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

## REPLY BRIEF FOR PETITIONERS


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## PARTIES TO THE PROCEEDING

The petition correctly lists the parties to the proceeding. The judicial respondents (hereafter "judges") dispute this, claiming (Opp.II) that "[s]everal 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. That is wrong. This Court's Rule 12.6 provides that "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties … in this Court," save where a petitioner "notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition." Petitioners have provided no such notice.

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This litigation seeks to stop respondents from locking presumptively innocent people in jail when doing so *is not necessary*, and when people must (as the district court found) endure the irreparable harms of detention for weeks or months before having any chance to challenge their detention. Like the Fifth Circuit, respondents never defend their practices, instead arguing that—despite the finding about the lack of a timely state-court opportunity to be heard—federal courts cannot hear claims like petitioners'. Neither this Court's cases (on abstention or mootness) nor basic concepts of justice and human dignity countenance, much less require, that result. This Court should say so here because the decision below deepens a circuit conflict and applies abstention and mootness tests starkly different than this Court's. Respondents' counterarguments fail.

## ARGUMENT

### I. *YOUNGER*

The Fifth Circuit's *Younger* holding cements a 2-2 circuit conflict and flouts this Court's precedent. Respondents offer no persuasive answer.[1]

A. The judges first address the conflict by citing (Opp.13) *O'Shea* v. *Littleton*, 414 U.S. 488 (1974). But *O'Shea* only underscores the split: While the Fifth and Second Circuits held that *O'Shea* controls in cases like this (and requires abstention), the Ninth and Eleventh Circuits held that *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), controls (and precludes abstention). Pet.13-16. That is the conflict requiring resolution.

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[1] The judges claim (Opp.12) that petitioners never "discuss the overarching [*Younger*] standard." They need to read more closely. Pet.3-4.

The judges next argue (Opp.13-14) that the Ninth and Eleventh Circuit decisions are distinguishable because the plaintiffs there sought more limited relief than petitioners. *Accord* Dallas Opp.14, 16. Not so.

First, each plaintiff asserted the same equal-protection/due-process claims for relief petitioners have: Governments cannot detain people pretrial unless a court finds (after providing adequate procedural protections) that detention is necessary to serve a government interest. *See Walker* v. *City of Calhoun*, 901 F.3d 1245, 1259 (11th Cir. 2018) (describing "Walker's allegation"); *Arevalo* v. *Hennessy*, 882 F.3d 763, 764-765 (9th Cir. 2018) (recounting Arevalo's "argu[ment]"); Pet.App.83a-84a (summarizing petitioners' claim). And both courts rejected abstention because adjudicating that claim would not—under *Gerstein*—"interfere with" state prosecutions. *Walker*, 901 F.3d at 1255; *Arevalo*, 882 F.3d at 766. The Fifth and Second Circuits held the opposite, based on *O'Shea*. Pet.App.14a n.17; *Wallace* v. *Kern*, 520 F.2d 400, 406 (2d Cir. 1975). Again, that is the conflict needing resolution.

Second, respondents mischaracterize petitioners' requested relief. It is not "an order mandating detailed structural changes." Judges' Opp.15. The complaint requests a declaration and an injunction prohibiting unconstitutional pretrial detention. CA5 Record on Appeal ("ROA") 475. That is just like the injunction that *Gerstein* held did not unduly interfere with prosecutions—despite recognizing it might require changes to some states' procedures. 420 U.S. at 108 n.9, 124-125. Petitioners' claims cannot be dismissed because the district court entered a *different* injunction, Pet.App.195a.

In short, the lower courts are divided about whether, under *Gerstein* and *O'Shea*, petitioners' claim triggers *Younger*. That divide warrants resolution.

B. Respondents' arguments that the Fifth Circuit's *Younger* holding follows this Court's precedent likewise fail.

1. *Undue Interference.* The judges contend (Opp.16) that undue interference exists here because "petitioners seek a mandate" regarding what "state-court bail hearing[s must] include." As explained, that is mischaracterization. And the snippets the judges excerpt from petitioners' complaint (*id.*) simply described the regime being challenged. But under the injunction *sought*, respondents would (like Florida in *Gerstein*) retain flexibility about the details of bail-related proceedings.

