No. 24-

IN THE

Supreme Court of the United States

DWIGHT RUSSELL, *et al.*,
on behalf of themselves and others similarly situated,
Petitioners,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

ALEC KARAKATSANIS
ELIZABETH ROSSI
JEREMY D. CUTTING
CIVIL RIGHTS CORPS
1601 Connecticut Ave. N.W.
Suite 800
Washington, D.C. 20009

NEAL S. MANNE
JOSEPH S. GRINSTEIN
SUSMAN GODFREY LLP
1000 Louisiana Street
Suite 5100
Houston, TX 77002

DUSTIN RYNDERS
TRAVIS FIFE
TEXAS CIVIL RIGHTS PROJECT
2100 Travis Street
Houston, TX 77002

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
JOSEPH M. MEYER
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave. N.W.
Washington, D.C. 20037
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTION PRESENTED

Whether, under this Court's precedent, legislation enacted during a lawsuit renders asserted claims for prospective relief moot if the legislation does not cure all of the constitutional harm alleged in the litigation, such that the courts could still provide the plaintiff with effectual relief.

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiff-appellants below, are Dwight Russell, Johnnie Pierson, Joseph Ortuno, Maurice Wilson, and Christopher Clack, on behalf of themselves and others similarly situated.

Respondents Harris County, Texas, and Harris County Sheriff Ed Gonzalez were defendant-appellees below.

Respondent State of Texas was intervenor-appellee below.

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INTRODUCTION

For people arrested on felony charges in Harris County, Texas, the fundamental right to pretrial liberty depends on access to money: Those who have it are usually released in a matter of hours, and can remain free throughout the pretrial period. Those who lack access to money, by contrast, are routinely locked in jail for prolonged periods, often months or even years.

Petitioners brought this action challenging the constitutionality of Harris County's post-arrest detention practices, alleging that the systematic deprivation of physical liberty is unconstitutional because it occurs

without any finding that detaining someone is necessary to protect public safety or prevent flight, and without the basic procedural protections necessary to make any such finding reliable. Petitioners further alleged that the county's practice of depriving many thousands of people of pretrial liberty inflicts irreparable harm, cutting people off from their jobs, homes, families, medical care, and houses of worship. It also curtails people's ability to defend against the charges, of which they are presumed innocent.

While this case was pending in district court, Texas enacted legislation making certain changes to the state's laws regarding bail—including entrenching the constitutional violations alleged in this case by *requiring* an upfront cash payment as a condition of release for large swaths of arrestees, regardless of whether alternatives to detention would adequately serve the government's interests. Over the following year, petitioners conducted discovery into Harris County's bail practices after the statute took effect. That discovery yielded undisputed evidence that the county's practices continued unchanged in all relevant respects. In fact, one of the named plaintiffs here was subjected to the same unconstitutional practices after the new law took effect as he was before its enactment.

With this case still pending in district court, the en banc Fifth Circuit ruled in another case—*Daves* v. *Dallas County*, 64 F.4th 616 (5th Cir. 2023) (en banc)—that similar claims against similar bail practices in another Texas county (Dallas County) were moot in light of the new statute. Bound by that decision, Judge Rosenthal ruled here that this "largely legally identical" case had to be dismissed as moot—despite what she called the undisputed "evidence of ongoing constitutional violations" that was "inconsistent with a finding of mootness."

App.10a, 11a. *Daves* required dismissal, Judge Rosenthal clarified, "[u]nless the United States Supreme Court steps in." App.4a.

This Court should step in. The en banc decision in *Daves* that bound the lower courts here (a Fifth Circuit panel summarily affirmed in light of *Daves*) flouted this Court's settled rule that mid-litigation legislation moots a case *only* if it provides the precise relief sought in the litigation, such that a court could not grant the plaintiff any effective relief. *Daves* did not even purport to apply that standard, instead adopting its own, invented rule: that intervening legislation moots a case if it makes "substantial changes." App.104a. Under this Court's settled mootness test, this case is unquestionably not moot—not surprisingly, since the new Texas law does not purport to provide what petitioners say the Constitution requires in order to justify deprivations of pretrial liberty. Indeed, counsel for one of the respondents (the Harris County sheriff) conceded 18 months after Texas's bail reform took effect that "[i]f the test for mootness is"—as this Court has repeatedly held—"that the new law has to solve all of the injuries, I don't think we can meet that test," because "there's no denying that the injuries are occurring." Transcript of Discovery Hearing (Dkt. 666) at 23:3-6, *Russell* v. *Harris County*, No. 4:19-cv-00226 (S.D. Tex. Mar. 29, 2023) (hereafter "Discovery Hearing Transcript").

