No. 23-97

IN THE
Supreme Court of the United States

SHANNON DAVES, *et al.,* ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED; FAITH IN TEXAS; AND TEXAS ORGANIZING PROJECT,
Petitioners,
v.
DALLAS COUNTY, TEXAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals err in concluding that a federal court must abstain under the principles of *Younger v. Harris*, 401 U.S. 37 (1971), from entertaining a sweeping challenge to state court bail procedures that would require federal courts to intervene in ongoing state criminal proceedings that already provide an adequate opportunity to raise federal constitutional challenges?

2. Did the court of appeals err in concluding that this case is moot as a result of the Texas Legislature enacting comprehensive bail reform legislation that fundamentally alters the bail setting process in Texas state courts?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

Petitioners seek to invoke the powers of the federal judiciary to undertake a massive intervention in the bail setting process in Texas state courts. The Petition—which is laced with inaccuracies regarding the bail procedures currently employed in Dallas County—aims to reinstate sweeping injunctive relief that would establish a *de facto* federal judicial monitor to correct perceived deficiencies in the process accorded during bail setting to thousands of arrestees within Texas's criminal justice system.

As expansive as the district court's injunction is, Petitioners' ambitions are even more staggering in scope. Their aim is nothing short of the elimination of pretrial detention from the criminal justice system. Indeed, Petitioners' counsel sought this outcome in *ODonnell v. Harris County*, a closely related case that they filed in Houston on behalf of a class of misdemeanor arrestees. *See, e.g.*, Pet. App. 3a. As a result of a consent decree in that case, most misdemeanor arrestees in Houston are now immediately released without bail and without ever appearing before a judge. A federal district judge in Houston enforces this system by reviewing detailed bi-annual reports from court-appointed *rapporteurs* who purport to document the "performance" of this "pretrial reform." Petitioners seek the same relief in Dallas that they sought in Houston.[1]

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[1] The factual and procedural history of the *ODonnell* case is too extensive to discuss here but is set forth in detail in two Fifth Circuit opinions. *See ODonnell v. Goodhart*, 900 F.3d 220 (5th Cir. 2018); *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). The bi-annual reports referenced above are filed on the

As the Fifth Circuit recognized, Petitioners' efforts are an affront to the principles of equity, comity, and federalism articulated in *Younger v. Harris*, 401 U.S. 37 (1971), which counsel that federal courts must abstain from hearing actions for declaratory or injunctive relief where (1) such relief would unduly interfere with ongoing state proceedings, (2) important state interests are at stake, and (3) the putative plaintiff has an adequate opportunity to raise his federal constitutional claim in the course of the state proceedings. Pet. App. 7a–32a. Indeed, despite Petitioners' attempt to manufacture evidence of a circuit split on this question, every circuit court confronted with the kind of expansive request for ongoing federal judicial intervention in core state criminal justice proceedings that Petitioners advance here has recognized the need for abstention under *Younger*. This Court's precedents mandate the same conclusion.

Moreover, of great import for this Court's review, Petitioners chose to pursue their preferred outcome by suing an unusual arrangement of state judicial officers, with respect to whom federal injunctive relief is inappropriate. Consequently, Petitioners face multiple threshold obstacles to proceeding with this suit, separate and apart from either of the questions presented in the Petition. The Fifth Circuit relied on such threshold grounds in vacating the preliminary injunction that had been issued by the district court, and its reasoning suggests that the dismissal of the entire case is also warranted on such grounds. Pet. App. 7a–32a. In sum, the jurisdictional deficiencies, outstanding legal issues, and unresolved factual conflicts that have characterized this litigation to date

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docket with the district court. *See ODonnell v. Harris Cnty.*, No. H-16-1414 (S.D. Tex. 2016).

indicate that this case is an exceptionally poor vehicle for addressing any purported circuit conflict regarding the propriety of *Younger* abstention.

Finally, after Petitioners brought this suit, the Texas Legislature enacted a major overhaul of the bail setting process employed in Texas courts. Thirteen judges of the Fifth Circuit reasonably concluded, in an alternative holding, that this new law renders the controversy moot and requires dismissal of Petitioners' case. Pet. App. 28a–32a. Regardless of whether that determination was correct, it cannot legitimately be argued that a routine dismissal for mootness is somehow a question of profound importance that warrants review by this Court. Nor can there be any doubt that the Fifth Circuit applied the proper legal standard in determining mootness—a familiar, commonplace legal inquiry applied without fanfare in thousands of cases. Accordingly, review by this Court should also be precluded under Rule 10(a).

STATEMENT OF THE CASE

This case has taken many twists and turns in over five years of litigation. The procedural history of this suit is highly complex, but it needs to be set forth in some detail to illuminate the challenges that would remain if this Court were to grant the Petition.

I. Petitioners seek sweeping injunctive relief against state judicial officers that aims to transform the process by which bail is set in Dallas County courts.

Petitioners represent a class of indigent individuals arrested for misdemeanor or felony offenses in Dallas County, Texas. Petitioners maintain that indigent arrestees in Dallas County are jailed solely because

they cannot pay cash bail, ostensibly in violation of the Equal Protection and Due Process Clauses of the U.S. Constitution's Fourteenth Amendment. Pet. App. 84a.

A. The Complaint

Petitioners have styled this suit as a civil rights action under 42 U.S.C. § 1983. They are suing Dallas County—a political subdivision of the State of Texas—as well as the Dallas County Sheriff, the Judges of the Dallas County Criminal Court at Law ("the Misdemeanor Judges"), the Judges of the Dallas County Criminal District Court ("the Felony Judges"), and the Dallas County Criminal District Court Magistrate Judges.[2] Pet. App. 84a.