The judges deny any mischaracterization—but then discuss only the *district court's* injunction, not petitioners' requested relief. Opp.17. It is thus not correct, as respondents repeatedly say (e.g., Opp.15), that petitioners "seek … structural changes." And respondents' failure to address petitioners' actual request for relief only confirms that respondents cannot explain how that relief triggers *Younger*.[2]

The judges also argue that "petitioner[s'] requested injunctive relief 'would contemplate interruption of state proceedings to adjudicate assertions of noncompliance.'" Opp.17 (quoting *O'Shea*, 414 U.S. at 500). But they never explain why claims of non-compliance with an

[2] Other mischaracterizations abound, such as that petitioners seek "a substantive right to [affordable] bail" (Judges' Opp.16 n.3). The Court should check carefully before crediting respondents' assertions.

injunction regarding pretrial release would interfere, not with "state proceedings," *id.*, but with "state prosecutions," *Gerstein*, 420 U.S. at 108 n.9. There would be no such interference because the injunction sought is "directed only at" a separate issue: "the legality of pretrial detention without a judicial hearing." *Id.* By contrast, the hypothetical injunction in *O'Shea* could have disrupted prosecutions, because it was "aimed at … events that might [occur] in … future state criminal trials." 414 U.S. at 500.

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

Next, the judges point (Opp.17) to the reporting requirement in the district court's injunction. But even if such a requirement unduly interfered with prosecutions, petitioners' *requested* injunction (ROA.475) included no such requirement. Again, claims cannot be dismissed because a court enters an injunction never requested. And here, as in *Gerstein* but unlike in *O'Shea*, an injunction exists that would vindicate petitioners' claim without triggering *Younger*—the injunction petitioners sought. Moreover, even if a provision of the district court's injunction constituted undue interference, the proper course would be to modify the injunction, not dismiss the claims. Pet.25-26. Dallas responds (Opp.29) that just requiring a hearing and findings would constitute undue interference. If that were true, *Gerstein*

(where both were sought) would have required abstention.[3]

As to *Gerstein*'s *Younger* holding, the judges first assert (Opp.18) that *Gerstein*'s only "*holding*" concerned the Fourth Amendment. Wrong again: *Gerstein* "held" that abstention was unwarranted. *Moore* v. *Sims*, 442 U.S. 415, 431 (1979).

The judges further argue (Opp.19) that *Gerstein* held that probable-cause hearings need not include certain procedural protections. That validates petitioners' argument, because *Gerstein* rejected abstention *even though* those protections were sought, 420 U.S. at 108 n.9. *Gerstein*, that is, did not dismiss the claim (as respondents say should occur here), instead addressing it on the merits. Hence, even if petitioners had sought a detailed prescriptive injunction, abstention still would not be required.

The judges next quote (Opp.19) *Wallace*'s view that *Gerstein* could not have intended to overrule *O'Shea*. That is not petitioners' argument. *O'Shea* and *Gerstein* addressed different circumstances: *O'Shea* a challenge to many aspects of a criminal-justice system, *see* 414 U.S. at 492, and *Gerstein* a challenge "only [to] the legality of pretrial detention," 420 U.S. at 108 n.9. Cases like this are akin to *Gerstein*, not *O'Shea*.

Dallas, meanwhile, distinguishes *Gerstein* as involving probable cause, not bail. Opp.17. But what matters is that both cases involve "the legality of pretrial

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[3] Dallas admits (Opp.29) that the decision below closes all lower federal courthouse doors to claims like petitioners'. Its improper blitheness about that outcome rests on *Younger* itself, disregarding this Court's modern *Younger* precedent. *See* Cato Amicus Br. 6-9. (Respondents ignore both amicus briefs.)

detention," *Gerstein*, 420 U.S. at 108 n.9. Nor can Dallas distinguish *Gerstein* on the ground that here, bail determinations are "*already happening*—just not in the *manner* the Petitioners believe it should." Opp.17. The same was true of probable-cause determinations in *Gerstein*. Likewise, the consequences Dallas posits of the relief "Petitioners seek" (Opp.18) were also present there. And Dallas is wrong (*id.*) that "there was no … judicial review in *Gerstein*." *See* 420 U.S. at 106.

In short, no undue interference exists here because petitioners do not "seek to dictate" bail hearings' conduct or outcomes, Judges' Opp.19. Petitioners seek what *Gerstein* held did not trigger *Younger*: an injunction barring unconstitutional pretrial detention while leaving states flexibility regarding how to adhere to the Constitution's mandates. Respondents cannot reconcile the decision below with *Gerstein*'s holding. That alone precludes abstention.

2. *Adequate Opportunity.* The judges say (Opp.19) that Texas provides the requisite "adequate opportunity" to raise petitioners' federal claim in state court through a bond-reduction motion or a habeas petition. But they never contest the district court's finding that bond-reduction motions take weeks or months to be heard. Pet.App.172a. (And habeas proceedings take far longer.) Nor do they deny that people suffer irreparable harms while detained. These facts mean that, under this Court's precedent, neither avenue constitutes an adequate opportunity. Pet.20-25. Respondents' answers fail.[4]

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[4] Dallas repeatedly fights the district court's findings, for example, referring (Opp.19) to harm from "brief" detention. *See also* Dallas Opp.20 (citing Dallas's evidence and pleadings). Again, the court found that respondents detain people for *weeks and months*

The judges argue (Opp.20) that inadequacy can be shown only by proving that "state procedural law barred presentation of" federal claims altogether. If that were true, *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), would have required abstention, because state law there provided an opportunity to have the federal claims adjudicated in state court, *id.* at 577 & n.16. But *Gibson* held that opportunity inadequate because it occurred *after* irreparable harm was inflicted. *Id.* The same is true here.

