoined under *Ex parte Young* because they typically "do not enforce state laws as executive officials might." *Id.* at *5. Instead, when "a state court errs in its rulings" in a particular case, "the traditional remedy" is to appeal that decision. *Id.*

Whole Woman's Health concerns a wholly different part of *Ex parte Young* and does not alter that analysis, here. In *Whole Woman's Health*, the state court judges had no relation to S.B. 8—they neither created nor enforced it. The bond schedules at issue in this case, however, were promulgated by judges, not the legislature, and they are enforced by judges, not private citizens or executive officials. Moreover, because the promulgation of the bond schedule is unlinked to any particular case (and is enforced by judges that didn't even create it), the "traditional remedy" of an appeal is unavailable and the traditional role of judges is not in play.

This case is more in line with *Shelley v. Kraemer*, 334 U.S. 1 (1948), which recognized that when state courts enforce rules "formulated by those courts" and such rules violate constitutional rights, those courts may be stopped from continued enforcement. *Id.* at 17, 20. The *Whole Woman's Health* Court did not overrule *Shelley v. Kraemer*; it instead explained that that case was different because it did not involve a pre-enforcement action and constitutionality was used as a defense. *Whole Woman's Health*, 2021 WL 5855551, at *7. In other words, S.B. 8 presented a different context because the violators of the law had not yet been sued and had therefore not faced

The requirements are straightforward: for *Ex parte Young* to permit a suit against otherwise immune state officials, a plaintiff must sue them in their official capacities, allege an ongoing violation of federal law, and seek relief that properly can be characterized as prospective. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). Any official who has "some connection" to enforcement of the alleged violation of federal law is amenable to suit. *Ex parte Young*, 209 U.S. at 157. To have such a connection, we have said that plaintiffs need only demonstrate that, in exercising official duties, the official "constrain[s]" the plaintiffs' rights in some way.[13]

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conduct to which they could raise constitutionality as a defense. This case is different. The Plaintiffs here were actually (and unconstitutionally) detained for wealth-based reasons. The unconstitutional practice was promulgated by judges and is enforced by judges. Consistent with *Shelley v. Kraemer*, state court judges may be enjoined for their independently unconstitutional acts. *Whole Woman's Health* presents no issue.

[13] This is getting old to say, but our circuit's case law on what constitutes "some connection" to enforcement for *Ex parte Young* purposes is hardly a paragon of clarity. *See*, e.g., *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) ("This circuit has not spoken with conviction about all relevant details of the 'connection' requirement."), *cert. denied*, 141 S. Ct. 1124 (2021) (mem.); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) ("The precise scope of the 'some connection' requirement is still unsettled. …"); *City of Austin v. Paxton*, 943 F.3d 993, 999 (5th Cir. 2019) ("What constitutes a sufficient 'connection to … enforcement' is not clear from our jurisprudence." (quoting *Ex parte Young*, 209 U.S. at 157)), *cert. denied*, 141 S. Ct. 1047 (2021) (mem.).

As a general matter, I am skeptical that our various probing—and jurisdictional—"some connection" tests are consistent with the Supreme Court's articulation of *Ex parte Young* as a "straightforward inquiry" that is satisfied so long as the complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md.*, 535 U.S. at 645 (quotation omitted). In particular, our heavy use of redressability related questions

Air Evac, 851 F.3d at 519; *see also K.P. v. LeBlanc*, 729 F.3d 427, 439 (5th Cir. 2013). That requirement is plainly satisfied.

Specifically, this case is akin to our court's decision in *Air Evac*, in which we concluded that a set of state officials had constrained a plaintiff's rights by setting a particular reimbursement rule applicable to the plaintiff that the officials could, in turn, police through a pseudo-appeal process. 851 F.3d at 519. That is, although the officials did not "direct[ly] enforce[]" their rule, they could be prospectively sued simply because they were practically able to "effectively ensure the … scheme is enforced from start to finish." *Id.*

The same analysis applies here. The District Judges have used their local rule setting authority, Tex. Gov't Code Ann. § 74.093(c), to issue a bond schedule that in practice controls their subordinates. It is clear from

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in the state sovereign immunity inquiry strikes me as both redundant to our well-established approach to standing and, more to the point, irrelevant to whether the case is in substance a suit against a sovereign entity. *Cf. Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1256 (11th Cir. 2020) (noting that the "some connection" test is less demanding than the standing inquiry). It seems to me that the better approach would be to leave much of that analysis to a causation question on the merits—as applicable here, whether the named defendant "subject[ed], or cause[d] to be subjected" the plaintiffs to a violation of their rights under federal law—rather than frontload it all into an attempt to discern whether the state's sovereign interests are impacted by the litigation. 42 U.S.C. § 1983; *see Verizon Md.*, 535 U.S. at 646 (emphasizing that merits analyses are not appropriate in the state sovereign immunity inquiry).

Even so, we need not clarify our "some connection" approach in this case; it is plain that the District Judges have a sufficient connection to the enforcement of their own, binding bond schedule to be amenable to suit under our precedents. *See Air Evac*, 851 F.3d at 515-16.

both Plaintiffs' complaint and from the district court's fact-finding that the District Judges effectively ensure that their schedule is applied. The schedule is, per the complaint, the "exclusive means" for determining pretrial release and is, per the district court, "binding" on the Magistrate Judges. Setting a binding schedule that the relevant decisionmakers do not deviate from is enough to constrain the rights of indigent arrestees like Plaintiffs for *Ex parte Young* purposes. That a different group—the Magistrate Judges—directly enforce the bond schedule is not determinative. *Air Evac*, 851 F.3d at 519. Notably, we are not talking about enjoining the District Judges from hearing cases or telling them how to determine a particular case, so those types of situations are not in play here.

If the actual alleged (and proven) facts of this case were not enough, the District Judges' ability to effectively ensure that their bond schedule is applied is also obvious from the control they exercise over the Magistrate Judges under state law. As a general matter, the Magistrate Judges follow the District Judges' lead across the board: the Magistrate Judges are "surrogate court officer[s]" whose role is "to assist the district judge." *Madrid v. State*, 751 S.W.2d 226, 229 (Tex. App.—El Paso 1988, pet. ref'd). The Magistrate Judges' decisions depend on "active or tacit finalization" by the District Judges. *Id.* at 228. Even when explicitly referred a matter, the Magistrate Judges "have no power of their own" and their orders are only "legally binding" if "adopted by the referring court." *Kelley v. State*, 676 S.W.2d 104,107 (Tex. Crim. App. 1984); *accord Omura v. State*, 730 S.W.2d 766, 767 (Tex. App.—Dallas 1987, writ ref'd) ("[A] magistrate acts only as the agent of the district court, under *proper supervision* by the court."); *see generally* Tex. Gov't Code Ann. § 54.308. Further,

although the District Judges are correct that the Texas Court of Criminal Appeals has given more significant discretion to Magistrate Judges on bail issues (at least until another judge assumes jurisdiction over a case), it is plain that, notwithstanding that authority, the Magistrate Judges *here* follow the District Judges' marching orders on the subject.

The District Judges thus have both the power to "effectively ensure" that their bond schedule is enforced and have, as a matter of undisputed fact, actually ensured that the specific prices they have set are enforced. *AirEvac*, 851 F.3d at 519. That makes them proper *Ex parte Young* defendants.

The District Judges try to distance themselves from that conclusion by asserting that they don't control every step the Magistrate Judges take. After all, they note, the schedule is technically called a guideline and, what's more, the Magistrate Judges continue to simply follow the schedule even after the District Judges told them to also evaluate financial affidavits. But those arguments are put firmly to rest by the Plaintiffs' allegations (and, for that matter, the district court's fact-finding): whatever label the District Judges put on the schedule—and even though they have added the affidavits as an additional step in the process—the specific prices on the schedule are plainly binding in practice.

Yet, the majority opinion buys the District Judges' argument, essentially concluding that state officials can duck responsibility simply by calling their *actually binding* policies mere recommendations. The majority opinion questions "how the District Judges' and County Judges' promulgations of the non-binding bail schedules would predictably cause the Magistrate judges to *treat* the schedules as binding." As if something called a

recommendation could never be intended and treated as a requirement. Indeed, the majority opinion flatly disregards Plaintiffs' allegations (not to mention, the district court's fact-finding) that the District Judges' "recommended" schedule was nothing of the sort. *Cf. Verizon Md.*, 535 U.S. at 646 (emphasizing that an allegation of an ongoing violation of federal law is sufficient; no "analysis of the merits of the claim" is necessary). But the majority opinion's conclusion also poses a deeper problem by injecting a perplexing formalism into the equation: per the majority opinion, state officials can now wash their hands of their actual connection to enforcement just by calling their directives advisory—even when plaintiffs allege (and a federal district court finds as a matter of fact) that the directive actually governs how others act. That cannot be the law and, in fact, is not the law. So long as plaintiffs plausibly allege that the state officials "constrain" their rights in the exercise of their official duties, it does not matter what label the officials slap on their stationery. *AirEvac*, 851 F.3d at 519.

All this squares up: whether or not the District Judges can assert state sovereign immunity, they can be prospectively enjoined under *Ex parte Young*. That does not necessarily answer, however, whether the *specific* injunctive relief sought here is appropriate, a subject on which the District Judges launch a bevy of arguments. But, like their general complaints, these also fail. In particular, the District Judges assert that the district court cannot require them to review bail decisions (which they contend would violate state law); change the bond schedule (which they contend is an inappropriate order to affirmatively regulate); or instruct the Magistrate Judges to assess arrestees' ability to pay (which they contend is an improper directive to comply with

state law). The District Judges are wrong on all three points.

On the first point (reviewing bail decisions), it is true that, under Texas law, bail decisions are sometimes left to the "sole jurisdiction" of the Magistrate Judges—such as when those judges hear the matter in the first instance. *See Ex parte Clear*, 573 S.W.2d at 229. It is likewise true that directing the District Judges to review challenged Magistrate Judge bail decisions (as the district court did) would appear to require them to assume some jurisdiction over the bail process, at least in part. But, as the District Judges elsewhere acknowledge, that's something the District Judges *can already do*; as they put it, they are already empowered to "consider a motion to *reduce* [Plaintiffs'] bail." *See*, *e.g.*, *Ex parte Williams*, 467 S.W.2d 433, 434 (Tex. Crim. App. 1971). So, directing them to do so here does not require any violation of state law—it merely requires them to exercise authority they already have. Indeed, to the extent there are any lingering *Younger* concerns, that direction is also minimally intrusive; the District Judges' review need not even result in a written decision. The district court's direction is therefore permissible under *Ex parte Young*. *See Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 55-56, 58 (1991).

On the second point (altering the bond schedule), the District Judges make much of the general principle that the federal government lacks the ability to require affirmative state regulation on a topic. But the cases they cite for that proposition are about commandeering state enforcement authorities to create policies in the service of accomplishing some statutory goal, not about federal court involvement in rectifying self-evident constitutional violations. *See Nat'l Fed'n of lndep. Bus. v. Sebelius*, 567 U.S. 519, 577-78 (2012); *Murphy v. NCAA*, 138

S. Ct. 1461, 1477 (2018); *Mi Familia Vota v. Abbott*, 977 F.3d 461, 469 (5th Cir. 2020). That distinction dooms the District Judges' argument; contrary to the District Judges' intimations otherwise, injunctions requiring affirmative steps to safeguard constitutional rights fall squarely within the equitable powers of the federal courts.[14] As this court has previously explained, correcting Fourteenth Amendment violations in particular often requires state officials to change their policies, and so a court is empowered to "exert its equitable power to prevent repetition of the violation … by commanding measures that safeguard against recurrence." *Ruiz*

[14] *See, e.g.*, *M. D. by Stukenberg v. Abbott*, 907 F.3d 237, 276-79, 282-83 (5th Cir. 2018) (concluding that a federal court could require a state foster care system to implement training, investigative, reporting, and computer systems policies); *Ruiz v. Estelle*, 679 F.2d 1115, 1155-56 (Former 5th Cir. 1982) (concluding that a federal court could require a state prison system to record all disciplinary hearings, preserve those recordings, and make them available to inmates), *modified on other grounds*, 688 F.2d 266 (Former 5th Cir. 1982); *Ciudadanos Unidos de San Juan v. Hidalgo Cnty. Grand Jury Comm'rs*, 622 F.2d 807, 82830 (5th Cir. 1980) (concluding that a federal court could require local jury commissioners to formulate policies to ensure that indigent individuals, among other groups, were adequately represented in grand jury pool); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-20 (1971) (requiring a state public school district to implement a busing policy to rectify an equal protection violation and noting that a federal court's power to enter such injunctive relief "does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right"); *Jones v. Tex. Dep't of Crim. Just.*, 880 F.3d 756, 759-60 (5th Cir. 2018) (per curiam) (concluding that a federal court could require a prison to provide an inmate with less sugary meals); *Gates v. Cooke*, 376 F.3d 323, 339-40 (5th Cir. 2004) (concluding that a federal court could require a prison to adopt a policy providing fans, ice water, and daily showers to inmates under certain conditions); *Miller v. Carson*, 563 F.2d 741, 751 (5th Cir. 1977) (concluding that a federal court could require a prison to adopt a policy allowing inmates to exercise outdoors).

v. Estelle, 679 F.2d 1115, 1156 (Former 5th Cir. 1982), *modified on other grounds*, 688 F.2d 266 (Former 5th Cir. 1982). The district court's order is plainly permissible under that framing. Indeed, the order does not even direct any defendant to create any new affirmative policies, it just requires defendants to alter their *existing* policies—including, specifically, an existing bond schedule the District Judges have already issued—to conform them to the requirements of federal law. That is the sort of prospective relief available under *Ex parte Young*. *See Verizon Md.*, 535 U.S. at 645.

Same with the third point (directing the Magistrate Judges to consider ability to pay). The District Judges assert that such relief is inappropriate because state law already requires the Magistrate Judges to take into consideration an arrestee's ability to make bail. *See* Tex. Code Crim. P. art. 17.15(4). It is true that federal courts cannot prospectively enjoin state officials to comply with state law under *Ex parte Young*. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). But that's not what Plaintiffs are asking for; they want the District Judges to direct the Magistrate Judges to consider their ability to pay because the *Fourteenth Amendment* requires it. That the same relief could also be available under state law is immaterial. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 439 (2004); *see also Tex. Democratic Party*, 961 F.3d at 401 (emphasizing that an attempt to prevent conduct that "violate[s] the Constitution" is not an attempt to enforce state law).