Petitioners seek an expansive injunction that prohibits the above-mentioned judicial officers from "[operating a] system of wealth-based detention" and instead requires them in setting bail to conduct a detailed inquiry into each arrestee's ability to pay, to consider non-financial alternatives for ensuring that the arrestee appears at trial, and to make findings that either pretrial detention or any particular release condition is necessary to meet a compelling government interest. Pet. App. 84a. In practice, satisfying Petitioners' radical demands would result in the immediate pretrial release of all indigent arrestees. *See* Pet. App. 72a.

The judicial officers named in Petitioners' suit are the ones who participate in the bail setting process in

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[2] Based on the statutory scheme and local practice, *see* Tex. Gov't Code § 54.301, the Magistrate Judges are appointed and controlled by the Felony Judges. The Felony Judges alone hire and fire the Magistrate Judges. Moreover, the Magistrate Judges report to the Felony Judges and are subject to the policies and guidance that the Felony Judges promulgate. Pet. App. 183a.

Dallas County. Pet. App. 83a. Within hours of arrest, most arrestees in Dallas County are taken before a Magistrate Judge, who is responsible for either (1) setting bail or (2) releasing the arrestee on a personal bond, such that the arrestee does not need to make an up-front payment to obtain release. The Sheriff enforces the bail determination and has no authority to modify it. Pet. App. 85a.

At the time that this suit was filed in 2018, both the Misdemeanor Judges and the Felony Judges had promulgated bail guidelines for use by the Magistrate Judges to promote uniformity and fairness across Dallas County's criminal justice system. Pet. App. 85a. The bail schedules promulgated by the Misdemeanor Judges were labeled "guidelines" and stated that any bond should be set "in proportion to the facts of the alleged offense after evaluating the special circumstances of each offense." Pet. App. 85a. Similarly, the Felony Judges issued bail schedules containing "recommended amounts" and indicating that "bonds may be set higher or lower than the amount shown if justified by the facts of the case and the circumstances of the defendant." Pet. App. 85a.

Dallas County, the Misdemeanor Judges, the Magistrate Judges, and the Sheriff (collectively, "the Dallas County Defendants") suggested that the federal district court was required to abstain from hearing an action to enjoin state bail procedures pursuant to the principles of *Younger*. Pet. App. 84a–85a. Although the initial briefing on this point was limited, they invoked *Younger* abstention based on the view that the injunction would interfere with ongoing state court criminal proceedings, that it would implicate the state's important interest in securing the appearance of arrestees at trial through an effective bail system,

and that arrestees already have an adequate opportunity to raise objections to bail through bail review hearings or state habeas corpus actions. *See, e.g.*, Pet. App. 171a–74a.

The Dallas County Defendants also moved to dismiss Petitioners' suit, arguing that there could be no constitutional violation because, even pursuant to the bail schedules, the Magistrate Judges retained discretion to consider indigency in setting bail. Pet. App. 112a. Moreover, they argued that neither the County, the Sheriff, nor any of the named judicial officers are proper defendants in this suit—the judicial officers are state, not local, policymakers, and the Sheriff's role is entirely ministerial, such that there is no local policymaker whose actions could give rise to § 1983 liability. Pet. App. 115a–16a. Finally, they argued that *Ex parte Young*-style injunctive relief is also presumptively unavailable because the only actors responsible for enforcement of the policy at issue would be state judicial officers, who are not subject to the doctrine's limited exception from sovereign immunity. Pet. App. 115a–16a.

Relying heavily on the Fifth Circuit's decision in *ODonnell*, the district court declined to abstain under *Younger*. The court did not fully analyze the doctrine or explain its decision. The court further concluded—again, rotely relying on *ODonnell*—that all the named judicial officers were local policymakers potentially subject to § 1983 liability. Pet. App. 187a–188a.

Furthermore, despite clear evidence that the bail schedules were not designed to be followed strictly, the district court concluded that the Magistrate Judges "routinely treat[ed] these schedules as binding when determining bail." Pet. App. 185a. Reasoning that such "mechanical" imposition of secured money bail

pursuant to a fixed schedule violates the Equal Protection and Due Process clause, the district court granted a preliminary injunction in favor of Petitioners that, like the virtually identical injunction entered in *ODonnell*, is breathtaking in scope. *See* Pet. App. 190a.

B. The Injunction

The injunction entered by the district court legislates, in minute detail, the bail procedures that Dallas County judicial officers must employ in ongoing criminal cases. For example, the injunction requires the following specific processes (Pet. App. 195a–97a):

- *Financial Affidavit*: Pretrial Services must verify an arrestee's ability to pay a bail amount by having the arrestee complete a financial affidavit, with that affidavit to include specific details about an arrestee's financial situation.
- *Individualized Hearing*: A defendant who completes an affidavit "showing an inability to pay secured money bail" is entitled to a hearing, within 48 hours from arrest, at which an impartial decision-maker must conduct an individualized hearing. At the hearing, the arrestee must have an opportunity to present and respond to evidence. If the decision-maker declines to lower the bail amount or impose an alternative condition of release, the decision-maker is required to make written findings or findings on the record explaining the reason for that decision.
- *Formal Adversarial Bail Review Hearing*: The County is required to provide the arrestee with a formal adversarial bail review hearing before a Misdemeanor or Felony Judge for any arrestee

whose bail amount is not lowered after the individualized assessment.

- *Sheriff's Role*: The Court "authorized" the Dallas County Sheriff to decline to enforce bail orders that are not accompanied by a "record" showing that an arrestee received an individualized hearing and an opportunity for formal review. However, all other conditions of release "ordered by the Magistrates" were to "remain in effect."
- *Weekly Reporting*: The County must make a weekly report *to the federal district court* of defendants who did not receive an individualized assessment within 48 hours of arrest. The injunction specifically contemplates future intervention from the federal court, notifying the County that a "pattern of delays might warrant further relief from the district court." The injunction effectively dictates what judicial officers can and cannot do in setting bail. Moreover, its reach extends beyond the judicial act of setting bail—the injunction instructs Pretrial Services to perform certain functions and it purports to authorize the Sheriff to ignore certain bail orders.

