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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-20005

DWIGHT RUSSELL; JOHNNIE PIERSON; JOSEPH ORTUNO; MAURICE WILSON; CHRISTOPHER CLACK,
Plaintiffs—Appellants,

versus

HARRIS COUNTY, TEXAS; ED GONZALEZ, *Sheriff*,
Defendants—Appellees,

STATE OF TEXAS,
Intervenor—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-226

Filed February 16, 2024

UNPUBLISHED ORDER

Before SMITH, STEWART, and GRAVES, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that Appellants' unopposed motion for summary affirmance is GRANTED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-19-226

DWIGHT RUSSELL, ET AL.,
Plaintiffs,

v.

HARRIS COUNTY, TEXAS, ET AL.,
Defendants.

Filed August 31, 2023

MEMORANDUM AND ORDER

"The reason that prisons are filled with poor people, and that rich people rarely go to prison, is not because the rich have better lawyers than the poor. It is because prison is for the poor, and not the rich."[1]

"At least 21 inmates died while in custody at the [Harris County] jail in 2021 …. Another 28 inmates died last year, and another four have died in the first couple months of 2023 …."[2]

[1] Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013).

[2] Giulia Heyward, *Dozens of Inmates Have Died in a Houston Jail Since 2021. Now the FBI Is Investigating*, NPR (Feb. 15, 2023),

Thirty-six years ago, the Supreme Court stated that "[i]n our society liberty is the norm, and detention prior to trial … is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Today, detention before trial or a guilty plea may be "the norm," and liberty its "carefully limited exception." *See* Kellen Funk & Sandy Mayson, *Bail at the Founding*, 137 HARV. L. REV. (forthcoming 2023) (manuscript at 3).

This case challenged Harris County's pretrial practice of detaining persons accused of a crime simply because they are too poor to post money bail. The Fifth Circuit has recognized a constitutional right of those accused of certain misdemeanor offenses—and, by extension, those accused of certain nonviolent felony offenses—who are eligible for bail but unable to afford it. At the same time, the latest rulings from the Fifth Circuit have increasingly narrowed the availability of a remedy for violations of this constitutional right.

The Fifth Circuit's most recent decision in *Daves v. Dallas County (Daves II)*, 64 F.4th 616 (5th Cir. 2023) (en banc), brings this case to an end. "Lost in the shuffle … is this case's bottom-line issue: in many circumstances, only those with money can get out of jail before trial. So, if you can pay for your crime of arrest, you're free. If you can't, you're not." *Daves v. Dallas County (Daves I)*, 22 F.4th 522, 551 (5th Cir. 2022) (en banc) (Haynes, J., dissenting).

Unless the United States Supreme Court steps in, this court is bound by *Daves I and Daves II*. This case must be dismissed. Final judgment will be entered separately.

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https://www.npr.org/2023/02/15/1157215405/fbi-jail-deaths-harris-county-houston-civilrights-investigations.

I. Background

This case was filed in January 2019, but it began with a separate case from 2016. That case was brought by Maranda Lynn ODonnell, who was arrested for driving with a suspended license, had bail set at the prescheduled amount ($2,500), could not afford that bail, and was therefore detained. She sued, alleging a violation of her constitutional rights. *ODonnell v. Harris County*, 227 F. Supp. 3d 706, 722 (S.D. Tex. 2016). In that case, this court found "tens of thousands of constitutional violations" occurring in Harris County based on its standardized bail practices that failed to take into account an individual's ability to pay. *ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1150 n.99, 1151 (S.D. Tex. 2017).

ODonnell went up and down the appellate ladder, but each time, this court's core holding—that this constitutional violation can and should be remedied—was upheld. *See ODonnell v. Harris County (ODonnell I)*, 892 F.3d 147, 157 (5th Cir. 2018) ("For the reasons set forth below, we affirm the court's rulings that the County's bail system violates both due process and equal protection, though we modify the basis for its conclusion as to due process."); *ODonnell v. Goodhart (ODonnell II)*, 900 F.3d 220, 225 (5th Cir. 2018) ("The identified violation was the automatic imposition of bail. Individualized hearings fix that problem…."); *ODonnell v. Salgado (ODonnell III)*, 913 F.3d 479, 482 (5th Cir. 2019) ("[T]he published opinion granting the stay is this court's last statement on the matter and, like all published opinions, binds the district courts in this circuit.").

Shortly after the Fifth Circuit issued its opinion in *ODonnell III*, this case was filed. Several felony arrestees, on behalf of themselves and those similarly situated, sued (1) Harris County, (2) the Harris County

Sheriff, and (3) Harris County District Judges, also referred to as the felony judges,[3] for using secured money bail to detain impoverished felony arrestees, without adequate factual findings or other adequate procedural safeguards in violation of equal protection and due process. (Docket Entry No. 1).

As this case proceeded, the Fifth Circuit, sitting en banc, retracted the findings made and legal conclusions reached in *ODonnell*. On January 7, 2022, the Fifth Circuit issued *Daves I*. That case was a class action lawsuit alleging that Dallas County, the Sheriff, the Magistrates, the Felony Judges, and the Misdemeanor Judges used an unconstitutional system of wealth-based detention. As the dissent noted, "[a]lthough [that] case [was] captioned as *Daves*, the majority opinion use[d] it to overrule much of the *ODonnell* cases." *Daves I*, 22 F.4th at 551 (Haynes, J., dissenting). In overruling *ODonnell*, *Daves I* made several threshold determinations about standing, abstention, and capacity to sue, which directly impacted this case. The court held a status conference on January 31, 2022, and asked the parties to brief the impact of *Daves I*. (Docket Entry No. 562).

The en banc court in *Daves* I had also instructed the Northern District of Texas to address on remand whether *Younger* abstention applied and whether Texas Senate Bill 6 mooted the case. *Daves I*, 22 F.4th at 531 (majority opinion). On July 6, 2022, the *Daves* district court issued its post-remand opinion, concluding that *Younger* abstention was not required, but that the case had been made moot by the Texas legislature's adoption

[3] The felony judges were later dismissed with prejudice. (Docket Entry No. 391).

of Senate Bill 6. *Daves v. Dallas* County, No. 3:18-cv-154, 2022 WL 2473364, at *3, *6 (N.D. Tex. July 6, 2022).

In December 2022, the *Russell* plaintiffs filed a motion for summary judgment. (Docket Entry No. 634). The plaintiffs argued that there was no genuine dispute of material fact and that they were entitled to judgment as a matter of law on their substantive and procedural due process claims. In January 2023, the State of Texas, which had intervened, moved to dismiss based on mootness. (Docket Entry No. 642). The State also argued that the plaintiffs did not establish a legal right to pretrial release or to be free from money-based detention. (Docket Entry No. 642 at 13-21). As to procedural due process, the State argues that the plaintiffs had not established a legal right or its violation. (Docket Entry No. 642 at 22-23).

In January and February 2023, the two remaining defendants, Sheriff Ed Gonzalez and Harris County, each responded to the plaintiff's motion for summary judgment with a cross-motion for summary judgment, arguing that jurisdictional issues precluded judgment for the plaintiffs as a matter of law. (Docket Entry Nos. 641, 643). Sheriff Gonzalez's response argued that the plaintiffs lacked standing to sue him and that their claims were moot. (Docket Entry No. 641). Harris County's response argued that the plaintiffs had failed to adequately plead *Monell* liability and that their claims were moot. (Docket Entry No. 643). The court heard oral argument on these issues in March 2023. (Docket Entry No. 658). Two days later, the Fifth Circuit issued *Daves II*.

In *Daves II*, the Fifth Circuit held that S.B. 6 made the case moot. *Daves II*, 64 F.4th at 635. But despite the *Daves II* court's holding that S.B. 6 (which was passed

before the issuance of *Daves I*) mooted the case, the court did not vacate its earlier opinion in *Daves I*. The court did not explain how *Daves I* was both moot and presented a live case or controversy, a core requirement for jurisdiction. *Id.* at 635 n.41. The court also, in what appears to be an advisory opinion given its conclusion that the case was moot, overruled *ODonnell's* holding on *Younger* abstention. *Id.* at 623-33.

II. Analysis

Based on *Daves II*, no decision on the merits may issue in this case. The plaintiffs have argued that this case is not moot, citing to "[d]ecades of unbroken Supreme Court precedent [that] establish that the enactment of legislation moots a case only if the legislation 'completely and irrevocably eradicates the effects of the alleged violation[s],'or affords the plaintiffs the 'precise relief … requested in the prayer for relief in their complaint.'" (Docket Entry No. 650 at 11 (first quoting *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979), then quoting *New York State Rifle & Pistol Association v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam)).

The plaintiffs went on to provide several examples of substantive harm that existed even after the passage of S.B. 6:

- **Felony arrestees who are obviously too poor to make a payment are required to pay secured bail without any finding that their detention is necessary.** Dkt. 634 (Pls' Br.) at 43-44; Dkt. 634-1 (Pls' SUMF) ¶¶ 103, 109; e.g. id. ¶ 109 n. 205 (May 6, 2022; A.R. was required to pay $20,000 for release, even though she is a single mother of four who relies on food assistance; no findings of ability to pay or necessity of detention); id. (September 12, 2022; M.A.A.

was required to pay $50,000 for release, even though she is an indigent mother of three who had never been arrested before; no findings of ability to pay or necessity of detention).

- **Detention 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.** Dkt. 634 (Pls' Br.) at 43-44; Dkt. 634-1 (Pls' SUMF) ¶¶ 100, 106, 113; e.g. id. ¶ 113 n. 210 (July 29, 2022 hearing lasting 70 seconds where officer required $10,000 secured bond for R.J.M. without making any findings or applying any standard of evidence).
- **Class members are stuck in jail when they cannot pay secured bail without any opportunity for an adversarial, on-the-record bail hearing, and are sometimes not brought to court at all until they plead guilty.** Dkt. 634 (Pls' Br.) at 18-20; e.g., Dkt. 634-1 (Pls' SUMF) ¶ 151 n. 276 (D.H. waited over four months for a hearing); id. (R.B. waited 56 days for a hearing); id. ¶ 139 (August 5, 2022 hearing where officer required $25,000 secured bond in absentia for teenager J.S., who four months later still had not seen a judge)

….

- **Money bail is still set in a majority of felony cases.** Prior to S.B. 6, 2 about 69% of people charged with felonies were required to make a payment to get out of jail. Dkt. 634 (Pls' Br.) at 24. After S.B. 6,3 about 75% must make a

payment. Ex. 1 (Pls' SSUMF) ¶ 2(a) (citing Supplement to Expert Report of Dr. Jennifer Copp ("Supp. Copp Report").

- **Most people still cannot pay their way out of jail prior to first appearance.** Prior to S.B. 6, 68% of people remained detained at their scheduled first appearance in district court. Dkt. 634 (Pls' Br.) at 24. After S.B. 6, 73% remained detained at first appearance. Ex. 1 (Pls' SSUMF) ¶ 2(d) (citing Supp. Copp Report).
- **Bail review hearings remain extremely rare.** Both before and since S.B. 6, only 7% of detained felony arrestees were scheduled for one. Dkt. 634 (Pls' Br.) at 24; Ex. 1 (Pls' SSUMF) ¶ 2(e) (citing Supp. Copp Report).
- **Thousands of people are still detained at disposition every year solely because they cannot pay the secured bail amounts required for release.** Before S.B. 6, 45% of people who were required to pay money to be released remained detained at the time their case was resolved. Dkt. 634 (Pls' Br.) at 25. After S.B. 6, among cases that were resolved, that figure was 64%. Ex. 1 (Pls' SSUMF) ¶ 2(c) (citing Supp. Copp Report).

(Docket Entry No. 650 at 14-15).

The evidence of ongoing constitutional violations is inconsistent with a finding of mootness. That finding is especially puzzling when the underlying right at issue is "'fundamental to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history and tradition.'" *Timbs v. Indiana*, 139 S. Ct. 682, 686-87 (2019) (alterations in original) (quoting reference omitted). *See generally* Monica

Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 Duke L.J. 1473 (2020) (discussing how legal-financial obligations lead to the criminalization of poverty and calling on the judiciary to more actively address these practices); Funk & Mayson, *supra* (discussing the historical origins and practices of bail). *See also id.* (manuscript at 29) ("[B]y the 1790s the states were in the process of broadly adopting a reformed approach to bail that severely limited magisterial discretion and protected the fundamental rights of the criminal accused.").

Nevertheless, this court is bound by the Fifth Circuit's conclusions. The Fifth Circuit determined that S.B. 6 mooted the challenges in *Daves*, despite the plaintiffs citing to similar continued constitutional violations. *Daves*, although involving different facts, is largely legally identical to *Russell*. Adherence to Fifth Circuit authority requires that this case be dismissed as moot. Having made that ruling, the court need not address any other basis for dismissal.

III. Conclusion

The motions to dismiss on the basis of mootness, (Docket Entry Nos. 641, 642, 643), are granted. This case is dismissed.

SIGNED on August 31, 2023, at Houston, Texas.