The question presented, moreover, is both recurring and important. Defendants in litigation frequently argue that claims against them are moot due to legislation enacted during the litigation. If left uncorrected, the en banc Fifth Circuit's novel mootness test—that a claim is moot when intervening legislation makes some mere alteration in the general area affecting the claim—would enable legislatures to moot virtually any challenge

without even attempting to redress the injuries alleged. That would be a license for profound mischief by state and local legislatures, via manipulation of federal courts' jurisdiction. In this case, for example, the Fifth Circuit's new standard effects massive inefficiency—in addition to allowing for the ongoing infliction of the grievous harms alleged—by needlessly erasing years of work by the trial court, government parties, and plaintiffs' counsel.

Resolution of the question presented in the context of this particular case, moreover, is critically important. Every year, state and local governments arrest and detain hundreds of thousands of people who cannot afford cash bail. In many places, like Harris County, this de facto pretrial detention is imposed without, as noted, any finding that the deprivation of physical liberty serves any government interest and without the adversarial procedural safeguards that define American law. And as noted, such detention inflicts grievous harms, such as the loss of one's job, housing, ability to care for young children or elderly parents, and the ability to effectively prepare one's defense. Certiorari is needed to ensure that federal courts retain the ability to safeguard presumptively innocent individuals' fundamental right to physical liberty. Unlike in *Daves*, moreover, there is no abstention ruling here that might be deemed a vehicle problem.

Put simply, either plenary review or summary reversal is warranted to correct a momentous departure from this Court's precedents, in a case affecting one of the most fundamental rights of an enormous number of people.

OPINIONS BELOW

The district court's memorandum and order dismissing the case as moot (App.3a-11a) is unpublished but available at 2023 WL 5658936. The Fifth Circuit's summary-affirmance order (App.1a) is unpublished.

The Fifth Circuit's en banc opinion in *Daves* v. *Dallas County* (App.77a-153a), which bound Judge Rosenthal and the Fifth Circuit panel in this case, is published at 64 F.4th 616.

JURISDICTION

The Fifth Circuit entered judgment on February 16, 2024. On June 7, Justice Alito extended the time to file this petition through July 15, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The law that the lower courts held moots this case—Texas Senate Bill 6 (87th Tex. Leg. 2d C.S., Aug. 31, 2021)—is reproduced in the appendix (App.155a-192a).

STATEMENT

A. Petitioners Challenge Unconstitutional Bail Practices In Harris County

Petitioners are five individuals who were each arrested in Harris County, Texas (which includes Houston). App.22a-23a. Each petitioner was kept in jail throughout his pretrial period solely because he could not afford to pay secured money bail. App.19a-20a. ("Secured" bail means that payment is required before release, whereas with "unsecured" bail—the predominant form of bail for centuries, from the Magna Carta until the last few decades—payment is required only if a

mandatory court appearance is missed. *See* App.15a.) While being detained pretrial (and before having any opportunity to contest that ongoing detention in a meaningful adversarial proceeding), petitioners filed this lawsuit, on behalf of themselves and thousands of similarly situated individuals detained pretrial in the Harris County jail, challenging the constitutionality of the practices that resulted in the deprivation of their physical liberty.

Petitioners' complaint alleges that Harris County officials routinely detain presumptively innocent people after perfunctory proceedings that do not involve constitutionally required findings or provide constitutionally required procedures. App.20a. Specifically, petitioners claim that respondents consistently violate felony arrestees' equal-protection right against wealth-based detention and their substantive-due-process right to pretrial liberty by routinely requiring unattainable financial conditions of release—i.e., bail orders that constitute de facto orders of pretrial detention—without first finding that detention is necessary to protect public safety or ensure appearance at trial. App.71a-72a. Petitioners also claim that respondents violate procedural due process by not providing various procedural protections, such as the opportunity to confront and present evidence. App.72a-73a. Accordingly, petitioners sought to enjoin Harris County officials from detaining people without (1) a finding that "pretrial detention is necessary to meet a compelling government interest," and (2) procedural "safeguards to ensure the accuracy of [any] findings," including, (a) "an adversarial hearing, with counsel, at which the [arrestee] has notice of the critical issues to be decided," (b) "an opportunity" for the arrestee "to be heard and to present and confront evidence," and (c) "on-

the-record findings by clear and convincing evidence." App.30a, 72a-73a.

B. Texas Enacts S.B. 6

While this case was pending in district court, Texas enacted a statute—Senate Bill 6 ("S.B. 6") (87th Tex. Leg. 2d C.S., Aug. 31, 2021)—that made certain changes to the state's bail laws. For example, S.B. 6 requires secured money bail as a condition of release for anyone charged with (1) an enumerated offense "involving violence" or (2) any felony while released on bail or community supervision for such an offense. App.170a-175a. This requirement applies even if one or more alternatives to detention (such as GPS monitoring, regular check-ins, no-contact/stay-away orders, text-message reminders about court appearances, etc.) would serve the government's interests in protecting public safety and assuring appearance at trial.