The Dallas County Defendants appealed the injunction, but it was left in place by a three-judge panel of the Fifth Circuit. *See Daves v. Dallas Cnty., Tex.*, 984 F.3d 381, 402 (5th Cir. 2020), *reh'g en banc granted*, *order vacated*, 988 F.3d 834 (5th Cir. 2021). The panel explained that it would reverse if its analysis were "completely *de novo*," but noted that it was obligated to follow the Fifth Circuit's precedent in *ODonnell*. *Id.*

Taking up the panel's suggestion, the Dallas County Defendants sought rehearing en banc to challenge the determination that the Misdemeanor Judges were local policymakers under § 1983. The Fifth Circuit granted the County's petition and called for supplemental briefing on the question of the Misdemeanor Judges' status—*and* on the propriety of abstention under *Younger*. *Daves,* 988 F.3d at 835.

In addition, during the pendency of the en banc proceedings, the Texas Legislature enacted Senate Bill 6 ("S.B. 6"), a bill providing for comprehensive bail reform in all Texas state courts. The legislation codified reforms inspired by the type of relief ordered by the district court, which was itself modeled on the injunction previously ordered by the Fifth Circuit in *ODonnell*.[3] Pet. App. 174a–179a. The en banc court tasked the parties with providing supplemental briefing as to the effect of S.B. 6 on the case.

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[3] With S.B. 6, the Texas Legislature made both substantive and procedural changes to Texas law governing how bail is set. Texas law now requires that any arrestee charged with an offense punishable as a Class B misdemeanor or higher, and who is unable to pay a bail amount set by a judge, be provided with an opportunity to complete a financial affidavit. *See* Tex. Code Crim. Proc. art. 17.028(h). Texas law now also requires that any person completing an affidavit of inability to pay is entitled to a "prompt review . . . on the bail amount"; and the magistrate must make written findings if the bond amount is not lowered following that review. *See* Tex. Code Crim. Proc. art. 17.028(h). It also requires individual consideration of all Article 17.15 factors, and that the magistrate impose 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." *See* Tex. Code Crim. Proc. art. 17.028(a), (b).

II. The en banc Fifth Circuit vacates the preliminary injunction in its entirety on threshold grounds and issues a limited remand to the district court instructing it to evaluate arguments for dismissal based on *Younger* abstention and mootness.

The Fifth Circuit, sitting en banc, vacated the preliminary injunction based on the jurisdictional and threshold arguments advanced by the Dallas County Defendants. The court held that neither the Misdemeanor Judges nor the Felony Judges could be proper defendants in a § 1983 action against the County, as they acted for the State of Texas, not Dallas County, when addressing bail guidelines. Pet. App. 105a–107a. The court also held that Petitioners lacked Article III standing to sue the Felony and Misdemeanor Judges because those judges' actions (enacting non-binding bail schedules) were too remote from the cause of Petitioners' injury (the allegedly routine application of the bail schedules without individualized consideration). Pet. App. 113a–114a.

The court left open for future decision whether the Magistrate Judges or the Sheriff should be deemed local policymakers, and whether Petitioners had standing to sue either of them. Pet. App. 107a–109a, 114a–116a. With the Felony and Misdemeanor Judges out of the case, however, there was no longer a basis for a preliminary injunction against Dallas County. Accordingly, the court vacated the injunction in its entirety. Pet. App. 114a.

By its own terms, the preliminary injunction did not apply to the Magistrate Judges, as they could not be enjoined directly given their status as state judicial officers acting in a judicial capacity. Nor did the injunction apply directly to the Sheriff, except to

exempt her from enforcing allegedly unconstitutional orders. Accordingly, the status of those parties did not need to be resolved by the Fifth Circuit to vacate the injunction—and it remains an unresolved issue in this lawsuit. Pet. App. 107a–109a; 115a–116a.

The Fifth Circuit declined to opine on the equally critical threshold issues of the propriety of abstention under *Younger* and the effect of S.B. 6 on the continued vitality of the controversy. Instead, the court ordered a limited remand to the district court to provide a thorough analysis of both issues. Pet. App. 116a–122a.

III. The district court declines to abstain under *Younger* but dismisses the case as moot due to the enactment of S.B. 6.

On remand, the district court held an evidentiary hearing and the Dallas County Defendants sought to introduce new evidence pertinent to the analysis of *Younger* abstention. *See* Pet. App. 169a n.3; *see also Daves v. Dallas Cnty., Texas*, No. 3:18-CV-154-N, 2022 WL 2473364 (N.D. Tex. July 6, 2022), ECF No. 279 at 13–15 ("The current facts are different than the facts before the Court at the preliminary injunction hearing three and-a-half years ago"). In particular, the Dallas County Defendants introduced evidence that the Misdemeanor Judges had adopted new and expanded procedures for reviewing bail that comply with, and even surpass, the State of Texas's uniform requirements enacted via S.B. 6. *See Daves*, No. 3:18-CV-154-N, ECF No. 279-6, Decl. of Judge Carmen White; ECF No. 279-7, Decl. of Lynn Pride Richardson; s*ee also* ECF No. 283 (motion to strike new evidence).