The cases respondents cite offer no help. When *Pennzoil Company* v. *Texaco, Inc.*, 481 U.S. 1 (1987), stated that Texaco had not shown that "state procedural law barred presentation of its claims," it was responding to Texaco's *argument* that "Texas procedure" was "inadequa[te]," *id.* at 14, 17. This Court disagreed, noting that state laws showed the opposite. *Id.* at 15-16 & n.15. But it did not hold that proving that state procedural law bars presentation of federal claims is the *only* way to show inadequacy.

Similarly, while *Moore* rejected the argument that delay in obtaining a state-court hearing precluded abstention, 442 U.S. at 432, it did so because the plaintiff parents had their removed children back, such that delay would not cause irreparable harm, *id.* at 431-434. *Moore* even distinguished *Gerstein* on that basis, *id.* at 431-432, reaffirming that where (as here) plaintiffs face irreparable harm before they can raise their claims, abstention is inappropriate.

Respondents' position—that state-court opportunities existing on paper but plainly deficient in operation are nonetheless adequate—also makes no sense.

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before providing a chance to challenge pretrial detention. Pet.App.172a.

Congress enacted 42 U.S.C. §1983 to ensure that precisely such practices (constitutional on paper but unconstitutional in reality) could be challenged. *See Monroe* v. *Pape*, 365 U.S. 167, 174-180 (1961). Thus, §1983 liability extends to unconstitutional "custom[s]." *Monell* v. *Department of Social Services of New York*, 436 U.S. 658, 691 & n.56 (1978). Respondents' argument conflicts with this precedent.

The judges next deny (Opp.21-22) that, to be adequate, an opportunity must occur before irreparable harm is inflicted. But they never explain in what sense an opportunity is "adequate" if it exists only after grievous injury is inflicted (just as they never explain their view on the underlying constitutional merits, i.e., that government should be free to deprive people of physical liberty, inflicting an array of irreparable harms, when detention is not necessary to serve any government interest). Instead, they again cite (Opp.21-22) *Pennzoil* and *Moore*, which as explained do not help them. They also claim (Opp.22) that *Gibson* was about bias, not timeliness. But petitioners explained why that is wrong (Pet.23); the judges never answer that explanation.[5]

Finally, the judges assert (Opp.22-23) that separate proceedings (like habeas) can provide an adequate opportunity. But they ignore petitioners' many arguments (Pet.25) for why that assertion conflicts with this Court's and other circuits' precedent. And they do not dispute that this Court has never mandated initiating a separate proceeding, or that it has consistently described

[5] The judges note (Opp.22) that "*Moore* and *Pennzoil* post-date *Gibson*." Putting aside that those cases are inapposite for the reasons given, if their argument were right, abstention would be unavailable anyway, because *Gerstein* post-dated *O'Shea*, and lack of undue interference alone forecloses abstention.

adequacy as an opportunity within the relevant state proceedings. Pet.24; *Ohio Civil Rights Commission* v. *Dayton Christian Public Schools, Inc.*, 477 U.S. 619, 627 (1986). The judges instead cite (Opp.22-23) *O'Shea*'s reference to collateral review. That reference, however, was not about *Younger* but about "the basic requisites" for "equitable relief," 414 U.S. at 502. That is why *O'Shea*, in the same clause it mentioned "the inadequacy of remedies," also mentioned "the likelihood of … irreparable injury." *Younger* abstention can be foreclosed even absent irreparable harm. *E.g.*, *New Orleans Public Service, Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 366-368 (1989). *O'Shea* thus does not help respondents with adequate opportunity any more than with undue burden.

## II. MOOTNESS

A. Respondents offer no cogent defense of the Fifth Circuit's refusal to apply this Court's mootness standard.

Dallas argues the Fifth Circuit "at most" misapplied "settled law." Opp.26. That is incorrect: "[S]ettled law" requires a determination that a court cannot "grant any effectual relief" before a case is deemed moot. *Mission Product Holdings, Inc.* v. *Tempnology, LLC*, 139 S.Ct. 1652, 1660 (2019). The Fifth Circuit made no such determination; respondents do not say otherwise. Nor do respondents identify any basis for that court's less-demanding test, requiring only "substantial changes" to state law, Pet.App.28a. This case is thus not about "error correction" (Judges' Opp.15, 23), but about the "'clear misapprehension of [controlling legal] standards'"—which respondents agree "justifies the Court's intervention," Judges' Opp.25 (quoting *Tolan* v. *Cotton*, 572 U.S. 650, 659 (2014) (per curiam)).