In short, even if the District Judges are state officials, they can be prospectively enjoined under *Ex parte Young* in connection with their promulgation of the bond

schedule and their acquiescence to its mechanical application on the part of the Magistrate Judges.[15]

B. Standing

Plaintiffs have satisfied the concrete injury, traceability, and redressability requirements to establish standing against all Defendants. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

The analysis is simple. Plaintiffs as a class are continuously injured by being detained solely based on their inability to pay. So, the concrete injury requirement is met. *McLaughlin*, 500 U.S. at 50-51. It is an unchallenged fact that the bond schedules the County Judges and District Judges issue—which the Magistrate Judges and the Sheriff in turn enforce—are the but-for reason that Plaintiffs receive that treatment. So, traceability is met. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). Enjoining the Defendants to change how the schedules are enforced would stop this systemic injury. So, redressability is met. *McLaughlin*, 500 U.S. at 51.

Importantly, the County Judges' and District Judges' schedules are not just given "virtually determinative effect"—they are given *actually* determinative effect by the Sheriff and the Magistrate Judges. *Bennett v. Spear*, 520 U.S. 154, 170 (1997). Plaintiffs therefore have standing against all of them.

C. Abstention

We've arrived at the final issue—*Younger* abstention—which the majority opinion relies upon heavily

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[15] Because the majority opinion reaches no conclusion on the Sheriff, *see* Majority Op. at 27, I will not address her "classification" here either.

even though no party had briefed it to the en banc court.[16] That simple fact should end the discussion: a party abandons an argument by failing to present it in en banc briefing, regardless of whether the party had previously raised it at some other stage of litigation. *Coke v. Gen. Adjustment Bureau, Inc.*, 640 F.2d 584, 586 n.2 (5th Cir. Mar. 1981) (en banc) ("[The party] has not renewed this argument in his briefs to the en banc court, and we therefore consider the argument to have been abandoned."); *see also Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union*, 468 U.S. 491, 500 n.9 (1984) (reasoning that, when a state party fails to "press [a] *Younger* abstention claim" on appeal and submits to the court's jurisdiction, it effectively "agree[s] to … adjudication of the controversy" such that comity concerns "are not implicated"); *Tex. Ass'n of Bus. v. Earle*, 388 F.3d 515, 519 (5th Cir. 2004) (noting that *Younger* arguments can be waived even if the doctrine would otherwise apply). It should go without saying that resuscitating an abandoned argument, as the majority opinion does, is directly contrary to "our adversarial system of adjudication" and "the principle of party presentation."[17]

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[16] Because the majority opinion remands on *Younger* and subtracts a number of defendants, it does not reach the merits of the preliminary injunction. I will not, therefore, spend much time on the merits other than to say that I continue to conclude that *ODonnell I* was correctly decided and would affirm the district court's injunction for the reasons set forth in the district court's opinion.

[17] Of course, we are required to address subject matter jurisdiction because it cannot be waived. But our precedents firmly establish that *Younger* abstention is non-jurisdictional. *Weekly v. Morrow*, 204 F.3d 613, 615 (5th Cir. 2000). The majority opinion does not claim to be overruling our holdings on that score, so I am at a loss as to why we would raise this abstention issue sua sponte, even if it is theoretically in our power to do so. *Cf. Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976) (noting merely that *some* abstention

United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020); *see also Rollins v. Home Depot USA*, 8 F.4th 393, 398 (5th Cir. 2021) ("Courts should not selectively address forfeited arguments just because they have sympathy for a particular litigant."). That should end the matter.

The majority opinion nonetheless "sall[ies] forth" on its own initiative.[18] *Sineneng-Smith*, 140 S. Ct. at 1579 (quotation omitted). But even if we consider the merits of this argument, it fails. Our—and more importantly, the Supreme Court's—precedents make it plain that *Younger* abstention is entirely inappropriate here. Abstention is only appropriate if the case requires (1)

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doctrines "*may*" be raised sua sponte (emphasis added)). *But see E. Martin Estrada, Pushing Doctrinal Limits: The Trend Toward Applying* Younger *Abstention to Claims For Monetary Damages and Raising Younger Abstention Sua Sponte on Appeal*, 81 N.D. L. REV. 475, 476 (2005) (describing "[s]ua sponte application of *Younger* abstention" as "suspect," noting that "the Supreme Court has not directly addressed the issue of whether *Younger* abstention can be raised sua sponte on appeal," and emphasizing that such a step "rests on shaky ground—obiter dictum in [*Bellotti*] that is not at all concerned with *Younger* abstention").

That's especially so because the principle the majority opinion surely attempts to vindicate—respect for the state courts—has been abandoned in this case by the very parties most acutely connected to that interest: state court judges. *See Brown*, 468 U.S. at 500 n.9. Since they no longer brief the claim that *Younger* is implicated here, why should we?

[18] The majority opinion proceeds on its own initiative, even though the offices of Defendants' counsel are "chock-full of excellent attorneys." *Lucio v. Lumpkin*, 987 F.3d 451, 506 (5th Cir. 2021) (en banc) (Haynes, J., dissenting), *cert. denied*, No. 21-5095, 2021 WL 4822723 (U.S. Oct. 18, 2021) (mem.). Although we liberally construe pro se briefs, we do not make arguments for those litigants, so we really do not need to make arguments here on behalf of well-represented parties.

interference with an "ongoing state judicial proceeding" (2) that "implicate[s] important state interests" and (3) that offers an "adequate opportunity" to "raise constitutional challenges." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *see Younger*, 401 U.S. at 43-49. Specifically, the first and third conditions for triggering *Younger* are plainly not met in this case.

As to the first, general-purpose procedural safeguards (like those ordered by the district court) do not directly interfere with any particular criminal proceeding. *Pugh v. Rainwater*, 483 F.2d 778, 782 (5th Cir. 1973) (concluding that a challenge to "pre-trial procedural rights" did not interfere with "any state prosecution *as such*"), *rev'd on other grounds sub nom. Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975) (reversing on the merits but likewise concluding that abstention was not required because the requested injunction's procedural reforms requiring probable cause hearings were "not directed at the state prosecutions as such"); *see ODonnell I*, 892 F.3d at 156-57; *see also Tarter v. Hury*, 646 F.2d 1010,1013-14 (5th Cir. Unit A June 1981) (concluding that "nondiscretionary procedural safeguard[s]" did not interfere with a criminal proceeding).

As to the third, the Supreme Court has told us that state criminal proceedings (like the ones Plaintiffs face) generally do not offer adequate opportunities to raise concerns about the constitutionality of pretrial detention processes. As the Supreme Court explained in *Gerstein*, "the legality of pretrial detention without a judicial hearing" almost universally cannot "be raised in defense of the criminal prosecution." 420 U.S. at 108 n.9. There can be no serious debate that the same point holds true here; plainly, unconstitutional pretrial detention is not a

defense to, say, a theft charge. *See generally* Tex. Penal Code Ann. § 31.03. Under the Supreme Court's reasoning in *Gerstein*, then, Plaintiffs lack an adequate opportunity to raise their detention challenges in the proceedings they are facing. *See* 420 U.S. at 108 n.9.

These authorities—especially the Supreme Court's Gerstein opinion—put beyond doubt that *Younger* abstention is completely unwarranted. The cases relied upon in the majority opinion are not to the contrary because the Supreme Court's decision in *O'Shea* and our decision in *Tarter*, are both distinguishable.

O'Shea v. Littleton, 414 U.S. 488 (1974), involved more than just bail setting, it also involved issues at other stages of the proceedings, including allegedly discriminatory sentencing and jury fee practices (some by a county attorney's office), all of which the district court would have to review *on the merits*. *See id.* at 491-92; *Littleton v. Berbling*, 468 F.2d 389, 392-93 (7th Cir. 1972) (underlying case summarizing the challenged conduct). Moreover, *O'Shea* suggested that the plaintiffs in the case had an adequate opportunity to present their claims in the proceedings themselves through, for example, appealing any racially discriminatory sentences. 414 U.S. at 502. Certainly, *O'Shea* stands for the proposition that beginning-to-end federal supervision of the state courts is inappropriate. But it is clear that more limited procedural challenges to a pretrial detention regime (as in this case) can proceed in federal court; after all, *Gerstein*—decided the year after *O'Shea*—specifically held that requests for probable cause hearings do not require abstention. *Gerstein*, 420 U.S. at 108 n.9.

Indeed, our decision in *Tarter* elucidates that line. To be sure, *Tarter* concluded that a federal district court should abstain from reviewing *the merits* of excessive

bail claims while an arrestee is being detained (a holding the majority opinion emphasizes)—but *Tarter* also concluded that a federal court is well within its rights to consider requests for "nondiscretionary procedural safeguard[s]" (a holding the majority opinion ignores). 646 F.2d at 1013-14. Nothing about the district court's injunction in this case requires the district court to review *the merits* of any bail determination—at most, it requires Defendants to take certain nondiscretionary procedural steps (providing affidavits for arrestees to fill out, giving them hearings, and considering their ability to pay) and then provide the district court with a list of arrestees who have not received those safeguards. All of those requirements are consistent with *Tarter*.

The majority opinion's determination to ignore *Gerstein* and apply inapposite authority is, of course, problematic in its own right. But the majority opinion's *Younger* holding *also* breaks with the First, Third, Ninth, Eleventh, and D.C. Circuits, all of which have correctly held that abstention is inappropriate in the pretrial detention context in light of *Gerstein*. *Fernandez v. Trias Monge*, 586 F.2d 848, 851-54 (1st Cir. 1978); *Stewart v. Abraham*, 275 F.3d 220, 225-26 (3d Cir. 2001); *Arevalo v. Hennessy*, 882 F.3d 763, 766 (9th Cir. 2018); *Walker v. City of Calhoun*, 901 F.3d 1245, 1254-55 (11th Cir. 2018); *Campbell v. McGruder*, 580 F.2d 521, 525-26 & n.6 (D.C. Cir. 1978).

In short, as many of our sister circuits have wisely recognized, *Younger* abstention is foreclosed by precedent here.[19] In any event, it would be a significant

[19] Tellingly on this point, the highest judicial officers of our state courts, with *the Chief Justice of Texas* as their president, have filed an amicus brief in this case, asking *us* to resolve the merits of Plaintiffs' claims and decide what procedures the Constitution

stretch to say that the procedures of Dallas County's pretrial detention scheme could be meaningfully challenged in Plaintiffs' state court prosecutions. In fact, the absence of meaningful review lies at the very core of Plaintiffs' claims. Per Plaintiffs, the pretrial bail system improperly continues to keep them detained without conducting adequate hearings to determine whether they can pay bail. Those allegations were born out by the district court's fact-finding in this case: Plaintiffs are detained for days, weeks, and sometimes months all on the basis of half-minute arraignment hearings that are about as nuanced as ordering from a drive-thru window at a burger joint. They have their name called, and they are told how much they have to pay. There is no opportunity to challenge the process, let alone to make constitutional arguments like those raised in this case. Abstention is plainly inappropriate, so remand is unnecessary.

III. Conclusion

The bail system at issue in this case 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. That the majority opinion attempts to find a way to remove our obligation to address these critical issues is problematic. Because there are no jurisdictional issues and *Younger* is not before us, we should have reached the merits of the preliminary injunction and affirmed. Given the majority opinion's different pathway, I respectfully dissent.

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requires. They tell us that our "intervention is necessary" and specifically "request[] that [we] comprehensively articulate and analyze the fundamental constitutional principles." In doing so, our state court compatriots apparently see what the majority opinion does not; that federal involvement in these matters does not threaten the health of the state courts, it fortifies it.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:18-CV-154-N

SHANNON DAVES, *et al.*,
Plaintiffs,

v.

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

MEMORANDUM OPINION AND ORDER

This Order addresses the questions that the Fifth Circuit directed this Court to consider on remand: (1) whether the Court should have abstained under the *Younger* abstention doctrine and (2) what effect, if any, passage of Senate Bill 6 (S.B. 6) during the Texas Legislature's second called session in 2021 has on this case. The Court believes that *Younger* abstention does not apply, but concludes that S.B. 6 moots this case.

I. THE ORIGINS OF THIS OPINION

The Court assumes familiarity with the underlying facts giving rise to this lawsuit, which are discussed in this Court's order granting Plaintiffs' motion for preliminary injunction. *Daves v. Dallas Cty.*, 341 F. Supp. 3d 688, 691-693 (N.D. Tex. 2018). Defendants[1] appealed the

[1] All subsequent references to "Defendants" refer solely to those parties against whom viable claims remain pending in light of

preliminary injunction, and a panel of the Fifth Circuit affirmed in part, reversed in part, and remanded the cause back to this Court. *Daves v. Dallas Cty.*, 984 F.3d 381, 414 (5th Cir. 2020). The Circuit subsequently agreed to rehear the case en banc. *Daves v. Dallas Cty.*, 988 F.3d 834, 835 (5th Cir. 2021).

The en banc Fifth Circuit reversed two of the panel's holdings. First, Plaintiffs could not hold Dallas County liable under 42 U.S.C. § 1983 for the acts of two groups of defendants—the Texas District Court Judges and the County Court at Law Judges—because both groups of judges were acting for the State when engaging in the challenged conduct. *Daves v. Dallas Cty.*, 22 F.4th 522, 540-41 (5th Cir. 2022) (the "En Banc Opinion"). Second, Plaintiffs lacked standing to sue either the Texas District Judges (with jurisdiction over felony cases) or County Court at Law Judges (with jurisdiction over misdemeanor prosecutions). *Id.* at 544. The En Banc Court concluded by remanding the case to this Court "for the limited purpose of conducting such proceedings as it considers appropriate and making detailed findings and conclusions concerning" the applicability of the *Younger* abstention doctrine and the effect of S.B. 6, a recently passed Texas state law that imposes statewide procedural changes in the bail-setting process. *Id.* at 548.[2]

Following remand, the parties have briefed the issues that the Fifth Circuit directed this Court to consider. The Court has heard oral argument on the issues

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the holdings of the en banc Fifth Circuit, namely Dallas County, the Magistrate Judges, and the Dallas County Sherriff.