The Dallas County Defendants submitted documentary and video evidence of these new procedures in action. *See Daves*, No. 3:18-CV-154-N, ECF No. 279-6,

Decl. of Judge Carmen White; ECF No. 279-7, Decl. of Lynn Pride Richardson; *see also Daves v. Dallas Cnty., Texas*, No. 18-11368 (5th Cir. 2018), ECF No. 486, Suppl. Br. 9–11. In sum, notwithstanding Petitioners' misleading assertions in the Petition, arrestees in Dallas County *do not* languish in jail for weeks on end—let alone months—without an opportunity to challenge their bail determinations. Rather, they are afforded multiple, timely opportunities to challenge bail and they are provided a robust process, including the assistance of counsel. The Dallas County Defendants argued that such procedures create an adequate opportunity to raise federal constitutional issues within the course of the state proceedings, as required by the third element of the *Younger* abstention analysis.

The district court ignored the new evidence submitted by the Dallas County Defendants, however. *See* Pet. App. 171a. Instead, the district court determined that abstention under *Younger* is improper because the state court procedures do not provide an opportunity for an arrestee to obtain a timely resolution of his constitutional challenge to bail. In so concluding, the district court relied on its outdated initial factual findings suggesting that arrestees could face extensive waiting periods for bail review and habeas corpus hearings, and that arrestees would not be provided with counsel for such hearings. Pet. App. 171a.

The district court went on, however, to evaluate mootness in light of the enactment of S.B. 6 and concluded that the case should be dismissed as moot. The court reasoned that the controversy was no longer a live one because the challenged procedures were no longer in effect and had been wholly displaced by the new law. Pet. App. 174a–180a.

IV. The case returns to the en banc Fifth Circuit, which holds that the court must abstain under *Younger* or, in the alternative, that the case must be dismissed as moot.

After the district court's decision, the case returned to the Fifth Circuit en banc. The Fifth Circuit reversed the district court and held that *Younger* applies under these circumstances and that it precludes a federal court from issuing the requested injunctive relief against state court bail procedures. Pet. App. 2a–33a.

The Fifth Circuit determined that an injunction of such expansive scope and intrusiveness constitutes undue interference with ongoing state proceedings under *Younger*. Pet. App. 7a–28a. The Fifth Circuit reasoned that such an injunction would be akin to the "type of 'periodic reporting' scheme" or "ongoing federal audit of state criminal proceedings" precluded by this Court's precedent, and that it would "open[] the federal courts any time an arrestee cries foul." Pet. App. 22a–23a. Specifically, the Fifth Circuit noted that "in their supplemental briefing, [Petitioners'] claims for relief including on-the-record hearings and detailed factual opinions concerning bail determinations reify how far federal courts would have to intrude into daily magistrate practices." Pet. App. 23a n.30.

The court further determined that state court proceedings provide an adequate opportunity for arrestees to raise any federal constitutional objection to bail through bail review hearings and state habeas corpus filings. The court clarified that "timeliness" is not a stand-alone requirement for adequacy of state procedures under this analysis; rather, delays in state court operations are a problem under *Younger* only when

they are severe enough to amount to bad faith. Pet. App. 7a–28a.

The court also held, in the alternative, that the case is moot due to the enactment of S.B. 6, the new Texas law that changes the bail setting process in all Texas courts. Applying principles of justiciability under Article III, the court reasoned that a legal challenge to state court procedures that are no longer in effect and have been legislatively displaced cannot be a live, justiciable controversy. Pet. App. 28a–33a. Indeed, the Fifth Circuit reasoned that to hold otherwise would be to issue an "advisory opinion" because the evidence in the record was "largely generated during proceedings that occurred pre-amendment[.]" Pet. App. 30a.

REASONS FOR DENYING THE PETITION

I. There is no genuine conflict among the circuit courts regarding the propriety of *Younger* abstention under the circumstances at issue here.

Petitioners maintain that the circuit courts are split as to how *Younger* abstention applies in cases like this one. The ostensible divide is illusory, however, and reflects nothing more than the application of the fact-sensitive *Younger* abstention doctrine to materially different circumstances. The differing outcomes described in the Petition are primarily the result of the varying scope of relief that the respective federal plaintiffs were seeking. The scope of the proposed injunction is a critical factor to consider under the *Younger* doctrine, which seeks to protect state courts from unwarranted interference by their federal counterparts.

Two key cases establish the framework for evaluating the *Younger* doctrine's "interference" factor. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), plaintiff-detainees

in Florida argued they had a constitutional right to a judicial determination of probable cause before they were subjected to pre-trial detainment. At the time, state law foreclosed any right to a preliminary hearing or even habeas relief when an information was filed for 30 days after the initial arrest. *Id.* at 106. The Court declined to abstain because the relief being sought "was not directed at the state prosecutions as such," but rather "at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution" and thus "could not prejudice the conduct of the trial on the merits." *Id.* at 108 n.9.

In contrast, *O'Shea v. Littleton* involved a constitutional challenge to Illinois bail procedures—the same kind of challenge at issue in this case. 414 U.S. 488 (1974). There, the Court characterized the relief sought by the plaintiffs as "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. Such expansive relief was improper, as it "contemplate[d] interruption of state proceedings to adjudicate assertions of noncompliance by petitioners," which would be "intrusive and unworkable[.]" It would invariably lead to "unwarranted anticipatory interference in the state criminal process by means of continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts." *Id.* at 500–01. Worse still, it would require ongoing monitoring of state court procedures, which would be "antipathetic to established principles of comity" and constitute "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings [that] is in sharp conflict with the principles of equitable restraint which this Court has recognized[.]" *Id.* at 501–02.

This distinction—ongoing interference with state bail procedures, as opposed to limited intervention at a distinct stage of the criminal justice process—explains the alleged "circuit split." In *Wallace v. Kern*, the Second Circuit considered an argument that the "procedures in the state courts regarding bail are arbitrary and unreasonable." 520 F.2d 400, 401 (2d Cir. 1975). Notably, the plaintiffs there "sought improvements in the physical facilities of the courts," "an evidentiary hearing on the question of bail within 72 hours after arraignment," and "a written statement by the judge of his reasons for fixing bail at any point when a bail decision is made." *Id.* The court easily determined that such detailed relief would unduly "interfere[] in state bail hearing procedures" and constituted "the kind of continuing surveillance found to be objectionable in *O'Shea*." *Id*.

