No. 23-97

In the Supreme Court of the United States

SHANNON DAVES, *ET AL.*, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

DALLAS COUNTY, TEXAS, ET AL.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF THE FELONY JUDGES

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

LANORA C. PETTIT
Principal Deputy Solicitor General
Counsel of Record

WILLIAM F. COLE
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Lanora.Pettit@oag.texas.gov
(512) 936-1700

QUESTIONS PRESENTED

Under *Younger v. Harris*, principles of equity and comity dictate that federal courts abstain from adjudicating claims that seek to restrain state criminal prosecutions when the movant has an adequate remedy at law and will not suffer irreparable injury if denied relief. 401 U.S. 37, 43-44 (1971). Petitioners seek the opposite: they sought (and initially obtained) a federal injunction imposing a host of mandatory procedural requirements that every state court in Dallas County must follow when issuing or implementing bail decisions. What followed were lengthy appellate proceedings in which some but not all claims were ultimately dismissed for lack of standing. In the interim, recognizing the need for uniform bail reform, the Texas Legislature passed a law imposing many of the same procedural requirements. The en banc Fifth Circuit concluded that what remained of the case at that time was both moot and subject to *Younger* abstention. The questions presented are:

1. Whether federal courts should entertain claims demanding they oversee the procedures state courts follow in making bail determinations, where state law provides mechanisms for arrestees to assert constitutional claims in state court concerning their pretrial detention.

2. Whether this Court should address the abstention doctrine given the Texas Legislature's promulgation of uniform, statewide procedures that supersede the informal practices challenged by petitioners.

PARTIES TO THE PROCEEDINGS

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

Respondents, who were defendants-appellees/cross-appellants below, include Dallas County, Texas; Dallas County Sheriff Marian Brown; and six Dallas County Magistrate Judges: (1) Hon. Janet Lusk; (2) Hon. Isabel Cruz; (3) Hon. Timothy Sommers; (4) Hon. David Woodruff; (5) Hon. Terry Landwehr; and (6) Hon. Kathleen Sprinkle.[1]

Several defendant-appellees/cross-appellants below are incorrectly listed as respondents to this petition since petitioners do not challenge the Fifth Circuit's ruling dismissing them from the case on standing grounds. *See infra* at 28-31. Those include two classes of judges.

First, seventeen Dallas County Criminal District Court Judges: (1) Hon. Ernest White (194th District); (2) Hon. Hector Garza (195th District); (3) Hon. Raquel Jones (203rd District); (4) Hon. Tammy Kemp (204th District); (5) Hon. Jennifer Bennett (265th District); (6) Hon. Amber Givens-Davis (282nd District); (7) Hon. Lela Mays (283rd District); (8) Hon. Stephanie Huff (291st District); (9) Hon. Brandon Birmingham (292nd District); (10) Hon. Tracy Holmes (363rd District); (11) Hon. Tina Yoo Clinton (Crim. Dist. Ct. No. 1);

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[1] Due to the length of this litigation, there has been turnover among the different classes of judges. Because each judge was sued in his or her official capacity, each was replaced by his successor pursuant to Supreme Court Rule 35.3. The current officeholders are listed in this section.

(12) Hon. J.J. Koch (Crim. Dist. Ct. No. 2); (13) Hon. Audra Riley (Crim. Dist. Ct. No. 3); (14) Hon. Dominique Collins (Crim. Dist. Ct. No. 4); (15) Hon. Carter Thompson (Crim. Dist. Ct. No. 5); (16) Hon. Nancy Mulder (Crim. Dist. Ct. No. 6); (17) Hon. Chika Anyiam (Crim. Dist. Ct. No. 7).

Second, eleven Dallas County Criminal Court Judges: (1) Hon. Marilyn Mayse (No. 1); (2) Hon. Julia Hayes (No. 2); (3) Hon. Audrey Moorehead (No. 3); (4) Hon. Dominique Williams (No. 4); (5) Hon. Lisa Green (No. 5); (6) Hon. Angela King (No. 6); (7) Hon. Remko Tranisha Edwards (No. 7); (8) Hon. Carmen White (No. 8); (9) Hon. Peggy Hoffman (No. 9); (10) Hon. Monique Huff (No. 10); (11) Hon. Shequitta Kelly (No. 11).

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INTRODUCTION

Apparently dissatisfied with the perceived pace of bail reform in Texas, petitioners originally brought this class-action suit in 2018 seeking to effectively end cash bail for indigent arrestees in Dallas County. Petitioners named as defendants a bevy of state and local officials, including the district judges of Dallas County's criminal courts ("Felony Judges"), the statutory county-court judges ("Misdemeanor Judges"), the Dallas County Magistrate Judges, the Dallas County Sheriff, and the County itself. This brief is submitted only on behalf of the Felony Judges.

Before the district court, petitioners sought—and received—an injunction imposing a panoply of procedural requirements that state judges in Dallas County must follow before imposing cash bail on arrestees. It took the district court five pages to delineate those requirements, and it made the age-old practice prohibitively difficult. The district court also imposed a weekly reporting requirement on the County to ensure that its judges and other local officials were complying with the procedural code that the district court discovered in the interstices of the Due Process Clause. Years of appellate proceedings, including not one but two decisions from the en banc Fifth Circuit, followed.

Only the *first* opinion is relevant to the Felony Judges. In that opinion, the court dismissed the claims against the Felony Judges and the Misdemeanor Judges for lack of standing. The court reasoned that though these judges promulgated recommended bail schedules in felony and misdemeanor cases, they had not caused any injury to petitioners because they do not actually set bail in individual cases. Petitioners nowhere challenge that conclusion.

Instead, the petition challenges the Fifth Circuit's *second* en banc opinion, which addressed claims against the remaining defendants following a limited remand to the district court to determine whether intervening legislation had mooted the suit and whether the district court should have abstained in the first instance under *Younger v. Harris*, 401 U.S. 37 (1971). The district court agreed the suit was now moot but opined that *Younger* abstention was not warranted. The Fifth Circuit agreed that the case was moot but separately concluded that *Younger* abstention independently barred it from moving forward. Neither holding requires this Court's time—particularly as to Felony and Misdemeanor Judges whom petitioners would still lack standing to sue even if they were to prevail before this Court on both questions presented (which they should not).