As to other felony arrestees, S.B. 6 dictates that "ability to make bail" be "considered," App.179a, as Texas law also required *before* S.B. 6, *see* App.81a n.5; Tex. Code Crim. Proc. art. 17.15 (1993) ("ability to make bail is to be regarded"). But S.B. 6 does not mandate—as petitioners say the Constitution requires—an actual *finding* concerning ability to pay, let alone an on-the-record finding made by clear and convincing evidence after an adequately noticed and adversarial evidentiary hearing, as petitioners allege the Constitution also mandates. Similarly, although S.B. 6 purports to require that officials "impose the least restrictive conditions … necessary to reasonably ensure" that the government's interests are served, App.165a, it does not require (as petitioners allege the Constitution requires) any on-the-record finding that detention is necessary, let alone that such a finding be made by clear and convincing evidence

after a procedurally adequate evidentiary hearing, including providing the opportunity to present evidence and to confront evidence presented by the state. In fact, S.B. 6 specifically provides that it "may not be construed as requiring … an evidentiary hearing that is not required by other law." App.166a.

C. Undisputed Record Evidence Shows Unchanged Practices After S.B. 6

Discovery in this case remained open for more than a year after S.B. 6 took effect (in December 2021). During that time, petitioners assembled an evidentiary record demonstrating that Harris County's practices continued unchanged in all relevant respects after the law's enactment.

In particular, when petitioners moved for summary judgment in December 2022, the record contained: (1) sworn testimony from prosecutors, former judicial officers, public defenders, and the private bar explaining how the challenged practices continued after (and often because of) the new law; (2) court records documenting the continued practices; (3) videos of bail proceedings, combined with case records, declarations, and testimony of system actors necessary to understand the videos; (4) expert reports analyzing data from over 36,000 arrests made in Harris County in 2022; and (5) other exhibits showing that felony arrestees continued to be detained without an on-the-record finding made by clear and convincing evidence regarding the need for detention, let alone adversarial hearings where arrestees are afforded notice, counsel, and an opportunity to present and confront evidence. Post S.B.-6 video evidence, for example, reveals that unaffordable bail was still routinely imposed in proceedings that lasted less than two minutes and in which arrestees were prevented from speaking. *See*

App.9a; Plaintiffs' Summary-Judgment Motion (Dkt. 634) at 13, 59-60, *Russell* (S.D. Tex. Dec. 9, 2022). One named plaintiff even submitted a declaration attesting that he was re-arrested after S.B. 6 took effect and again detained without the findings and procedures petitioners say the Constitution requires, just as he had been prior to S.B. 6. Declaration of Maurice Wilson (Dkt. 679-5) ¶¶17-18, *Russell* (S.D. Tex. Apr. 20, 2023).

Respondents submitted no evidence, let alone evidence contradicting the facts petitioners' evidence established. To the contrary, counsel for the Harris County sheriff conceded there was "no denying that the [alleged] injuries [we]re [still] occurring" a year and a half after S.B. 6 took effect. Discovery Hearing Transcript at 23:5-6.

D. The Fifth Circuit's En Banc Mootness Holding In *Daves*

Before this lawsuit was filed, individuals who had been arrested and detained in Dallas County, Texas, sued to challenge that county's similar bail practices. That litigation—captioned *Daves* v. *Dallas County*—was resolved by the en banc Fifth Circuit while petitioners' summary-judgment motion here was pending.

As relevant here, the en banc Fifth Circuit held that the *Daves* plaintiffs' claims (which mirrored the claims here) were moot in light of S.B. 6. The court did not hold, or even assert, that this Court's established mootness standard—that a court cannot grant the plaintiff any effectual relief—was met. Instead, pointing to what it called "the substantial changes made by [S.B. 6] to procedures for assessing bail," App.104a, the court reasoned that a ruling on the plaintiffs' claims "would constitute … an advisory opinion," App.106a. The court so held despite video evidence in the record showing materially

unchanged bail practices in Dallas County post-S.B. 6. The court dismissed those videos as "minimal evidence" regarding "what actually happens in Dallas County" post-S.B. 6, App.106a—even though the plaintiffs had submitted *hundreds* of videos of bail hearings conducted by different magistrates over a five-month period, and even though the defendants there never claimed (nor did the Fifth Circuit) that the videos did not fully and accurately depict the defendants' post-S.B. 6 bail practices.

Despite concluding that S.B. 6 deprived federal courts of subject matter jurisdiction to adjudicate the plaintiffs' claims, the court in *Daves* deemed it appropriate to also hold—as a "coequal ground for dismissing th[e] case"—that *Younger* v. *Harris*, 401 U.S. 37 (1971), and its progeny required abstention. App.104a.

Judge Graves dissented. He explained that the case was not moot because the plaintiffs challenged Dallas County's actual bail *practices*, not S.B. 6, and record video evidence "showed that the alleged illegal practices continue post-S.B. 6." App.152a-153a.