[Signature]
Lee H. Rosenthal
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Case No. 4:19-cv-00226
(Class Action)

DWIGHT RUSSELL, JOHNNIE PIERSON,
JOSEPH ORTUNO, CHRISTOPHER CLACK,
MAURICE WILSON,
On behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

HARRIS COUNTY, TEXAS,
SHERIFF ED GONZALEZ,
HAZEL B. JONES (174TH) NIKITA V. HARMON (176TH)
ROBERT JOHNSON (177TH) KELLI JOHNSON (178TH)
RANDY ROLL (179TH) DASEAN JONES (180TH)
DANILO LACAYO (182ND) CHUCK SILVERMAN (183RD)
ABIGAIL ANASTASIO (184TH) JASON LUONG (185TH)
GREG GLASS (208TH) BRIAN E. WARREN (209TH)
FRANK AGUILAR (228TH) CHRIS MORTON (230TH)
JOSH HILL (232ND) HILARY UNGER (248TH)
LORI CHAMBERS GRAY (262ND) AMY MARTIN (263RD)
HERB RITCHIE (337TH) RAMONA FRANKLIN (338TH)
JESSE MCCLURE, III (339TH) GEORGE POWELL (351ST)
BROCK THOMAS (RIC)

Defendants.

Filed June 26, 2020
The Honorable Lee H. Rosenthal
U.S. District Judge

SECOND AMENDED CLASS ACTION COMPLAINT

I. Introduction

1. This case is about Harris County jailing some of its poorest people, charged with felonies, because they cannot afford to make a monetary payment.

2. Harris County previously used access to cash to make release-and-detention decisions in the County's misdemeanor bail system. In 2016, certain of undersigned counsel filed a lawsuit against the County, the Sheriff, the misdemeanor judges (who were added later), and the Hearing Officers. Following a nearly two-week evidentiary hearing in March 2017, the Court struck down Harris County's misdemeanor bail policies, finding that the policies violated Equal Protection and Due Process, coerced guilty pleas, and disproportionately affected people of color. The Court issued a preliminary injunction that led to the release of more than 13,000 people who otherwise would have been illegally detained.

3. In 2018, a slate of candidates ran for election to the misdemeanor courts on a platform acknowledging the devastating consequences of the County's decades-long policy of detaining poor misdemeanor arrestees after arrest for days and weeks, and promising to work with the Plaintiffs' counsel and other stakeholders to reform the system and end the misdemeanor lawsuit. All of the candidates won; all of the incumbent judges who had resisted the lawsuit were removed by the voters.

On January 17, 2019, after the newly elected judges took office, all of the misdemeanor judges promulgated a new rule that will dramatically change the misdemeanor bail system. It was the result of intensive conversations with class counsel, the District Attorney, the Sheriff and his command staff, and the Public Defender. The rule requires the initial release decision in misdemeanor cases to be made on the basis of the offense charged. Most arrestees—approximately 85%—will automatically qualify for release on unsecured bonds (requiring a payment only if the person willfully misses court and the bond is subsequently forfeited). Only people arrested for a few select offenses will be required to appear before a judge within 48 hours, at which time they may also qualify for release on unsecured bonds or with other appropriate conditions tailored to a specific, identified risk. This rule will give effect to the Supreme Court's requirement that detention prior to trial must be the "carefully limited exception," and will reverse the years-long practice of detaining 40% of misdemeanor arrestees throughout the duration of their cases.

4. Reforms to Harris County's misdemeanor pretrial detention system came after numerous county officials spoke out against the system's unequal treatment of people who are poor. Sheriff Ed Gonzalez, though a necessary defendant in the misdemeanor case and in this one, has stated:

> The County's widespread detention of arrestees because they are too poor to pay arbitrary amounts of money is a waste of public resources and actually undermines public safety … . I believe that the current operation of the money bail system, including the Sheriff's active participation in that system, violates the United States Constitution … . A person's access to

> money should not be a determining factor in whether he or she is jailed or released after arrest and pending trial.[1]

District Attorney Kim Ogg, who is not a defendant in either case but has been a strong voice for reform of the County's misdemeanor bail policies, has stated:

> It is our position that bail reform is necessary and long overdue. Holding un-adjudicated misdemeanor offenders in the Harris County Jail solely because they lack the money or other means of posting bail is counterproductive to the goal of seeing that justice is done. We do not want to be complicit in a system that incentivizes presumptively innocent people to plead guilty merely to expedite their release from custody. We do not want to administer punishment

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[1] Meagan Flynn, *Incoming Sheriff Ed Gonzalez Declares Bail System Unconstitutional*, Houston Press (Nov. 29, 2016), https://www.houstonpress.com/news/incoming-sheriff-ed-gonzalez-declares-bail-system-unconstitutional-8984569; *see also* Michael Hardy, *In Fight Over Bail's Fairness, Sheriff Joins the Critics*, New York Times (Mar. 9, 2017), https://www.nytimes.com/2017/03/09/us/houston-bail-reform-sheriff-gonzalez.html?module=inline (quoting Sheriff Gonzalez saying "When most of the people in my jail are there because they can't afford to bond out, and when those people are disproportionately [B]lack and Hispanic, that's not a rational system."); Cameron Langford, *Texas Sheriff Among Critics of His Own Bail System*, Courthouse News (Mar. 9, 2017), https://www.courthousenews.com/texas-sheriff-among-critics-bail-system/ (quoting Sheriff Gonzalez's testimony in federal court, in which he stated, "When we look at equal protection, in my opinion it should be equal protection for everyone, but statistically speaking it doesn't bear that out. When I see that many of the people inside the jail, on any given day an average of 9,000, are just poor and can't bond out, and I look at racial disparities, disproportionally communities of color, then that's very concerning to me.").

> before the defendant has been adjudicated. It makes no sense to spend public funds to house misdemeanor offenders in a high-security penal facility when the crimes themselves may not merit jail time. These secure beds and expensive resources should be prioritized for the truly dangerous offenders and "flight risks" who need to be separated from the community.[2]

5. For people charged with felonies, however, the practice of conditioning release on access to money persists: arrestees charged with felonies are released from custody almost immediately if they can make a predetermined payment of money to the County while arrestees who are too poor to purchase their liberty remain in jail solely because of their poverty. As a result of these policies and practices, more than half of the people arrested for felony offenses remain detained for the entire duration of their case until its disposition.[3] Many of the lowest level arrestees are then released on the day of conviction.

6. The felony bail system in Harris County raises the same legal issues as the misdemeanor system, has the same devastating consequences for impoverished arrestees, is similarly coercive of guilty pleas, and is even more costly to the system, in part, because felony arrestees constitute approximately 77% of the jail population on any given day. The felony system demands

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[2] Position Statement of District Attorney Kim Ogg About Bail Bond Litigation Pending in the United States District Court, Case No. 4:16-cv-1414, ECF 206 (Mar. 3, 2017).

[3] Harris County Pretrial Services, 2017 Annual Report 16 (2017), https://pretrial.harriscountytx.gov/Library/2017%20Annual%20Report.pdf (showing that non-violent felony arrests account for 68.9% of all felony arrests).

analogous reforms: ending the use of the secured bail schedule to make the initial release decision and ensuring that anyone detained prior to trial is afforded the substantive findings and procedural protections the Constitution requires to protect against an erroneous deprivation of the right to bodily liberty—the most important right protected by the Constitution, other than the right to life itself.

7. Approximately twelve percent of the felony pretrial population in the Harris County Jail consists of people whose most serious charge is a "state jail" felony. State jail felonies are the least serious class of felony charges in the Texas criminal legal system. They consist mostly of non-violent offenses and, in many instances, they are simply misdemeanor offenses enhanced by prior misdemeanor convictions.

8. Almost 70% of all felony arrestees are charged with non-violent offenses.[4] The most common charge for all felony arrestees is drug possession, which is the most serious charge for 26.8% of felony arrestees.[5] Only 8.6% of all felony arrestees are released on an unsecured bond.[6] Money bail is required as a condition of release for the overwhelming majority of felony arrestees, meaning that these arrestees are eligible for release, but will be released only if they can make an up-front monetary payment. Those who are too poor to pay must stay in jail cells.

9. This mass detention caused by arrestees' inability to access money has devastating consequences for

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[4] Harris County Pretrial Services, *supra* note 3, at 21.

[5] *Id.*

[6] *Id.* at 17.

arrested individuals, for their families, and for the community. Pretrial detention of presumptively innocent individuals causes them to lose their jobs and shelter, interrupts vital medication cycles, worsens mental health conditions, makes people working to remain sober more likely to relapse, and separates parents and children. It exposes people to dangerous overcrowding, violence, and infectious disease at the jail. It coerces guilty pleas and results in longer sentences. In part because arrest and detention for any period of time destabilizes a person's life, even a couple of days in pretrial detention makes a person more likely to commit crimes in the future. It also costs Harris County tens of millions of dollars every year—money that could be invested in systems that provide support to people suffering from addiction, housing instability, mental health issues, and poverty, instead of a system that research shows actually exacerbates those conditions.

10. Between 2009 and the present, 125 people died in the Harris County Jail awaiting trial,[7] including a woman this month who committed suicide while being detained due to her inability to pay $3,000 money bail. She was granted a personal bond an hour after she was found hanging.[8]

11. Named Plaintiffs Christopher Clack and Maurice Wilson are currently being detained in the Harris County Jail because they cannot afford the monetary

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[7] Attorney General of Texas, *Custodial Death Report*, https://oagtx.force.com/cdr/cdrreportdeaths, last accessed Jan. 21, 2019.

[8] Keri Blakinger, *Harris County jail inmate dies by suicide days after misdemeanor arrest*, Houston Chron. (Jan. 16, 2019) https://www.chron.com/news/houston-texas/article/Harris-County-jail-inmate-dies-by-suicide-days-13538819.php.

payment required for their release. Mr. Clack is required to pay $17,500 to be released. And Mr. Wilson is required to pay $10,000 to be released. Dwight Russell, Johnnie Pierson, and Joseph Ortuno were detained when the initial Complaint was filed on January 21, 2019.[9] Mr. Russell was required to pay a $25,000 secured bail amount to be released. Mr. Pierson was required to pay $15,000 to be released. Mr. Ortuno was required to pay $30,000 to be released. Because of their poverty, each of the Plaintiffs is (or was) confined to a Harris County jail cell. In none of their cases did a judicial officer make any finding concerning ability to pay, the availability of alternative non-financial conditions of release, or the need to detain them to serve any government interest. Moreover, none of the Plaintiffs was afforded the procedural safeguards required to ensure the accuracy of any decision to detain them pretrial.

12. On behalf of the many other arrestees subjected to Harris County's unlawful and ongoing post-arrest wealth-based detention scheme, the Plaintiffs challenge in this action the use of secured money bail to detain only the most impoverished felony arrestees. Harris County's wealth-based felony pretrial detention system violates the Equal Protection and Due Process Clauses of the United States Constitution.

13. By and through their attorneys and on behalf of themselves and all others similarly situated, Plaintiffs seek an injunction against Defendants' wealth-based post-arrest policies and practices and a declaration that Defendants cannot employ a system of pretrial detention based solely on access to money by imposing and

[9] Each of the original named Plaintiffs was subsequently released after the lawsuit was filed.

enforcing secured financial conditions of pretrial release without factual findings on the record, after adequate procedural safeguards to ensure the accuracy of the findings, either (1) that the person can afford to pay the amount required for release or (2) that, although the person cannot afford it and will be detained, pretrial detention is necessary because every less-restrictive alternative condition is inadequate to meet a specific, compelling government interest in court appearance or community safety.

II. Related Litigation

14. In accordance with Local Rule 5.2, Plaintiffs advise the Court of related litigation that is currently pending: *ODonnell v. Harris County*, Case No. 4:16-cv-1414 (S.D. Tex. 2016), in the United States District Court for the Southern District of Texas, Houston Division. *ODonnell* raises the same legal claims and challenges materially identical bail policies and practices as applied to people arrested for misdemeanor offenses. This lawsuit is a companion case to *ODonnell*; the claims pled here could have been added to *ODonnell* itself by way of an amended Complaint.

III. Nature of the Action[10]

15. It is the policy and practice of Defendants to detain all felony arrestees who are eligible for release unless they pay a monetary sum. The amount of money required is initially determined by a generic schedule and is subsequently set by Hearing Officers at arrestees' probable cause hearings, during which the Hearing Officers fail to make the findings required by the

[10] Plaintiffs make the allegations in this Complaint based on personal knowledge as to matters in which they have had personal involvement and on information and belief as to all other matters.

Constitution, and the County fails to provide the procedural protections required to ensure the accuracy of any decision that results in a person's pretrial detention. It is the policy and practice of the Harris County Sheriff to require these payments as a condition of release without a judicial officer having made a finding either that the person can afford to pay the amount or that detention is necessary to serve any government interest. This practice results in the systemic detention of those arrestees who are too poor to pay. Plaintiffs seek declaratory and injunctive relief prohibiting Defendants' post-arrest detention scheme based on access to money.

Jurisdiction and Venue

16. This is a civil rights action arising under 42 U.S.C. § 1983 and 28 U.S.C. § 2201, *et seq.*, and the Fourteenth Amendment to the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

17. Venue in this Court is proper pursuant to 28 U.S.C. § 1391.

Parties

18. Dwight Russell is a 61-year-old man who has lived in Houston his entire life. He represents himself as an individual and a Class of similarly situated people subjected to Defendants' wealth-based post-arrest detention practices.

19. Johnnie Pierson is a 51-year-old man who has lived in Houston his entire life. He represents himself as an individual and a Class of similarly situated people subject to Defendants' wealth-based post-arrest detention practices.

20. Joseph Ortuno is an 18-year-old teenager who has lived in Houston his entire life. He represents

himself as an individual and a Class of similarly situated people subject to Defendants' wealth-based post-arrest detention practices.