Dallas, however, invokes (Opp.22-23) "broader principles of justiciability," under which Texas Senate Bill 6 supposedly mooted petitioners' claims by creating "a fundamentally different approach" to bail. But Dallas cites no authority for that mootness test, which likewise differs from this Court's. Nor does Dallas explain how legislative change could moot petitioners' claims *unless* it "completely and irrevocably eradicated the effects of the alleged violation," *Los Angeles County* v. *Davis*, 440 U.S. 625, 631 (1979), or afforded "the precise relief … requested," *New York State Rifle & Pistol Association* v. *City of New York*, 140 S.Ct. 1525, 1526 (2020) (per curiam). Dallas ignores these cases. The judges, meanwhile, question their significance (Opp.26-27). But neither opposition claims the Fifth Circuit *applied these standards*. It did not—which is why certiorari is warranted, S.Ct. R. 10(c).

B. Under this Court's standard, this case is not moot: A court could grant effective relief by enjoining the alleged constitutional violations. Pet.31-32. Petitioners offer no persuasive response.

Dallas (Opp.30) and the judges (Opp.24) recite "aspects" of Texas bail procedure S.B. 6 amended. They never dispute, however, that S.B. 6 does not require some procedures (e.g., evidentiary hearings) that petitioners say are constitutionally required for pretrial detention. Instead, Dallas argues (Opp.31) that relief "beyond" S.B. 6 violates *Younger*. That is meritless as explained in Part I. The judges, meanwhile, argue that any assertion that "S.B. 6 does not go far enough … is a separate challenge." Opp.26. They cite no authority for that proposition, and it makes no sense. A claim that the Constitution requires certain safeguards is not moot because the state decides to require *some* of them.

Next, respondents insist that S.B. 6 "supplanted the challenged bail procedures," mis-equating petitioners' claims with a challenge to a repealed statute. Dallas Opp.30; *accord* Judges' Opp.26. Beyond the fact that petitioners' claims are directed at respondents' actual *practices*, respondents' argument fails because S.B. 6 does not purport to halt those practices—nor mandates the relief petitioners seek. Were that not enough (and it is), hundreds of unchallenged videos of post-S.B. 6 bail proceedings show that respondents *still* routinely detain people pretrial absent the necessity findings and procedural protections petitioners say the Constitution requires. Pet.9.

Dallas contends, however (Opp.30), that petitioners' "injury" is that bail is "being set at an unaffordable level with no adequate review process," which it argues S.B. 6 provides. Petitioners' actual injury is being subject to protracted unnecessary detention without basic procedural protections, including some that S.B. 6 does *not* require. A court could mandate those protections, so under the correct legal test, this case is not moot.

Lastly, Dallas raises (Opp.31) Eleventh Amendment concerns about ordering it to comply with *state* law. *Accord* Judges' Opp.26. But petitioners do not seek to enforce S.B. 6, and respondents give no reason an injunction enforcing *federal* law would raise these concerns. Meanwhile, even if the injunction were modified to address "changed circumstances" (Judges' Opp.26), that would implicate mootness only if the district court could no longer grant "any effectual relief," *Mission*, 139 S.Ct. at 1660. That is not the situation.

## III. NO VEHICLE PROBLEM EXISTS

Neither opposition disputes that the issues here are important and recurring. Their scattershot vehicle arguments fail.

Dallas asserts (Opp.25) that this is not a good vehicle because Dallas "sharply contest[s]" the district court's *Younger*-related findings. That is irrelevant; a party can *always* say that about adverse findings. And Dallas is particularly ill-situated to complain because it declined the court's invitation "to suggest additional findings." Pet.App.172a n.4. As for Dallas's related argument that *Younger* involves "a fact-sensitive analysis" (Opp.26), if that sufficed, this Court would never decide *Younger* cases.

Dallas further contends (Opp.21) that the Court should not resolve the *Younger* split because of the alternative mootness holding. *Accord* Judges' Opp.28. But this Court regularly reviews alternative rulings where each merits review. *E.g.*, *SEC* v. *Jarkesy*, No. 22-859 (U.S.).

Finally, Dallas argues (Opp.24) that "all parties" would likely be dismissed after any remand. That is almost certainly wrong, but regardless, that possibility (which exists in many cases) would not prevent this Court from addressing the questions presented and thus is irrelevant to whether to grant review. Likewise, the judges' contention (Opp.29-30) that review should be denied as to them is immaterial to whether review should be granted at all.

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The procedural issues here should not obscure the stakes. The Constitution protects presumptively innocent people against extended periods of *unnecessary*

pretrial detention. And neither *Younger* nor mootness doctrine prevents federal courts from enforcing that bedrock constitutional principle.

## CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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