When the *Daves* plaintiffs sought review by this Court, the defendants argued that the twin grounds for the en banc court's decision (abstention and mootness), the particular defendants named in the complaint there, and supposed factual disputes made the case a "poor vehicle" for this Court's review. Brief in Opposition of Judge Ernest White, et al. at 27, *Daves* v. *Dallas County*, No. 23-97 (U.S. Nov. 21, 2023) (hereafter "*Daves* Judges Cert. Opp."); Brief in Opposition of Dallas County, et al. at 23, *Daves* (U.S. Nov. 22, 2023) (hereafter "*Daves* County Cert. Opp."). This Court denied review. *See Daves* v. *Dallas County*, 144 S.Ct. 548 (2024).

E. Proceedings Here After *Daves*

While *Daves* was pending before the en banc Fifth Circuit, respondents here moved Judge Rosenthal to dismiss petitioners' claims as moot in light of S.B. 6. Two days after Judge Rosenthal heard oral argument on that issue, the Fifth Circuit issued its en banc mootness-abstention decision in *Daves*.

"Based on *Daves*," Judge Rosenthal subsequently held, "no decision on the merits may issue in this case," as *Daves* "requires that this case be dismissed as moot." App.8a, 11a. Judge Rosenthal acknowledged that petitioners had "provide[d] several examples of substantive harm that existed even after the passage of S.B. 6," including that "[f]elony arrestees who are obviously too poor to make a payment are required to pay secured bail without any finding that their detention is necessary"; that "[d]etention orders are imposed without any opportunity to present evidence, let alone any application of a heightened evidentiary standard or an explanation of how any such evidence supports judicial findings"; and that arrestees "are stuck in jail when they cannot pay secured bail without any opportunity for an adversarial, on-the-record bail hearing." App.8a-9a. Judge Rosenthal recognized that this "evidence of ongoing constitutional violations is inconsistent with a finding of mootness." App.10a. "Nevertheless," she determined, she was bound by the en banc Fifth Circuit's decision "that S.B. 6 mooted the challenges in *Daves*[] despite the plaintiffs [there] citing to similar continued constitutional violations." App.11a. "This case must be dismissed," Judge Rosenthal therefore concluded, "[u]nless the United States Supreme Court steps in." App.4a.

On appeal, petitioners moved (with respondents' consent) for summary affirmance in light of *Daves*,

preserving for this Court's review their argument that *Daves*'s mootness holding is wrong. The Fifth Circuit summarily affirmed. App.1a.

REASONS FOR GRANTING THE PETITION

This case presents an opportunity for the Court to reaffirm the proper mootness standard and correct the en banc Fifth Circuit's erroneous adoption of its own standard. Doing so is important not only to remedy the lower courts' flouting of this Court's precedent, but also to afford petitioners an opportunity to vindicate this Court's promise that in our society, "liberty"—not "detention prior to trial"—"is the norm," *United States* v. *Salerno*, 481 U.S. 739, 755 (1987). And this case presents an excellent vehicle for doing so, as none of the vehicle problems that the defendants in *Daves* asserted is present here.

I. UNDER THIS COURT'S ESTABLISHED MOOTNESS STANDARD, THIS CASE IS UNQUESTIONABLY NOT MOOT

For decades, this Court has consistently held that a case becomes moot only if a court cannot give the plaintiff any effective relief. A mid-litigation change in the law therefore cannot moot claims of constitutional violations unless it cures those alleged violations. The Fifth Circuit never claimed that that happened in *Daves*, yet it declared that case moot anyway, in an en banc decision that bound the lower courts here. The Fifth Circuit's refusal to apply this Court's established mootness standard, together with the fact that that standard is not met here (as it was not met in *Daves*), justifies plenary review or summary reversal.

A. The Fifth Circuit's En Banc Decision In *Daves*—Which Bound The Lower Courts Here—Did Not Apply This Court's "Settled" Mootness Test

1. "Under settled law, [courts] may dismiss [a] case [as moot] only if 'it is impossible for a court to grant [the plaintiff] any effectual relief ….'" *Mission Products Holdings, Inc.* v. *Tempnology, LLC*, 139 S.Ct. 1652, 1660 (2019) (quoting *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013)). Legislation enacted mid-litigation meets that standard only if it "completely and irrevocably eradicate[s] the effects of the alleged violation[s]," *Los Angeles County* v. *Davis*, 440 U.S. 625, 631 (1979), or affords the plaintiffs the "precise relief … requested in … their complaint," *New York State Rifle & Pistol Association* v. *City of New York*, 140 S.Ct. 1525, 1526 (2020) (per curiam) (hereafter "*New York Rifle*"). And "the party who alleges that a controversy … has become moot has the 'heavy burden' of establishing that." *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1983).

The Fifth Circuit did not apply this "settled" standard, *Mission Products*, 139 S.Ct. at 1660, in *Daves*—a decision which, as noted, bound the lower courts in this "largely legally identical" case, App.11a. Indeed, the one paragraph of the opinion in *Daves* that even acknowledged this Court's mootness precedents utterly failed to reconcile them with the court's holding that *Daves* was moot.