[2] Unusually, the En Banc Court "[gave] the district court authority on remand to reach the result it considers appropriate even if it is inconsistent with any of this court's precedent," excepting the En Banc Opinion itself. En Banc Opinion at 548.

and conducted an evidentiary hearing.[3] The issues before the Court on remand are now ripe for disposition.

II. THE *YOUNGER* DOCTRINE DOES NOT REQUIRE ABSTENTION IN THIS CASE

When a plaintiff has properly invoked the jurisdiction of a federal court, the court has a "virtually unflagging" duty to resolve the dispute before it. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The ordinary obligation to address the merits of a case or controversy within the court's jurisdictional grant, however, gives way in the face of several doctrines of abstention. One such rule holds that a federal court should abstain from exercising its jurisdiction when the plaintiff has requested relief from the federal court that would unduly interfere with an ongoing state judicial proceeding.

A. Younger *Abstention Basics*

The *Younger* abstention doctrine, *see Younger v. Harris*, 401 U.S. 37 (1971), derives its force from two distinct but interrelated considerations: (1) traditional limitations on courts of equity and (2) comity between the federal and state judicial systems. First, as the Court

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[3] No live testimony was offered at the evidentiary hearing. The vast majority of the proffered evidence, consisting of video recordings and documents, was offered without objection and admitted. Some of Plaintiffs' exhibits were offered as demonstratives and considered only on that basis. Defendants offered written declarations, to which Plaintiffs objected based on relevance and an agreement among the parties that no additional evidence would be offered on remand. *See* Pls.' Mot. to Strike [283]. The Court overruled the relevancy objection and determined that the declarations were offered as rebuttal evidence and thus fell outside the parties' agreement. Plaintiffs did not object to the declarations as hearsay. All of the proffered evidence is now admitted and before the Court.

reasoned in *Younger*, "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. This general principle then obtains even greater significance when a federal court faces a request to exercise its equitable powers to restrain a state judicial proceeding. *Id.* at 44. Such a request requires careful consideration under our federal system "in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*

Younger involved an attempt to enjoin a state criminal prosecution, but the Court subsequently expanded the scope of state proceedings to which the doctrine applies. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975); *see also Juidice v. Vail*, 430 U.S. 327, 334 (1977). These decisions extended *Younger*'s reach to include certain categories of civil proceedings that implicate important state interests. Nevertheless, the Court has continued to emphasize that the mere existence of an ongoing state proceeding involving the same subject matter in dispute in federal court has not generally given rise to the need for abstention. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 373 (1989). Most recently, the Court has clarified that the scope of *Younger* reaches interference with only: (1) state criminal prosecutions; (2) certain civil enforcement actions that implicate important state interests; and (3) "civil proceedings involving certain orders ... uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013).

Sprint bore on the first prong of the oft-cited, tripartite test to determine whether to abstain under *Younger*: (1) when faced with the prospect of interference with an ongoing state proceeding of the type contemplated in *Sprint*, a court should also assess (2) whether the proceeding implicates an important state interest and (3) whether there is an adequate opportunity in the state proceedings to raise constitutional challenges. *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). The relevant time frame to assess this inquiry is as of the time of filing. *Gilbertson v. Albright*, 381 F.3d 965, 969 n.4 (9th Cir. 2004) (en banc); *Liedel v. Juvenile Ct. of Madison Cty.*, 891 F.2d 1542, 1546 n.6 (11th Cir. 1990); *Zalaman v. Armstrong*, 802 F.2d 199, 204 (6th Cir. 1986); *Despain v. Johnston*, 731 F.2d 1171, 1178 (5th Cir. 1984); *cf. Colonial Life & Accident Ins. Co. v. Medley*, 572 F.3d 22, 26 (1st Cir. 2009) (noting that the court must make *Younger* abstention decision before reaching merits). If at the outset the court answers the three questions in the affirmative, it should abstain absent truly extraordinary circumstances. *Middlesex*, 457 U.S. at 431.

B. Adequate Opportunity

The Court first considers whether there is an adequate opportunity to press constitutional challenges in the course of the state proceedings. *Ohio C.R. Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 627 (1986). Defendants contend that the availability of state habeas corpus relief constitutes an adequate opportunity to raise constitutional challenges.

The Court disagrees and concludes that Plaintiffs lack an adequate means of litigating their constitutional claims in the state forum. In order for an alternative mechanism to press federal claims in state court to

qualify as adequate, it must be *timely*. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). At the outset of the case, this Court made factual findings that delays of days or weeks (sometimes months) separate initial bail determination and review before a judge.[4] *Daves v. Dallas Cty*, 341 F. Supp. 3d at 692. Nowhere in the briefing do Defendants contend that these reviews—intrinsic to the bail-setting process—present an opportunity to litigate *constitutional challenges* to the structure of the system by which the determinations are made. But even if automatic bail review or reduction hearings offer a chance to press constitutional claims the factual findings made at the time the Court entered the preliminary injunction led it to conclude that these proceedings want for adequacy because they are untimely.

As an alternative, Defendants argue that filing a collateral action, in the form of a state habeas corpus petition, offers an adequate alternative mechanism to press federal challenges. Defendants acknowledge that pursuing habeas would require bringing a collateral action in Texas state court. But the Court found that obtaining appointed counsel can take substantial time. *See id.* at 692-93. As Defendants conceded at oral argument, this leaves a detained individual with the choice of either filing a pro se habeas petition (not a high percentage play) or waiting for counsel. Tr. of Oral Arg. 32:8-10 [290]. While habeas may offer a chance to litigate constitutional challenges to the process for setting bail, the practical realities reflected in the Court's prior factual findings indicate that mechanism is inadequate, i.e., too

[4] The Court invited the parties on remand to propose any additional fact findings pertinent to *Younger* abstention, but neither side chose to suggest additional findings.

slow.[5] As such, the Court need not have abstained under *Younger* because the third prong of the *Middlesex* test is not met.[6]

C. Interference

The parties devote considerable attention to whether the injunctive relief sought here is the kind of interference that *Younger* seeks to avoid. That inquiry devolves to whether this case looks more like *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975), or *O'Shea v. Littleton*, 414 U.S. 488, 499-504 (1974). In *Gerstein*, the Supreme Court held that an injunction requiring a prompt pretrial judicial determination of probable cause was not the kind of interference in the underlying criminal prosecution that *Younger* sought to avoid. In *O'Shea*, the Supreme Court held that an injunction against excessive

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[5] This is borne out by the exemplar habeas case Defendants cite for the availability of habeas as a constitutional remedy. *Ex parte Keller*, 595 S.W.2d 531 (Tex. Crim. App. 1980). The case reflects that petitioners were in custody from August 31, 1979 through at least February 6, 1980 (the date of the opinion). That five months is considerably longer than the one month the Supreme Court found too slow in *Gerstein v. Pugh*, 420 U.S. 103 (1975).

[6] The parties disagree whether the opportunity to raise constitutional challenges must be a part of the underlying criminal proceedings (intrinsic) or whether it can be collateral, i.e., habeas (extrinsic). So far as the Court is aware, the Supreme Court has always phrased the inquiry in terms of whether the course of proceedings subject to interference would present an opportunity to raise constitutional challenges. Two circuits have held the opportunity must be intrinsic to the state proceedings, i.e., not habeas. *See Esso Standard Oil Co. v. Lopez-Freytes*, 522 F.3d 136, 145 (1st Cir. 2008); *Habich v. City of Dearborn*, 331 F.3d 524, 532 (6th Cir. 2003). The Fifth Circuit has not addressed that question. Because the Court finds that state habeas is not an adequate procedure, it need not address the intrinsic/extrinsic question.

bail would involve the federal court in an ongoing audit of state criminal proceedings, which was the kind of interference *Younger* sought to avoid. Given this Court's determination of the adequacy prong, it is unnecessary to resolve the difficult interference question.[7]

III. THE PASSAGE OF SENATE BILL 6 MOOTS PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF

Plaintiffs' standing, assessed at the outset of litigation, is a constitutional prerequisite to a federal court's exercise of subject matter jurisdiction. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). Some minimum level of interest in the subject matter of the case must survive as it progresses, or else the court will dismiss it as moot. *Id.* at 189. The Supreme Court has succinctly described mootness as "standing in a time frame." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

Defendants contend that intervening legislative action, namely the passage by the Texas Legislature of Senate Bill 6 ("S.B. 6"), moots this controversy. The Court agrees that this law, passed in the wake of similar litigation challenging bail practices in Harris County, Texas renders Plaintiffs' challenge to policies and practices in Dallas County as they existed prior to S.B. 6 nonjusticiable.

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[7] The scope of relief that could be afforded to Plaintiffs in view of the En Banc Opinion is not before the Court on this limited remand. But in assessing the interference prong of *Younger*, it would appear that the Court should consider whether injunctive relief against the very few defendants remaining after the En Banc Opinion would interfere with ongoing state criminal proceedings. That perplexing formulation of the question is another reason for this Court not to reach the interference question.

Federal courts have long recognized that intervening legislative action can moot a previously live controversy. *U.S. Dep't of Just. v. Provenzano*, 469 U.S. 14, 15 (1984) (act of Congress); *United Bldg. & Constr. Trades Council of Camden Cty. & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208, 213 (1984) (amendment to challenged municipal ordinance); *see generally* 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3553.6 (3d ed. 2008 & Supp. 2022) (mootness by superseding legislative action). Most such cases involve repeal or amendment of the challenged portion of some law that existed at the outset of the case. *See*, *e.g.*, *U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco, and Firearms v. Galioto*, 477 U.S. 556, 559-60 (1986) (statutory amendment cured alleged constitutional infirmity); *AT&T Commc'ns of the Sw. v. City of Austin*, 235 F.3d 241, 243 (5th Cir. 2000) (offending ordinance repealed). But Plaintiffs here challenged the policies and procedures adopted in Dallas County in the absence of any state statute and sought an order from this Court requiring Defendants to correct alleged constitutional deficiencies in these policies and practices.

Subsequently, the Texas Legislature enacted S.B. 6 to impose uniform minimum procedural requirements on bail practices throughout the state. *See generally*, Act of August 31, 2021, 87th Tex. Leg., 2d C.S., ch.. 11, 2021 Tex. Sess. Law Serv. (West). Specifically, S.B. 6 amended the Texas Code of Criminal Procedure to require an individualized bail determination within forty-eight hours of arrest. TEX. CODE CRIM. P. ANN. art. 17.028(a). Among other factors, the decisionmaker must consider an arrestee's ability to pay money bail. *Id.* art. 17.15(a)(4). Where a bail schedule or standing order remains in place, it also codified the right of an arrested

individual to complete a financial affidavit—either in advance of or concurrent with the initial bail determination proceeding—and procedures to place arrested individuals on notice of this right. *Id.* arts. 17.028(f), (g-1). And it created a mechanism for obtaining review of an initial bail determination in light of information concerning ability to pay provided in a financial affidavit. *Id.* art. 17.028(h). These features of S.B. 6 track the Fifth Circuit's now-superseded *ODonnell* panel decision holding that due process requires an individualized determination of bail within forty-eight hours. Moreover, comments made in committee hearings in both the Texas House and Senate suggest that the Fifth Circuit's opinion in *ODonnell* motivated the bill and directly bore on its structure. Tex. Senate Comm. on Juris., *Hearing on August 7, 2021*, at 0:35-4:59 (Aug. 23, 2021), https://tlcsenate.granicus.com/MediaPlayer.php?clip_id=16451 (testimony of bill's author before Senate committee); Tex. House Select Comm. on Const. Rts. and Remedies, *Hearing on August 21, 2021*, at 9:27-10:05 (Aug. 21, 2021), https://tlchouse.granicus.com/MediaPlayer.php?view_id=46&clip_id=22300 (laying out influence of *ODonnell* on the bill's structure).

Thus, the subject matter of this lawsuit—Dallas County's home-grown procedures for setting pretrial bail circa 2018—is no more. S.B. 6 replaced Dallas County's procedures with a uniform set of statewide statutory procedures.[8]

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[8] It is important to note that the constitutionality of S.B. 6 is not presently before this Court. First, there are no pleadings attacking S.B. 6. Second, none of the named plaintiffs was detained pursuant to the S.B. 6 procedures. Third, there is minimal evidence in the record reflecting what actually happens in Dallas County after the effective date of S.B. 6. And, finally, the constitutionality of

The enactment of S.B. 6 moots Plaintiffs' request for injunctive relief. An en banc decision of the Fifth Circuit—rendered in the same decade-long litigation that produced the Supreme Court's decision in *Gerstein*—offers perhaps the closest procedural and factual comparator to this case.[9] In *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc), the court addressed claims challenging Dade County's bail practices (as distinct from the probable cause issue addressed in *Gerstein*). After the filing of the case, Florida adopted new procedural rules imposing statewide minimum procedural standards on bail practices. *Id.* at 1055-56. The court started with the premise that it must decide the case on the law as it then stood, not on the law in place at the outset of the case. *Id.* at 1058. The complaint, however, had challenged local policies and procedures that Dade County had adopted prior to the adoption of the then-new procedural rules. *Id.* The need to apply the amended procedural rules meant, the court reasoned, that the challenge to the pre-rule policies and procedures had "lost its character as a present, live controversy." *Id.*

This Court holds that Plaintiffs' request for injunctive relief in this case is moot for the same reasons stated in *Rainwater*. The Court must apply the law as it stands today. When the case began, Dallas County set its bail practice and procedures without the guidance of a uniform state statute or procedural rule. The Texas Legislature has stepped in to impose statewide procedural requirements that go beyond those alleged to have been in

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S.B. 6 is not within the scope of the limited remand from the En Banc Court. *See* En Banc Opinion at 248.

[9] The En Banc Opinion's directive that this Court should not be bound by Fifth Circuit precedent did not apply to the mootness issue on remand, but only to *Younger* abstention.

place in Dallas County at the outset of this case. A challenge to current practices, either on the grounds that various actors in Dallas County have failed to fully implement procedures compatible with S.B. 6 or based on a challenge to S.B. 6's constitutional sufficiency presents an altogether different case or controversy from the one initiated in this Court in 2018.