21. Christopher Clack is a 46-year-old man who lives in Houston. He represents himself as an individual and a Class of similarly situated people subject to Defendants' wealth-based post-arrest detention practices.

22. Maurice Wilson is 36-year-old man who lives in Houston. He represents himself as an individual and a Class of similarly situated people subject to Defendants' wealth-based post-arrest detention practices.

23. Defendant Harris County is a municipal corporation organized under the laws of the State of Texas. The County, through the judges who are its final policymakers for promulgating bail procedures, makes policy decisions about which arrestees are eligible for release on nonfinancial conditions. The County, through the judges, also makes policy decisions about the content of the findings that are required to justify pretrial detention and about the procedural safeguards to provide for arrestees, including: whether and when to provide adversarial hearings and counsel; whether to provide notice, an opportunity to be heard, and an opportunity to present and confront evidence; and whether to make findings on the record. The County's policies and practices result in systemic wealth-based pretrial detention of Harris County felony arrestees without the substantive findings or procedural safeguards required by the United States Constitution.

24. The Harris County Sheriff is the chief law enforcement officer for Harris County and operates the Harris County Jail, the forthcoming Joint Processing Center, and several other detention facilities. He is responsible under state law for enforcing pretrial bail

orders and directives issued by judges or promulgated by local rule. State law also obligates the Sheriff to ensure the lawfulness of any order resulting in a person's detention in the Harris County Jail and requires him to not enforce orders he knows to be illegal.

25. The Sheriff's Office is itself responsible for about 19% of felony arrests within Harris County. The Sheriff's Office also transports arrestees from field stations run by various other authorities with arresting power to the Harris County Jail, which houses all people to be detained pending prosecution within the Harris County courts. The Sheriff's Office detains arrestees at the Harris County Jail and several other facilities. The officers and employees of the Sheriff's Office are authorized by County policy to accept money bail, as determined by the money bail schedule or by a judicial officer, and release arrestees.

Bonding office in the Joint Processing Center, which the County expects will open on February 1, 2019, subject to further delays.

26. After arrest, Sheriff's Office employees and agents bring arrestees detained because they cannot pay

money bail to a room inside the jail for probable cause hearings and bail setting. Sheriff's Office employees supervise and monitor the arrestees during the hearing. The Sheriff has knowledge that Hearing Officers require secured financial conditions of release without findings concerning a person's ability to pay the amount set and without any findings concerning alternatives to pretrial detention.

27. The Sheriff, who operates the jail, is aware of who is in the jail and the basis for each person's detention, including whether any person is eligible for pretrial release, and the amount of money bail any person is required to pay for immediate release. The Sheriff therefore has knowledge that the imposition of secured money bail results in systemic, wealth-based detention, and that there are thousands of people in the jail every night who would be released but for their inability to pay a money bail amount imposed without any finding that pretrial detention is necessary and without the basic procedural safeguards necessary to ensure the accuracy of such a finding.

28. The Sheriff's Office, by policy and practice, detains arrestees too poor to afford the money bail amounts that are imposed without findings concerning ability to pay or the need for detention, and releases arrestees who pay their money bail.

29. The Sheriff is sued in his official capacity because he is the final policymaker for all law enforcement decisions in Harris County. To the extent the Sheriff is not a County policymaker for the conduct challenged in this Complaint, the Sheriff is sued in his official capacity as an enforcement actor for purposes of injunctive relief and can be enjoined in his capacity as an enforcement actor, regardless of whether he acts on behalf of the

County or the State of Texas when he enforces bail directives.[11]

30. Hazel B. Jones, Nikita V. Harmon, Robert Johnson, Kelli Johnson, Randy Roll, DaSean Jones, Danilo Lacayo, Chuck Silverman, Abigail Anastasio, Jason Luong, Greg Glass, Brian E. Warren, Frank Aguilar, Chris Morton, Josh Hill, Hilary Unger, Lori Chambers Gray, Amy Martin, Herb Ritchie, Ramona Franklin, Jesse McClure, III, George Powell, and Brock Thomas are the 23 Harris County District Court Judges ("felony judges") who preside over felony criminal cases.

31. On June 24, 2020, Judge Chuck Silverman filed a Motion to Intervene, stating that "[t]he felony pretrial detention system in Harris County needs to be reformed" and acknowledging that the system "has real—sometimes devastating—consequences." Dkt. 181-1 at 3. Judge Silverman further explained that his interests are "directly at odds" with the "apparent objectives" of the State Intervenors who "would seemingly have the Court reject the plaintiffs' efforts to reform the felony bail system in Harris County." *Id.* at 9.

32. On June 26, 2020, Judge Brian Warren filed a Motion to Intervene, stating that "bond reform … requires well-reasoned and intelligent proposals in order to ensure that the system recognizes 'liberty [as] the norm, and detention prior to trial or without trial [as] the carefully limited exceptino.' *United States v. Salerno*, 481 U.S. 739, 755 (1987)." Dkt. 192 at 1. Judge Warren

[11] Defendant Ed Gonzalez is named separately from the County as a defendant in the event that the Court concludes that he acts on behalf of the State in any capacity, and thus is subject to prospective relief only in that capacity. If the Court, however, determines that he is a final policymaker for the County, naming him individually is redundant of a suit against the County.

further stated that he believes "more voices are needed" to ensure new felony bail rules do "not lead to disproportionately affecting minorities," that he has "already taken part in promoting and shaping bond reform," and that he has "important interests that cannot be adequately represented by an existing party." *Id.*

33. The felony judges are sued in their official capacities for injunctive and declaratory relief.

34. The felony judges promulgate Harris County's post-arrest procedures for felony arrestees—including the generally applicable Felony Bond Schedule (Ex. 4)—by administrative order.

35. On March 20, 2020, and again on April 2, 2020, the felony judges—sitting *en banc* and acting collectively—promulgated standing orders enumerating specific offenses for which an arrestee would be automatically eligible for a release on a personal bond prior to seeing a judicial officer. The operative Amended Order excludes all people who have a prior conviction for a "violent" offense, although the judges do not define the term "violent," and there is no definition of the term in state law.

36. In practice, the standing order applies to only a handful of arrestees, and the jail population has continued to rise steadily each week.

37. Sheriff Gonzalez estimates that the jail population will exceed 10,000 by Labor Day 2020, a nearly 25% increase in several months.

38. Each judge knows that, notwithstanding the recent orders, the vast majority of arrestees continue to be subjected to the same process with the same constitutional infirmities: arrestees are required to pay secured money bail amounts that are determined without any

finding that pretrial detention is necessary or that less-restrictive conditions are inadequate to reasonably assure community safety and reasonably prevent flight, and these policies and practices result in the pretrial detention every day of thousands of presumptively innocent people—in the middle of a global pandemic which has caused a deadly virus to circulate quickly throughout the jail and resulted in the deaths of at least three people in the jail so far.

39. Each judge knows that, pursuant to their policies and practices, the Sheriff's Office enforces secured financial conditions of release against people the Sheriff's Office arrests or accepts into custody, without an inquiry into or findings concerning the person's present ability to pay the predetermined amount set.

40. Each judge also knows that, during the initial probable cause hearing,[12] the Criminal Law Hearing Officers systematically order secured financial conditions of release without making findings concerning the person's present ability to pay and without a showing by the government that pretrial detention is necessary to serve a compelling interest in protecting public safety or preventing flight from prosecution.

41. Each judge is further aware that thousands of people charged with felonies are detained in Harris County every day solely because they cannot afford to pay the money bail amounts imposed pursuant to the predetermined bail schedule that the felony judges promulgate and without a finding that detention in necessary. Each judge is aware that Criminal Law Hearing Officers fail—as a matter of routine practice—to make

[12] The probable cause hearing is also known as a "magistration" or "15.17 hearing."

findings concerning ability to pay or the necessity of detention during the initial magistration hearings, which are recorded on video and audio and kept by the County and the clerk's office.

42. Each judge knows that arrestees are not given a formal, on-the-record, adversarial, evidentiary bail hearing at their first appearance before a felony judge after magistration. Each judge is aware that, typically, there is no review of the money bail amount previously imposed; no findings concerning ability to pay; no findings concerning whether pretrial detention is necessary to serve a compelling government interest; that arrestees typically do not present evidence and legal argument in support of pretrial release or against the arguments and evidence of the government; and that, when a judges issues a transparent or de facto detention order, there is never a finding that pretrial detention is necessary because less restrictive alternatives are insufficient to serve the government's interests. When the felony judges retain or set conditions of release, they routinely as a matter of practice do not hold a formal adversarial hearing where the arrestee is present with counsel and given an opportunity to present and confront evidence. They do not apply an evidentiary standard, let alone require clear and convincing evidence. They do not make any findings on the record concerning ability to pay any financial condition of pretrial release, alternatives to detention, or that pretrial detention is necessary.

43. If a person files a request for pretrial release by motion or writ after their first appearance, it will typically take weeks for any hearing to occur, and it does not occur at all in the vast majority of cases. During that time, people are detained solely because they cannot afford to pay secured bail, even though the government has not proved, and no judge has found, that such

pretrial detention is necessary to meet any government interest.

Factual Background

A. The Named Plaintiffs Are Being Kept in Jail Because They Cannot Afford the Money Bail Required for Their Release, Even Though the Government Has Not Made a Substantive Finding that Detention is Necessary

44. Dwight Russell is a 61-year-old man. Ex. 1 (Declaration of Dwight Russell) ¶ 1.

45. Mr. Russell was arrested on January 19, 2019 and taken into the custody of Harris County for allegedly driving while intoxicated, third offense. He was informed that, because of the Harris County bail schedule, he would be released immediately, but only if he paid a money bail amount of $25,000. He was told that he will be detained by Harris County if he does not pay. *See Id.* ¶¶ 3, 4.

46. Mr. Russell appeared while in custody at the jail at a probable cause hearing, and a Hearing Officer found probable cause for his arrest. Pursuant to the policies and practices described in this Complaint, no findings were made concerning his ability to pay or the need to detain him in light of available, less-restrictive alternative conditions of release. *Id.* ¶¶ 5, 6. Nor was he afforded the procedural protections required, including an adversarial hearing with an opportunity to present evidence and on-the-record findings by clear and convincing evidence.

47. The predetermined money bail amount required by the Harris County bail schedule was confirmed to be $25,000. *Id.* ¶ 4.

48. Mr. Russell struggles to meet the basic necessities of life. His only income is from food stamps. He is unemployed and has no savings. He lives with his sister, who provides him with financial support. *Id.* ¶ 7.

49. He cannot afford to purchase his release from jail. *Id.* ¶ 4.

50. Johnnie Pierson is a 51-year-old man. Ex. 2 (Declaration of Johnnie Pierson) ¶ 1.

51. Mr. Pierson was arrested on January 18, 2019, for possession of less than one gram of a Penalty Group 1 controlled substance, a state jail felony offense. He was taken to the Houston city jail and then to the Harris County jail. *Id.* ¶ 3.

52. At the jail, deputies took him to see a Hearing Officer, who told Mr. Pierson that he could be released, but only if he paid $15,000. He was told that, if he does not pay the money, he will be kept in a jail cell. *Id.* ¶ 4.

53. Pursuant to the policies and practices described in this Complaint, no findings were made concerning his ability to pay or the need to detain him in light of available, less-restrictive alternative conditions of release. *Id.* ¶ 7. Nor was he afforded the procedural protections required, including an adversarial hearing with an opportunity to present evidence and on-the-record findings by clear and convincing evidence.

54. Mr. Pierson struggles to meet the basic necessities of life. He survives on food stamps and works part-time on cars when he can. He does not have any other income. *Id.* ¶ 10.

55. He cannot afford to purchase his release from jail. *Id.* ¶ 13.

56. Joseph Ortuno is an 18-year-old teenager who is in high school. Ex. 3 (Declaration of Joseph Ortuno) ¶¶ 1, 6.

57. He was arrested on January 17, 2019, for possession with intent to deliver a controlled substance. He was taken first to the Houston city jail and then to the Harris County jail. *Id.* ¶ 3.

58. At the jail, deputies took him to see a Hearing Officer, who told Mr. Ortuno that he could be released, but only if he paid $30,000. He was told that, if he does not pay the money, he will be kept in a jail cell. *Id.* ¶ 4.

59. Pursuant to the policies and practices described in this Complaint, no findings were ever made concerning his ability to pay or the need to detain him in light of available, less-restrictive alternative conditions of release. *See Id.* ¶ 5. Nor was he afforded the procedural protections required, including an adversarial hearing with an opportunity to present evidence and on-the-record findings by clear and convincing evidence.

60. Mr. Ortuno struggles to meet the basic necessities of life. When not in school, he makes money by helping his uncle with tile installation, but he cannot afford to purchase his release from jail. *Id.* ¶¶ 4, 7, 12.

61. Christopher Clack is 46 years old.

62. Mr. Clack was arrested on January 17, 2020 for two felony offenses, and taken to the Harris County Jail.

63. At the jail, deputies took him to see a Hearing Officer, who told Mr. Clack that he could be released, but only if he paid $17,500. He was told that, if he does not pay the money, he would be kept in a jail cell.

64. Mr. Clack struggles to meet the basic necessities of life. Prior to being detained, Mr. Clack typically

earned about $200-$400 per week as an independent contractor. He does not have any financial support outside of the income he used to earn by working. He does not have a bank account.