STATEMENT

I. Statutory Background

A. Under Texas law, nearly all prisoners are "bailable by sufficient sureties." TEX. CONST. art. I, § 11. To ensure that arrestees do not face excessive waits for release, Texas law deems all (or, at least, nearly all) members of the Texas judiciary to be "magistrates" capable of setting bail. Tex. Code Crim. Proc. arts. 2.09, 17.031(a). Within 48 hours of arrest, arrestees are to be brought before a magistrate (so defined) of the county where he was arrested, or, if more "expeditious[]," to a magistrate in another county. *Id*. art. 15.17(a). Although Dallas County has many "magistrates" within the meaning of this broad definition, bail is almost always set by a Dallas County Magistrate Judge, one of whom is "on duty twenty-four hours a day, seven days a week at the jail." ROA.4170.

B. At the time that the district court entered its injunction, the Sheriff's Department initiated the bail process in Dallas County by sending information regarding an arrestee to a magistrate clerk, who conducts additional research to check the arrestee's criminal history. ROA.6482-83. The arrestee also prepared an affidavit providing information that would allow the Magistrate Judge to evaluate her financial condition. ROA.6483-84. Dallas County provided officers to assist arrestees in preparing these affidavits. ROA.6484-85. And once this paperwork was complete, the magistrate clerk forwarded it to a Magistrate Judge for review. ROA.6483.

Only after the Magistrate Judge had a chance to review the documents would the bail hearing occur. ROA.6483. At that hearing, the Magistrate Judge formally notified the arrestee of the charges against him (or her), made a probable-cause determination, and set bail. ROA.6481; *Rothgery v. Gillespie County,* 554 U.S. 191, 199 (2008). The judge has discretion to release most prisoners "on personal bond without sureties or other security," Tex. Code Crim. Proc. art. 17.03(a), or to require a bail bond, *id.* arts. 17.04-.05.

In exercising this discretion, "Texas law compel[led]" the Magistrate Judges to balance the arrestee's "ability to make bail and the safety of the community." ROA.4168. Specifically, Magistrate Judges were required to consider the State's interests in (a) having "reasonable assurance" that the arrestee would appear at trial, taking into account (b) "the nature of the offense and the circumstances under which [it] was committed," and (c) the "future safety of a victim . . . and the community." Tex. Code Crim. Proc. art. 17.15(1), (3), (5). They were also (d) expressly instructed to consider the defendant's "ability to make bail," and (e) told that "[t]he

power to require bail *is not to be used*" as an "instrument of oppression." *Id.* art. 17.15(2), (4) (emphasis added).

To promote efficient and consistent application of the Legislature's criteria, the Felony Judges promulgated a schedule of recommended bail for felonies committed within their geographic jurisdiction. ROA.2499. These "bail guidelines [we]re just that—guidelines." ROA.4167. They reflected the Judges' assessment of the state-oriented factors of the Legislature's test by incorporating (1) the degree of the offense charged, (2) an arrestee's conviction history, and (3) whether he was already on probation or bond for a prior felony. ROA.493; *see also* ROA.2501, 4167. But Magistrate Judges always retained "full discretion in determining release conditions" because they "are dealing with individual people, and the circumstances of every case are different." ROA.4168. Critically, Magistrate Judges remained under their statutory duty to consider the arrestee's ability to pay and whether bail is being used as an instrument of oppression. Tex. Code Crim. Proc. art. 17.15(2), (4).

C. In response to a number of lawsuits challenging bail practices in several Texas counties, the 87th Texas Legislature enacted Senate Bill 6 in August 2021, *see* Act of August 31, 2021, 87th Leg. 2d C.S., ch. 11, 2021 Tex. Gen. Laws 3937 ("S.B. 6"), while this case was pending before the en banc Fifth Circuit, *infra* at 10.

S.B. 6 amended several aspects of the Texas Code of Criminal Procedure regarding bail in misdemeanor and felony cases. For example, it created a "public safety report system," developed and maintained by the Office of Court Administration of the Texas Judicial System, which compiles background information about defendants for use by magistrates during bail hearings. Tex. Code Crim. Proc. arts. 17.021, 17.022. S.B. 6 also imposed

qualification and training requirements upon magistrates who conduct bail hearings, *id.* arts. 17.023, 17.024, 17.0501, and clarified a list of offenses that preclude an individual from obtaining release on personal recognizance. *Id.* arts. 17.03 (b-2), (b-3), 17.027. And perhaps most notably, it required (1) a decision on bail within 48 hours of arrest, (2) individual consideration of the Article 17.15 factors, and (3) "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." *Id.* art. 17.028. These procedural requirements are not dissimilar from those sought by petitioners here.

II. Procedural History

A. The parties

Although litigated as a class action, petitioners are the six named plaintiffs who were arrested for misdemeanors or felony offenses in Dallas County between January 17 and January 19, 2018. ROA.420-22.

No later than January 27, each had been released from custody—sometimes without any cash-bail requirement. ROA.416-17. In particular, Erriyah Banks successfully moved the court for a reduction of two $25,000 bonds and obtained release on a personal recognizance bond with electronic monitoring just three days after appointment of counsel. ROA.417, 4343. Her case was not unusual for the class: in a sample of cases from Dallas County, in January, June, and July 2018, nine out of ten detainees who sought a bond reduction hearing (or where a judge did so sua sponte), the bond was reduced, or the individual released on personal recognizance. ROA.4351-58 (columns T & U).

The operative complaint was filed on January 30, 2018. ROA.415-78. Petitioners alleged that their pre-trial detention violated their equal-protection, procedural-due-process, and substantive-due-process rights under the Fourteenth Amendment. ROA.473-74. Petitioners sought prospective relief, including a preliminary injunction. ROA.190.