Nor may the Court go any further in its analysis. Consideration of the constitutionality of S.B. 6 would be improper in this posture. *See* supra n.8. It remains a possibility that Dallas County's bail practices suffer from constitutional deficiencies today, but for the foregoing reasons, the Court concludes that another case properly presenting objections to post-S.B. 6 practices would be the proper vehicle to pursue such claims. *Cf. Defenders of Wildlife, Inc. v. Endangered Species Scientific Auth.*, 725 F.2d 726, 731-32 (D.C. Cir. 1984) (holding that Congress's intervening passage of a bill expressly affirming challenged agency guidelines meant that any challenge to agency guidelines promulgated under the intervening legislation required a new lawsuit).

The Court finds Plaintiffs' grounds for distinguishing *Rainwater* unavailing. At oral argument, Plaintiffs argued that a critical difference between this case and *Rainwater* is that the challenged procedural rule at issue could, in practice, have been applied consistently with the plaintiffs' demands. Tr. of Oral Arg. at 17:18-18:3. Here, by contrast, the text of the bill directly conflicts with the relief requested, at least in certain circumstances. But this objection necessarily goes to the constitutionality of the procedures contained in S.B. 6, an altogether different question than the one before the Court, which focused on the sufficiency of pre-S.B. 6 policies and practices in Dallas County.

Plaintiffs also argue that this case is not moot because they seek greater remedies than those afforded by S.B. 6, but this argument likewise fails. It confuses remedies with mootness. The question is not whether the Texas Legislature gave Plaintiffs everything on their wish list—rather the question is whether Dallas County's home-grown bail procedures are still extant to be attacked after the enactment of S.B. 6. They are not.

In response to the *ODonnell* panel opinions, the Texas Legislature sought to the deficiencies found by imposing new statewide procedural safeguards. As the Supreme Court noted in *Gerstein*, concerns of federalism weigh in favor of deference that provides room for the States to experiment in devising procedures capable of upholding constitutional rights. *Gerstein*, 420 U.S. at 123-24. There is more than one way to ensure that a bail system upholds due process rights. Texas has chosen its way, and Plaintiffs are not entitled to have this Court immediately intervene to tinker with the rules that the Legislature has just recently enacted. Accordingly, the Court holds that Plaintiffs' request for injunctive relief should be dismissed as moot. *Accord* FEDERAL PRACTICE AND PROCEDURE, *supra*, at Supp. 73 ("A challenge to the validity of a new enactment, however, may be deferred to later litigation when the new enactment is amended while an appeal is pending and the record does not support adjudication as to the new enactment.") (citing *Am. Charities for Reas. Fund. Reg., Inc. v. O'Bannon*, 909 F.3d 329, 332-34 (10th Cir. 2018)).

CONCLUSION

This concludes this Court's disposition of the matters referred to it by the limited remand. The parties are directed to confer with the District Clerk of this Court and the staff of the Fifth Circuit regarding how to

supplement the record on appeal to reflect the proceedings here on the remand for this case's return to the En Banc Court.

Signed July 6, 2022.

[Signature]
David C. Godbey
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:18-CV-0154-N

SHANNON DAVES, *et al.*,
Plaintiffs,

v.

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

MEMORANDUM OPINION AND ORDER

This Order addresses Plaintiffs Shannon Daves, Shakena Walston, Erriyah Banks, Destinee Tovar, Petroba Michieko, and James Thompson's motion for preliminary injunction [3]. For the reasons set forth below, the Court grants Plaintiffs' motion and issues the Preliminary Injunction filed contemporaneously with this Order. The Court has also granted Plaintiffs' motion for class certification [2] in a separate order. The preliminary injunction shall apply to the class the Court certified in that Order.

I. ORIGINS OF THE DISPUTE

This case is about Dallas County's pretrial detention system. Plaintiffs are recent arrestees in custody at the Dallas County Jail. Plaintiffs allege that the County, the Sheriff, the Magistrates, the Felony Judges, and the Misdemeanor Judges employ an unconstitutional

"system of wealth-based detention by imposing and enforcing secured money bail without an inquiry into and findings concerning the arrestee's present ability to pay." Compl. ¶ 8 [1]. Plaintiffs seek both injunctive and declaratory relief against the County's procedures. Now before the Court is Plaintiffs' motion for preliminary injunction.

The disposition of this case is greatly simplified by the Fifth Circuit's recent decision in *ODonnell v. Harris Cty*, 892 F.3d 147 (5th Cir. 2018) (on rehearing) (*ODonnell I*). *See also ODonnell v. Goodheart*, 900 F.3d 220 (5th Cir. 2018) (*ODonnell II*) (reversing aspects of the injunction entered on remand from *ODonnell I*). This case differs from *ODonnell* in two respects: (1) it includes felony arrestees; and (2) Plaintiffs raise a substantive due process argument not raised in *ODonnell*. The Court holds that neither of those differences is material and issues a preliminary injunction in the form suggested in *ODonnell I*.

II. FACTUAL FINDINGS

The Court makes the following findings.

1.0. The post-arrest system in Dallas County has four main actors.

1.1. First are the Dallas County Criminal Court at Law Judges ("Misdemeanor Judges").[1]

[1] These are Defendants Dan Patterson, Julia Hayes, Doug Skemp, Nancy C. Mulder, Lisa Green, Angela King, Elizabeth Crowder, Tina Yoo Clinton, Peggy Hoffman, Roberto Canas, Jr., and Shequitta Kelly.

1.2. Second are the Dallas County Criminal District Court Judges ("Felony Judges").[2] The Felony Judges hire and fire Magistrate Judges.

1.3 Third are the Magistrate Judges.[3] Magistrate Judges report to the Felony Judges, and are subject to the policies and guidance the Felony Judges promulgate. Magistrate Judges also routinely follow the guidance and policies Misdemeanor Judges distribute, but they do not report to Misdemeanor Judges. Magistrate Judges are responsible for determining the conditions of release for arrestees in Dallas County.

1.4. Fourth is the Dallas County Sheriff, Defendant Marian Brown. The Sheriff is responsible for enforcing the Magistrate Judges' bail determinations.

2.0. The court finds that the County's post-arrest system operates in the following way.

2.1. The process begins with an arrest. This arrest can be made by a number of agencies, including the Dallas County Sheriff's Office, and the City of Dallas Police Department.

2.2. If either of these two agencies make the arrest, the arrestee will be taken directly to the Dallas County Jail. If another agency makes the

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[2] These are Defendants Ernest White, Hector Garza, Teresa Hawthorne, Tammy Kemp, Jennifer Bennett, Amber Givens-Davis, Livia Liu Francis, Stephanie Mitchell, Brandon Birmingham, Tracy Holmes, Robert Burns, Nancy Kennedy, Gracie Lewis, Dominique Collins, Carter Thompson, Jeanine Howard, and Stephanie Fargo.

[3] These are Defendants Terrie McVea, Lisa Bronchetti, Steven Autry, Anthony Randall, Janet Lusk, and Hal Turley.

arrest, the arrestee is taken to the jail the arresting authority operates.

2.3. The arrestee is then scheduled for a hearing that is locally referred to as an arraignment. Arraignments are held in front of Magistrate Judges, either in person or by video-link.

2.4. At arraignments, Magistrate Judges inform the arrestee of the offense charged and set the condition required for release.

2.5. In Texas, release is generally contingent on one of two types of bonds. The first is an unsecured, or personal release bond. These require the arrestee to make a payment only if he or she fails to appear. The second is a secured bond. These require an arrestee to make an up-front payment in order to avoid detention.

2.6. In February 2018, the Felony Judges granted Magistrate Judges the authority to grant personal release, or unsecured bonds.

2.7. Video evidence taken in July 2018, however, reveals that Magistrate Judges routinely deny personal release bonds. The vast majority of arrestees are instead given secured financial conditions of release.

2.8. The Misdemeanor Judges have given Magistrate Judges a generally applicable schedule of secured financial conditions that apply to every misdemeanor arrestee in the County.

2.9. The Felony Judges have given Magistrate Judges a similar schedule for felony arrestees.

2.10. These schedules operate like a menu, associating various "prices" for release with different types of crimes and arrestees.

2.11. Magistrate Judges routinely treat these schedules as binding when determining bail. The schedules are the policy of Dallas County.

2.12. Video evidence taken in July 2018 reveals that arraignments typically last under 30 seconds, and consist of the Magistrate Judge: (1) calling the arrestee by name, (2) informing the arrestee of the crime he or she is accused of and the bail associated with that crime, and (3) asking the arrestee if he or she is a United States citizen.

2.13. Prior to February 2018, Magistrate Judges did not take an arrestee's ability to pay into consideration when setting bail. In February 2018, Magistrate Judges were instructed to consider a financial affidavit that arrestees have the opportunity to fill out prior to arraignment. The form asks arrestees to indicate the maximum amount of secured bail they could afford.

2.14. Yet, Magistrate Judges still routinely treat the schedules as binding, and make no adjustment in light of an arrestee's inability to pay. The post- February 2018 affidavits have made no material difference in the Magistrate Judges' practices. Routine reliance on the schedules is still the policy of Dallas County.

2.15. Once an arrestee knows the amount required for release, he or she can pay the sum and obtain release.

2.16. An arrestee who cannot access money through a bank account can call a family member or friend, or contact a commercial bonding company. If he or she still cannot access the required funds, he or she is kept in jail, assigned to a housing unit, and confined in a cell until his or her first appearance.

2.17. Misdemeanor arrestees typically wait between four and ten days for their first appearance before a misdemeanor judge. Felony arrestees who waive indictment typically wait two weeks for their first appearance before a felony judge. Felony arrestees who do not waive indictment typically wait two to three months.

2.18. Most misdemeanor and low level felony arrestees who are detained at the time of their first appearance elect to plead guilty. Doing so most often results in sentences of time served and immediate release.

2.19. If arrestees do not plead guilty, they will be detained until their next appearance.

2.20. Judges decline to hold an on-the-record hearing regarding bond reduction or pretrial release at the first appearance. In order to obtain such a hearing, a defense attorney must file a written motion for bond reduction. The hearing is usually scheduled for a week or more after the motion is filed.

3.0. The Court thus finds that the County's post-arrest system automatically detains those who cannot afford the secured bond amounts recommended by the schedules. This detention can last for days, weeks, and, in some cases, even months. This

detention results solely because an individual cannot afford the secured condition of release.

4.0. The County's policy of routinely relying on the schedules thus causes the pretrial detention of indigent arrestees. The February 2018 changes that the County implemented had minimal effect; the policy is still firmly in place, and the resulting harms are ongoing.

5.0. Pretrial detention has severe consequences beyond deprivation of liberty. Some examples include: 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.

III. THE FELONY AND MISDEMEANOR JUDGES ARE PROPER DEFENDANTS UNDER SECTION 1983; THE SHERIFF IS NOT

Plaintiffs sue Dallas County under 42 U.S.C. §1983. To succeed, Plaintiffs must first "'show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right.'" *ODonnell v. Harris Cty.*, 251 F. Supp. 3d. 1052, 1148 (S.D. Tex, 2018) (quoting *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009)).[4]

These requirements are met as to the Felony and Misdemeanor Judges. When the Felony and Misdemeanor Judges promulgated the bail schedules, they were not acting in their judicial capacity, but rather in "their capacity as county policymakers." *ODonnell I*, 892 F.3d at 156. While the schedules may not appear to be

[4] The governmental entity here is a county, of course, rather than a municipality.

"official policy" in the traditional sense of the term, the Magistrate Judges' routine reliance on the schedules was clearly a practice "so common and well settled as to constitute a custom that fairly represents municipal policy." *ODonnell I*, 892 F.3d at 155 (finding "official policy" to "include ... practices that are 'so common and well settled as to constitute a custom that fairly represents municipal policy'") (quoting *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992)). That reliance, furthermore, is the factual foundation upon which the Plaintiffs' constitutional theories rest. The administration of the schedules was thus, in other words, an official policy promulgated by a municipal policymaker that became the driving force behind an alleged constitutional violation. As such, the Court finds the judges are proper defendants under section 1983.

Because the Felony and Misdemeanor Judges are acting as policymakers for the County, in these circumstances, their actions can subject the County to liability under section 1983. Thus, the County is also a proper defendant. Because the County is a proper defendant, any injunction against the County would reach the Magistrate Judges, who are acting on behalf of the County. The Court, therefore, need not consider whether the Magistrate Judges are themselves proper defendants.[5]

The Sheriff, however, is not a proper defendant under section 1983. The Sheriff does not have policy making authority, but rather "is legally obliged to execute all lawful process" and follow the instructions of the magistrate. *ODonnell I*, 892 F.3d at 156. She, thus, cannot act

[5] The Magistrate Judges here are analogous to the Hearing Officers in *ODonnell I*. The Fifth Circuit affirmed the injunction against the Hearing Officers, *ODonnell I*, 892 F.3d at 165, but did not specifically address whether they were proper defendants.

as a policymaker like the Felony and Misdemeanor Judges. Accordingly, the Court holds that the Sheriff is not a proper defendant under section 1983.

IV. THE COURT GRANTS PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION

To obtain a preliminary injunction, Plaintiffs must establish:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Janvey v. Alguire, 647 F.3d 585, 595 (5th Cir. 2011). The Court holds that Plaintiffs have satisfied each of these elements.

A. *Plaintiffs Have Shown a Likelihood of Success on the Merits*

1. Equal Protection Claim.[6]—First, Plaintiffs have shown it is substantially likely that Dallas County's current post-arrest procedures violate their equal protection rights. The Fifth Circuit in *ODonnell I* concluded that the equal protection issue essentially amounted to the following:

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[6] The Court is aware that in the intersection of indigency and the criminal justice system, the Supreme Court has observed that "[d]ue process and equal protection principles converge in the Court's analysis ... ." *Bearden v. Georgia*, 461 U.S. 660, 665 (1983). This Memorandum follows *ODonnell I* in discussing the two theories separately.

> [T]ake two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart.