65. He cannot afford to purchase his release from jail.

66. Pursuant to the policies and practices described in this Complaint, no findings were made concerning his ability to pay or the need to detain him in light of available, less-restrictive alternative conditions of release. Nor was he afforded the procedural protections required, including an adversarial hearing with an opportunity to present evidence and on-the-record findings by clear and convincing evidence.

67. Although court records show that Mr. Clack had settings on January 21 and March 12, 2020, he was transported to court from the jail only on March 12, and he was kept in lock-up during the hearing. There was no review of his bail conditions, and the judge did not make a finding that his continued detention was necessary. His next court appearance is scheduled for July 16.

68. Mr. Clack learned on May 4, 2020, that a few weeks ago, his lawyer called the judge in his case to ask for a bond reduction. Mr. Clack was not present for the call. The judge refused to reduce the bond amount, but the reasons were never explained to him.

69. Mr. Clack fears for his health and life because of an outbreak of COVID-19 in the Harris County Jail.

70. Mr. Clack is ineligible for release on a personal bond pursuant to GA-13.

71. Maurice Wilson is 36 years old.

72. He was arrested on January 30, 2020 for drug possession, and taken to the Harris County Jail.

73. At the jail, deputies took him to see a Hearing Officer, who told Mr. Wilson that he could be released, but only if he paid $15,000. He was told that, if he does not pay the money, he will be kept in a jail cell.

74. Although court records show that Mr. Wilson had court settings on February 3, February 12, April 6, April 13, and May 4, he was transported to court from the jail only on February 12, and he was kept in lock-up during that proceeding and did not see the judge. On February 12, 2020, the judge lowered Mr. Wilson's bond from $15,000 to $10,000, but Mr. Wilson still could not afford the sum. There was no on-the-record bail hearing, and the judge did not make a finding that detention was necessary. Mr. Wilson's next court date is currently set for June 15.

75. Mr. Wilson struggles to meet the basic necessities of life. Before his arrest, he earned money by working sporadically for his father's landscaping business. He has no other source of income. Mr. Wilson provides financial support for his 15-year-old son.

76. He cannot afford to purchase his release from jail.

77. Pursuant to the policies and practices described in this Complaint, no findings have been made concerning Mr. Wilson's ability to pay or the need to detain him in light of available, less-restrictive alternative conditions of release. Nor was Mr. Wilson afforded the procedural protections required, including an adversarial hearing with an opportunity to present evidence and on-the-record findings by clear and convincing evidence.

78. Mr. Wilson fears for his health and life because of an outbreak of COVID-19 in the Harris County Jail.

79. Mr. Wilson is ineligible for a personal bond pursuant to GA-13.

B. Defendants' Post-Arrest Practices Cause the Detention of Arrestees Who Cannot Pay a Money Bail Amount While Those Who Can Pay Are Released

i. Arrest and the Initial Money Bail-Setting Process

80. Harris County uses a predetermined money bail schedule, promulgated through administrative order by the Harris County District Court Judges ("the felony judges"), to determine financial conditions of pretrial release for nearly all felony arrestees in Harris County. *See* Ex. 4 (Harris County District Court Felony Bond Schedule). The schedule requires arrestees charged with certain offenses to remain in custody until a magistrate determines conditions of release at a probable cause hearing. For all other arrestees, the schedule lists an amount of cash a person must pay to purchase her release. The cash amount is based on a combination of the type of offense and the "risk" level of the arrestee as determined by a risk assessment algorithm. The algorithm itself is a secret, and the County's use of the assessment tool to determine the price of release is nonsensical and an improper use of the tool. First, there is no science showing that higher amounts of money mitigate higher risks of nonappearance or new criminal activity. Second, the tool is intended only to identify a risk *absent* interventions, such as text-message reminders or appropriate conditions like a stay-away order.

81. Harris County itself made 19% of felony arrests within the County in 2017. The City of Houston Police Department made 53.9% of felony arrests in 2017.[13] There are roughly 100 additional agencies within Harris County that have the authority to make arrests.

82. When a person is arrested within Harris County, she will be taken to a "field station" run by the arresting authority. If she is arrested by Harris County, she will be taken either to a field station or directly to the jail. These field stations vary in size and their capacity to hold and process arrestees. Some include holding cells. In others, arrestees are made to sit shackled to a bench while initial post-arrest procedures are conducted.

83. When the newly constructed Joint Processing Center ("JPC")—which Harris County spent $100 million to build—opens later this year, all people arrested by Harris County or the Houston Police Department will be taken directly to the JPC. This means that about 75% of arrestees will immediately be in the Sheriff's physical custody upon arrest.

84. Once at a field station, if the person was arrested without a warrant, the arresting officer will determine whether the Harris County District Attorney's Office wishes to pursue the charge by calling a hotline that is staffed 24 hours a day, 7 days a week by Harris County's assistant district attorneys. The arresting officer describes the allegations to the assistant district attorney ("ADA") on duty, who makes an initial charging decision over the phone.

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[13] Harris County Pretrial Services, *supra* note 3, at 8.

85. If the ADA on hotline duty does not wish to pursue charges, she tells the officer to release the individual.

86. If the ADA decides to pursue the charges, the arresting officer will type a summary of the facts giving rise to the arrest into the District Attorney's Intake Management System.

87. The summary will be transmitted to the District Attorney's ("DA") intake division where an ADA will formally accept charges.

88. The District Clerk's Office then files the case, creates a case number, and assigns the case to a courtroom. Pretrial Services runs the person's information through an algorithm to create a "risk assessment" score and applies the felony judges' schedule. The process from arrest to formal charges being filed and the cash amount required for release being set typically lasts about 6 to 8 hours.

89. Once the charging document is filed, a case number assigned, and a monetary amount set, the arrestee will be eligible to pay the secured money bail amount and be released. Up to this point, Harris County does not perform any inquiry into the arrestee's ability to pay the money bail amount required by the felony judges' schedule.

90. From the moment a secured bail amount is set in a felony case, the arrestee is eligible for release from Harris County custody if she can pay the amount required. If a person is subject to certain "hold" orders (e.g., an immigration detainer, probation hold, or process from another county), that person will be eligible for transfer to the jurisdiction where the hold is operative as soon as she pays. Typically, there is a set time period within which the other jurisdiction can come and pick up

the arrestee. That time period does not begin ticking down unless and until the person pays the amount required by the judges' schedule in Harris County.

91. Arrestees can pay the amount themselves, make a phone call to ask a friend or family member to pay the money on their behalf, or contact a commercial bonding agent to post bail. A person who can afford to pay will be released from the field station and will never be transported to the Harris County Jail.

92. The imposition of a financial condition of release is the moment of differential treatment: Defendants will release a person with financial resources almost immediately after money is paid, but Defendants will continue to detain a person who cannot afford to pay. This policy and practice results in systemic and automatic wealth-based detention.

93. Whether a person is arrested pursuant to a warrant or pursuant to a warrantless arrest, that person can pay the secured money bail amount predetermined by the schedule and be released immediately from the field station,[14] prior to formal booking.[15] If the individual is unable to pay, she will be transported to and booked into the jail.

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[14] Individuals arrested by Harris County officers are generally taken directly to the Harris County Jail. However, as noted, Harris County itself is only one of roughly 100 agencies with arresting authority in the County, some of which are 60 to 90 minutes outside of Houston.

[15] The vast majority of arrestees use a bail bond, obtained through a commercial bail bond company, to secure their release from jail. Typically, if accepted by a for-profit bail agent, an arrestee will have to pay the agent a non-refundable fee of 10% of the value of the bond to be released.

94. The time it takes for an arrestee to be transported to the Harris County Jail varies depending on a variety of factors, including where the person was arrested.

95. Harris County is a large county, and individuals arrested within its borders can be taken initially to field stations as geographically close to the Harris County Jail as the Houston Police Station located a little over a mile from the jail, or as far away as, for example, the City of Lakeview, which is more than 30 miles away.

96. Sometime after a person arrives at the jail—and usually before she is assigned to a housing unit—she will be taken by Sheriff's Office employees to a room in the jail with several dozen other new arrestees to appear before a Hearing Officer, who will determine probable cause. Many people every month must wait up to 48 hours for a probable cause hearing, though some have their hearings within 24 hours of arrest.

97. These policies have consistently, for years, resulted in the needless and devastating jailing of impoverished people accused of felony offenses. In 2017, up to 85% of felony arrestees were booked into the jail because they were unable to immediately pay for their release.[16] Arrestees booked into the jail endure a lengthy, intrusive, and humiliating process that includes seizure of their property, bodily searches, personal questions about their physical health, and interviews requiring them to disclose private financial and mental health information. The inmate processing center is notoriously crowded with people who are in moments of extreme crisis, having just been arrested, separated from their children and families, and deprived of their freedom. Some

[16] Harris County Pretrial Services, *supra* note 3, at 19.

are suffering from painful withdrawal symptoms or mental health episodes. Many are worried about missing shifts at their jobs or making rent payments. All are, at that moment, presumed innocent of all charges. The processing center is loud, dirty, and full of flies and noxious smells. The risk of suicide—elevated for all people detained in jails—is at its highest in the hours and days immediately following arrest. Similarly situated arrestees who were able to pay the predetermined money bail amount avoid the booking process altogether.

98. In 2017, approximately 55% of felony arrestees were still in jail when their case reached disposition.[17] Many of these arrestees were detained solely due to their inability to afford the secured financial condition set for their release.[18]

ii. Probable Cause Hearings

99. The Harris County Sheriff's Office, through its jail personnel, assembles recently arrested people nine times per day, every day of the week, for an appearance before one of the Harris County Hearing Officers. The Hearing Officer determines probable cause for the arrest, if it was warrantless, and imposes conditions of release.

100. These hearings are referred to locally as "magistrations," "Article 15.17 hearings," or "probable cause hearings."

101. In March 2017, in the middle of the evidentiary hearing in the *ODonnell* case, challenging the County's misdemeanor bail system, the County

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[17] *Id.* at 16.

[18] *Id.* at 19 (showing in Table B.1 that roughly 45% of felony arrestees post money bail).

Commissioners voted to fund a pilot program allowing defense attorneys to appear on behalf of detained arrestees at these hearings beginning in July 2017.[19] Assistant public defenders are currently authorized to represent most arrestees, though there are some exclusions.

102. At the probable cause hearing, Hearing Officers typically make no findings concerning ability to pay; they make no findings as to whether alternative

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[19] Harris County received $150,000 in May 2015 from the MacArthur Foundation to create a proposal for improvements to the criminal legal system. *See* Press Release, *MacArthur Announces 20 Jurisdictions to Receive Funding to Reduce Jail Use* (May 26, 2015), https://www.macfound.org/press/press-releases/macarthur-announces-20-jurisdictions-receive-funding-reduce-jail-use/. Harris County subsequently convened a Criminal Justice Coordinating Council, which investigated ways to reduce incarceration. Among the most important reforms that participants recommended was to provide defense attorneys at the probable cause hearings. Early in January 2016, the Coordinating Counsel submitted its grant proposal to the MacArthur Foundation, seeking $4 million over two years to put its plans into effect. Without a public explanation and despite the availability for funding for lawyers to represent all arrestees, the final document included a proposal for counsel only to represent individuals who are mentally ill. Meagan Flynn, *Bail Hearings: Where Prosecutors and Magistrates Ensure Defenseless People Stay In Jail* (Jan. 11, 2016), http://www.houstonpress.com/news/bail-hearings-where-prosecutors-and-magistrates-ensure-defenseless-people-stay-in-jail-8058308. On April 13, 2016, Harris County was awarded a $2 million MacArthur grant to reform its criminal system, but that money was not allocated to funding public defenders at bail hearings, even for people with mental illnesses. *See Harris County receives $2 million grant to reform criminal justice system*, KPRC News (Apr. 13, 2106), http://www.click2houston.com/news/watch-live-harris-county-receives-2-million-grant-to-reform-criminal-justice-system. That change came only in the midst of the evidentiary hearing on the *ODonnell* Plaintiffs' motion for preliminary injunction.

conditions of release serve the government's interests or whether pretrial detention is necessary to serve any government interest; they do not allow arrestees to confront the evidence and arguments of the government or put on evidence in support of pretrial release; and they do not provide other basic procedural safeguards, such as applying any evidentiary standard to any factual finding, let alone the clear-and-convincing-evidence standard, or issuing any statement of findings or reasons explaining why a particular financial condition or pretrial detention is required.

103. An ADA participates in the probable cause hearings via videolink by arguing for the Hearing Officer to make a finding of probable cause and often asking the Hearing Officer to impose money bail in an amount higher than the amount on the schedule or on the warrant. District Attorney Kim Ogg has an internal policy requiring motions for high bond on certain cases. She also has a policy of asking the Hearing Officer to detain using a "no bond" order every arrestee charged with an offense for which the Texas Constitution authorizes pretrial detention, regardless of the person's individual case and circumstances and regardless of the availability of less-restrictive alternatives to detention.

104. When the docket begins, arrestees are seated on benches in a room at the jail.

105. The Hearing Officer calls an individual's name and reads the charge. That individual gets up and stands in the middle of a red square on the floor of the room in the jail. An ADA then reads from the police report. The Hearing Officer decides whether there is probable cause, finding probable cause in almost every case. The Hearing Officer regularly sets secured money

bail and sometimes increases the money bail amount from the amount required by the bail schedule.