First, the court baselessly asserted that the standard this Court articulated in *Davis*—"that a change in the law during litigation does not moot a claim unless it 'completely and irrevocably eradicated the effects of the alleged violation'"—applies only "where the question was mootness owing to … voluntary cessation."

App.106a-107a. The court cited no case supporting that limitation, no doubt because this Court has never so limited the completely-eradicates requirement, and in fact has applied it *outside* the voluntary-cessation context, *see Golden State Transit Corporation* v. *City of Los Angeles*, 475 U.S. 608, 613 n.3 (1986). Nor did the Fifth Circuit explain why its proposed cabining of *Davis* makes sense. It does not.

Second, the Fifth Circuit stated that *New York Rifle* "actually favor[ed]" holding *Daves* moot because *New York Rifle* "held that the controversy" in that case "became moot due to New York City's amendment of its ordinance '[a]fter we granted certiorari.'" App.107a (second alteration in original). But this Court did not hold *New York Rifle* moot simply because the relevant ordinance was amended. It held the case moot because the petitioners there sought relief from the challenged ordinance "insofar as [it] prevented their transport of firearms to a second home or shooting range outside of the city," and "the City amended the rule so that *petitioners [could] transport firearms to a second home or shooting range outside of the city*." 140 S.Ct. at 1526 (emphasis added). In other words, the Court held the case moot because the settled mootness standard was met: The amendment provided "the precise relief that petitioners requested in … their complaint." *Id.* The Court, in fact, was unanimous as to what the relevant standard was: The dissenters in *New York Rifle* disagreed that that standard was met; in their view, the amendment gave the petitioners only "*most of* what they sought." *Id.* at 1528 (Alito, J., dissenting). But the dissenters agreed that it is "well-established" that "a case becomes moot only when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party." *Id.*

(quotation marks omitted). Again, the Fifth Circuit did not apply that unanimously endorsed standard.

2. The additional reasons the en banc Fifth Circuit gave for deeming *Daves* moot—reasons which, again, bound the lower courts here—were likewise untenable.

a. The Fifth Circuit mischaracterized the *Daves* plaintiffs' challenge to Dallas County's bail *practices* as a challenge to a *statute*, i.e. as a request for the court to "rule on the status of S.B. 6," App.106a. For instance, the court endorsed the district court's statement in *Daves* that the plaintiffs were "not entitled to have [courts] immediately intervene to tinker with the rules that the Legislature has just recently enacted." App.105a. The *Daves* plaintiffs, however, never challenged S.B. 6. They challenged Dallas County's actual bail *practices* (just as petitioners here challenge Harris County's actual practices). And record evidence showed that Dallas County's post-S.B. 6 practices were no different than its pre-S.B. 6 practices—as record evidence here shows for Harris County. If courts had jurisdiction before S.B. 6 to hear the *Daves* plaintiffs' challenge (as no party in *Daves* disputed), then courts likewise had jurisdiction after S.B. 6.

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

- "The crux of this case is now whether [S.B. 6] … measures up to plaintiffs' proffered constitutional minima."
- "To rule on the status of S.B. 6 and its procedures [now], based on evidence largely generated … pre-amendment, would constitute … an advisory opinion."

- "That the named plaintiffs have not been subject to bail proceedings since years before … S.B. 6 calls into question their ability to pursue this litigation."

App.106a, 108a. Again, the short answer to all these assertions is that the *Daves* plaintiffs (like petitioners here) were not challenging "S.B. 6 and its procedures." And the named plaintiffs in *Daves*, like petitioners here, were "subject to" the practices they *did* challenge, practices that evidence showed continued unchanged. The Fifth Circuit's repeated mischaracterization of the *Daves* plaintiffs' claims is telling.

b. The Fifth Circuit dismissed the *Daves* plaintiffs' submission of hundreds of videos of post-S.B. 6 bail hearings as "minimal evidence" regarding "what actually happens in Dallas County" post-S.B. 6. App.106a. That was doubly flawed. First, even the defendants in *Daves* (like respondents here) never claimed that the post-S.B. 6 evidence in the record did not fully and accurately depict their post-S.B. 6 practices. Second, if there hadn't been adequate record evidence about those practices, the proper course would have been to remand for the development of such evidence, not to dismiss the case as moot.

c. Lastly, the Fifth Circuit derided as "incoherent" (App.108a) the *Daves* plaintiffs' argument that because they sought relief beyond what a prior case—*ODonnell* v. *Harris County*, 892 F.3d 147 (5th Cir. 2018) (op. on reh'g)—held to be constitutionally required, the case was not moot even if S.B. 6 provided that relief. That too was wrong. The *Daves* plaintiffs' argument was straightforward: It was irrelevant whether S.B. 6 did what the *ODonnell* panel said the Constitution requires, because "the precise relief that petitioners requested in

… their complaint," *New York Rifle*, 140 S.Ct. at 1526, went *beyond* what *ODonnell* required. Petitioners here argued that the Constitution required more than the limited relief the Fifth Circuit had required in *ODonnell*.