ODonnell I, 892 F.3d at 163. That Plaintiffs' case involves felony and misdemeanor arrestees does not change the analysis.[7] The fact remains that two arrestees similar in every way except their ability to pay will have vastly different pretrial outcomes as a result of the Magistrate Judges' mechanical application of the bond schedules. Wealthy arrestees—regardless of the crime they are accused of—who are offered secured bail can pay the requested amount and leave. Indigent arrestees in the same position cannot. Indeed, the equal protection issue that plagued *ODonnell I* is not cured by adding more arrestees to the mix. The Court thus finds

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[7] Although Dallas County argues that this Court should afford lesser relief than *ODonnell I* allowed because of the presence of felony defendants, this Court sees no reason the procedural due process or equal protection analysis would differ if a defendant were charged with a felony.

that Plaintiffs have a substantial likelihood of succeeding on their equal protection claim.

2. Procedural Due Process Claim.—The Court reaches a similar conclusion with respect to Plaintiffs' procedural due process arguments. To succeed on a procedural due process theory, Plaintiffs must show: (1) that there exists a liberty or property right that has been infringed by the State, and (2) that the procedures protecting that right were constitutionally deficient." *ODonnell I*, 892 F.3d at 157 (citing *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010)).

Plaintiffs first identify a fundamental right against wealth based detention. Pls.' Br. in Supp. of the Named Pls.' Mot. for Class-Wide Prelim. Inj., 20-24 [4-3] ("Pls.' Br."). Presented with an almost identical slate of facts, the Fifth Circuit in *ODonnell* found this right to be too broad, and instead chose to recognize only the right to be "bailable upon sufficient sureties." *ODonnell I*, 892 F.3d at 158. The Court finds the same reasoning applies here, and thus recognizes only the right to be bailable upon sufficient sureties.

The County's existing procedures surrounding this right are constitutionally deficient. As stated above, the decision to impose secured bail is essentially automatic. Even after the financial affidavit was introduced, decisions are still made in an overtly mechanical way that routinely detains indigent arrestees because they cannot afford bail. That this case involves felony arrestees, again, does not change the analysis.[8] The Fifth Circuit's

[8] As noted above, this is in large part because the procedures for setting bail are the same regardless of the crime of which the arrestee is accused. The Court acknowledges, however, that the type of crime may impact the risk analysis when deciding the amount of bail or other security required.

balancing exercise further reveals that there are procedures the County can implement that would better protect the right, without causing an untenable administrative burden. *ODonnell I*, 892 F.3d at 160-1. The Plaintiffs have thus shown there is a substantial likelihood that the County's post-arrest procedures violate procedural due process.

3. Substantive Due Process Claim.—Some words are owed, however, to Plaintiffs' alleged pretrial liberty right. Pls.' Br., 24-6 [4-3]. Plaintiffs contend that there is a substantive due process right to pretrial liberty that requires more relief than the right to be bailable upon sufficient sureties. *Id.* Specifically, they seek to require a substantive finding by the Magistrate Judges that no other alternative to secured release would serve the State's interest before detaining an individual before trial. The Court disagrees for two reasons.

First, while the plaintiffs in *ODonnell* did not raise this argument, the broader right to pretrial liberty was still a factor in *ODonnell I*'s balancing exercise. *ODonnell I*, 892 F.3d at 159 (noting that the "the right to pretrial liberty of those accused" was "particularly important"). With this right in full view, the Fifth Circuit nonetheless found that the procedures required in the model injunction struck the proper constitutional balance. This Court will follow their guidance.

Even if *ODonnell I* lacked this guidance, however, the Court would reach the same result. Plaintiffs chief support for their argument is *United States v. Salerno*, 481 U.S. 739 (1987). There, the Supreme Court upheld procedures in the Bail Reform Act that required detention of individuals "charged with certain serious felonies [only] if the Government demonstrates by clear and convincing evidence after an adversary hearing that no

release conditions 'will reasonably assure ... the safety of any other person and the community.'" *Salerno*, 481 U.S. at 739 (quoting 18 U.S.C. §3142(e)).

There is no denying that *Salerno* firmly emphasizes the importance of the right to pretrial liberty. *Id.* at 750. But that alone does not establish that the right to pretrial liberty can be stretched by substantive due process to require the finding Plaintiffs seek. There is a difference between requiring that arrestees be granted *some* condition of release absent a showing that they are a flight risk, and requiring that arrestees be granted a condition of release they can afford absent a showing that no other condition of release is feasible. The Court accepts that due process requires the former, but declines to extend it to cover the latter.

This is in large part because the law requires "that if a constitutional claim is covered by a specific constitutional provision, such as the ... Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Walker v. City of Calhoun, GA*, 2018 WL 400052, at *7 (11th Cir. Aug. 22, 2018) (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.9 (1997)). The Eighth Amendment states that "[e]xcessive bail shall not be required." U.S. CONST. Amend. VIII. Plaintiffs do not raise an Eighth Amendment claim and do not contend they can show a violation under Eighth Amendment jurisprudence. *See, e.g. Stack v. Boyle*, 342 U.S. 1 (1951) (holding that "excessive" bail under the Eighth Amendment is bail set at a higher figure than the amount reasonably calculated to assure the accused will stand trial).

The moment that Plaintiffs transition from advocating for reformed procedures to advocating for the

abolition of or lessening of monetary bail, they must traverse through the Eighth Amendment. Requiring courts to use detention only as a last resort does just that. The Court declines to use substantive due process as an end-around of the Eighth Amendment. Plaintiffs have thus not shown a likelihood of success on their substantive due process arguments.

B. *Plaintiffs Have Shown a Risk of Irreparable Harm*

Failure to grant an injunction would risk irreparable harm. The status quo deprives the Plaintiff class of an established liberty interest without procedural due process and in violation of their equal protection rights. The record clearly indicates that this constitutional deprivation is ongoing and routine. The injury also extends well beyond the initial deprivation of liberty. Those detained lose their jobs, their homes, and much more. Without an injunction, these injuries will linger unchecked and untreated. Indeed, these were the exact facts that led the district court in *ODonnell* to find a risk of irreparable harm. 251 F. Supp. 3d at 1157-8. This Court agrees.

C. *The Balance of Harms and the Public Interest Favor an Injunction*

The balance of harms also tilts heavily in favor of an injunction. Defendants fail to produce credible evidence of harm that competes with the severity of the harm to the Plaintiff class's liberty interest at stake. Much of the evidence they lean on to support their allegations of increased failed appearances, heightened risks to the public, and exorbitant costs is the same that was presented to the district court in *ODonnell*. See Dallas County Defs.' Resp. to Pls. Mot. for Prelim. Inj., 14-17 [32] ("Defs.' Resp."). The court there found that "the reliable, credible evidence in the record" showed that

secured financial conditions fare no better than unsecured or non-financial conditions at assuring appearance or law-abiding behavior, and that community supervision was actually more cost effective than pretrial detention.[9] *ODonnell*, 251 F. Supp. at 1131-2, 1145. This Court agrees, and none of the additional evidence Defendants produce compels a different finding.

As to the public interest, "it is always in the public interest to prevent the violation of a party's constitutional rights." *ODonnell*, 251 F. Supp. 3d at 1159 (quoting *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012)). The County's post-arrest system routinely violates indigent arrestees' constitutional rights. As such, the Court finds an injunction to be in line with the public interest.

V. RELIEF

Both parties request the Court to stray from the Fifth Circuit's model injunction in one way or another. Plaintiffs urge the Court to require a substantive finding that detention is strictly necessary before imposing it on an indigent arrestee, and to prohibit any amount of wealth based detention. *See* Pls. Reply to County Defs.' Resp. in Opp'n. to Pls.' Mot. For Prelim. Inj., 10-14 [58]. Defendants argue less relief—if any—should be granted because this case includes felony arrestees. Defs.' Resp., 16, 22 [32]. The Court respectfully declines to do either.

This case shares the same roots as *ODonnell*. Much like *ODonnell*, there is a clear showing of routine wealth

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[9] In spite of the evidence presented on costs, nothing in the injunction the Court is granting today *requires* community supervision. Today's injunction follows the guidance of the Fifth Circuit, mandating only additional procedures at the moment bail is set. This is examined in more detail in the next section.

based detention. There is also a clear showing this detention violates procedural due process and equal protection rights. That some of those impacted are accused of felonies, as examined above, does not meaningfully change the analysis.

The apple ought not to fall far from the tree. The Fifth Circuit has designed appropriate relief for an almost identical case. Doing anything different here would put the Court in direct conflict with binding precedent. The Court thus finds that the procedures required to protect the rights currently in jeopardy are those articulated by the Fifth Circuit in *ODonnell I*.[10]

Broadly, those procedures include "notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decision-maker." ODonnell I, 892 F.3d at 163. Specifically, the Court is by separate order requiring the relief set forth in the Fifth Circuit's model injunction, slightly modified to fit the facts of this case.

CONCLUSION

For the reasons stated above, the Court grants Plaintiffs' motion for preliminary injunction. Following

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[10] It is worth noting that the injunction is not absent an instruction to consider alternatives to secured release. In reaching its conclusion, *ODonnell I* cited case law requiring "meaningful consideration of other possible alternatives" before imposing secured conditions of release an arrestee could not afford. *ODonnell I*, 892 F.3d at 161 (citing *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978)). This instruction was further reflected in the model injunction: twice it states the need for consideration of whether "other condition[s]" will provide "sufficient sureties." *Id.* at 164, 165. The Court adopts this language, but declines to speculate as to whether the Fifth Circuit intended this instruction to further require the precise substantive finding Plaintiffs seek.

ODonnell, the Court exercises its discretion under Federal Rule of Civil Procedure 65(c) to waive the bond requirement. *ODonnell*, 251 F. Supp. 3d at 1160 (citing *City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority*, 636 F.2d 1084 (5th Cir. 1981)). Plaintiffs are indigent and "have brought this suit to enforce their constitutional rights." *Id.* The relief shall apply to the class the Court certified in a separate order, and shall take effect within thirty (30) days.

Signed September 20, 2018.

[Signature]
David C. Godbey
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11368

SHANNON DAVES; SHAKENA WALSTON; ERRIYAH BANKS; DESTINEE TOVAR; PATROBA MICHIEKA; JAMES THOMPSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; FAITH IN TEXAS; TEXAS ORGANIZING PROJECT EDUCATION FUND,
Plaintiffs—Appellants Cross-Appellees,

versus

DALLAS COUNTY, TEXAS; ERNEST WHITE, 194TH; HECTOR GARZA, 195TH; RAQUEL JONES, 203RD; TAMMY KEMP, 204TH; JENNIFER BENNETT, 265TH; AMBER GIVENS-DAVIS, 282ND; LELA MAYS, 283RD; STEPHANIE MITCHELL, 291ST; BRANDON BIRMINGHAM, 292ND; TRACY HOLMES, 363RD; TINA YOO CLINTON, NUMBER 1; NANCY KENNEDY, NUMBER 2; GRACIE LEWIS, NUMBER 3; DOMINIQUE COLLINS, NUMBER 4; CARTER THOMPSON, NUMBER 5; JEANINE HOWARD, NUMBER 6; CHIKA ANYIAM, NUMBER 7 JUDGES OF DALLAS COUNTY, CRIMINAL DISTRICT COURTS,
Defendants—Appellees Cross-Appellants,

MARIAN BROWN; TERRIE MCVEA; LISA BRONCHETTI; STEVEN AUTRY; ANTHONY RANDALL; JANET LUSK; HAL TURLEY, DALLAS COUNTY MAGISTRATES; DAN PATTERSON, NUMBER 1; JULIA HAYES, NUMBER 2; DOUG SKEMP, NUMBER 3; NANCY MULDER, NUMBER 4; LISA GREEN, NUMBER 5; ANGELA KING, NUMBER 6; ELIZABETH CROWDER, NUMBER 7; CARMEN WHITE, NUMBER 8; PEGGY HOFFMAN, NUMBER 9; ROBERTO

CANAS, JR., NUMBER 10; SHEQUITTA KELLY, NUMBER 11 JUDGES OF DALLAS COUNTY, CRIMINAL COURTS AT LAW,
Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CV-154

Filed February 25, 2021

ON PETITIONS FOR REHEARING
AND REHEARING EN BANC

(Opinion December 28, 2020, 5 Cir., 2020, 984 F.3d 381)

Before Owen, *Chief Judge*, and Jones, Smith, Stewart, Dennis, Elrod, Southwick, Haynes, Graves, Higginson, Costa, Willett, Ho, Duncan, Engelhardt, and Wilson, *Circuit Judges*.[1]

PER CURIAM:

A member of the court having requested a poll on the petition for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs. Pursuant to 5th Cir.R.41.3, the panel opinion in this case dated December 28, 2020, is vacated.

IT IS FURTHER ORDERED that the petition for rehearing is denied as moot.

[1] Judge Oldham is recused and did not participate in this decision.

APPENDIX F

TEXAS SENATE BILL 6
(ENROLLED AUGUST 21, 2021)

AN ACT

relating to rules for setting the amount of bail, to the release of certain defendants on a monetary bond or personal bond, to related duties of certain officers taking bail bonds and of a magistrate in a criminal case, to charitable bail organizations, and to the reporting of information pertaining to bail bonds.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act may be cited as the Damon Allen Act.

SECTION 2. Article 1.07, Code of Criminal Procedure, is amended to read as follows:

Art. 1.07. RIGHT TO BAIL. Any person [~~All prisoners~~] shall be eligible for bail [~~bailable~~] unless denial of bail is expressly permitted by the Texas Constitution or by other law [~~for capital offenses when the proof is evident~~]. This provision may [~~shall~~] not be [~~so~~] construed [~~as~~] to prevent bail after indictment found upon examination of the evidence, in such manner as may be prescribed by law.