Petitioners named as defendants Dallas County, its sheriff, and three kinds of judges: the Felony Judges, the Misdemeanor Judges, and Magistrate Judges. ROA.5957-59. Represented by different counsel, each class of judges serves a different role and derives its power from a different place.

The seventeen Felony Judges are elected state officials whose "jurisdiction [is] provided by Article V, Section 8 of the Texas Constitution." Tex. Gov't Code § 24.007(a). They hold positions created by the State Legislature, Act of May 25, 1985, 69th Leg., R.S., ch. 480, § 1, 1985 Tex. Gen. Laws 1720 (recodifying Tex. Gov't Code tit. 2),[2] that are periodically reapportioned on a statewide basis to maintain roughly equal caseloads. Tex. Gov't Code §§ 24.941-.945. As a result, large counties—like Dallas County—may have multiple Felony Judges while more sparsely populated counties may share a single judge. *Cf. id.* § 24.017. At all times, the Felony Judges' powers and priorities are delineated in state statutes. *See, e.g.*, *id.* §§ 24.003, 24.012(e). And their compensation is paid by the State. Report of the Judicial Compensation Commission 2022 9 (Dec. 2022), *available at* https://tinyurl.com/323bbsvt.

The eleven Misdemeanor Judges, by contrast, are elected *county* officials. Tex. Gov't Code §§ 25.0003(a),

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[2] *See also, e.g.*, Tex. Gov't Code §§ 24.373-.374, .382, .901-.907.

25.0591(b)(1)-(11). Their positions are authorized by state law, but their salaries are paid out of the county budget. *Id.* § 25.0593(c). And the county Commissioner's Court—the executive body that governs a Texas county—has considerable influence over the manner and means of their employment. *Cf., e.g.*, *id.* §§ 25.0005, .0016, .0592-.0593.

Finally, Dallas County's twenty Magistrate Judges are appointed by either felony or misdemeanor judges *Id.* § 54.301; ROA.4170. They are also paid by the County. Tex. Gov't Code § 54.303(a), (c).

Where a Magistrate Judge is appointed to accept cases from more than one Misdemeanor or Felony Judge—as is common in Dallas County—all are required to consent to his appointment, *id.* § 54.301(c), and a majority to his removal, *id.* § 54.305(b). Once appointed, a Magistrate Judge may accept referrals from any of these judges to perform specifically enumerated tasks, which may include presiding over bail hearings. *Id.* § 54.306; Tex. Code Crim. Proc. arts. 2.09, 17.03(a), 17.15; ROA.4170-72.

B. Initial district-court proceedings

Each class of defendants filed a motion to dismiss for lack of jurisdiction or failure to state a claim. ROA.1127-91. Without addressing the significant jurisdictional concerns raised in those motions, the district court held a preliminary-injunction hearing. ROA.6424-580. A month later, it certified a class comprised of "[a]ll arrestees who are or will be detained in Dallas County custody because they are unable to pay" secured-money bail. ROA.5981.

The same day it certified a class, the district court issued an injunction that mirrored the relief approved by a panel of the Fifth Circuit in *ODonnell v. Harris County*, 892 F.3d 147, 164-66 (5th Cir. 2018)

("*ODonnell I*"). The district court acknowledged that the Felony Judges had adapted their policy "[i]n February 2018"—less than two weeks after *ODonnell I* but well after petitioners had been released from custody. ROA.5990-91. Nevertheless, the court concluded that the class representatives had shown that Magistrate Judges continued to mechanically apply the bail schedules without "individual consideration for each arrestee of whether another amount or condition provides sufficient sureties." ROA.5974-75.

As a remedy, the district court adopted wholesale the procedural remedies discussed in *ODonnell I* without ever addressing whether those remedies were appropriate following the limitations imposed on that opinion by *ODonnell v. Goodhart*, 900 F.3d 220 (5th Cir. 2018) ("*ODonnell II*"). *See* ROA.5974-79. The court, however, rejected petitioners' claimed entitlement to a "substantive due process right to pretrial liberty that requires more relief than the right to be bailable upon sufficient sureties"—*i.e.*, a substantive-due-process right *against* cash bail. ROA.5967. All defendants appealed, leading to years of additional proceedings.

C. Initial appellate proceedings

1. Panel stage

Initially, a panel of the Fifth Circuit vacated the preliminary injunction as it applied to the Felony Judges. *Daves v. Dallas County*, 984 F.3d 381, 394-400 (5th Cir. 2020) ("*Daves I*"). Looking to the Judges' role under state law, the panel concluded that the Felony Judges may have promulgated one of the bail schedules, but the Magistrate Judges to whom the individual petitioners' cases were referred had been the ones to apply that schedule. *Id.* at 398-400. Applying well-established principles of standing and sovereign immunity, the panel

held that it lacked jurisdiction to award relief against the Felony Judges. *Id.* at 400.

Though similar standing principles should have applied to the Misdemeanor Judges, the panel did *not* dismiss the claims against them on similar grounds. *Cf. id.* at 401-03. Instead, applying *ODonnell I*, the panel affirmed the district court's injunction of the Misdemeanor Judges on the merits. *Id.* Like the district court, however, the panel rejected petitioners' attempt to expand existing Fifth Circuit precedent to hold "that cash[] bail cannot be required when an indigent arrestee cannot pay, absent a finding that there is no other alternative." *Id.* at 413. The panel agreed that such a remedy "would effectively eliminate cash bail for indigents." *Id.*

Both petitioners and the Misdemeanor and Magistrate Judges filed petitions for rehearing en banc, which the Fifth Circuit granted. The en banc proceedings produced two separate opinions: one is the subject of the current petition; the other addresses petitioners' claims against the judges represented by undersigned counsel.