By contrast, in *Walker v. City of Calhoun, GA*, 901 F.3d 1245 (11th Cir. 2018), the Eleventh Circuit declined to abstain under *Younger* in a case that involved state administrative litigation—the suit did not contemplate ongoing interference with any state criminal process. 901 F.3d at 1255. Similarly, the Ninth Circuit in *Arevalo v. Hennessy* declined to abstain under *Younger* in a challenge to state bail procedures because the requested relief could "be achieved without an ongoing intrusion into the state's administration of justice[.]" 882 F.3d 763, 766 n.2 (9th Cir. 2018).

Moreover, any difference in the outcomes of these cases is further justified by differences in the state procedures being challenged. Such differences are material because the third element of the *Younger* abstention doctrine calls for an inquiry into whether the challenged state procedures provide an adequate

opportunity for the federal plaintiff to raise his federal constitutional challenge in the course of the state proceedings. Both in this case and in *Wallace*, bail review and habeas corpus hearings provided such an opportunity; by contrast, in *Arevalo*, the plaintiff had exhausted any such options.

In sum, any alleged split between these cases is purely illusory. There is no circuit divide; there are only federal circuit courts applying a nuanced legal test to different factual scenarios.

II. The Fifth Circuit's decision to abstain under *Younger* does not conflict with this Court's precedents.

Petitioners' argument that the Fifth Circuit's opinion is in conflict with this Court's rulings is inaccurate. With respect to the alleged conflict with *Gerstein*, that case did not address bail procedures; rather, the issue there was whether a person arrested and held for trial on an information was entitled to a judicial determination of probable cause for the detention. The opinion also emphasized at the outset that Florida law essentially *precluded* state court defendants from doing anything to challenge their detention for up to 30 days. *Gerstein*, 420 U.S. at 106. In contrast, this case does *not* involve defendants who are entirely deprived of a bail determination, and who are merely seeking a federal court to order that such a determination take place. Instead, this is a case where the bail determination is *already happening*—just not in the *manner* the Petitioners believe it should happen.

This type of relief violates the principles of equity, comity, and federalism underlying the *Younger* abstention doctrine, and for this reason, the Fifth Circuit was appropriately guided by *O'Shea*. The risks there—

the possibility that a state court judge would be summoned into federal court to answer for his non-compliance with a federal injunction, 414 U.S. at 501–02—is just as present here. The relief that Petitioners seek, including "on-the-record hearings and detailed factual opinions concerning bail determinations," *see, e.g.*, Pet. App 31a, would require state judicial officers to undertake specific actions within the context of a bail hearing, and any alleged deficiency would subject the state court to potential contempt suits.

Further still, there was no avenue for *any* type of judicial review in *Gerstein*. In direct contrast, Texas law *does* explicitly provide for many avenues for a defendant to challenge a bail hearing. *See* Tex. Code Crim. Proc. art. 17.028(h) (review of bail amount); Tex. Code Crim. Proc. art. 17.03 (personal bond); *Stack v. Boyle*, 342 U.S. 1, 6 (1951) ("[T]he proper procedure for challenging bail as unlawfully fixed is by motion for reduction of bail and appeal to the Court of Appeals from an order."). And even if these avenues did not exist, Texas law undisputedly provides the opportunity to challenge one's pretrial detention on an unaffordable bail amount via a writ of pretrial habeas. Tex. Code Crim. Proc. art. 11.01; *see also Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001) ("We have held that an applicant may use pretrial writs to assert his or her constitutional protections with respect to . . . bail.").

These state-supplied avenues are important for another reason: this Court's precedent has long held that, absent "unambiguous authority" demonstrating that state procedural law bars the federal plaintiff from presenting his federal constitutional claims, a federal court "should assume that state procedures will afford an adequate" remedy. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987). Petitioners attempt to over-

come this fatal hurdle by arguing that the Fifth Circuit did not apply the "timeliness" aspect of the adequacy element of *Younger* abstention, citing to *Gibson v. Berryhill*, 411 U.S. 564 (1973). But timeliness is simply not a part of *Younger* abstention jurisprudence, and the threat of irreparable harm from brief periods of incarceration, without more, does not supplant the ordinary *Younger* abstention analysis nor transform the practical timeliness of state procedures into the sole criterion for evaluating the adequacy of a state forum.

The only case that Petitioners cite for that proposition analyzed delay, but only within the context of one of the "special circumstances" exceptions to *Younger*—"irreparable injury that is both serious and immediate." *Id.* at 573–74. Even if *Gibson* were ambiguous on the point, other cases from this Court make clear that Petitioners must demonstrate that state procedural law forbids them from seeking to avoid the allegedly irreparable harm by raising their federal constitutional claims in the state court proceedings. *Cf. Pennzoil*, 481 U.S. at 14; *see Moore v. Sims*, 442 U.S. 415, 431–32 (1979).

The delays that Petitioners reference simply do not amount to irreparable injury and are instead nothing more than mere procedural deficiencies or ordinary delays that do not render a forum inadequate for *Younger* purposes. *See SKS & Assocs., Inc. v. Dart*, 619 F.3d 674, 676 (7th Cir. 2010) ("To the extent that delays in state court processes adversely affect the [federal] plaintiff, it can and must seek remedies through the state courts themselves."); *see also Kugler v. Helfant*, 421 U.S. 117, 124 (1975) ("ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional

rights"). Even if timeliness were a part of the adequacy analysis—which it is not—the pretrial procedures at issue here afford arrestees an adequate, timely opportunity to raise their federal constitutional claims. *See Daves*, No. 3:18-CV-154-N, ECF No. 279-6, Decl. of Judge Carmen White; ECF No. 279-7, Decl. of Lynn Pride Richardson; *see also Daves v. Dallas Cnty., Texas*, 18-11368 (5th Cir. 2018), ECF No. 486, Suppl. Br. 9–11 (noting that counsel is appointed for each misdemeanor detainee no more than two business days after the initial magistration, which, for almost everyone, takes place within forty-eight hours of arrest).