SECTION 3. Article 15.17(a), Code of Criminal Procedure, is amended to read as follows:

(a) In each case enumerated in this Code, the person making the arrest or the person having custody of the person arrested shall without unnecessary delay, but not later than 48 hours after the person is arrested, take the person arrested or have him taken before some

magistrate of the county where the accused was arrested or, to provide more expeditiously to the person arrested the warnings described by this article, before a magistrate in any other county of this state. The arrested person may be taken before the magistrate in person or the image of the arrested person may be presented to the magistrate by means of a videoconference. The magistrate shall inform in clear language the person arrested, either in person or through a videoconference, of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, and of his right to have an examining trial. The magistrate shall also inform the person arrested of the person 's right to request the appointment of counsel if the person cannot afford counsel. The magistrate shall inform the person arrested of the procedures for requesting appointment of counsel. <u>If applicable, the magistrate shall inform the person that the person may file the affidavit described by Article 17.028(f).</u> If the person does not speak and understand the English language or is deaf, the magistrate shall inform the person in a manner consistent with Articles 38.30 and 38.31, as appropriate. The magistrate shall ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person at the same time. If the person arrested is indigent and requests appointment of counsel and if the magistrate is authorized under Article 26.04 to appoint counsel for indigent defendants in the county, the magistrate shall appoint counsel in accordance with Article 1.051. If the magistrate is not authorized to appoint counsel, the magistrate shall without unnecessary delay, but not

later than 24 hours after the person arrested requests appointment of counsel, transmit, or cause to be transmitted to the court or to the courts' designee authorized under Article 26.04 to appoint counsel in the county, the forms requesting the appointment of counsel. The magistrate shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall, after determining whether the person is currently on bail for a separate criminal offense and whether the bail decision is subject to Article 17.027, admit the person arrested to bail if allowed by law. A record of the communication between the arrested person and the magistrate shall be made. The record shall be preserved until the earlier of the following dates: (1) the date on which the pretrial hearing ends; or (2) the 91st day after the date on which the record is made if the person is charged with a misdemeanor or the 120th day after the date on which the record is made if the person is charged with a felony. For purposes of this subsection, "videoconference" means a two-way electronic communication of image and sound between the arrested person and the magistrate and includes secure Internet videoconferencing.

SECTION 4. Article 17.02, Code of Criminal Procedure, is amended to read as follows:

Art. 17.02. DEFINITION OF "BAIL BOND". A "bail bond" is a written undertaking entered into by the defendant and the defendant 's sureties for the appearance of the principal therein before a court or magistrate to answer a criminal accusation; provided, however, that the defendant on execution of the bail bond may deposit with the custodian of funds of the court in which the prosecution is pending current money of the United

States in the amount of the bond in lieu of having sureties signing the same. Any cash funds deposited under this article shall be receipted for by the officer receiving the funds and, on order of the court, be refunded in the amount shown on the face of the receipt less the administrative fee authorized by Section 117.055, Local Government Code, if applicable, after the defendant complies with the conditions of the defendant 's bond, to:

(1) any person in the name of whom a receipt was issued, including the defendant if a receipt was issued to the defendant; or

(2) the defendant, if no other person is able to produce a receipt for the funds.

SECTION 5. Chapter 17, Code of Criminal Procedure, is amended by adding Articles 17.021, 17.022, 17.023, 17.024, 17.027, and 17.028 to read as follows:

Art. 17.021. PUBLIC SAFETY REPORT SYSTEM. (a) The Office of Court Administration of the Texas Judicial System shall develop and maintain a public safety report system that is available for use for purposes of Article 17.15.

(b) The public safety report system must:

(1) state the requirements for setting bail under Article 17.15 and list each factor provided by Article 17.15(a);

(2) provide the defendant 's name and date of birth or, if impracticable, other identifying information, the cause number of the case, if available, and the offense for which the defendant was arrested;

(3) provide information on the eligibility of the defendant for a personal bond;

(4) provide information regarding the applicability of any required or discretionary bond conditions;

(5) provide, in summary form, the criminal history of the defendant, including information regarding any:

(A) previous misdemeanor or felony convictions;

(B) pending charges;

(C) previous sentences imposing a term of confinement;

(D) previous convictions or pending charges for:

(i) offenses that are offenses involving violence as defined by Article 17.03; or

(ii) offenses involving violence directed against a peace officer; and

(E) previous failures of the defendant to appear in court following release on bail; and

(6) be designed to collect and maintain the information provided on a bail form submitted under Section 72.038, Government Code.

(c) The office shall provide access to the public safety report system to the appropriate officials in each county and each municipality at no cost. This subsection may not be construed to require the office to provide an official or magistrate with any equipment or support related to accessing or using the public safety report system.

(d) The public safety report system may not:

(1) be the only item relied on by a judge or magistrate in making a bail decision;

(2) include a score, rating, or assessment of a defendant 's risk or make any recommendation regarding the appropriate bail for the defendant; or

(3) include any information other than the information listed in Subsection (b).

(e) The office shall use the information maintained under Subsection (b)(6) to collect data from the preceding state fiscal year regarding the number of defendants for whom bail was set after arrest, including:

(1) the number for each category of offense;

(2) the number of personal bonds; and

(3) the number of monetary bonds.

(f) Not later than December 1 of each year, the office shall submit a report containing the data described by Subsection (e) to the governor, lieutenant governor, speaker of the house of representatives, and presiding officers of the standing committees of each house of the legislature with primary jurisdiction over the judiciary.

(g) The Department of Public Safety shall assist the office in implementing the public safety report system established under this article and shall provide criminal history record information to the office in the electronic form necessary for the office to implement this article.

(h) Any contract for goods or services between the office and a vendor that may be necessary or appropriate to develop the public safety report system is exempt from the requirements of Subtitle D, Title 10, Government Code. This subsection expires September 1, 2022.

Art. 17.022. PUBLIC SAFETY REPORT. (a) A magistrate considering the release on bail of a defendant charged with an offense punishable as a Class B misdemeanor or any higher category of offense shall order that:

(1) the personal bond office established under Article 17.42 for the county in which the defendant is being detained, if a personal bond office has been established for that county, or other suitably trained person including judicial personnel or sheriff's department personnel, use the public safety report system developed under Article 17.021 to prepare a public safety report with respect to the defendant; and

(2) the public safety report prepared under Subdivision (1) be provided to the magistrate as soon as practicable but not later than 48 hours after the defendant's arrest.

(b) A magistrate may not, without the consent of the sheriff, order a sheriff or sheriff 's department personnel to prepare a public safety report under this article.

(c) Notwithstanding Subsection (a), a magistrate may personally prepare a public safety report, before or while making a bail decision, using the public safety report system developed under Article 17.021.

(d) The magistrate shall:

(1) consider the public safety report before setting bail; and

(2) promptly but not later than 72 hours after the time bail is set, submit the bail form described by Section 72.038, Government Code, in accordance with that section.

(e) In the manner described by this article, a magistrate may, but is not required to, order, prepare, or consider a public safety report in setting bail for a defendant charged only with a misdemeanor punishable by fine only or a defendant who receives a citation under Article 14.06(c). If ordered, the report shall be prepared for the time and place for an appearance as indicated in the citation.

(f) A magistrate may set bail for a defendant charged only with an offense punishable as a misdemeanor without ordering, preparing, or considering a public safety report if the public safety report system is unavailable for longer than 12 hours due to a technical failure at the Office of Court Administration of the Texas Judicial System.

Art. 17.023. AUTHORITY TO RELEASE ON BAIL IN CERTAIN CASES. (a) This article applies only to a defendant charged with an offense that is:

(1) punishable as a felony; or

(2) a misdemeanor punishable by confinement.

(b) Notwithstanding any other law, a defendant to whom this article applies may be released on bail only by a magistrate who is:

(1) any of the following:

(A) a resident of this state;

(B) a justice of the peace serving under Section 27.054 or 27.055, Government Code; or

(C) a judge or justice serving under Chapter 74, Government Code; and

(2) in compliance with the training requirements of Article 17.024.

(c) A magistrate is not eligible to release on bail a defendant described by Subsection (a) if the magistrate:

(1) has been removed from office by impeachment, by the supreme court, by the governor on address to the legislature, by a tribunal reviewing a recommendation of the State Commission on Judicial Conduct, or by the legislature's abolition of the magistrate's court; or

(2) has resigned from office after having received notice that formal proceedings by the State Commission on Judicial Conduct have been instituted as provided by Section 33.022, Government Code, and before final disposition of the proceedings.

Art. 17.024. TRAINING ON DUTIES REGARDING BAIL. (a) The Office of Court Administration of the Texas Judicial System shall, in consultation with the court of criminal appeals, develop or approve training courses regarding a magistrate's duties, including duties with respect to setting bail in criminal cases. The courses developed must include:

(1) an eight-hour initial training course that includes the content of the applicable training course described by Article 17.0501; and

(2) a two-hour continuing education course.

(b) The office shall provide for a method of certifying that a magistrate has successfully completed a training course required under this article and has demonstrated competency of the course content in a manner acceptable to the office.

(c) A magistrate is in compliance with the training requirements of this article if:

(1) not later than the 90th day after the date the magistrate takes office, the magistrate successfully completes the course described by Subsection (a)(1);

(2) the magistrate successfully completes the course described by Subsection (a)(2) in each subsequent state fiscal biennium in which the magistrate serves; and

(3) the magistrate demonstrates competency as provided by Subsection (b).

(c-1) Notwithstanding Subsection (c), a magistrate who is serving on April 1, 2022, is considered to be in compliance with Subsection (c)(1) if the magistrate successfully completes the training course not later than December 1, 2022. This subsection expires May 1, 2023.

(d) Any course developed or approved by the office under this article may be administered by the Texas Justice Court Training Center, the Texas Municipal Courts Education Center, the Texas Association of Counties, the Texas Center for the Judiciary, or a similar entity.

Art. 17.027. RELEASE ON BAIL OF DEFENDANT CHARGED WITH FELONY OFFENSE COMMITTED WHILE ON BAIL. (a) Notwithstanding any other law:

(1) if a defendant is charged with committing an offense punishable as a felony while released on bail in a pending case for another offense punishable as a felony and the subsequent offense was committed in the same county as the previous offense, the defendant may be released on bail only by:

(A) the court before whom the case for the previous offense is pending; or

(B) another court designated in writing by the court described by Paragraph (A); and

(2) if a defendant is charged with committing an offense punishable as a felony while released on bail for another pending offense punishable as a felony and the subsequent offense was committed in a different county than the previous offense, electronic notice of the charge must be promptly given to the court specified by Subdivision (1) for purposes of reevaluating the bail decision, determining whether any bail conditions were violated, or taking any other applicable action.

(b) This article may not be construed to extend any deadline provided by Article 15.17.

Art. 17.028. BAIL DECISION. (a) Without unnecessary delay but not later than 48 hours after a defendant is arrested, a magistrate shall order, after individualized consideration of all circumstances and of the factors required by Article 17.15(a), that the defendant be:

(1) granted personal bond with or without conditions;

(2) granted surety or cash bond with or without conditions; or

(3) denied bail in accordance with the Texas Constitution and other law.

(b) In setting bail under this article, the magistrate shall impose the least restrictive conditions, if any, and the personal bond or cash or surety bond necessary to reasonably ensure the defendant's appearance in court as required and the safety of the community, law enforcement, and the victim of the alleged offense.

(c) In each criminal case, unless specifically provided by other law, there is a rebuttable presumption that bail, conditions of release, or both bail and conditions of release are sufficient to reasonably ensure the defendant's appearance in court as required and the

safety of the community, law enforcement, and the victim of the alleged offense.

(c-1) Subsections (b) and (c) may not be construed as requiring the court to hold an evidentiary hearing that is not required by other law.

(d) A judge may not adopt a bail schedule or enter a standing order related to bail that:

(1) is inconsistent with this article; or

(2) authorizes a magistrate to make a bail decision for a defendant without considering each of the factors in Article 17.15(a).

(e) A defendant who is denied bail or who is unable to give bail in the amount required by any bail schedule or standing order related to bail shall be provided with the warnings described by Article 15.17.

(f) A defendant who is charged with an offense punishable as a Class B misdemeanor or any higher category of offense and who is unable to give bail in the amount required by a schedule or order described by Subsection (e), other than a defendant who is denied bail, shall be provided with the opportunity to file with the applicable magistrate a sworn affidavit in substantially the following form:

"On this ___ day of _____, 2___, I have been advised by _____ (name of the court or magistrate, as applicable) of the importance of providing true and complete information about my financial situation in connection with the charge pending against me. I am without means to pay _____ and I hereby request that an appropriate bail be set. (signature of defendant)."

(g) A defendant filing an affidavit under Subsection (f) shall complete a form to allow a magistrate to assess

information relevant to the defendant's financial situation. The form must be the form used to request appointment of counsel under Article 26.04 or a form promulgated by the Office of Court Administration of the Texas Judicial System that collects, at a minimum and to the best of the defendant's knowledge, the information a court may consider under Article 26.04(m).

(g-1) The magistrate making the bail decision under Subsection (a) shall, if applicable:

(1) inform the defendant of the defendant's right to file an affidavit under Subsection (f); and

(2) ensure that the defendant receives reasonable assistance in completing the affidavit described by Subsection (f) and the form described by Subsection (g).

(h) A defendant described by Subsection (f) may file an affidavit under Subsection (f) at any time before or during the bail proceeding under Subsection (a). A defendant who files an affidavit under Subsection (f) is entitled to a prompt review by the magistrate on the bail amount. The review may be conducted by the magistrate making the bail decision under Subsection (a) or may occur as a separate pretrial proceeding. The magistrate shall consider the facts presented and the rules established by Article 17.15(a) and shall set the defendant's bail. If the magistrate does not set the defendant's bail in an amount below the amount required by the schedule or order described by Subsection (e), the magistrate shall issue written findings of fact supporting the bail decision.

(i) The judges of the courts trying criminal cases and other magistrates in a county must report to the Office of Court Administration of the Texas Judicial System each defendant for whom a review under Subsection (h)

was not held within 48 hours of the defendant's arrest. If a delay occurs that will cause the review under Subsection (h) to be held later than 48 hours after the defendant's arrest, the magistrate or an employee of the court or of the county in which the defendant is confined must provide notice of the delay to the defendant's counsel or to the defendant, if the defendant does not have counsel.

(j) The magistrate may enter an order or take other action authorized by Article 16.22 with respect to a defendant who does not appear capable of executing an affidavit under Subsection (f).

(k) This article may not be construed to require the filing of an affidavit before a magistrate considers the defendant's ability to make bail under Article 17.15.

(l) A written or oral statement obtained under this article or evidence derived from the statement may be used only to determine whether the defendant is indigent, to impeach the direct testimony of the defendant, or to prosecute the defendant for an offense under Chapter 37, Penal Code.