106. As a matter of routine practice, Hearing Officers do not make findings concerning an arrestee's ability to pay the money bail amount that they impose, nor do they meaningfully consider alternative non-financial conditions of release for those who cannot afford to pay the bail amount set. They do not make findings concerning the necessity of pretrial detention or make findings that less-restrictive conditions are inadequate to meet a compelling government interest.

107. Hearing Officers rarely require alternative, non-monetary conditions of release and routinely state that they are not permitted to impose certain non-monetary conditions of release.

108. For decades, the Hearing Officers simply reviewed the bail amount previously affixed to ensure that it conformed to the bail schedule and the specific policy instructions from the felony judges about how to administer the predetermined schedule. These instructions included laminated charts and emails instructing Hearing Officers about who the Hearing Officers could and could not order released on personal bonds (i.e., unsecured bonds that do not require payment upfront) and in what circumstances they could deviate from the cash bail schedule (almost never, according to the instructions). Although the felony judges purportedly rescinded these instructions in 2017 with the implementation of the new felony bail schedule and expanded the Hearing Officers' authority to determine money bail amounts and other conditions of release, the purported policy changes have not meaningfully changed actual practice. Specifically, the rule changes have failed to correct the core constitutional infirmity of the Harris

County bail system: requiring secured financial conditions of release without findings concerning ability to pay, the necessity of pretrial detention, or the adequacy of alternative conditions, and without all of the safeguards required to ensure the accuracy of those findings, including application of the clear-and-convincing-evidence standard and a statement of reasons concerning why a particular financial condition or pretrial detention is required.

109. Throughout the hearing, the arrestees remain in the Harris County Jail, supervised by Sheriff's Office employees. Sheriff's Office employees and agents also observe the probable cause hearings and witness Defendant Hearing Officers routinely failing and refusing as a matter of policy to consider alternatives to secured financial conditions.

110. State law requires probable cause hearings to occur within 48 hours. Although the County strives to hold these probable cause hearings within 24 hours of arrest for people charged with felonies, the County's online case records show that the hearings sometimes do not occur until up to 48 hours after arrest. At any point in the booking process, an arrestee can pay his or her predetermined money bail and be released.

111. If a person pays money bail prior to the probable cause hearing, she will be released and the probable cause determination in her case will be made at a subsequent court appearance.

112. If an individual is not brought to the probable cause hearing due to medical reasons, which is a frequent occurrence (approximately 5% to 10% of male arrestees are not brought to the probable cause hearing for medical reasons and approximately 25% of female arrestees are not brought to the probable cause hearing for

medical reasons), the Hearing Officer will make a finding of probable cause and require financial conditions of pretrial release in that person's absence. The County's protocol prohibits assistant public defenders from representing people who are not present at the hearing. Therefore, in these cases, the money bail amount is set without any argument on the arrestee's behalf.

iii. The Use of Personal Bonds

113. Hearing Officers sometimes recommend arrestees for release on "personal bonds," a term Defendants use to describe release without requiring an upfront payment prior to release, i.e., without a secured financial condition of release. The felony bond schedule lists certain low-level offenses for which there is a presumption of personal bond.

114. Only about 8% of felony arrestees were released on personal bonds in 2017.[20]

115. Even when individuals are recommended for personal bonds, many will not be released immediately, and some will not be released at all. This is because some Hearing Officers require Pretrial Services to first "verify" a person's references, meaning that the arrestee must provide Pretrial Services with contact information for friends or family members, and Pretrial Services must then contact those individuals and attempt to confirm certain information reported by the arrestee. Sometimes Pretrial Services is required to verify the information with multiple "references." Among the information Pretrial Services seeks to confirm, as a matter of policy, is whether the person has a place to stay if she is released from the jail. If a person does not have an

[20] Harris County Pretrial Services, *supra* note 3, at 17.

address to verify, then the verification process cannot be completed, and the person will not be released. According to these policies and practices, a person who is homeless will not be released on a personal bond, i.e., without payment of the scheduled amount of bail, because she has no address that can possibly be verified. Homeless defendants are therefore categorically ineligible for personal bonds due to the verification policy. Sometimes, references cannot be reached to verify information for days or a week. Sometimes they cannot be reached at all. In those cases, the person will not be released on a personal bond and will be detained unless she can pay the money bail.

116. At any point in the verification process, the arrestee is permitted to pay the money set pursuant to the schedule and be released immediately.

117. For decades, in violation of state judicial conduct rules, there has been an entrenched culture among the Hearing Officers of abiding strictly by written and oral directives regarding the money bail-setting process issued by the felony judges, who control their employment. For example, the felony judges instructed Hearing Officers that they could never recommend homeless individuals for release on personal bonds, i.e., without secured financial conditions. Some judges told Hearing Officers never to issue non-financial conditions for any defendant who was assigned to their courtroom at all,[21] or for individuals who previously received

[21] Gabrielle Banks, *Harris County hearing officers sanctioned by state for not considering personal bonds*, Houston Chron. (Feb. 23, 2018), https://www.chron.com/news/houston-texas/article/Trio-of-Harris-County-hearing-officers-sanctioned-12494892.php

personal bonds in other cases.[22] Other judges told Hearing Officers to consider unsecured financial conditions only for "students."[23] The Hearing Officers believed themselves to be bound by these rules and understood that the judges could hire and fire them at will. The Hearing Officers' contracts are reviewed annually by a committee that includes several of the felony judges.

118. These explicit written instructions have purportedly been rescinded with implementation of the current schedule in 2017, and Hearing Officers have purportedly been given greater discretion to determine bond amounts. Although written rules prohibiting or categorically limiting release have purportedly been formally rescinded, videos and data demonstrate that actual practices are virtually the same as they have been for many years.

iv. Assignment to a Housing Unit

119. People who are being processed through the Inmate Processing Center cannot be contacted by people outside the jail, including attorneys, with the exception of a brief interview with an assistant public defender shortly before the probable cause hearing. Most arrestees are not assigned to a housing unit until after their probable cause hearing and will remain inaccessible to their appointed attorney, who will represent them in their case, and everyone else outside the jail until the

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[22] James Pinkerton & Laura Caruba, *Tough bail policies punish the poor and the sick, critics say*, Houston Chron. (Dec. 26, 2015), http://www.houstonchronicle.com/news/houston-texas/houston/article/Tough-bail-policies-punish-the-poor-and-the-sick-6721984.php?t=373b57d418&cmpid=email-premium.

[23] *Id.*

jail assigns the individual to a housing unit sometime after the probable cause and bail hearing.

120. It is only after being assigned to a housing unit that an arrestee can be contacted by anyone outside the jail and will be scheduled for a hearing in a Criminal District Court.

121. Typically, a lawyer is not appointed until the first appearance in court. First appearance cannot occur until booking is complete. The booking process can take days.

122. In total, it takes a minimum of 24 hours for an arrested person to be fully booked into the jail, assigned to a housing unit, and made available for a visit. Arrested persons who cannot pay generally will not have counsel appointed or be able to meet with counsel until after their first court appearance. Felony arrestees virtually never meet their lawyer before the first appearance. At any point during this period of time, a person can pay money bail and be released.

v. First Appearances

123. If, after the probable cause hearing, an arrestee is still unable to purchase her release from jail, general Harris County practice is that she will be taken to a District Court, usually within 24 to 48 hours of the probable cause hearing. However, many arrestees who have their probable cause hearings on Thursday or Friday will not see a District Judge until the following Monday at the earliest, and sometimes must wait until Tuesday.

124. Detained individuals are usually assigned a court-appointed attorney or public defender at the first appearance hearing, but there is typically no review of the money bail amount previously imposed. Although an

informal off-the-record request for bail reduction may, in theory, be made at first appearance, it is not possible to have a bail hearing at that time.

125. Detained individuals typically remain in lock-up outside of the courtroom and are not brought into the courtroom on this court date. The case is almost always then "reset," meaning that another hearing is scheduled, typically weeks in the future.

126. As a result, arrestees who cannot pay for their release remain in detention and are returned to jail cells, usually without ever having been brought into the courtroom.

127. As a matter of routine practice, the felony judges do not conduct bail hearings at first appearance: they make no findings concerning ability to pay; they make no findings as to whether pretrial detention is necessary to serve any government interest; they do not allow arrestees to confront the evidence and arguments of the government or put on evidence and argument in support of pretrial release; and they do not provide other basic procedural safeguards, such as making findings by any evidentiary standard, let alone by clear and convincing evidence, or issuing any statement of reasons concerning why a particular financial condition or pretrial detention is required.

128. Typically, if a person wishes to have an evidentiary hearing concerning the appropriateness of the secured bond amount set, the need to keep the person in a jail cell pending resolution of the case, and whether less-restrictive conditions of release are available, the person's lawyer must file a motion and then have a court proceeding scheduled for a later date. A hearing on the motion will likely not occur for more than a week after the motion is filed. This hearing will be the arrestee's

first opportunity to present witnesses or documentary evidence and the first time that a judge will even conceivably make findings on the record regarding release conditions.

129. One of the purposes and effects of Harris County's post-arrest detention is to coerce and process large numbers of guilty pleas prior to any person conducting any legal or factual investigation into the charges, let alone the complete and zealous investigation and defense required by professional standards and the Sixth Amendment to the United States Constitution. If an arrestee agrees to plead guilty at this first appearance, then the arrestee will be brought out from the lock-up to plead guilty.

130. The felony judges routinely accept guilty pleas from individuals who are in jail solely because they are too poor to pay money bail.

131. The felony judges—and every other actor in the County's post-arrest system (as well as anyone who has observed probable cause hearings or first appearances)—know that many of the detained individuals who appear in front of them charged with felonies are being detained in jail solely because they are too poor to pay the money bail amount required as payment for release. The judges and Sheriff's Office employees and agents have knowledge that, in thousands of people's cases every day, there is no reason for a person's detention other than the person's inability to make a monetary payment.

132. In 2017, approximately 55% of felony arrestees were still in jail when their case reached

disposition.[24] Individuals detained pretrial are more likely to be sentenced to jail, are less likely to be sentenced to probation, and are given longer sentences than those received by individuals who were released pretrial. The conviction rates for people released at disposition are significantly lower than for similarly situated people who are detained at disposition.

C. The Harris County Jail

133. The Harris County Jail is the largest jail in Texas and the third largest jail in the United States, behind only Rikers in New York and the Los Angeles County Jail.[25] The Harris County Jail books on average 120,000 individuals per year and 330 individuals per day.[26]

134. The vast majority of human beings in the Harris County Jail cells are not there because they have been convicted of a crime. Instead, most people—an average of 85% in September 2018—are being kept in jail cells prior to trial, despite the presumption of innocence. Many of these people are in jail solely because they cannot afford to pay money bail. If they could pay the money bail assigned to them, they could walk out of the doors of the jail at any time.

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[24] Harris County Pretrial Services, *supra* note 3, at 16 (showing in Table B.1 that roughly 45% of felony arrestees post money bail).

[25] Sarah R. Guidry, et al., *A Blueprint for Criminal Justice Policy Solutions in Harris County* 1 (2015), http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2015/ls_sclaid_summit_03_tcjc_2015_harris_county_blueprint.authcheckdam.pdf.

[26] *Id.* at 9.

135. In September 2018, a typical month, the average daily population of the Harris County Jail was 9,803 individuals, 8,386 of whom were pretrial detainees. About 90% of these pretrial detainees—7,553 individuals—had been arrested for felony or state jail felony charges.

136. Over 10 years ago, the Department of Justice investigated the Harris County Jail and launched an era of federal oversight because of the serious and systemic violations of constitutional rights that pervaded the facility.[27] The investigation led the County to form the Harris County Criminal Justice Coordinating Council in an effort to address the overcrowding in the jail.[28] Although there have been some decreases in the jail population in more recent years, Harris County consistently struggles to stay within its operating capacity. In fact, the jail's persistent overcrowding, resulting largely from the thousands of people detained pretrial on felony charges, has led the Sheriff to refuse to accept new arrestees from arresting agencies like Houston Police Department ("HPD"), which in turn has meant that HPD arrestees are forced to languish in the City's custody for days before being transferred to the County's inmate processing center.[29]

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[27] *Id.* at 2.

[28] *Id.*

[29] Undersigned counsel Civil Rights Corps sued the City of Houston for detaining people in violation of their Fourth Amendment right to a probable cause determination within 48 hours. *Hernandez v. City of Houston*, 4:16-cv-3577 (S.D. Tex. Dec. 5, 2016).

137. In 2013, taxpayers spent almost $500,000 *per day* to operate the jail.[30]

138. Since 2009, 125 human beings have died while in pretrial custody in the Harris County Jail.[31]

139. In August 2018, arrestee Debora Lyons hanged herself in a common area of the Harris County Jail while detained on a felony theft charge with money bail set at $1,500.[32] She had been arrested on July 21 for allegedly stealing clothes and an airbed totaling less than $2,500. The day *after* she died, former Judge Jim Wallace granted her a personal bond.

140. Three weeks earlier, Navy veteran Eldon Lee Harris had hanged himself while in solitary confinement.[33]

141. The Texas Commission on Jail Standards has found the Harris County Jail to be in noncompliance of state standards five times in the past two years.[34] Three out of five of these compliance failures have been related to preventable deaths.

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[30] Guidry, *supra* note 23, at 13.

[31] Attorney General of Texas, *Custodial Death Report*, https://oagtx.force.com/cdr/cdrreportdeaths, last accessed Jan. 21, 2019.

[32] Keri Blakinger, *Inmate who killed herself in Harris County jail had previously threatened suicide*, Houston Chron. (Aug. 22, 2018), https://www.chron.com/news/houston-texas/article/Inmate-who-killed-herself-in-jail-had-previously-13172633.php.