In sum, nothing the Fifth Circuit said justified its failure to apply this Court's longstanding mootness standard, or otherwise warranted holding *Daves* moot and thereby binding lower courts in similar cases, like this one.

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

Under this Court's "settled" (and "demanding") test, *Mission Products*, 139 S.Ct. at 1660, the "'heavy burden'" of establishing mootness, *Long*, 463 U.S. at 1042 n.8, is not satisfied here.

Petitioners challenged Harris County's practice of imposing secured money bail as a condition of pretrial release without (1) making any on-the-record finding that detention is necessary to protect public safety or prevent flight, App.71a-72a, and (2) providing procedural safeguards necessary to ensure the reliability of any such finding, App.72a-73a—including a heightened standard of proof (in recognition of the importance of physical liberty) and a hearing where individuals have counsel and an opportunity to present and confront evidence, App.30a, 72a-73a. S.B. 6, by its terms and based on the undisputed record (which includes court records and videos), did not change that practice. To the contrary, S.B. 6 *bars* Harris County in many cases from providing the findings and procedures petitioners allege are required. S.B. 6 therefore unquestionably does not "completely and irrevocably eradicate[] the effects of the alleged violation[s]," *Davis*, 440 U.S. at 631, or afford petitioners the "precise relief … requested in … their

complaint," *New York Rifle*, 140 S.Ct. at 1526. It thus cannot moot this case.

To be sure, S.B. 6 made changes to Texas law regarding pretrial release. But these provisions in no way eradicate the alleged violations or provide petitioners their requested relief. For example, S.B. 6 expressly provides that it does "not … requir[e] … an evidentiary hearing" before pretrial detention, App.166a, as petitioners claim the Constitution demands. Nor does S.B. 6 require the other safeguards petitioners say are constitutionally mandated at such a hearing, including adequate notice of the issues to be decided, counsel for the arrestee, an on-the-record statement of reasons for any order resulting in pretrial detention, and findings made by clear and convincing evidence concerning the factual basis for whether detention is required. Moreover, the statute's requirement that "ability to make bail" be "considered," App.179a—which is relevant to whether an order of a financial condition will operate to detain a person prior to trial—is decades old and does not necessitate any actual finding, much less the finding petitioners say is constitutionally required, *see supra* p.7. The statute's purported requirement that officials "impose the least restrictive conditions … necessary," App.165a, likewise does not necessitate any actual finding, *see supra* pp.7-8, and in any event is inapplicable by the statute's plain terms to many individuals, who must be detained (regardless of necessity) unless they pay secured money bail (notwithstanding the lack of evidence that requiring an upfront cash payment furthers the government's legitimate interests), *see* App.170a-175a. Nothing about these provisions (or any other) renders a court unable to grant petitioners effectual relief here, i.e., an injunction prohibiting respondents from detaining people pretrial

without the required findings and procedural protections.

In any event, reams of uncontested post-S.B. 6 evidence confirms—and respondents have never denied (and in fact have *conceded*)—that respondents still commit the alleged constitutional violations, routinely detaining people pretrial by imposing secured money bail without the findings and procedural protections petitioners say are required. As noted, according to counsel for the Harris County sheriff, "there's no denying that the [alleged] injuries are occurring" even with S.B. 6 in place, meaning respondents "can[not] meet th[e] test" for mootness this Court has repeatedly articulated. Discovery Hearing Transcript at 23:3-6. Indeed, the undisputed record here contains "several examples" of constitutional violations from "after the passage [and effective date] of S.B. 6," App.8a, evidence that Judge Rosenthal—who has presided over cases like this for nearly a decade—recognized "is inconsistent with a finding of mootness," App.10a. For instance, Judge Rosenthal cited undisputed post-S.B. 6 evidence that "an indigent mother of three who had never been arrested before" "was required to pay $50,000 for release," and that "a single mother of four who relies on food assistance" "was required to pay $20,000 for release," both with "no findings of ability to pay or necessity of detention." App.8a-9a. Judge Rosenthal further cited undisputed evidence that post-S.B. 6 bail hearings last barely a minute and are conducted by officials "without making any findings or applying any standard of evidence." App.9a. To the extent the undisputed record reflects any relevant change to Harris County's bail practices, it shows that S.B. 6 has resulted in *more* felony arrestees being required to pay for pretrial release, *see* App.9a-10a, and *more* people subject to secured money bail remaining in

jail before trial, *see* App.10a. All this proves that S.B. 6 has done nothing to ameliorate petitioners' injuries. A court could thus grant effectual relief: (1) an injunction prohibiting defendants from detaining people pretrial unless they make the findings and provide the procedural protections that petitioners say the Constitution requires, and/or (2) a declaration that the Constitution does require those findings and protections to justify pretrial detention.