(m) Notwithstanding Subsection (a), a magistrate may make a bail decision regarding a defendant who is charged only with a misdemeanor punishable by fine only or a defendant who receives a citation under Article 14.06(c) without considering the factor required by Article 17.15(a)(6).

SECTION 6. (a) Article 17.03, Code of Criminal Procedure, as effective September 1, 2021, is amended by amending Subsection (b) and adding Subsections (b-2) and (b-3) to read as follows:

(b) Only the court before whom the case is pending may release on personal bond a defendant who:

(1) is charged with an offense under the following sections of the Penal Code:

(A) [~~Section 19.03 (Capital Murder);~~

[~~(B) Section 20.04 (Aggravated Kidnapping);~~

[~~(C) Section 22.021 (Aggravated Sexual Assault);~~

[~~(D) Section 22.03 (Deadly Assault on Law Enforcement or Corrections Officer, Member or Employee of Board of Pardons and Paroles, or Court Participant);~~

[~~(E) Section 22.04 (Injury to a Child, Elderly Individual, or Disabled Individual);~~

[~~(F) Section 29.03 (Aggravated Robbery);~~

[~~(G)~~] Section 30.02 (Burglary); or

(B) [~~(H)~~] Section 71.02 (Engaging in Organized Criminal Activity);

[~~(I) Section 21.02 (Continuous Sexual Abuse of Young Child or Disabled Individual); or~~

[~~(J) Section 20A.03 (Continuous Trafficking of Persons);~~]

(2) is charged with a felony under Chapter 481, Health and Safety Code, or Section 485.033, Health and Safety Code, punishable by imprisonment for a minimum term or by a maximum fine that is more than a minimum term or maximum fine for a first degree felony; or

(3) does not submit to testing for the presence of a controlled substance in the defendant 's body as requested by the court or magistrate under Subsection (c) of this article or submits to testing and the test shows

evidence of the presence of a controlled substance in the defendant's body.

(b-2) Except as provided by Articles 15.21, 17.033, and 17.151, a defendant may not be released on personal bond if the defendant:

(1) is charged with an offense involving violence; or

(2) while released on bail or community supervision for an offense involving violence, is charged with committing:

(A) any offense punishable as a felony; or

(B) an offense under the following provisions of the Penal Code:

(i) Section 22.01(a)(1) (assault);

(ii) Section 22.05 (deadly conduct);

(iii) Section 22.07 (terroristic threat); or

(iv) Section 42.01(a)(7) or (8) (disorderly conduct involving firearm).

(b-3) In this article:

(1) "Controlled substance" has the meaning assigned by Section 481.002, Health and Safety Code.

(2) "Offense involving violence" means an offense under the following provisions of the Penal Code:

(A) Section 19.02 (murder);

(B) Section 19.03 (capital murder);

(C) Section 20.03 (kidnapping);

(D) Section 20.04 (aggravated kidnapping);

(E) Section 20A.02 (trafficking of persons);

(F) Section 20A.03 (continuous trafficking of persons);

(G) Section 21.02 (continuous sexual abuse of young child or disabled individual);

(H) Section 21.11 (indecency with a child);

(I) Section 22.01(a)(1) (assault), if the offense is:

(i) punishable as a felony of the second degree under Subsection (b-2) of that section; or

(ii) punishable as a felony and involved family violence as defined by Section 71.004, Family Code;

(J) Section 22.011 (sexual assault);

(K) Section 22.02 (aggravated assault);

(L) Section 22.021 (aggravated sexual assault);

(M) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(N) Section 25.072 (repeated violation of certain court orders or conditions of bond in family violence, child abuse or neglect, sexual assault or abuse, indecent assault, stalking, or trafficking case);

(O) Section 25.11 (continuous violence against the family);

(P) Section 29.03 (aggravated robbery);

(Q) Section 38.14 (taking or attempting to take weapon from peace officer, federal special investigator, employee or official of correctional facility, parole officer, community supervision and corrections department officer, or commissioned security officer);

(R) Section 43.04 (aggravated promotion of prostitution), if the defendant is not alleged to have engaged in conduct constituting an offense under Section 43.02(a);

(S) Section 43.05 (compelling prostitution); or

(T) Section 43.25 (sexual performance by a child).

(b) This section takes effect on the 91st day after the last day of the legislative session if this Act does not receive a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution, this section has no effect.

SECTION 7. (a) Article 17.03, Code of Criminal Procedure, is amended by amending Subsection (b) and adding Subsections (b-2) and (b-3) to read as follows:

(b) Only the court before whom the case is pending may release on personal bond a defendant who:

(1) is charged with an offense under the following sections of the Penal Code:

(A) [~~Section 19.03 (Capital Murder);~~

[~~(B) Section 20.04 (Aggravated Kidnapping);~~

[~~(C) Section 22.021 (Aggravated Sexual Assault);~~

[~~(D) Section 22.03 (Deadly Assault on Law Enforcement or Corrections Officer, Member or~~

~~Employee of Board of Pardons and Paroles, or Court Participant);~~

[~~(E) Section 22.04 (Injury to a Child, Elderly Individual, or Disabled Individual);~~

[~~(F) Section 29.03 (Aggravated Robbery);~~

[~~(G)~~] Section 30.02 (Burglary); or

(B) [~~(H)~~] Section 71.02 (Engaging in Organized Criminal Activity);

[~~(I) Section 21.02 (Continuous Sexual Abuse of Young Child or Children); or~~

[~~(J) Section 20.03 (Continuous Trafficking of Persons);~~]

(2) is charged with a felony under Chapter 481, Health and Safety Code, or Section 485.033, Health and Safety Code, punishable by imprisonment for a minimum term or by a maximum fine that is more than a minimum term or maximum fine for a first degree felony; or

(3) does not submit to testing for the presence of a controlled substance in the defendant's body as requested by the court or magistrate under Subsection (c) of this article or submits to testing and the test shows evidence of the presence of a controlled substance in the defendant's body.

(b-2) Except as provided by Articles 15.21, 17.033, and 17.151, a defendant may not be released on personal bond if the defendant:

(1) is charged with an offense involving violence; or

(2) while released on bail or community supervision for an offense involving violence, is charged with committing:

(A) any offense punishable as a felony; or

(B) an offense under the following provisions of the Penal Code:

(i) Section 22.01(a)(1) (assault);

(ii) Section 22.05 (deadly conduct);

(iii) Section 22.07 (terroristic threat); or

(iv) Section 42.01(a)(7) or (8) (disorderly conduct involving firearm).

(b-3) In this article:

(1) "Controlled substance" has the meaning assigned by Section 481.002, Health and Safety Code.

(2) "Offense involving violence" means an offense under the following provisions of the Penal Code:

(A) Section 19.02 (murder);

(B) Section 19.03 (capital murder);

(C) Section 20.03 (kidnapping);

(D) Section 20.04 (aggravated kidnapping);

(E) Section 20A.02 (trafficking of persons);

(F) Section 20A.03 (continuous trafficking of persons);

(G) Section 21.02 (continuous sexual abuse of young child or children);

(H) Section 21.11 (indecency with a child);

(I) Section 22.01(a)(1) (assault), if the offense is:

(i) punishable as a felony of the second degree under Subsection (b-2) of that section; or

(ii) punishable as a felony and involved family violence as defined by Section 71.004, Family Code;

(J) Section 22.011 (sexual assault);

(K) Section 22.02 (aggravated assault);

(L) Section 22.021 (aggravated sexual assault);

(M) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(N) Section 25.072 (repeated violation of certain court orders or conditions of bond in family violence, child abuse or neglect, sexual assault or abuse, indecent assault, stalking, or trafficking case);

(O) Section 25.11 (continuous violence against the family);

(P) Section 29.03 (aggravated robbery);

(Q) Section 38.14 (taking or attempting to take weapon from peace officer, federal special investigator, employee or official of correctional facility, parole officer, community supervision and corrections department officer, or commissioned security officer);

(R) Section 43.04 (aggravated promotion of prostitution);

(S) Section 43.05 (compelling prostitution); or

(T) Section 43.25 (sexual performance by a child).

(b) This section takes effect immediately if this Act receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III,

Texas Constitution. If this Act does not receive a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution, this section has no effect.

SECTION 8. Chapter 17, Code of Criminal Procedure, is amended by adding Article 17.0501 to read as follows:

Art. 17.0501. REQUIRED TRAINING. The Department of Public Safety shall develop training courses that relate to the use of the statewide telecommunications system maintained by the department and that are directed to each magistrate, judge, sheriff, peace officer, or jailer required to obtain criminal history record information under this chapter, as necessary to enable the person to fulfill those requirements.

SECTION 9. Chapter 17, Code of Criminal Procedure, is amended by adding Article 17.071 to read as follows:

Art. 17.071. CHARITABLE BAIL ORGANIZATIONS. (a) In this article, "charitable bail organization" means a person who accepts and uses donations from the public to deposit money with a court in the amount of a defendant 's bail bond. The term does not include:

(1) a person accepting donations with respect to a defendant who is a member of the person's family, as determined under Section 71.003, Family Code; or

(2) a nonprofit corporation organized for a religious purpose.

(b) This article does not apply to a charitable bail organization that pays a bail bond for not more than three defendants in any 180-day period.

(c) A person may not act as a charitable bail organization for the purpose of paying a defendant 's bail bond in a county unless the person:

(1) is a nonprofit organization exempt from federal income taxation under Section 501(a), Internal Revenue Code of 1986, as an organization described by Section 501(c)(3) of that code; and

(2) has been issued a certificate under Subsection (d) with respect to that county.

(d) A county clerk shall issue to a charitable bail organization a certificate authorizing the organization to pay bail bonds in the county if the clerk determines the organization is:

(1) a nonprofit organization described by Subsection (c)(1); and

(2) current on all filings required by the Internal Revenue Code.

(e) A charitable bail organization shall file in the office of the county clerk of each county where the organization intends to pay bail bonds an affidavit designating the individuals authorized to pay bonds on behalf of the organization.

(f) Not later than the 10th day of each month, a charitable bail organization shall submit, to the sheriff of each county in which the organization files an affidavit under Subsection (e), a report that includes the following information for each defendant for whom the organization paid a bail bond in the preceding calendar month:

(1) the name of the defendant;

(2) the cause number of the case;

(3) the county in which the applicable charge is pending, if different from the county in which the bond was paid; and

(4) any dates on which the defendant has failed to appear in court as required for the charge for which the bond was paid.

(f-1) A sheriff who receives a report under Subsection (f) shall provide a copy of the report to the Office of Court Administration of the Texas Judicial System.

(g) A charitable bail organization may not pay a bail bond for a defendant at any time the organization is considered to be out of compliance with the reporting requirements of this article.

(h) The sheriff of a county may suspend a charitable bail organization from paying bail bonds in the county for a period not to exceed one year if the sheriff determines the organization has paid one or more bonds in violation of this article and the organization has received a warning from the sheriff in the preceding 12-month period for another payment of bond made in violation of this article. The sheriff shall report the suspension to the Office of Court Administration of the Texas Judicial System.

(i) Chapter 22 applies to a bail bond paid by a charitable bail organization.

(j) A charitable bail organization may not accept a premium or compensation for paying a bail bond for a defendant.

(k) Not later than December 1 of each year, the Office of Court Administration of the Texas Judicial System shall prepare and submit, to the governor, lieutenant governor, speaker of the house of representatives, and presiding officers of the standing committees of each house of the legislature with primary jurisdiction over

the judiciary, a report regarding the information submitted to the office under Subsections (f-1) and (h) for the preceding state fiscal year.

SECTION 10. (a) Article 17.15, Code of Criminal Procedure, is amended to read as follows:

Art. 17.15. RULES FOR SETTING [~~FIXING~~] AMOUNT OF BAIL.

(a) The amount of bail and any conditions of bail to be required in any case in which the defendant has been arrested are [~~is~~] to be regulated by the court, judge, magistrate, or officer taking the bail in accordance with Articles 17.20, 17.21, and 17.22 and [~~, they~~] are [~~to be~~] governed [~~in the exercise of this discretion~~] by the Constitution and [~~by~~] the following rules:

1. Bail and any conditions of bail [~~The bail~~] shall be sufficient [~~sufficiently high~~] to give reasonable assurance that the undertaking will be complied with.

2. The power to require bail is not to be [~~so~~] used [~~as~~] to make bail [~~it~~] an instrument of oppression.

3. The nature of the offense and the circumstances under which the offense [~~it~~] was committed are to be considered, including whether the offense:

(A) is an offense involving violence as defined by Article 17.03; or

(B) involves violence directed against a peace officer.

4. The ability to make bail shall [~~is to~~] be considered [~~regarded~~], and proof may be taken on [~~upon~~] this point.

5. The future safety of a victim of the alleged offense, law enforcement, and the community shall be considered.

6. The criminal history record information for the defendant, including information obtained through the statewide telecommunications system maintained by the Department of Public Safety and through the public safety report system developed under Article 17.021, shall be considered, including any acts of family violence, other pending criminal charges, and any instances in which the defendant failed to appear in court following release on bail.

7. The citizenship status of the defendant shall be considered.

(a-1) Notwithstanding any other law, the duties imposed by Subsection (a)(6) with respect to obtaining and considering information through the public safety report system do not apply until April 1, 2022. This subsection expires June 1, 2022.

(b) For purposes of determining whether clear and convincing evidence exists to deny a person bail under Section 11d, Article I, Texas Constitution, a magistrate shall consider all information relevant to the factors listed in Subsection (a).

(c) In this article, "family violence" has the meaning assigned by Section 71.004, Family Code.

(b) Article 17.15(a), Code of Criminal Procedure, as amended by this Act, and Article 17.15(c), as added by this Act, take effect immediately if this Act receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, Article 17.15(a), Code of Criminal

Procedure, as amended by this Act, and Article 17.15(c), as added by this Act, take effect on the 91st day after the last day of the legislative session.

SECTION 11. Article 17.20, Code of Criminal Procedure, is amended to read as follows:

Art. 17.20. BAIL IN MISDEMEANOR. (a) In cases of misdemeanor, the sheriff or other peace officer, or a jailer licensed under Chapter 1701, Occupations Code, may, whether during the term of the court or in vacation, where the officer has a defendant in custody, take the defendant's [~~of the defendant a~~] bail [~~bond~~].