2. Initial en-banc review

In the first round of en banc proceedings, the Fifth Circuit held that petitioners lacked standing to sue both the Felony and Misdemeanor Judges. *Daves v. Dallas County*, 22 F.4th 522, 542-44 (5th Cir. 2022) (en banc) ("*Daves II*"). The court explained that petitioners' injuries were not traceable to the Felony or Misdemeanor Judges, who merely promulgated the recommended felony and misdemeanor bail schedules, but who did not apply those schedules in individual cases. *Id.* at 543. Nor was it a predictable consequence of those judges' mere promulgation of the recommended bail schedules that the Magistrate Judges would allegedly apply those schedules rigidly and without individualized

consideration of the arrestees' circumstances—particularly since the Felony and Misdemeanor Judges told the Magistrate Judges to exercise their discretion when making bail determinations. *Id.* at 543-44.

The Fifth Circuit did not, however, rule on the question whether petitioners had standing to sue the remaining parties: the Magistrate Judges, Dallas County, or the Dallas County Sheriff. *Id.* at 544-45. Instead, it pretermitted consideration of that question in favor of issuing a limited remand to the district court to consider whether it should have abstained from ruling on this case under *Younger*. *Id.* at 547-48. The en banc court also instructed the district court to consider whether S.B. 6 mooted plaintiffs' claims, which concerned Dallas County's pre-existing informal practices. *Id.* at 548.

D. Post-Remand Proceedings

This appeal returned to the en banc court after the district court concluded: (1) that the *Younger* abstention doctrine did not apply because petitioners "lack[ed] an adequate means of litigating their constitutional claims in the state forum," but (2) petitioners' challenge to "policies and practices" in Dallas County concerning bail was now moot given the Texas Legislature's passage of S.B. 6, which "impose[d] uniform minimum procedural requirements on bail practices throughout the state." Pet.App.167a-80a.

Following supplemental briefing in which the (already dismissed) Felony Judges were instructed to participate, thirteen out of fifteen members of the en banc court agreed with the district court that S.B. 6's passage mooted petitioners' challenge to Dallas County's bail practices. Pet.App.30a. They explained that "[t]o 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." *Id.*

A smaller majority of the en banc court also held that the district court should have abstained under *Younger.* Pet.App.7a-28a. No one disputed that the second prerequisite of *Younger* was present: the State has a demonstrably important interest in regulating the subject matter of the claim—*i.e.*, state-court bail procedures. Pet.App.18a n.23. As a result, the court focused on the remaining two elements: whether the federal proceeding would interfere with an "ongoing state judicial proceeding," and whether the plaintiff has an "adequate opportunity" to raise the federal claim in state proceedings. Pet.App.16a-24a. As to the former, the court held that petitioners' request to dictate the conduct of state-court bail proceedings—subject to an ongoing monitoring requirement—would lead to precisely the type of "ongoing interference and 'audit' of state criminal procedures" that this Court forbade in *O'Shea v. Littleton*, 414 U.S. 488 (1974). Pet.App.23a-24a. As to the latter, the court found *Younger* satisfied because at least three mechanisms for challenging excessive bail existed under state law: a motion for a bond reduction, a bail-review hearing, and a pretrial writ of habeas corpus. Pet.App.16a-22a.

This petition, challenging only the rulings in the Fifth Circuit's *second* en banc opinion, followed.

REASONS FOR DENYING THE PETITION

I. The *Younger* Question Does Not Warrant this Court's Review.

To start, nothing about the en banc Fifth Circuit's conclusion that the district court should have abstained from adjudicating petitioners' lawsuit under *Younger* merits this Court's review. The *Younger* abstention doctrine is grounded in "[t]he basic doctrine of equity

jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger*, 401 U.S. at 43-44. It also rests on principles of "comity": "that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 44.

From these bedrock principles of equity and comity, this Court has required lower federal courts abstain from adjudicating a case in the presence of three prerequisites: (1) the federal case would interfere with "an ongoing state judicial proceeding"; (2) the state proceeding "implicate[s] important state interests"; and (3) "there [is] an adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

The petition does not seem to dispute that the Fifth Circuit correctly identified this this established standard—or even discuss the overarching standard at all. *Cf.* Pet. 13-27. Instead, it jumps right (at 13-16) to a putative circuit split regarding how the standard has been applied in the bail context. No such circuit split exists. And the Fifth Circuit faithfully applied this Court's precedents.

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

Petitioners' chief argument for review is that the en banc Fifth Circuit's conclusion that their lawsuit would

interfere with an "ongoing state judicial proceeding" in violation *O'Shea* conflicts with the holdings of the Eleventh Circuit in *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), and the Ninth Circuit in *Arevalo v. Hennessy*, 882 F.3d 763 (9th Cir. 2018). Not so.

1. Though petitioners downplay its significance (at 4, 19), this Court has already considered how *Younger* abstention applies in the context of structural federal-court challenges to state bail practices. In *O'Shea*, a putative class of indigent plaintiffs claimed that several judges (among other defendants) had violated their constitutional rights through the "discriminatory enforcement and administration of criminal justice," including in bond-setting hearings. 414 U.S. at 491. As relevant here, this Court held that "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials" violated the principles announced in *Younger* just three years earlier. *Id.* at 500. Such relief, the Court explained, "would contemplate interruption of state proceedings to adjudicate assertions of noncompliance" and thus "require . . . continuous supervision by the federal court over the conduct of the [judges] in the course of future criminal trial proceedings,"—effectively "an ongoing federal audit of state criminal proceedings." *Id.* at 500-01. "[S]uch a major continuing intrusion . . . into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint" embodied in our federal system generally and in *Younger* specifically. *Cf. id.* at 502.

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

requests did not rise to the level of interference contemplated by *O'Shea*.

Specifically, in *Walker*, the Eleventh Circuit declined to abstain under *Younger* because the plaintiff "merely [sought] prompt bail determinations for himself and his fellow class members." 901 F.3d at 1254. The plaintiffs did *not* "ask for the sort of pervasive federal court supervision of State criminal proceedings that was at issue in *O'Shea*," but instead "a prompt pretrial determination of a distinct issue, which will not interfere with subsequent prosecution." *Id.* at 1255.