[33] *Id.*

[34] Keri Blakinger, *State finds Harris County jail out of compliance for 5th time in two years*, Houston Chron. (Nov. 30, 2018), https://www.chron.com/news/houston-texas/article/State-finds-Harris-County-jail-out-of-compliance-13435304.php.

142. On January 17, 2019, two days after Tracy Whited committed suicide in the Harris County Jail, Texas state Senator John Whitmire sent a letter to County Judge Lina Hidalgo citing "unsanitary and unhealthy conditions" at the jail and proposing state oversight for the facility. He stated that conditions at the jail "jeopardize[] the safety and well-being of our fellow citizens who find themselves housed in the Harris County Jail."[35]

143. According to the Harris County Sheriff's Office, one-quarter of individuals in the Harris County Jail have been diagnosed with some form of mental illness.[36]

144. There is a documented history of inmate abuse by jail guards, deaths and suicides in the jail, inadequate training of jail staff, and lack of access to medications and medical services. For years, the County has been aware of these intolerable conditions, which exist largely because of the overcrowding resulting from the volume of pretrial felony detainees who cannot afford to pay money bail. It has failed to remedy them.[37]

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[35] Keri Blakinger, *Houston senator raises possibility of state oversight for Harris County jail*, Houston Chron. (Jan. 17, 2019), https://www.chron.com/news/houston-texas/article/Houston-senator-raises-possibility-of-state-13542101.php.

[36] Harris County Sheriff's Office, *Jail Mental Health Initiatives*, http://www.harriscountycit.org/jail-mental-health-unit/ (last visited January 19, 2019).

[37] *Jailhouse Jeopardy: Uncovering abuses at Harris County's jail*, Houston Chron., (Oct. 3, 2015-Mar. 6, 2016), http://www.houstonchronicle.com/local/investigations/jailhouse-jeopardy/ (providing links to a series of articles written by several reporters).

145. On a typical day, hundreds of new arrestees, presumed innocent, are arrested and booked into this jail.[38] At any given moment, there are hundreds of people charged only with state jail felonies—the least serious class of felony charges in the Texas criminal legal system, consisting mostly of non-violent offenses or misdemeanor offenses enhanced by prior misdemeanor convictions—who are being detained in the Harris County Jail solely because they cannot afford money bail.[39]

146. In 2017 alone, there were more than 500 people who were detained at disposition because they were unable to pay a $2,000 money bail. Many of these individuals could have walked out of the jail if they had been wealthy enough to pay the monetary amount required for freedom. Only those individuals who are too poor to purchase their release are subjected to these conditions and the health and safety risks of pretrial jailing.

D. Defendants' Wealth-Based Detention Practices Are Causing Plaintiffs to Be Jailed Solely Due to Their Inability to Pay Bail

147. The named Plaintiffs are eligible for release and would not have to endure pretrial incarceration if they paid the amount of money required by Defendants.

148. Arrestees are given a right to release pending trial, but Defendants' wealth-based detention

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[38] Guidry, *supra* note 23, at 9 (stating that there are 330 bookings per day); Harris County Pretrial Services, *supra* note 3, at 16 (stating that, in 2017, 30,978 people were arrested on felony charges, which averages more than 80 arrests per day).

[39] *See*, *e.g.*, Guidry, *supra* note 253, at 15 (noting that, in 2013 alone, there were 3,120 misdemeanor arrestees who could not post the $500 money bail that Harris County demanded of them).

system conditions their release on their ability to afford money bail, thus tying their pretrial freedom to their wealth status.

149. As a matter of policy and practice, when a new arrestee is brought to the Harris County Jail, county employees inform the arrestee that she will be released from jail immediately if she pays the money bail amount. The arrestee is told that she will remain in jail if she is not able to make that payment.

150. The Harris County Sheriff's Office collects arrestees' money bail payments. It is the policy and practice of the Harris County Sheriff's Office to release only those arrestees who pay their money bail amount.

151. In a typical week, the Sheriff's Office releases hundreds of individuals who pay their money bail amount.

152. It is the policy and practice of the Sheriff's Office to detain individuals who do not pay the money bail amount. Before an individual's probable cause hearing, it is the policy and practice of the Sheriff's Office to detain the individual based on a money bail amount set pursuant to a predetermined bail schedule. After a probable cause hearing, it is the policy and practice of the Sheriff's Office to detain the individual based on a money bail amount imposed by a Hearing Officer.

153. If a person cannot pay money bail after her first court appearance before a District Judge, it is the policy and practice of the Sheriff's Office to continue to detain that individual unless and until she makes a monetary payment.

154. Under Defendants' wealth-based practices, those who have enough money to pay are released from the County jail. Some poorer arrestees eventually make

arrangements with private bail bond companies, after spending hours, days, or weeks in jail.[40] And many others who are poorer still are left to languish in jail until their case resolves.

E. Defendants' Use of Money Bail Is Not Narrowly Tailored—Nor Is It as Effective as Many Other Methods—in Securing Court Attendance or Public Safety

155. The empirical evidence shows that there is no relationship between requiring money bail as a condition of release and defendants' rates of appearance in court.[41]

156. While tying pretrial freedom (for those charged with felonies) to access to money is the norm in Harris County, other jurisdictions throughout the country do not keep people in jail because of their poverty. Instead of relying on money, other jurisdictions release arrestees with pretrial supervision practices and

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[40] Because of the common availability of commercial bail bonds, those who remain in the Harris County jail are typically those who cannot even afford to pay a third-party bonding agent. Typically, bonding agents require a non-refundable premium of 10% of the bail amount, although a bonding agent is free to refuse to pay for the release of any arrestee for any reason or for no reason. Bonding agents also routinely accept lower premiums, or no premiums, and place the arrestee on a payment plan for the rest. In short, it is completely up to the bonding company whether to make a deal with a particular individual who cannot afford to pay the sum required for release. The Named Plaintiffs cannot afford such a bail.

[41] Arpit Gupta, Christopher Hansman, & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization* 5 (May 2, 2016), http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf ("We find no evidence that money bail increases the probability of appearance.").

procedures that can help increase court attendance and public safety without requiring detention.

157. Other jurisdictions employ numerous less restrictive strategies for assuring public safety and court appearance when the government determines, on the basis of evidence and argument, that there is a need to guard against a particular risk. These strategies include: unsecured or "signature" bonds (which do not require payment up front for release but instead allow immediate release upon a promise to pay the monetary amount if the person does not appear as required), reporting obligations, two-way phone and text message reminders of court dates, rides to court for those without transportation or a stable address, flexible court appearances including evening and weekend court sessions for those with jobs they cannot miss, counseling, drug and alcohol treatment, batterer intervention programs, anger management courses, alcohol monitors, or, in extreme cases of particular risk, electronic monitoring, among other services.

158. Defendants are permitted by state (and federal) law to use these alternatives but, as a matter of routine practice and policy, choose not to for impoverished felony arrestees. The vast majority of Harris County arrestees are therefore processed and detained through Harris County's money bail scheme rather than non-monetary supervision methods. As a matter of policy and practice, Defendants do not consider, or make findings concerning, less restrictive alternatives than detention based on money bail that a person cannot afford.

159. Jurisdictions routinely using non-monetary conditions of release achieve high rates of court appearances while ensuring public safety. In Washington, DC, where 94% of cases resulted in pretrial release without

secured financial conditions in Fiscal Year 2017,[42] 88% of defendants released pretrial made all scheduled appearances throughout the life of their cases, with more than 86% of those released pretrial remaining arrest-free (and 99% remaining arrest-free for violent crimes).[43]

160. Empirical evidence proves that unsecured bond alone is at least as effective at reasonably assuring appearance in court as secured money bail.

161. Empirical evidence also demonstrates that secured money bail does not have any positive benefit to public safety. In fact, short periods of pretrial detention actually increase future crime. And in Texas, because a person cannot forfeit a secured money bail by committing a new crime, there is no rational relationship between a higher secured money bail and public safety, unless the higher bail is intended to accomplish pretrial detention—and even then, as noted, studies show that the resulting detention has a criminogenic effect on that person. Thus, even though the person may be incapacitated for the pretrial period, the destabilizing effects of pretrial detention make it *more likely* she will commit *new* crimes during the pretrial period and after.

162. Detention due to inability to pay money bail increases the likelihood of conviction. A person who is detained pretrial is 13% more likely to be convicted and

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[42] Pretrial Services Agency for the District of Columbia, *FY 2017 Release Rates for Pretrial Defendants within Washington, DC* (2018), https://www.psa.gov/sites/default/files/2017%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf.

[43] Pretrial Services Agency for the District of *Columbia, Congressional Budget Justification and Performance Budget Request: Fiscal Year 2019* (2018), https://www.csosa.gov/wp-content/uploads/bsk-pdf-manager/2018/07/FY2019-PSA-CBJ-Performance-Budget-02122018-1.pdf.

21% more likely to plead guilty.[44] Additionally, individuals detained pretrial are more likely to be given longer jail sentences.[45] Overall, individuals who are detained—instead of released on money bail or on a personal bond—have worse case outcomes.[46]

163. Money bail is disproportionately imposed on non-white arrestees.[47] In other words, even the rare

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[44] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 18 (May 2, 2016), https://www.law.upenn.edu/cf/faculty/research/details.cfm?research_id=14047; *see also* Gupta, et. al, *supra* note 41 at 3 (finding a 12% increase in the likelihood of conviction using the same data).

[45] Stevenson, *supra* note 44 at 18; Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2017).

[46] Stevenson, *supra* note 42 at 18; Gupta, et. al, *supra* note 41 at 13 (finding a 12% increase in the likelihood of conviction using the same data); Guidry, *supra* note 23 at 13 ("[D]efendants who are not released pre-trial are more likely to be incarcerated following a conviction, and they generally receive longer sentences upon conviction.").

[47] Gupta, et. al, *supra* note 41 at 4-5; Lise Olson, *Study: Inmates who can't afford bond face tougher sentences*, Houston Chron. (Sept. 15, 2013), http://www.houstonchronicle.com/news/houston-texas/houston/article/Study-Inmates-who-can-t-afford-bond-face-tougher-4817053.php (discussing Carlos Mathis, an African-American man, who was detained in jail for seven months on minor drug and theft charges because he could not afford money bail, and whose charges were dismissed); Isami Arifuku & Judy Wallen, *Racial Disparities at Pretrial and Sentencing and the Effects of Pretrial Services Programs* (Mar. 11, 2013), http://www.pretrial.org/download/research/Racial%20Disparities%20at%20Pretrial%20and%20Sentencing%20and%20the%20Effects%20of%20Pretrial%20Services%20Programs%20-%20NCCD%202013.pdf; Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. Legis. & Pub. Pol'y 919 (2013); Tina L. Freiburger,

personal bond in Harris County is disproportionately given to white arrestees.

164. Setting a secured money bail amount in an amount higher than a person can afford by definition defeats the purpose of money bail—to incentivize a person to return to court—and removes any legitimate (let alone compelling) state interest in the setting of a financial condition. Nor is setting money bail without findings concerning ability to pay narrowly tailored to meet any other legitimate or compelling government interest.

165. Defendants' use of money bail leads disproportionately to the detention of people of color. Regardless of the amount of money bail imposed, people of color are more likely to be detained at disposition than whites.[48]

166. Unnecessary pretrial detention causes instability in employment, housing, and care for dependent relatives. Studies show that those detained pretrial face worse outcomes at trial and sentencing than those released pretrial, even when charged with the same offenses. Detained defendants are more likely to plead guilty just to shorten their jail time, even if they are innocent. In fact, Harris County has led the country for years in exonerations—many of which resulted from wrongful convictions in drug cases involving people who pled guilty to get out of jail.[49] People detained pretrial

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et. al, *The Impact of Race on the Pretrial Decision*, 35 Am. J. of Crim. Just. 76 (2010), http://libres.uncg.edu/ir/asu/f/Marcum_CD_2010_Impact_of_Race.pdf.

[48] Gupta, et. al, *supra* note 40 at 4-5

[49] Alex Samuels, *Study finds Harris County leads nation in exonerations*, Texas Tribune (Mar. 7, 2017) https://www.texastribune.org/2017/03/07/report/.

have a more difficult time preparing for their defense, gathering evidence and witnesses, and meeting with their lawyers. Studies also show that just two days of pretrial detention increases the likelihood of future arrests and increases the future risk level of low-level offenders.

167. Pretrial detention is more than ten times more expensive than effective pretrial supervision programs. Through non-monetary tools, pretrial supervision programs can save taxpayer expense while maintaining high public safety and court appearance rates.

168. Since March 2020, due to the COVID-19 pandemic, people detained in the Harris County Jail face yet another irreparable harm: a heightened risk of contracting a deadly disease and dying because they cannot practice social distancing or basic health and sanitation measures.

169. On March 11, 2020, the World Health Organization declared COVID-19 a pandemic.[50]

170. As COVID-19 swept across the United States, it quickly became apparent that the Harris County Jail, like most jails and prisons, is devastatingly ill-equipped to prevent the virus from rapidly spreading among detainees and staff. Indeed, Sheriff Ed Gonzalez issued a desperate public warning on March 21, 2020: "Currently have 8,000 individuals, most pre-trial, in tight quarters."[51] The jail has "[v]ery limited services.