This Court's cases confirm that effectual relief remains available. For example, in *North Carolina* v. *Covington*, 138 S.Ct. 2548 (2018) (per curiam), the Court held that a mid-litigation redrawing of challenged legislative districts did not moot claims "that [the plaintiffs] were organized into legislative districts on the basis of … race," *id.* at 2553. Because the plaintiffs claimed that they "remained segregated" based on "race," the dispute was still "live." *Id.* Likewise here, "plaintiffs assert[] that they remain[]" unconstitutionally detained despite S.B. 6. *Id.*

Even if S.B. 6 had *lessened* petitioners' injuries—instead of exacerbating them by disclaiming a hearing requirement and automatically requiring the imposition of secured money bail resulting in automatic detention for many arrestees—this case still would not be moot. As this Court explained in *Northeastern Florida Chapter of Associated General Contractors of America* v. *City of Jacksonville*, 508 U.S. 656 (1993), mid-litigation legislation that disadvantages a plaintiff "to a lesser degree" but still "disadvantages them in the same fundamental way" does not render a case moot, *id.* at 662.

Put simply, under this Court's established mootness test, and the Court's cases applying that test, S.B. 6 does not moot petitioners' claims, either by its terms or in

practice. And the lower courts were bound to find mootness here by an en banc circuit decision that plainly departed from this Court's precedent.

II. The Question Presented Is Recurring And Important

Certiorari is warranted because this case presents an important and recurring issue regarding access to justice, and because the resolution of that issue in this case implicates the fundamental right to pretrial liberty for tens of thousands of people in Harris County (and many more elsewhere)—as well as federal courts' obligation to safeguard that right.

Defendants frequently argue that claims against them are moot due to legislation enacted during the litigation of those claims. This Court has considered such arguments at least twice in the last several years. *See New York Rifle*, 140 S.Ct. at 1526; *North Carolina*, 138 S.Ct. at 2552. Each time, this Court has applied its well-settled rule: Mid-litigation legislation does not moot a case unless the legislation provides "the precise relief that petitioners requested in … their complaint," *New York Rifle*, 140 S.Ct. at 1526; *see also North Carolina*, 138 S.Ct. at 2553. "[I]f that were [not] the rule"—as the en banc Fifth Circuit has now held—"a defendant could moot a case" simply by enacting legislation "that differs only in some insignificant respect" from the governing law at the time the case was filed. *Northeastern Florida Chapter*, 508 U.S. at 662. Worse still, defendants "might even repeat this cycle," *FBI* v. *Fikre*, 601 U.S. 234, 241 (2024) (quotation marks omitted), thereby forever evading judicial review without ever actually attempting to redress the injuries alleged—no matter how serious those injuries are to a plaintiff's business, religious faith, or, as here, physical liberty. As this Court recently

warned, "[a] live case or controversy cannot be so easily disguised, and a federal court's constitutional authority cannot be so readily manipulated," for "[t]he Constitution deals with substance, not strategies." *Id.* (quotation marks omitted). Certiorari is warranted here to prevent the manipulation (and evasion) of judicial review licensed by the en banc Fifth Circuit in *Daves*.

Resolving the effect of mid-litigation legislation in this particular case is especially important because it implicates the fundamental right to pretrial liberty. Physical liberty is among the oldest and most precious of rights, lying at the "core of the liberty protected by the Due Process Clause." *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992). And the scope of the right to pretrial liberty affects an enormous number of people, as hundreds of thousands of individuals are jailed every year in the United States. *See* Zeng, *Jail Inmates in 2021—Statistical Tables*, at 1, Bureau of Justice Statistics (Dec. 2022).

Pretrial detention, moreover, inflicts extraordinary harms. This Court has explained that pretrial detention can mean "loss of a job" and "disrupt[ion to] family life" for detainees. *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972); *accord Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975). Other courts have made the same point. *See ODonnell* v. *Harris County*, 892 F.3d 147, 154-155 (5th Cir. 2018) (op. on reh'g) (subsequent history omitted); *Curry* v. *Yachera*, 835 F.3d 373, 376-377 (3d Cir. 2016); *Lopez-Valenzuela* v. *Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) (en banc). And empirical research documents those harms (along with many others). For instance, according to one study of several hundred thousand cases, an arrestee "detained for even a few days may lose her job, housing, or custody of her children." Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L.

Rev. 711, 713 (2017). The Justice Department has found, meanwhile, that jailed individuals suffer every major type of chronic condition and infectious disease at higher rates than others. Maruschak et al., *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*, at 2-3, Bureau of Justice Statistics (rev. Oct. 4, 2016). Empirical research also indicates that those convicted following pretrial detention receive longer sentences than those convicted after being free pretrial. *See* Heaton, 69 Stan. L. Rev. at 747-748 & tbl. 3; Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. Econ. & Org. 511, 527-528 & tbl. 2 (2018). After they are freed, moreover, those detained pretrial earn less on average than arrestees who avoided pretrial detention—a 40% decrease in earnings, one study found, *see Collateral Costs: Incarceration's Effect on Effect on Economic Mobility* 11, The Pew Charitable Trusts (2010).