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

3. Contrary' to petitioners' insistence (at 14-15), the en banc Fifth Circuit's decision is entirely consistent with *Walker* and *Arevalo* for the simple reason that the relief petitioners seek is "factually far afield" of the relief provided in *Walker* and *Arevalo*. Pet.App.25a. Specifically, in those two cases, the plaintiffs—who filed their suits while still in jail—sought modest procedural relief:

timely, non-summary bail hearings. *Walker*, 901 F.3d at 1255; *Arevalo*, 882 F.3d at 766 n.2. By contrast, petitioners—who have not been subject to bail proceedings in years and were already released by the time this lawsuit was filed—seek an order mandating detailed structural changes to state-court bail practices on a class-wide basis without any regard to the current state of the law in Texas. *See infra* at 16-17.

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

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

1. Petitioners' suit would interfere with ongoing state judicial proceedings.

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

with the principles of equitable restraint which this Court has recognized." *Id.* at 502.

And, as even petitioners appear concede (at 13-16), the Fifth, Ninth, Eleventh Circuits all agree that, under *O'Shea*, such an intrusion is only exacerbated when the federal district court backs up its order by imposing on-going reporting or supervisory components. So does the Second Circuit. *See Wallace v. Kern*, 520 F.2d 400 (2d Cir. 1975).

b. Two of the problems identified in *O'Shea* are present here. *First*, like the plaintiffs in *O'Shea*, petitioners have asked the federal courts to overhaul the laws in Texas concerning bail. Specifically, petitioners seek a mandate, enforceable by a federal judgment for contempt, that any state-court bail hearing include "an inquiry into or findings concerning ability to pay," "consideration of non-financial alternatives" to cash bail, and "substantive findings" that a particular disposition "is necessary to meet a compelling government interest." ROA.475; *see also* Pet. 14n.1. That "substantive finding"[3] is, according to petitioners, operationalized through "written finding[s] on the record [stating] that no condition or combination of conditions could reasonably

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[3] As the Felony Judges explained below, this request for a "substantive finding" arguably goes further. Properly understood, a "finding" is a procedural device designed to ensure that the magistrate has considered the factors mandated by Texas law. *See* Felony Judges' Suppl. En Banc Brief at 3, 36-44, *Daves v. Dallas County*, No. 18-11368, 2021 WL 1847103 (5th Cir. Apr. 28, 2021). To obtain more as petitioners seem to demand (*e.g.*, at 14 n.1), would require recognition of a substantive right to have bail set at an affordable rate, which has never been recognized as a matter of federal law, *id.*, and is irreconcilable with this Court's current substantive-due-process test. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246-48 (2022)

assure the appearance of the person in court and the safety of any other person or the community." ROA.474. Further, the Magistrate Judge "must explain her reasons for so concluding." ROA.474.

As a result, not only do petitioners seek to impose the kind of "procedures which fix the time of, the nature of and even the burden of proof," in bail hearings, *Wallace*, 520 F.2d at 406, but they also aim to create a novel substantive right that would dictate (at minimum) the *content* of judicial decisions concerning bail. *See* ROA.474-75; Pet. 14 n.1. If granted, petitioner's requested injunctive relief "would contemplate interruption of state proceedings to adjudicate assertions of noncompliance" with federal-court-mandated procedures, *O'Shea*, 414 U.S. at 500, and thereby "open[] the federal courts any time an arrestee cries foul," Pet.App.22a-23a.

Second, to ensure compliance with its five-pages of instructions to state courts, the district court instructed Dallas County to provide a "a weekly report" of individuals who had not had a bail hearing in accordance with the federal-court-ordered procedures. ROA.5978; App.9a n.10. Such relief is just like "the 'periodic reporting' system" that this Court in *O'Shea* held "would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity" under *Younger*. 414 U.S. at 501.

c. Petitioners make two primary counterarguments. Neither has merit. *First*, they insist (at 26) that respondents (and by extension the Fifth Circuit) "mischaracteriz[e]" their requested relief, which seeks a mere "negative injunction, leaving jurisdictions ample flexibility regarding implementation." Not so. Although even the district court was unwilling to go as far as petitioners requested, ROA.5967, it still entered an injunction that for

more than five pages dictated to a host of county officials precisely how they must conduct bail proceedings. ROA.5974-79. As in *O'Shea*, this relief is "aimed at controlling or preventing the occurrence of specific events that might take place" at future bail hearings before Dallas County Magistrate Judges. *O'Shea*, 414 U.S. at 500. After all, any class member who believes a Magistrate Judge's bail order did not comply with the injunction would presumably be empowered to seek a federal-court determination of whether a cash-bail requirement was truly necessary. *See O'Shea*, 414 U.S. at 502. This is precisely the "untoward interference with the state judicial system [that] violates [the] established principles of comity and federalism" announced in *O'Shea* and *Younger*. *Wallace*, 520 F.2d at 404.

Second, petitioners maintain (at 16-18) that, notwithstanding *O'Shea*, programmatic challenges to state bail practices are exempt from *Younger* because of a single footnote in *Gerstein v. Pugh*, 420 U.S. 103 (1975). But the brief, two-sentence footnote that petitioners point to does not aid them.

The *holding* of *Gerstein* is that "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to [pretrial] detention." *Id*. at 126. But in a footnote, the Court stated that the district court correctly determined that *Younger* abstention was not warranted because (1) "[t]he injunction [seeking a timely probable-cause hearing] was not directed at the state prosecutions as such," (2) a challenge to pretrial detention could not be raised "in defense of the criminal prosecution," and (3) "[t]he order to hold preliminary hearings could not prejudice the conduct of the trial on the merits." *Id*. at 108 n.9. Petitioners' effort to apply that reasoning here takes this footnote out of context: the

statement was made while *rejecting* the district court's view that a probable-cause hearing must "be accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses." *Id.* at 119. It did so because "state systems of criminal procedure vary widely," "[t]here is no single preferred pretrial procedure," and because of the "desirability of flexibility and experimentation by the States." *Id.* at 123. These are precisely the type of comity-based concerns that animated the Court's decision in *Younger*. *Cf. Younger*, 401 U.S. at 44. And even the authority on which petitioners rely to manufacture a circuit split could not "agree that the *Gerstein* Court intended to overrule *O'Shea* in a footnote which does not even discuss it." *Wallace*, 520 F.2d at 408.