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[50] World Health Organization, "WHO Timeline—COVID-19" (Apr. 27, 2020), https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19 (last accessed May 1, 2020).

[51] Ed Gonzalez (@SheriffEd_HCSO), TWITTER (Mar. 21, 2020, 8:41 AM), https://twitter.com/SheriffEd_HCSO/status/1241344221921136641.

No capacity for ICU care. If someone older and/or with frail health gets the virus it can be a death sentence. Plus spread like wildfire... Individuals would need to be taken to our public health system, which does not have capacity to handle an outbreak in the jail and the anticipated needs of the general community."[52]

171. On March 29, 2020, the Houston Chronicle reported that the first detained person in the Harris County Jail had tested positive for COVID-19.[53]

172. Also on March 29, 2020, Texas Governor Greg Abbott issued Executive Order GA-13.[54] GA-13 purports to prohibit anyone currently charged with a crime involving "violence" and anyone with a prior conviction at any time in the past for a crime involving "violence" (regardless of the current charge), from being released on unsecured bail, regardless of any individualized proceedings or findings by a state court judge.[55]

173. Thus, for all of the people in these broad categories, GA-13 *requires* pretrial detention if they cannot pay for release and requires enforcement officials,

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[52] *Id.* (Mar. 21, 2020, 8:05 AM), https://twitter.com/SheriffEd_HCSO/status/1241335204905713664;
id. (Mar. 20, 5:19 PM), https://twitter.com/SheriffEd_HCSO/status/1241112204067381249. ("Jail health is community health.").

[53] Gabrielle Banks & Nicole Hensley, "First Harris County Jail inmate tests positive for COVID-19," Houston Chron. (Mar. 29, 2020), https://www.houstonchronicle.com/news/houston-texas/houston/article/First-Harris-County-Jail-inmate-tests-positive-15164825.php.

[54] *See* Dkt. 39-1.

[55] *See id.*

including the Sheriff and County, to refuse to release categories of people on personal bonds.[56]

174. GA-13 also makes pretrial detention indefinite by suspending relevant speedy trial provisions of Texas law that ordinarily would require a person's release if the state is not ready for trial.[57]

175. A little more than a month after GA-13 was issued, the number of reported COVID-19 cases in the jail—among both detainees and staff—has exploded. As of May 5, 2020, 599 people detained in the Harris County Jail and 255 employees of the Sheriff's Office had tested positive for COVID-19.[58] Almost half of people detained the jail were in quarantine: 2,828 people detained in the jail were in observational quarantine (possible exposure), 601 were in buffer quarantine (for those newly booked into the jail), 92 were in surveillance quarantine (asymptomatic patients who tested positive), and 157 in recovery quarantine.[59]

Class Action Allegations

176. The named Plaintiffs bring this action, on behalf of themselves and all others similarly situated, for the purpose of asserting the claims alleged in this Complaint on a common basis.

177. A class action is a superior means, and the only practicable means, by which the named Plaintiffs

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[56] A personal bond is an unsecured bond that allow a person to be released without making an up-front payment if the person agrees to pay an amount of money if the person does not appear.

[57] *Id.*

[58] Dkt. 138.

[59] *Id.*

and unknown Class members can challenge Defendants' unlawful wealth-based post-arrest detention scheme.

178. This action is brought and may properly be maintained as a class action pursuant to Rule 23(a)(1)-(4) and Rule 23(b)(2) of the Federal Rules of Civil Procedure.

179. This action satisfies the numerosity, commonality, typicality, and adequacy requirements of those provisions.

180. The Plaintiffs propose a single Class seeking declaratory and injunctive relief. The Declaratory and Injunctive Class is defined as: All felony arrestees who are detained by Harris County, for whom a secured financial condition of release has been set and who cannot pay the amount necessary for release on secured money bail because of indigence.

A. Numerosity—Fed. R. Civ. P. 23(a)(1)

181. In September 2018, the average daily population of felony and state jail felony arrestees being held pretrial was 7,553 individuals. Many of these people were held only because they could not afford to pay a money bail. Arrestees are detained in jail for varying lengths of time depending on how long it takes them to make the cash payment that is required for their release.

182. Some arrestees are able to pay immediately for their release. Others are forced to wait one or two days until they or family members can make the payment. Others will never be able to come up with any amount of money to pay for their release.

183. The number of current and future arrestees subject to this policy—if it is not enjoined—is well into the thousands.

B. Commonality—Fed. R. Civ. P. 23(a)(2)

184. The relief sought is common to all members of the Class, and common questions of law and fact exist as to all members of the Class. The named Plaintiffs seek relief concerning whether Defendants' policies, practices, and procedures violate the rights of the Class members and relief mandating that Defendants change their policies, practices, and procedures so that the constitutional rights of the Class members will be protected in the future.

185. Common legal and factual questions arise from one central scheme and set of policies and practices: Defendants' post-arrest wealth-based detention scheme. Defendants operate this scheme openly and in materially the same manner every day. The material components of the scheme do not vary from Class member to Class member, and the resolution of these legal and factual issues will determine whether all of the members of the Class are entitled to the constitutional relief that they seek.

Among the most important, but not the only, common questions of fact are:

- Whether Defendants have a policy and practice of using a predetermined schedule to determine the amount of money required to secure post-arrest release;
- Whether Defendants require that scheduled amount of money to be paid up front before releasing a person from the jail;
- Whether Defendants require arrestees who have had probable cause hearings to pay the secured money bail amount imposed by the

Hearing Officer before releasing such people from the jail;

- Whether, when requiring a financial condition of release there is an inquiry into ability to pay;
- Whether, if a person cannot pay for release, there is any inquiry into and findings concerning availability of alternative conditions of release and a finding that pretrial detention is necessary;
- Whether, in requiring pretrial detention, there is an adversarial hearing with counsel and notice of the critical issues at stake, opportunity to be heard and to confront evidence, findings by clear and convincing evidence, and a statement of reasons orally or in writing concerning the need for pretrial detention; and
- What standard post-arrest procedures Defendants perform on felony arrestees, for example, whether Defendants use any other alternate procedures for promptly releasing people determined otherwise eligible for release but who are unable to afford a monetary payment.

186. Among the most important common questions of law are:

- Whether requiring arrestees to pay money up front to secure release from post-arrest detention without an inquiry into or findings concerning the arrestee's present ability to pay the amount required, and without meaningful consideration of less restrictive

alternative conditions of release, violates the Fourteenth Amendment's Equal Protection and Due Process Clauses;

- Whether it is lawful to impose a secured financial condition of release that operates as a de facto order of pretrial detention because of a person's inability to pay without complying with the substantial findings, legal standards, and procedural safeguards required for issuing and enforcing a transparent order of preventive detention; and
- What substantive findings and procedural safeguards are required as a matter of federal law prior to pretrial detention of a presumptively innocent person.

C. Typicality—Fed. R. Civ. P. 23(a)(3)

187. The named Plaintiffs' claims are typical of the claims of the other members of the Class, and they have the same interests in this case as all other Class members. Each Class member is threatened with imminent and/or ongoing confinement in jail because she cannot afford to pay a standardized cash bail amount. The answer to whether Defendants' wealth-based detention scheme is unconstitutional will determine the claims of the named Plaintiffs and every other Class member.

188. If the named Plaintiffs succeed in the claim that Defendants' policies and practices concerning post-arrest detention violate their constitutional rights, that ruling will likewise benefit every other member of the Class.

D. Adequacy—Fed. R. Civ. P. 23(a)(4)

189. The named Plaintiffs are adequate representatives of the Class because their interest in the vindication of the legal claims that they raise is entirely aligned with the interests of the other Class members, each of whom has the same basic constitutional claims. They are members of the Class, and their interests do not conflict with those of the other Class members.

190. There are no known conflicts of interest among members of the proposed Class, all of whom have a similar interest in vindicating their constitutional rights in the face of Defendants' pay-for-freedom post-arrest detention system.

191. Plaintiffs are represented by attorneys from Civil Rights Corps, Susman Godfrey, and Texas Civil Rights Project who have experience in litigating complex civil rights matters in federal court and extensive knowledge of both the details of Defendants' scheme and the relevant constitutional and statutory law. Counsels' relevant qualifications are more fully set forth in the contemporaneously filed Motion for Class Certification.

192. The combined efforts of Class counsel have so far included extensive investigation into Harris County's predetermined money bail practices over a period of years, including numerous interviews, most intensively in recent months, with witnesses, court employees, people detained in jail, families, judges, attorneys practicing in courts throughout the region, community members, statewide experts in the functioning of state and local courts, empirical researchers, and national experts in constitutional law, post-arrest procedure, law enforcement, judicial procedures, criminal law, pretrial services, and jails.

193. Class counsel have a detailed understanding of state law and practices as they relate to federal constitutional requirements. Counsel have studied the way that these systems function in other cities and counties in order to investigate the wide array of lawful options in practice for municipalities.

194. Counsel have devoted enormous time and resources to becoming intimately familiar with Defendants' practices and with all of the relevant state and federal laws and procedures that can and should govern it. Counsel have also developed relationships with many of the individuals and families victimized by unlawful wealth-based pretrial detention practices. The interests of the members of the Class will be fairly and adequately protected by the Plaintiffs and their attorneys.

E. Rule 23(b)(2)

195. Class action status is appropriate because Defendants, through the policies, practices, and procedures that make up their wealth-based post-arrest detention scheme, have acted in the same unconstitutional manner with respect to all Class members. Defendants apply and enforce a wealth-based system of pretrial justice: some arrestees can purchase their immediate release, while other arrestees must remain in jail solely because they cannot pay.

196. The Class therefore seeks declaratory and injunctive relief that will prevent Defendants from detaining arrestees who cannot afford cash payments. Because the putative Class challenges Defendants' scheme as unconstitutional through declaratory and injunctive relief that would apply the same relief to every member of the Class, Rule 23(b)(2) is appropriate and necessary.

197. Injunctive relief compelling Defendants to comply with these constitutional rights will similarly protect each member of the Class from being subjected to Defendants' unlawful policies and practices. A declaration and injunction stating that Defendants cannot detain arrestees solely due to their inability to make a monetary payment would provide relief to every Class member. It would ensure that pretrial detention based on lack of access to money does not occur without the substantive findings and procedural safeguards that the Constitution requires for that government detention. Therefore, declaratory and injunctive relief with respect to the Class as a whole is appropriate.

198. Plaintiffs seek the following relief.

Claims for Relief

Count One: Defendants Violate Plaintiffs' Equal Protection and Due Process Rights by Jailing Them Solely Because They Cannot Afford a Monetary Payment.

199. Plaintiffs incorporate by reference the allegations in paragraphs 1-155.

200. The Fourteenth Amendment's Equal Protection and Due Process Clauses prohibit jailing a person solely because of her inability to make a monetary payment. Defendants violate Plaintiffs' rights by enforcing against them a system of pretrial detention that keeps them in jail solely because they cannot afford to pay money bail amounts imposed without findings concerning their present ability to pay and without findings concerning the necessity of the detention in light of alternative conditions of release that could serve the government's interests.

Count Two: Defendants Violate Plaintiffs' Substantive Due Process Right to Pretrial Liberty by Jailing Them Without a Finding That Pretrial Detention Is Necessary

201. Plaintiffs incorporate by reference the allegations in paragraphs 1-157.

202. The Fourteenth Amendment protects the fundamental interest in pretrial liberty that is infringed whenever a person is subject to a transparent or de facto order of pretrial detention. That interest in bodily liberty is not absolute, and it can be overcome, but only if the government first demonstrates that no alternative short of pretrial detention exists to mitigate an identifiable risk to the safety of the community or a risk of flight from prosecution, and that pretrial detention is therefore necessary to serve a specified, compelling interest in public safety or court appearance. Defendants violate Plaintiffs' rights by jailing them prior to trial without making any finding that pretrial detention is necessary to serve the government's interests.

Count Three: Defendants Violate Plaintiffs' Procedural Due Process Rights

203. Plaintiffs incorporate by reference the allegations in paragraphs 1-159.

204. The Due Process Clause requires that, for a transparent or de facto order of pretrial detention to be constitutionally valid, the government must provide rigorous procedural safeguards to ensure the accuracy of the substantive finding that pretrial detention is necessary because less-restrictive conditions are insufficient. The minimal safeguards required by the Constitution include: an adversarial hearing, with counsel, at which the person has notice of the critical issues to be decided at

the hearing, an opportunity to be heard and to present and confront evidence, and a statement of reasons on the record explaining the reasons for the finding that pretrial detention is necessary. Defendants violate procedural due process by detaining plaintiffs prior to trial without providing these safeguards to ensure the accuracy of any substantive determination that pretrial detention is necessary.