Finally, Petitioners argue that a habeas proceeding is irrelevant because it is not part of the pending criminal proceeding. But this Court has never held that *Younger* requires an opportunity to raise the constitutional challenge in the very proceeding that is at issue. *Cf. Wallace*, 520 F.2d at 406–07; *see SKS*, 619 F.3d at 680. Again, the test that Petitioners must meet is that "state law *clearly bars* the interposition of the constitutional claims" in order to carry their burden on this prong. *Moore*, 442 U.S. at 425–26 (emphasis added). Even if a second proceeding is required, this is not a "clear bar." *See, e.g., id.* at 424.

This is not a case about plaintiffs who are deprived of a bail determination, seeking a federal court to order that such a determination take place. Instead, this is a case where a bail determination, and, if necessary, a review of that determination, are already happening, and Petitioners' requested relief is about how and when that determination should occur, what substantive findings should be made, and what kind of continued federal oversight is appropriate. In short, this case is about imposing Petitioners' "preferred pretrial procedure" on Dallas County courts. This is

impermissible under this Court's precedents; the Fifth Circuit applied this Court's precedents to the issue at hand, and thus, the Petition should be denied.

III. This case presents an exceptionally poor vehicle for addressing any purported conflict regarding *Younger* abstention because this Court's review would inevitably encounter a minefield of jurisdictional deficiencies, pending legal questions, and unresolved factual conflicts.

A. The Fifth Circuit's alternative holding that this case should be dismissed as moot weighs against this Court's grant of the Petition.

This case presents a poor vehicle to resolve any purported conflict regarding *Younger* abstention because this suit has been rendered moot by the enactment of S.B. 6. Pet. App. 28a–32a. As the Fifth Circuit concluded, S.B. 6 has imposed an entirely new statutory framework that governs the bail procedures employed in all Texas courts, including those in Dallas County. Pet. App. 28a–33a. As such, there is no longer a live controversy with respect to the bail practices that Petitioners challenged when they filed this suit in 2018. Accordingly, the Court's resolution of any conflict as to the propriety of *Younger* abstention would have no practical effect in this case.

Although Petitioners have simultaneously asked the Court to review the Fifth Circuit's dismissal for mootness, the Petition does not identify a Circuit conflict or a question of profound importance that would independently warrant review of the Fifth Circuit's mootness holding. A large majority of the judges participating in the en banc decision concurred in that

holding. Pet. App. 2a. Petitioners seek review of both holdings because they know that their case is doomed absent reversal of both grounds for dismissal. Nevertheless, Petitioners cannot show that there is a Circuit conflict on this point. Nor can Petitioners argue that enactment of comprehensive reform of state court procedures while a constitutional challenge to such procedures is pending in federal court is a "recurring and important" question—on the contrary, such a scenario arises infrequently and is readily addressed by applying existing standards of justiciability.

Moreover, even if a dismissal for mootness were deemed unwarranted, the Fifth Circuit's mootness holding could only be characterized as a misapplication of a correctly stated rule of law. The Fifth Circuit employed the correct legal standard for mootness, *viz*., it invoked long-established principles of justiciability under Article III of the Constitution in determining that S.B. 6 foreclosed the possibility of legally cognizable relief, as any injunction would be directed at laws and procedures that no longer exist. Pet. App. 28a–33a. Accordingly, the issues presented in this case "are no longer 'live' [and] the parties lack a legally cognizable interest in the outcome." *Id.*

Petitioners maintain that S.B. 6 must be understood as the voluntary cessation of a legal violation, such that any change in procedures cannot moot the case because it does not grant them all the relief that they are seeking. But as the Fifth Circuit explained, S.B. 6 does not merely entail the voluntary cessation of an alleged constitutional violation—it is a fundamentally different approach to the bail setting process that completely supplants the previous legal framework that Petitioners challenged in 2018. Accordingly, the Fifth Circuit's emphasis on broader principles of

justiciability under Article III is the correct approach, regardless of whether there was any error in the application of such principles to the facts of this case. This Court's limited resources cannot be used to address every such error. *See* Rule 10(a).

In addition, a dismissal for mootness here would be without prejudice to Petitioners' re-filing to challenge S.B. 6 or any Dallas County practices adopted pursuant to S.B. 6. *Younger* abstention would have to be considered as a ground for dismissal based on the factual circumstances in such an action and, if the court deems abstention proper, the abstention question could again work its way up to this Court in a justiciable context. *See, e.g., Ozinga v. Price*, 855 F.3d 730, 734–35 (7th Cir. 2017) (reasoning a party was "free to file a new suit" when a change in state law "rendered moot" the initial challenge); *Am. Charities for Reas. Fund. Reg., Inc. v. O'Bannon*, 909 F.3d 329, 332–34 (10th Cir. 2018); *see also N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, NY*, 140 S. Ct. 1525, 1526 (2020) (change in state firearm licensing statute mooted case, but plaintiffs could still seek relief if the "new rule" were to "infringe their rights").

B. The Fifth Circuit's vacatur of the preliminary injunction on multiple jurisdictional and threshold grounds further weighs against this Court's grant of the Petition.