Rather than merely asking for a timely probable-cause hearing, *Gerstein*, 420 U.S. at 126, petitioners seek to dictate the conduct of bail hearings and the content of bail decisions. *Supra* at 16-17. That request is more akin to the relief that *Gerstein* rejected based on comity-based considerations. *Cf.* 420 U.S. at 119, 123. The Fifth Circuit was correct to do the same here.

2. Petitioners had an adequate opportunity to present their constitutional claims in state court.

The en banc Fifth Circuit also rightly concluded that the third *Younger* prerequisite was present because Texas detainees have an "adequate opportunity" to present their constitutional claims in state court. *Middlesex Cnty. Ethics Comm.*, 457 U.S. at 432. Specifically, "Texas law expressly provides mechanisms for challenging excessive bail," including a motion for bond reduction and a pretrial writ of habeas corpus. Pet.App.20a-22a.

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

Petitioners have never argued that "state law clearly bars" presentation of their constitutional claims. *Moore*, 442 U.S. at 425-26. For good reason: as the en banc Fifth Circuit rightly observed, petitioners may make a motion for a bond reduction. Pet.App.20a (citing Tex. Code Crim. Proc. art. 17.09(3)); *see generally* 41 GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 21.51 (3d ed. Supp. 2020). Indeed, one of the petitioners in this case, Erriyah Banks, successfully did so, ROA.417, 4343—as did nine out of ten detainees in a sample of cases taken in January, June, and July 2018. ROA.4351-58 (columns T & U); *supra* at 5.

Likewise, "[a] petition for habeas corpus is also available," Pet.App.21a, to a detainee seeking to "challenge the manner of his pretrial restraint, *i.e.*, the denial of bail or conditions attached to bail." *Ex parte Smith*, 178 S.W.3d 797, 801 (Tex. Crim. App. 2005) (per curiam); *see*

Tex. Code Crim. Proc. arts. 11.01-.06. As the Fifth Circuit observed, this procedural device "is no dead letter," as "Texas courts have shown themselves capable of reviewing bail determinations." Pet.App.21a.

b. The petition raises two main objections to the Fifth Circuit's analysis on the "adequate opportunity" prong. Again, neither has merit.

First, petitioners argue (at 20-23) that the state-court remedies that the Fifth Circuit identified are not "adequate" because none would allow detainees' claims to be "timely" decided. Leaving aside the practical impossibility of petitioners' suggestion (at 21) that procedures must allow release within hours (as opposed to "days") to be deemed constitutionally adequate, this Court has already twice rejected their argument that delay alone equates to inadequacy. In *Moore*, the plaintiffs complained that "they were not granted a hearing at the time that they thought they were entitled to one, [and] there was no practical opportunity to present their federal claims" in state court. 442 U.S. at 430. But as this Court explained, the relevant question is whether "state procedural law barred presentation of their claims." *Id.* at 432. Mere "delay in affording the [plaintiffs] a hearing in state court" does not "ma[k]e *Younger* abstention inappropriate." *Id.* at 432.

Likewise, in *Pennzoil*, this Court rejected an argument that the plaintiffs lacked an adequate opportunity to litigate constitutional challenges "because no Texas court could have heard Texaco's constitutional claims within the limited time available to Texaco." 481 U.S. at 14. The Court reiterated that the question is whether "state procedural law barred presentation of [plaintiff's] claims." *Id.* And because Texas law opened the state courts for the consideration of plaintiffs' claims, *id.* at 15-

16, the courts below "erred in accepting Texaco's assertions as to the inadequacies of Texas procedure to provide effective relief," *id.* at 17.

Plaintiffs respond (at 20-23) by pointing to this Court's statement in *Gibson v. Berryhill*, that application of *Younger* abstention turns on, among other things, "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." 411 U.S. 564, 577 (1973). But *Moore* and *Pennzoil* postdate *Gibson*, which in any event, did not turn on the *timeliness* of state remedies as both the en banc Fifth Circuit's majority opinion and lone written dissent on the *Younger* issue recognized. *See* Pet.App.26a-27a; *id.* at 62a (Southwick, J., concurring in the judgment) ("Admittedly, the timeliness portion of the presupposition did not come into play, only the competence factor.") Instead, *Gibson* held that *Younger* did not require abstention in favor of ongoing proceedings in a state administrative tribunal because that tribunal was so infected with bias against the plaintiffs that it did not constitute a competent tribunal in which to litigate the plaintiffs' constitutional claims. 411 U.S. at 577-79.[4]

Second, petitioners argue (at 24-25) that state habeas procedures would not present an "adequate opportunity" to present constitutional claims for *Younger* purposes "because they require initiating a separate civil proceeding." Yet as the Fifth Circuit recognized, this argument "is refuted by *O'Shea*, which specifically referenced the availability of state postconviction collateral review as

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[4] Similarly off-base is petitioners' observation (at 23) that the possible availability of *de novo* judicial review did not forestall this Court's conclusion that *Younger* was applicable. *See Gibson*, 411 U.S. at 577. That statement had nothing to do with *timeliness*, but again with bias. *Id.*

constituting an adequate opportunity." Pet.App.21a n.27 (citing *O'Shea*, 414 U.S. at 502). Petitioners' authority (at 24) is not to the contrary. *Deakins v. Monaghan*, did not even reach any *Younger* abstention issue. 484 U.S. 193, 202-04 (1988). And *Steffel v. Thompson* merely held that *Younger* abstention does not apply when "[n]o state criminal proceeding is pending at the time the federal complaint is filed. 415 U.S. 452, 462 (1974). Since, by definition, there is a criminal proceeding pending when an arrestee is awaiting a bail determination, *Steffel* is irrelevant here.