(b) Before taking bail under this article, the sheriff, peace officer, or jailer shall obtain the defendant's criminal history record information through the statewide telecommunications system maintained by the Department of Public Safety and through the public safety report system developed under Article 17.021.

(c) Notwithstanding Subsection (b), a sheriff, peace officer, or jailer may make a bail decision regarding a defendant who is charged only with a misdemeanor punishable by fine only or a defendant who receives a citation under Article 14.06(c) without considering the factor required by Article 17.15(a)(6).

(d) If the defendant is charged with or has previously been convicted of an offense involving violence as defined by Article 17.03, the sheriff, officer, or jailer may not set the amount of the defendant's bail but may take the defendant's bail in the amount set by the court.

SECTION 12. Article 17.22, Code of Criminal Procedure, is amended to read as follows:

Art. 17.22. MAY TAKE BAIL IN FELONY. (a) In a felony case, if the court before which the case [~~same~~] is pending is not in session in the county where the

defendant is in custody, the sheriff or other peace officer, or a jailer licensed under Chapter 1701, Occupations Code, who has the defendant in custody may take the defendant's bail [~~bond~~] in the [~~such~~] amount set [~~as may have been fixed~~] by the court or magistrate, or if no amount has been set [~~fixed~~], then in any [~~such~~] amount that the [~~as such~~] officer considers [~~may consider~~] reasonable and that is in compliance with Article 17.15.

(b) Before taking bail under this article, the sheriff, peace officer, or jailer shall obtain the defendant's criminal history record information through the statewide telecommunications system maintained by the Department of Public Safety and through the public safety report system developed under Article 17.021.

(c) If the defendant is charged with or has previously been convicted of an offense involving violence as defined by Article 17.03, the sheriff, officer, or jailer may not set the amount of the defendant's bail but may take the defendant's bail in the amount set by the court.

SECTION 13. Chapter 17, Code of Criminal Procedure, is amended by adding Articles 17.51, 17.52, and 17.53 to read as follows:

Art. 17.51. NOTICE OF CONDITIONS. (a) As soon as practicable but not later than the next business day after the date a magistrate issues an order imposing a condition of release on bond for a defendant or modifying or removing a condition previously imposed, the clerk of the court shall send a copy of the order to:

(1) the appropriate attorney representing the state; and

(2) the sheriff of the county where the defendant resides.

(b) A clerk of the court may delay sending a copy of the order under Subsection (a) only if the clerk lacks information necessary to ensure service and enforcement.

(c) If an order described by Subsection (a) prohibits a defendant from going to or near a child care facility or school, the clerk of the court shall send a copy of the order to the child care facility or school.

(d) The copy of the order and any related information may be sent electronically or in another manner that can be accessed by the recipient.

(e) The magistrate or the magistrate's designee shall provide written notice to the defendant of:

(1) the conditions of release on bond; and

(2) the penalties for violating a condition of release.

(f) The magistrate shall make a separate record of the notice provided to the defendant under Subsection (e).

(g) The Office of Court Administration of the Texas Judicial System shall promulgate a form for use by a magistrate or a magistrate's designee in providing notice to the defendant under Subsection (e). The form must include the relevant statutory language from the provisions of this chapter under which a condition of release on bond may be imposed on a defendant.

Art. 17.52. REPORTING OF CONDITIONS. A chief of police or sheriff who receives a copy of an order described by Article 17.51(a), or the chief's or sheriff's designee, shall, as soon as practicable but not later than the 10th day after the date the copy is received, enter information relating to the condition of release into the appropriate database of the statewide law enforcement

information system maintained by the Department of Public Safety or modify or remove information, as appropriate.

Art. 17.53. PROCEDURES AND FORMS RELATED TO MONETARY BOND. The Office of Court Administration of the Texas Judicial System shall develop statewide procedures and prescribe forms to be used by a court to facilitate:

(1) the refund of any cash funds paid toward a monetary bond, with an emphasis on refunding those funds to the person in whose name the receipt described by Article 17.02 was issued; and

(2) the application of those cash funds to the defendant's outstanding court costs, fines, and fees.

SECTION 14. Article 66.102(c), Code of Criminal Procedure, is amended to read as follows:

(c) Information in the computerized criminal history system relating to an arrest must include:

(1) the offender 's name;

(2) the offender 's state identification number;

(3) the arresting law enforcement agency;

(4) the arrest charge, by offense code and incident number;

(5) whether the arrest charge is a misdemeanor or felony;

(6) the date of the arrest;

(7) for an offender released on bail, whether a warrant was issued for any subsequent failure of the offender to appear in court;

(8) the exact disposition of the case by a law enforcement agency following the arrest; and

(9) [~~(8)~~] the date of disposition of the case by the law enforcement agency.

SECTION 15. Section 27.005, Government Code, is amended by amending Subsection (a) and adding Subsection (c) to read as follows:

(a) For purposes of removal under Chapter 87, Local Government Code, "incompetency" in the case of a justice of the peace includes the failure of the justice to successfully complete:

(1) within one year after the date the justice is first elected:

(A) [;] an 80-hour course in the performance of the justice 's duties; and

(B) the course described by Article 17.024(a)(1), Code of Criminal Procedure;

(2) each following year, a 20-hour course in the performance of the justice 's duties, including not less than 10 hours of instruction regarding substantive, procedural, and evidentiary law in civil matters; and

(3) each following state fiscal biennium, the course described by Article 17.024(a)(2), Code of Criminal Procedure.

(c) A course described by Subsection (a)(1)(A) may include a course described by Subsection (a)(1)(B).

SECTION 16. Subchapter C, Chapter 71, Government Code, is amended by adding Section 71.0351 to read as follows:

Sec. 71.0351. BAIL AND PRETRIAL RELEASE INFORMATION. (a) As a component of the official

monthly report submitted to the Office of Court Administration of the Texas Judicial System under Section 71.035, the clerk of each court setting bail in criminal cases shall report:

(1) the number of defendants for whom bail was set after arrest, including:

(A) the number for each category of offense;

(B) the number of personal bonds; and

(C) the number of surety or cash bonds;

(2) the number of defendants released on bail who subsequently failed to appear;

(3) the number of defendants released on bail who subsequently violated a condition of release; and

(4) the number of defendants who committed an offense while released on bail or community supervision.

(b) The office shall post the information in a publicly accessible place on the agency 's Internet website without disclosing any personal information of any defendant, judge, or magistrate.

(c) Not later than December 1 of each year, the office shall submit a report containing the data collected under this section during the preceding state fiscal year to the governor, lieutenant governor, speaker of the house of representatives, and presiding officers of the standing committees of each house of the legislature with primary jurisdiction over the judiciary.

SECTION 17. Subchapter C, Chapter 72, Government Code, is amended by adding Section 72.038 to read as follows:

Sec. 72.038. BAIL FORM. (a) The office shall promulgate a form to be completed by a magistrate, judge,

sheriff, peace officer, or jailer who sets bail under Chapter 17, Code of Criminal Procedure, for a defendant charged with an offense punishable as a Class B misdemeanor or any higher category of offense. The office shall incorporate the completed forms into the public safety report system developed under Article 17.021, Code of Criminal Procedure.

(b) The form must:

(1) state the cause number of the case, if available, the defendant's name and date of birth, and the offense for which the defendant was arrested;

(2) state the name and the office or position of the person setting bail;

(3) require the person setting bail to:

(A) identify the bail type, the amount of the bail, and any conditions of bail;

(B) certify that the person considered each factor provided by Article 17.15(a), Code of Criminal Procedure; and

(C) certify that the person considered the information provided by the public safety report system; and

(4) be electronically signed by the person setting the bail.

(c) The person setting bail, an employee of the court that set the defendant's bail, or an employee of the county in which the defendant's bail was set must, on completion of the form required under this section, promptly but not later than 72 hours after the time the defendant's bail is set provide the form electronically to the office through the public safety report system.

(d) The office shall publish the information from each form submitted under this section in a database that is publicly accessible on the office's Internet website. Any identifying information or sensitive data, as defined by Rule 21c, Texas Rules of Civil Procedure, regarding the victim of an offense and any person's address or contact information shall be redacted and may not be published under this subsection.

SECTION 18. (a) Section 411.083(c), Government Code, is amended to read as follows:

(c) The department may disseminate criminal history record information under Subsection (b)(1) only for a criminal justice purpose. The department may disseminate criminal history record information under Subsection (b)(2) only for a purpose specified in the statute or order. The department may disseminate criminal history record information under Subsection (b)(4), (5), or (6) only for a purpose approved by the department and only under rules adopted by the department. The department may disseminate criminal history record information under Subsection (b)(7) only to the extent necessary for a county or district clerk to perform a duty imposed by law to collect and report criminal court disposition information. Criminal history record information disseminated to a clerk under Subsection (b)(7) may be used by the clerk only to ensure that information reported by the clerk to the department is accurate and complete. The dissemination of information to a clerk under Subsection (b)(7) does not affect the authority of the clerk to disclose or use information submitted by the clerk to the department. The department may disseminate criminal history record information under Subsection (b)(8) only to the extent necessary for the office of court administration to perform a duty imposed by law, including the development and maintenance of the public

safety report system as required by Article 17.021, Code of Criminal Procedure, or to compile court statistics or prepare reports. The office of court administration may disclose criminal history record information obtained from the department under Subsection (b)(8):

(1) in a public safety report prepared under Article 17.022, Code of Criminal Procedure; or

(2) in a statistic compiled by the office or a report prepared by the office, but only in a manner that does not identify the person who is the subject of the information.

(b) This section takes effect on the 91st day after the last day of the legislative session.

SECTION 19. Section 117.055, Local Government Code, is amended by amending Subsection (a) and adding Subsections (a-1) and (a-2) to read as follows:

(a) Except as provided by Subsection (a-1), to [~~To~~] compensate the county for the accounting and administrative expenses incurred in handling the registry funds that have not earned interest, including funds in a special or separate account, the clerk shall, at the time of withdrawal, deduct from the amount of the withdrawal a fee in an amount equal to five percent of the withdrawal but that may not exceed $50. Withdrawal of funds generated from a case arising under the Family Code is exempt from the fee deduction provided by this section.

(a-1) A clerk may not deduct a fee under Subsection (a) from a withdrawal of funds generated by the collection of a cash bond or cash bail bond if in the case for which the bond was taken:

(1) the defendant was found not guilty after a trial or appeal; or

(2) the complaint, information, or indictment was dismissed without a plea of guilty or nolo contendere being entered.

(a-2) On the request of a person to whom withdrawn funds generated by the collection of a cash bond or cash bail bond were disbursed, the clerk shall refund to the person the amount of the fee deducted under Subsection (a) if:

(1) subsequent to the deduction, a court makes or enters an order or ruling in the case for which the bond was taken; and

(2) had the court made or entered the order or ruling before the withdrawal of funds occurred, the deduction under Subsection (a) would have been prohibited under Subsection (a-1).

SECTION 20. Article 17.03(f), Code of Criminal Procedure, is repealed.

SECTION 21. As soon as practicable but not later than April 1, 2022, the Office of Court Administration of the Texas Judicial System shall create the public safety report system developed under Article 17.021, Code of Criminal Procedure, as added by this Act, and any related forms and materials and shall provide to the appropriate officials in each county and each municipality access to the system, forms, and materials at no cost. If those items are made available before April 1, 2022, the office shall notify each court clerk, judge or other magistrate, and office of an attorney representing the state.

SECTION 22. (a) As soon as practicable but not later than April 1, 2022, the Office of Court Administration of the Texas Judicial System shall:

(1) promulgate the forms required by Articles 17.028(g) and 17.51(g), Code of Criminal Procedure, as

added by this Act, and by Section 72.038, Government Code, as added by this Act; and

(2) develop or approve and make available the training courses and certification method as described by Article 17.024, Code of Criminal Procedure, as added by this Act, and develop the procedures and prescribe the forms required by Article 17.53, Code of Criminal Procedure, as added by this Act.

(b) If the items described by Subsection (a) of this section are made available before April 1, 2022, the office shall notify each court clerk, judge or other magistrate, and office of an attorney representing the state.

SECTION 23. Section 117.055, Local Government Code, as amended by this Act, applies only to a withdrawal of funds from a court registry under Section 117.055, Local Government Code, made on or after the effective date provided by Section 23(c) of this Act. A withdrawal of funds from a court registry made before the effective date provided by Section 23(c) of this Act is governed by the law in effect on the date the withdrawal was made, and the former law is continued in effect for that purpose.

SECTION 24. The changes in law made by this Act apply only to a person who is arrested on or after the effective date of this Act. A person arrested before the effective date of this Act is governed by the law in effect on the date the person was arrested, and the former law is continued in effect for that purpose.

SECTION 25. (a) Except as provided by Subsection (b) or (c) of this section or another provision of this Act, this Act takes effect January 1, 2022.

(b) Article 17.15(b), Code of Criminal Procedure, as added by this Act, takes effect June 1, 2022, but only if

the constitutional amendment proposed by the 87th Legislature, 2nd Called Session, 2021, requiring a judge or magistrate to impose the least restrictive conditions of bail that may be necessary and authorizing the denial of bail under some circumstances to a person accused of a violent or sexual offense or of continuous trafficking of persons is approved by the voters. If that amendment is not approved by the voters, Article 17.15(b), Code of Criminal Procedure, has no effect.

(c) Articles 17.021 and 17.024, Code of Criminal Procedure, as added by this Act, and Sections 4, 17, 19, 20, and 21 of this Act take effect on the 91st day after the last day of the legislative session.

_____ _____

President of the Senate Speaker of the House

I hereby certify that S.B.ANo.A6 passed the Senate on August 9, 2021, by the following vote: Yeas 27, Nays 2; and that the Senate concurred in House amendments on August 31,2021, by the following vote: Yeas 26, Nays 5.

_____

Secretary of the Senate

I hereby certify that S.B. No. 6 passed the House, with amendments, on August 30, 2021, by the following vote: Yeas 85, Nays 40, one present not voting.

_____

Chief Clerk of the House

Approved:

_____

Date

_____

Governor