This suit also presents a poor vehicle for addressing *Younger* abstention because the Fifth Circuit correctly dismissed nearly the entire case on threshold grounds *before* reaching either of the two questions raised in the Petition. Pet. App. 105a–116a. The few claims left unaddressed are also likely to be resolved on such grounds in the event of a remand to proceed with the

case. Accordingly, even if the Court were to grant review and reverse the Fifth Circuit with respect to both of the questions presented in the Petition, this case is still likely to be dismissed on alternative grounds. This Court's decision would have little practical significance.

In its initial en banc opinion, the Fifth Circuit disposed of much of this case on jurisdictional and other threshold grounds. Pet. App. 80a–122a. Accordingly, even if the petition were granted as to one or both questions presented, the lower courts are ultimately likely to conclude that there is no proper defendant in this action, either because jurisdiction is lacking or because there is no local policymaker for § 1983 purposes. If either is true, all parties must be dismissed, and the case must be closed.

Article III standing with respect to the Felony and Misdemeanor Judges has already been determined to be lacking, and the Dallas County Defendants have consistently maintained that the Magistrate Judges and the Sheriff are also not proper defendants—a question that remains unresolved. *See, e.g.*, Pet. App. 105a–122a. In sum, all parties may be—indeed, are likely to be—dismissed on threshold grounds unrelated to the questions presented in the petition. It would be improper for the Court to resolve the questions presented when this case is sure to be thrown out on entirely unrelated grounds and the Court's resolution of such questions would be of no practical import to the judgment.

C. Unresolved conflicts as to the district court's factual findings underlying the *Younger* abstention inquiry further weigh against this Court's grant of the petition.

Finally, this suit would be a poor vehicle for addressing the propriety of *Younger* abstention because the factual context for the decision to abstain under *Younger* remains sharply contested, as described above. The Dallas County Defendants presented evidence to the district court on remand regarding the adequacy of the county courts' new bail procedures, but that evidence was not considered. Pet. App. 171a. Instead, the district court hewed to its original factual findings, based on evidence presented at the preliminary injunction hearing by the Petitioners four years prior. Pet. App. 171a–174a. Petitioners maintain that the current procedures are materially indistinguishable from the old ones and that the Dallas County Defendants have changed nothing about the bail system.

The Dallas County Defendants raised the factual discrepancies with the court of appeals and they even suggested that the court set aside the district court's outdated and clearly erroneous findings. Supp. Reply Br., No. 18-11368 (N.D. Tex. Aug. 17, 2022), ECF No. 488. As previously emphasized, there is no weeks-long nor months-long wait for arrestees to receive a hearing and arrestees are not denied assistance of counsel. Neither are bail review hearings perfunctory or futile. To opine on the propriety of abstention under *Younger*, this Court would need to resolve this factual dispute or to remand for further proceedings in the district court. The presence of such unresolved factual conflicts weighs strongly against grant of the Petition.

Moreover, a court's decision to abstain under *Younger* is based on a fact-sensitive analysis. Petitioners' argument hinges on a very specific factual predicate—namely, that arrestees consistently endure lengthy delays in obtaining bail review hearings in state court. This factual context would be subject to change in the future based on caseloads, staffing, and other variables of state court operations. For this Court to grant review to address such a fact-bound issue would not be an optimal use of judicial resources.

IV. The Fifth Circuit's routine dismissal of this case for mootness does not present a question of profound importance and constitutes, at most, a misapplication of settled law that is ineligible for review under Rule 10(a).

As discussed above, although Petitioners have asked this Court to review the Fifth Circuit's dismissal for mootness, the Petition does not identify a circuit conflict or a question of profound importance that would independently warrant review of this holding. And even if the Fifth Circuit's mootness analysis were inadequate, it can only be characterized as a misapplication of a correctly stated rule of law that is ineligible for review in this Court under Rule 10(a). Pet. App. 28a–33a.

Petitioners' argument regarding mootness weighs against review of that issue in this Court. Insofar as Petitioners rely on facts and evidence adjudicated at the preliminary injunction hearing in 2018 to prove their case, then the controversy is no longer a live one and review in this Court is unnecessary. *See id.* It would be "incoherent," to use the Fifth Circuit's language, for Petitioners to maintain that they can proceed with a suit to enjoin procedures that were

replaced years ago and as to which the factual record no longer reflects reality.

Insofar as Petitioners invoke "new" facts and evidence ostensibly presented to the district court on remand to revive their case, such evidence is sharply contested by the Dallas County Defendants, as explained above. *See Supp. Reply Br.*, No. 18-11368 (N.D. Tex. Aug. 17, 2022), ECF No. 488. This factual conflict—which is still unresolved because the district court opted not to enter new factual findings—strongly weighs against review in this Court.

In any event, Petitioners appear to recognize that new factual findings may be necessary, stating in the Petition that "if there weren't abundant record evidence about [Dallas County's current] practices, the proper course would be to remand for the development of such evidence, not to dismiss as moot." Pet. 30. Because Petitioners would still have to revive their case by filing an entirely new pleading referencing a wholly new legal framework, a remand would be indistinguishable from the re-filing of a new case after dismissal for mootness, as suggested above. Thus, a remand is not a superior, or even an appropriate, remedy under the circumstances here. Even if it were, however, the Fifth Circuit's choice of remedy does nothing to change the fact that it reached the conclusion of mootness by applying traditional principles of justiciability under Article III. Accordingly, the Fifth Circuit's dismissal on mootness grounds remains ineligible for review by this Court, regardless of Petitioner's preferred remedy.

V. The Fifth Circuit's decision was correct with respect to both the propriety of *Younger* abstention and dismissal on the basis of mootness.

A. *Younger* abstention

Younger requires federal court abstention when three elements 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)). As for the first element, and as already described above, the Fifth Circuit wisely understood that "[t]he 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." *Tarter v. Hury*, 646 F.2d 1010, 1013 (5th Cir. 1981). This type of ongoing review is exactly what *O'Shea* directly warned against, 414 U.S. at 500, and what *Younger* prohibits.