II. The Mootness Question Does Not Warrant this Court's Review.

Petitioners' request for review of the Fifth Circuit's mootness holding—joined by thirteen of the fifteen judges on the en banc court—is even less meritorious. Lacking even the pretense of a circuit split, the petition is again (at most) a fact-bound request for error correction. And, again, there is no error to correct.

A. The Constitution permits federal courts to adjudicate only "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988); *see* U.S. CONST. art. III. The case-or-controversy requirement forbids federal courts to resolve disputes "when 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 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). That is, "[i]f an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990)). And where, as here, "[t]he only

relief sought in the complaint was a declaratory judgment that the now repealed" procedures are "unconstitutional . . . and an injunction against [their] application," there is no request for relief that a federal court may offer. *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414-15 (1972) (per curiam); *accord City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (applying a similar rule under the doctrine of standing).

As noted, S.B. 6 amends several aspects of the Texas Code of Criminal Procedure regarding bail in misdemeanor and felony cases. *See supra* at 4-5. Relevant here, it sets forth several procedural requirements for bail hearings, including requiring (1) a decision on bail within 48 hours of arrest, (2) individual consideration of the Article 17.15 factors, and (3) "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. Proc. art. 17.028(a), (b).

This new "legislation . . . plainly renders moot the single issue" raised in the complaint. *U.S. Dep't of Justice v. Provenzano*, 469 U.S. 14, 15 (1984); *see also United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 213 (1984). Specifically, petitioners alleged that the informal processes used to set bail in Dallas County when they were arrested nearly six years ago—and particularly the use of a bail schedule—violated the Fourteenth Amendment. ROA.428-56. But as the district court explained, following the passage of S.B. 6 "the subject matter of this lawsuit—Dallas County's home-grown procedures for setting pretrial bail circa 2018—is no more" because "S.B. 6 replaced Dallas County's procedures with a uniform set of

statewide statutory procedures." Pet.App.176a. Likewise, because "the named plaintiffs have not been subject to bail proceedings since years before the advent of S.B. 6," that circumstance also "calls into question their ability to pursue this litigation for ongoing injunctive relief as injured parties, much less class representatives." Pet.App.30a. After all, "in order to pursue the declaratory and injunctive [relief] claims, . . . [Plaintiffs] must establish that [they] ha[ve] a 'specific live grievance' against the application of" S.B. 6's procedures. *Lewis*, 494 U.S. at 479 (quoting *Golden v. Zwickler*, 394 U.S. 103, 110 (1969)).

B. Petitioners make several arguments in response. None has merit. *First*, the petition repeatedly asserts (at 28-33) that the Fifth Circuit misunderstood or "mischaracterized" the nature of their lawsuit and then misapplied this Court's mootness precedent. For example, they argue (at 30) that, because Dallas County's practices allegedly "continue unchanged" even after the Texas Legislature enacted S.B. 6, they are still entitled to the relief sought in their operative complaint. Even if that were true (and it is not), "this Court is not equipped to correct every perceived error coming from the lower federal courts." *Tolan v. Cotton*, 572 U.S. 650, 659 (2014). And while "a clear misapprehension of [the controlling] standards in light of [its] precedents" justifies the Court's intervention, *id.*, misapprehension of the nature of a plaintiff's claim does not—no matter how repeated. *Contra* Pet. 30.

Second, petitioners insist (at 30) that the Magistrate Judges "continue" to violate the Constitution even after new procedures were enacted. Yet as the Fifth Circuit rightly noted, nearly all of the evidence in this case predates implementation of S.B. 6's procedures, and none of

the plaintiffs here has been subject to the post-S.B. 6 procedures. Pet.App.30a; *see also* Pet.App.176a n.1. At minimum, those changed circumstances would require reexamination of the validity of the injunction. *Cf. Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1855). But here, it requires more: if as petitioners argue (at 9, 30), "the Dallas County magistrates are not in compliance with state law, this raises issues for state courts to resolve," because "[p]ursuant to *Pennhurst State Sch. & Hosp. v. Halderman*, [465 U.S. 89, 106 (1984)] federal courts may not grant injunctive relief against the defendants on the basis of state law." Pet.App.32a n.40.

Third, petitioners argue (at 28) that legislation enacted mid-litigation only moots a case only if it "completely and irrevocably eradicate[s] the effects of the alleged violation[s]," *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979). Assuming that *any* legislation can be considered truly "irrevocable," *but see* Michael Doran, *Legislative Entrenchment and Federal Fiscal Policy*, 81 LAW & CONTEMP. PROBS. 27, 28 & n 4 (2018) ("The dominant position among legal scholars . . . is that legislative entrenchment is unwise, uncommon, and unconstitutional."), S.B. 6 does what petitioners insist it must: it "completely and irrevocably eradicate[s] the effects" of any informal practices of Dallas County Magistrates Judges by supplanting them with a bevy of procedural protections codified by statute and enforceable (if at all) in state court. If petitioners maintain that S.B. 6 does not go far enough to satisfy the Constitution, that is a separate challenge to S.B. 6, which petitioners admit (at 31) they have not yet sought to litigate.

Fourth, they complain (at 30) about the wording that the Fifth Circuit used to describe the mootness test. For

example, they maintain that the Fifth Circuit was wrong to ask "whether [S.B. 6] . . . measures up to plaintiffs' proffered constitutional minima." Pet.App.30a. Instead, petitioners insist, the court should have asked if S.B. 6 "ma[de] it impossible for a court to grant [the plaintiff] any effectual relief" regarding the bail practices that pre-existed S.B. 6. Pet. 28 (quoting *Mission Prods. Holdings v. Tempnology LLC*, 139 S. Ct. 1652 (2019)). But this is semantics: nowhere does the petition explain what "effectual relief," *Mission Prods. Holdings*, 139 S. Ct. at 1660, a court could provide if S.B. 6 *does* "measure up" to what petitioners claim the constitution demands, Pet.App.30a.