Because of these and other dire consequences, pretrial detainees are more likely to plead guilty to gain speedy release—regardless of whether they actually are guilty. *See ODonnell* v. *Harris County*, 251 F.Supp.3d 1052, 1157-1158 (S.D. Tex. 2017) (subsequent history omitted). For those who don't plead, pretrial detention increases the likelihood of conviction, by hindering access to counsel, witnesses, and exculpatory evidence. *See Barker*, 407 U.S. at 533. In fact, one study found that, controlling for other factors, pretrial detention is associated with a 25% increase in the likelihood of conviction, and leads to more crime in the future. Heaton, 69 Stan. L. Rev. at 744; *accord* D'Abruzzo, *The Harmful Ripples of Pretrial Detention*, Arnold Ventures (Mar. 24, 2022).

Nor are the harms from pretrial detention limited to those detained (and their families, friends, and co-

workers). Detention, this Court has explained, also burdens "society[,] which bears the direct and indirect costs of incarceration." *Rosales-Mireles* v. *United States*, 138 S.Ct. 1897, 1907 (2018). These costs—including the money needed to pay for mass jailing and the fact that those detained will more likely commit crimes in the future, *see, e.g.*, Lowenkamp, *The Hidden Costs of Pretrial Detention Revisited* 4 (2022)—also come with little or no benefit, as experts agree there is no "link between financial conditions of release and appearance at trial or law-abiding behavior before trial," *ODonnell*, 892 F.3d at 162; *see also ODonnell*, 251 F.Supp.3d at 1121-1122, 1152.

All these harms—which Judge Rosenthal noted are "'[l]ost in the shuffle'" as a result of *Daves*'s mootness holding, App.4a (quoting *Daves* v. *Dallas County*, 22 F.4th 522, 551 (5th Cir. 2022) (en banc) (Haynes, J., dissenting))—underscore the importance of the question presented and hence confirm the need for this Court's review.

III. This Case Is An Excellent Vehicle

In successfully opposing certiorari in *Daves*, the defendants argued that the case was a "poor vehicle" because it had been dismissed "on two independent grounds": "*Younger* abstention and mootness." *Daves* Judges Cert. Opp. 28; *accord Daves* County Cert. Opp. 21-23. This case, by contrast, was dismissed on mootness grounds alone (respondents having affirmatively chosen to waive abstention). *See* App.11a. Because the "important legal question is isolated here," this case is an "ideal vehicle" to answer that question. *Davis* v. *United*

States, 143 S.Ct. 647, 647 (2023) (Jackson, J., dissenting from denial of certiorari).[*]

The defendants in *Daves* also argued that that case was a poor vehicle because "yet another independent ground"—"lack of standing"—"support[ed] the dismissal of the claims against the" Dallas County judges named as defendants there. *Daves* Judges Cert. Opp. 28; *see also id.* at 28-31; *Daves* County Cert. Opp. 23-24. No judges are named as defendants here.

Finally, the *Daves* defendants argued that "unresolved factual conflicts weigh[ed] strongly against" granting review. *Daves* County Cert. Opp. 25. Here, by contrast, the material facts are undisputed. Because "the legal issue[] presented" here is "isolated from … factual controversies," this case is "a suitable vehicle for review." *Saye* v. *Williams*, 452 U.S. 926, 930 (1981) (Rehnquist, J., dissenting from denial of certiorari).

In short, this is an excellent vehicle to address the question presented.

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[*] Regarding respondents' affirmative waiver of abstention: The parties briefed below whether the district court should excuse that strategic waiver after years of respondents' reliance on it, but the court has yet to rule on that issue due to its mootness ruling. The abstention-waiver issue should be resolved on remand.

CONCLUSION

The petition for a writ of certiorari should be granted. Given the clarity of this Court's mootness precedent and the undisputed record in this case, the Court may deem summary reversal appropriate.

Respectfully submitted.

ALEC KARAKATSANIS
ELIZABETH ROSSI
JEREMY D. CUTTING
CIVIL RIGHTS CORPS
1601 Connecticut Ave. N.W.
Suite 800
Washington, D.C. 20009

NEAL S. MANNE
JOSEPH S. GRINSTEIN
SUSMAN GODFREY LLP
1000 Louisiana Street
Suite 5100
Houston, TX 77002

DUSTIN RYNDERS
TRAVIS FIFE
TEXAS CIVIL RIGHTS PROJECT
2100 Travis Street
Houston, TX 77002

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
JOSEPH M. MEYER
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave. N.W.
Washington, D.C. 20037
(202) 663-6000
seth.waxman@wilmerhale.com

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