As for the third element,[4] it is not the law that detention on an unaffordable bail amount, without more, precludes abstention; Petitioners instead are required to demonstrate that state procedural law forbids them from seeking to avoid the allegedly irreparable harm by raising their federal constitutional claims in the state court proceedings. *Cf. Pennzoil*, 481

[4] The parties do not dispute that the second element of *Younger* is satisfied.

U.S. at 14. And this, they never show, as Texas provides numerous such avenues.

However, two additional arguments warrant special response. First, narrowing the proposed federal injunction as Petitioners suggest is not a realistic proposal and would not alleviate the interference with criminal proceedings. Again, part of their requested remedy below included on-the-record hearings and detailed factual opinions concerning bail determinations, which would allow federal courts to intrude into daily magistrate practices. And despite the representation to the contrary, Petitioners did in fact seek the equivalent of appointment of a federal monitor by requesting an arrangement in which a federal court would receive periodic reports on state court operations and be empowered to respond to any individual arrestee or his counsel or family member who believed at any time that federally mandated bail procedures were not being followed.

Second, Petitioners parade an entirely illusory set of policy justifications in contending that the holding below essentially means that federal courts can do nothing with respect to constitutional violations. This is not the case; this Court retains ultimate power to review any claim of a constitutional violation via appeals from state supreme courts. *Younger* abstention does not conflict with this authority; all it requires is that such issues first be adjudicated in the state court system for all the reasons set forth in that opinion.

B. Mootness

Even if Petitioners were correct that abstention is unwarranted, the evidence in the record indicates that all the issues in this suit are now mooted. "If a case has been rendered moot, a federal court has no constitu-

tional authority to resolve the issues that it presents." *Env't Conservation Org. v. City of Dallas*, 529 F.3d 519, 525 (5th Cir. 2008) (citing *In re Scruggs*, 392 F.3d 124, 128 (5th Cir. 2004)). And this is because, as directly quoted by the Fifth Circuit, federal courts only may consider "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988).

Here, there is no actual, ongoing controversy, because S.B. 6 supplanted the challenged bail procedures by amending several aspects of the Texas Code of Criminal Procedure addressing bail. Pet. App. 28a–32a. In particular, S.B. 6 introduced Article 17.028. Subsection (a) of this article requires an initial individualized bail determination by a magistrate to occur not later than 48 hours after arrest. Subsections (f) and (g) afford indigent state court criminal defendants with the opportunity to file an affidavit of indigency either before or during the initial bail proceeding required under subsection (a). Subsection (h) requires a magistrate setting bail to conduct a "prompt review" of the bail amount based on an affidavit filed under subsection (f) and (g), either during the initial bail proceeding or as a separate pretrial proceeding. Any magistrate declining to lower the bail amount after such a review must make written findings explaining why. *Id.* And under subsection (i), any failure to provide such a review must be reported to the Office of Court Administration of the Texas Judicial System. *See, e.g.*, Pet. App. 28a–32a.

The sum of these amendments means that the claimed injury here—bail being set at an unaffordable level with no adequate review process—can be reviewed and remedied immediately under state law. *See* Tex. Code Crim. Proc. art. 17.028(h). As a result, defendants are provided a meaningful opportunity to challenge

any bail determination made by a magistrate and thus there is nothing serving the basis of Petitioners' challenge anymore as the old procedures would themselves be violations of state law. Consequently, Petitioners' "case has lost its character as a present, live controversy and is therefore moot." *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc); *see also Amawi v. Paxton*, 956 F.3d 816, 821 (5th Cir. 2020).

Petitioners try to circumvent the effect of S.B. 6 by arguing they have not challenged S.B. 6, but instead have somehow challenged the underlying, substantive practices of bail procedure in Dallas County. Practically, this is a distinction without a difference; and to the extent there were any difference, any continuation of the alleged unlawful conduct is now a violation of state law. Thus, the upshot of Petitioners' argument would likely be a violation of the Eleventh Amendment, as it would essentially result in a federal court ordering a state actor to follow state law.

Relatedly, to the extent Petitioners continue to insist on remedies beyond what the Texas Legislature has now provided in S.B. 6, such remedies would violate the *Younger* abstention doctrine. In *Gerstein*, this Court held that the Fourth Amendment required a judicial determination of probable cause but was hesitant to judicially prescribe the details of a specific state criminal procedure; it thus declined to hold that specific procedures urged by the plaintiffs were constitutionally necessary. 420 U.S. at 123–25. The Court reasoned that "state systems of criminal procedure vary widely," and "the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole." *Id.* The inherent request in Petitioners' relief for "more" sub-

stantive relief thus implicates federal court intrusion into state criminal proceedings in exactly the way *Younger* abstention forbids on the grounds of federalism and comity.

In sum, contrary to Petitioners' arguments, the Fifth Circuit—and even the district court below—faithfully applied this Court's precedent in determining that the issues presented in this case were entirely mooted by S.B. 6. And this is not a controversial result, as it has happened many times before. *See, e.g., Thomas v. Bryant*, 938 F.3d 134, 144 (5th Cir. 2019) ("A legislative remedy to a challenged law may moot a case pending appeal because courts can no longer enjoin the enforcement of a repealed law that has no effect."); *Jacksonville Prop. Rights Ass'n, Inc. v. City of Jacksonville, FL*, 635 F.3d 1266, 1274–75 (11th Cir. 2011) ("'[T]his Court has consistently held that a challenge to government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated.'" (quotation omitted)). Thus, the Fifth Circuit was entirely justified in concluding that this case is moot.

CONCLUSION

For the reasons discussed above, this Court should deny the Petition with respect to both questions presented.

Respectfully submitted,

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