Fifth, petitioners cite (at 28) *New York State Rifle & Pistol Ass'n v. City of N.Y.*, for the proposition that a case is moot only if it affords the plaintiff "the precise relief . . . requested in . . . their complaint." 140 S. Ct. 1525, 1526 (2020) (per curiam). True, the case recognized that was *one* way to moot a dispute. *Id.* But nothing in the Court's short, per curiam opinion purported to overturn the long-established mootness test, which requires dismissal "[i]f an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit.'" *Symczyk*, 569 U.S. at 72. As discussed, S.B. 6 does precisely that, rendering the second question presented uncertworthy.

III. This Case Is a Poor Vehicle to Consider the Questions Presented.

Even if the petition raised a question worth the investment of this Court's limited resources, this case presents a poor vehicle for its consideration for at least two reasons. *First*, because the Fifth Circuit's decision rests on two independent grounds for dismissal, petitioners cannot obtain relief allowing their case to proceed unless

this Court grants review and reverses on both questions. Because the Court is unlikely to do so for the reasons just discussed, this case remains a flawed vehicle for considering either of the two questions presented. *Second*, yet another independent ground supports the dismissal of the claims against the seventeen Felony Judges and eleven Misdemeanor Judges: lack of standing. The Fifth Circuit's ruling that any injury petitioners face cannot be fairly traced to those defendants falls outside the scope of the questions presented, and the time to seek review has now lapsed. As a result, it is questionable whether this Court has jurisdiction to consider the petition as to these respondents; but at minimum, the petition is a poor vehicle to consider any *other* justiciability problems.

A. The en banc Fifth Circuit's decision rests on two independent grounds for dismissal.

To start, this case is a poor vehicle to consider either of questions presented precisely because the Fifth Circuit's second en banc decision relies on two independent grounds for dismissal: *Younger* abstention and mootness, *see* Pet.App.7a-33a, which the court of appeals could (and did) decide in any order it chose, *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). Thus, to have any effect on the ultimate outcome of their lawsuit, petitioners would need to convince this Court to grant review and reverse the Fifth Circuit on both. Because neither question presented warrants this Court's attention (let alone reversal), *see supra* at 11-27, this case is a poor vehicle to resolve either.

B. The Felony and Misdemeanor Judges are not proper respondents to the petition.

Finally, this Court should at minimum deny review as to the seventeen Felony Judges and eleven

Misdemeanor Judges petitioners erroneously listed as respondents, Pet. ii, because whatever the Court decides as to the questions presented, it will have no effect on the dismissal of petitioners' claims against these defendants. Applying routine principles of Article III standing, the Fifth Circuit dismissed petitioners' claims against those judges in the first round of en banc proceedings. *Daves II*, 22 F.4th at 542-45. The court thereby "winnowed nonjusticiable claims," leaving open the "potential liability of the Dallas magistrate[] [judges] (for declaratory relief only pursuant to Section 1983(e)), the Sheriff, and the County," as the subjects of decision for the second round of en banc proceedings. Pet.App.6a; *see also Daves II*, 22 F.4th at 548 (leaving as "potentially proper parties" only the Magistrate Judges and Sheriff); *id.* at 545 ("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.").

The petition does not seek review of the Article III standing questions resolved in the first en banc decision disposing of petitioners' claims against the Felony and Misdemeanor Judges. "Th[at] framing of the question presented has significant consequences, however, because under this Court's Rule 14.1(a), '[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court.'" *Yee v. Escondido*, 503 U.S. 519, 535 (1992) (quoting Sup. Ct. R. 14.1(a)). The Court "disregard[s]" this principle "only in the most exceptional cases . . . where reasons of urgency or of economy suggest the need to address the unpresented question in the case under consideration." *Id.*

Here, the petition does not seek review of the Fifth Circuit's dismissal of petitioners' claims against the

Felony and Misdemeanor Judges on Article III standing grounds, meaning that none of these twenty-eight defendants is properly before this Court. Nothing in the petition even hints that the unpresented Article-III-standing question is "fairly included" in the questions presented. To the contrary, petitioners concede (at 8) that the Article III standing issue is "not directly related to this petition." Pet. 8. Properly so: the unpresented Article III standing question is "distinct, both analytically and factually," from the *Younger* abstention and mootness questions that are presented. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (per curiam).

Nor does the petition suggest this is the "exceptional case" warranting this Court's consideration of unpresented issues, which may occur where: (a) the Court "overrul[es] one of [its] prior decisions,"; (b) the petition presents only constitutional questions but the Court decides it on a "nonconstitutional ground[]"; (c) circumstances involving "the possible absence of jurisdiction"; or (d) plain error evident from the record and otherwise within the Court's jurisdiction. *Id.* at 32-33.

Thus, by limiting their questions presented to *Younger* abstention and mootness, petitioners have limited any potential relief the Court may grant to the discrete legal issues decided in the second round of en banc proceedings against the defendants who were still parties at that time: the Dallas Magistrate Judges, Dallas County Sheriff, and Dallas County. *See, e.g.*, Pet. i. Because the time has now expired for seeking this Court's review of the issues in the first en banc opinion, the Court arguably does not have jurisdiction to consider the claims against the Felony or Misdemeanor Judges because as to them the "judgment became final and

unreviewable upon the expiration of the 90-day deadline under 28 U.S.C. § 2101(c) for filing a petition for certiorari." *Salazar v. Buono*, 559 U.S. 700, 711-12 (2010); *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) (90-day deadline is "mandatory and jurisdictional"). But, at minimum, claims against them would be a poor vehicle to resolve *other* justiciability or abstention issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

LANORA C. PETTIT
Principal Deputy Solicitor General
Counsel of Record

WILLIAM F. COLE
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Lanora.Pettit@oag.texas.gov
(512) 936-1700

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