Request for Relief

WHEREFORE, Plaintiffs and the other Class members request that this Court issue the following relief:

a. A declaratory judgment that Defendants violate the Named Plaintiffs' and Class members' constitutional rights by operating a system of wealth-based detention that keeps them in jail solely because they cannot afford to pay secured money bail amounts required without findings concerning ability to pay, without consideration of or findings concerning nonfinancial alternatives, without findings that pretrial detention is necessary to meet a compelling government interest, and without safeguards to ensure the accuracy of that finding;

b. An order and judgment permanently enjoining Defendants from operating and enforcing a system of post-arrest detention that keeps Named Plaintiffs and Class members in jail because they cannot pay a secured financial condition of release required without findings concerning ability to pay, without consideration of or findings concerning non-financial alternatives, without findings that pretrial detention is necessary to meet a compelling government interest, and

without safeguards to ensure the accuracy of those findings;

c. A declaratory judgment that Executive Order GA-13 is unconstitutional to the extent it requires pretrial detention of arrestees who cannot afford secured money bail without the substantive findings and procedural safeguards required for an order of pretrial detention;

d. An order and judgment permanently enjoining the Sheriff and the County from enforcing GA-13 to the extent enforcing GA-13 results in the pretrial detention of individuals against whom there has been no substantive finding that pretrial detention is necessary following a hearing with sufficient procedural safeguards to ensure the accuracy of that finding;

e. Any other order and judgment this Court deems necessary to permanently enjoin Defendants—whether acting on behalf of the State, the County, or some other government entity—from implementing and enforcing a system of wealth-based pretrial detention that keeps arrestees in jail solely because they cannot afford to pay a secured financial condition of release required without an inquiry into or findings concerning ability to pay, without consideration of or findings concerning non-financial alternatives, without findings that a particular release condition is necessary to meet a compelling government interest, and without safeguards to ensure the accuracy of those findings;

f. An order certifying the class defined above; and

g. An order and judgment granting reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988, and any other relief this Court deems just and proper.

Date: June 26, 2020

Respectfully Submitted,

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11368

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

versus

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

MARIAN BROWN; TERRIE MCVEA; LISA BRONCHETTI;
STEVEN AUTRY; ANTHONY RANDALL; JANET LUSK;
HAL TURLEY, DALLAS COUNTY MAGISTRATES; DAN
PATTERSON, NUMBER 1; JULIA HAYES, NUMBER 2;
DOUG SKEMP, NUMBER 3; NANCY MULDER, NUMBER 4;

LISA GREEN, NUMBER 5; ANGELA KING, NUMBER 6; ELIZABETH CROWDER, NUMBER 7; CARMEN WHITE, NUMBER 8; PEGGY HOFFMAN, NUMBER 9; ROBERTO CANAS, JR., NUMBER 10; SHEQUITTA KELLY, NUMBER 11 JUDGES OF DALLAS COUNTY, CRIMINAL COURTS AT LAW,
Defendants—Appellees.

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

Filed March 31, 2023

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

EDITH H. JONES, *Circuit Judge*:

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

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

when state procedures allow the accused adequate opportunities to raise their federal claims.

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

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

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

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

1. *Abstention*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger*, 401 U.S. at 43-44, 91 S. Ct. at 750.[13] The Court's opinion relied heavily for this proposition on *Fenner v. Boykin*, 271 U.S. 240, 244, 46 S. Ct. 492, 493 (1926) ("The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection."). Citing *Fenner* in an earlier case, Justice Frankfurter emphasized that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies … [relating to] … the enforcement of the criminal law." *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500, 61 S. Ct. 643, 645 (1941) (citations omitted). The legacy of federal court noninterference in equity with state proceedings is over a century old.

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

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of

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

> separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id. at 44, 91 S. Ct. at 750. This arrangement he deemed "Our Federalism," with roots in the profound debates and compromises that shaped the Constitution. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

as to Tarter's claim for equitable relief based on that ground." *Id.* (footnote omitted). Just before stating this conclusion, the panel had recapitulated that the Supreme Court refused to consider declaratory or injunctive relief in *O'Shea* that would "require excessive federal interference in the operation of state criminal courts." *Id.*[20]

Together, *O'Shea* and *Tarter* supply compelling precedent for withholding federal adjudication of the bail complaint in both *ODonnell I* and *Daves*. Yet *ODonnell I* held these decisions inapposite for two reasons. First, after listing the three prerequisites for *Younger* abstention,[21] the court held the third prong—adequate opportunity to raise constitutional questions in the state proceedings—was unsatisfied due to the Supreme Court's decision in *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854 (1975). Second, dispatching *Younger's* first prong, *ODonnell I* held that the abstention principles of

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

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

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

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

But *Gerstein* is distinguishable on a number of grounds. As the Second Circuit noted, "it is elementary

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[22] *Gerstein*'s footnote nine states, "The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits." *Gerstein*, 420 U.S. at 108 n.9, 95 S. Ct. at 860 n.9 (citing *Conover v. Montemuro*, 477 F.2d 1073, 1082 (3d Cir. 1972); *Perez*, 401 U.S. 82, 91 S. Ct. 674; *Stefanelli v. Minard*, 342 U.S. 117, 72 S. Ct. 118 (1951)).

that what the Court said must be viewed in the light of the factual and legal setting the Court encountered." *Wallace v. Kern*, 520 F.2d 400, 406 (2d Cir. 1975). The *Wallace* court explained in detail why, under principles established in *Younger* and its progeny, *Gerstein* did not authorize a New York federal district court to require an evidentiary hearing on bail determinations within a certain period of time. *See id.* at 404-08. *Wallace* accordingly reversed the lower court's injunction. Like *Tarter*, *Wallace* is directly on point.

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

> This is precisely the mischief created by the order below. Having provided for new bail hearing procedures which fix the time of, the nature of and even the burden of proof in the evidentiary hearings, the order would permit a pretrial detainee who claimed that the order was

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

> not complied with to proceed to the federal court for interpretations thereof. This would constitute not only an interference in state bail hearing procedures, but also the kind of continuing surveillance found to be objectionable in *O'Shea*.[24]

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

Not only did *ODonnell I* misperceive the context and limited implications of *Gerstein*, but the court also

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[24] *Id.* at 406.

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

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

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

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

right to an examining trial before indictment in the county having jurisdiction of the offense … at which time the magistrate at the hearing shall determine the amount or sufficiency of bail, if a bailable case." *Id.* art. 16.01. And there appears to be no procedural bar to filing a motion for reconsideration of any of these rulings.

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

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

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

S.W.3d 142, 146-49 (Tex. App. 2020) (same); *Ex parte Castille*, No. 01-20-00639-CR, 2021 WL 126272, at *2-6 (Tex. App. Jan. 14, 2021) (same).

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

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

principles of comity").[29] And it opens the federal courts any time an arrestee cries foul. *ODonnell I*, 892 F.3d at 165-66. Even before this court reconsidered *ODonnell I*'s rulings en banc, we found it necessary to disapprove several of that decision's overreaching injunctive provisions. *See ODonnell II*, 900 F.3d at 224-28 (overruling provisions that would have freed defendants for technical noncompliance with federal orders).

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

For all of these reasons, we hold that pursuant to *Younger*, *O'Shea*, *Tarter*, and *Wallace*, neither *ODonnell I* nor this case should have been adjudicated in federal court. We overrule *ODonnell I*'s holding against abstention.[31] The injunctions issued in Houston and Dallas plainly show federal court involvement to the point of

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

[30] In fact, in their supplemental briefing, plaintiffs' claims for relief including on- the-record hearings and detailed factual opinions concerning bail determinations reify how far federal courts would have to intrude into daily magistrate practices.

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

ongoing interference and "audit" of state criminal procedures. Further, in stark contrast to *Gerstein*, Texas courts are neither unable nor unwilling to reconsider bail determinations under the proper circumstances, thus providing state court detainees the chance to raise federal claims without the need to come to federal court. The availability of state court remedies counsels that federal courts may not intervene under equity jurisprudence to decide these disputes.[32]

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

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

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

state criminal prosecutions").[33] Additionally, the *Walker* court distinguished *O'Shea* on the basis, contrary to this case, that the injunction sought by the *Walker* plaintiffs did not contemplate ongoing interference with the prosecutorial process. *Walker*, 901 F.3d at 1255. Finally, because the *Walker* court ended up vacating a "modest" remedial injunction ("modest" in comparison with those imposed in *ODonnell I* and *II* and in *Daves*),[34] it may not have viewed *Younger* abstention as a decisive threshold issue.[35]

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

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[33] *Pace* the *Walker* court, WRIGHT & MILLER'S long and detailed section on *Younger* abstention nowhere implies that the doctrine has become "disfavored," and the paper supplements continue to cite cases applying *Younger*. *See generally* §§ 4251-55.

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

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

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

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

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

raising federal claims in ongoing state proceedings before a *competent* state tribunal. *See id.*; *see also Juidice*, 430 U.S. at 337, 97 S. Ct. at 1218 ("Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings." (citing *Gibson*)).

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

Plaintiffs' broadside against all the available state remedies ultimately rests on the incorrect assumption that each moment in erroneous pretrial detention is a constitutional violation. But this case does not present

the situation that arose in *Gerstein*, where preliminary detention could occur without any judicial finding of probable cause and without legal recourse. An order for cash bail accompanies a judicial determination of probable cause, which means that the defendant has presumably violated the criminal law. At that point, the question becomes how to balance the interests of the defendant in being released pending trial against society's need to enforce the law, protect innocent citizens, and secure attendance at court proceedings. *See, e.g.*, Tex. Code Crim. P. art. 17.15(a). Certainly, any kind of error in assessing excessive bail is lamentable, whether it pertains to the defendant's criminal history, the nature of the instant charge, the protection of potential victims, or his ability to pay cash bail. Even more unfortunate is the plight of a person unconstitutionally convicted who remains incarcerated pending the outcome of appeal or postconviction remedies; yet that is precisely what *Younger* held despite the "untimeliness" of the state criminal process. The gist of *Younger*'s test for availability, however, lies in the fact that errors can be rectified according to state law, not that they must be rectified virtually immediately.

2. *Mootness*

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

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

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

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

challenge. But the evidence supporting that claim predated the new law. Consequently, "[a]s an attack on the Florida procedures which existed as of the time of trial, the case has lost its character as a present, live controversy and is therefore moot." *Pugh*, 572 F.2d at 1058.

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

Plaintiffs challenge mootness in light of two Supreme Court cases. Neither is helpful to plaintiffs. One of these stated that a change in the law during litigation does not moot a claim unless it "completely and irrevocably eradicated the effects of the alleged violation." *Los*

Angeles Cnty. v. Davis, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383 (1979). *Davis* recited the importance of completely eradicating the "effects of the alleged violation" where the question was mootness owing to the city's voluntary cessation of racially discriminatory practices. As a general rule, voluntary cessation of illegal practices does not render a case moot. *See id.* On the facts before it, the Court held that the case had become moot under the high standard for voluntary cessation. Voluntary cessation is not involved here. More recently, the Supreme Court disclaimed mootness unless the new law affords plaintiffs "the precise relief … requested in the prayer for relief in their complaint." *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam). That case actually favors the defendants, as it held that the controversy before the Supreme Court became moot due to New York City's amendment of its ordinance "[a]fter we granted certiorari." *Id.* This suggests that this court was exactly right in *Pugh*.[38]

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

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

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

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

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

[41] Plaintiffs urge the court to vacate our previous en banc decision should the case be deemed moot. In *Daves* (en banc), the court considered only threshold questions of justiciability, rightly recognizing that "there is no mandatory sequencing of jurisdictional issues." *Daves*, 22 F.4th at 532 (quoting *Sinochem*, 549 U.S. at 431, 127 S. Ct. at 1191). Here, we resolve additional threshold

CONCLUSION

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

We REMAND with instructions to DISMISS.

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questions—those of abstention and mootness—without reaching the merits. Vacatur of the previous en banc decision is unwarranted.

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

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

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

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

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

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

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

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

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

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

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

I. Abstention—some background

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

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

The event that was a portent, at least to the discerning, that the Supreme Court would sound retreat was the federal court injunction obtained by John Harris and three other defendants barring Los Angeles County

District Attorney Evelle J. Younger from prosecuting them under a statute the district court held was unconstitutional. *Harris v. Younger*, 281 F. Supp. 507, 509-10, 516-17 (C.D. Cal. 1968) (citing *Dombrowski* and holding the statute violated the First Amendment), *rev'd*, *Younger*, 401 U.S. 37. The Supreme Court reversed, holding that principles of equity and comity prohibited federal judicial interference with the ongoing state-court prosecution. *Younger*, 401 U.S. at 43-44, 53-54. On equity, the Court adhered to "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 43-44. On comity, "an even more vital consideration," the Court emphasized that the need for "proper respect for state functions" counseled against interference "with the legitimate activities of the States." *Id.* at 44.

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

More recently in its unanimous 2013 *Sprint* opinion, the Court summarized *Younger* abstention after 40 years. *See Sprint*, 571 U.S. 69. "The Court made clear that the circumstances fitting within the *Younger* abstention doctrine are exceptional and include: (1) state criminal prosecutions; (2) civil enforcement proceedings; and (3) civil proceedings involving certain orders that

are uniquely in furtherance of the state courts' ability to perform their judicial functions." 17B WRIGHT & MILLER, FED. PRAC. & PROC. § 4254 (Supp. 2022) (explaining *Sprint*, 571 U.S. at 69, 78). The *Younger* abstention doctrine goes "no further" than those three proceedings. *Sprint*, 571 U.S. at 82. As to the three *Middlesex* factors, they are "not dispositive" but are merely "*additional* factors appropriately considered by the federal court before invoking *Younger*." *Id.* at 81 (emphasis in original).

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

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

W. MOORE, ET AL., MOORE'S FED. CIV. PRAC. § 122.72[1][c], at 122-10 (Rev. 2022) (emphasis added). If that phrasing accurately captures the doctrine, abstention certainly could extend beyond the prosecution itself.

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

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

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

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

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

In the following analysis, whether abstention applies here turns on two of the *Middlesex* factors.[1] First, would injunctive or other relief from the federal court impermissibly interfere with ongoing state-court

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

proceedings? *Middlesex*, 457 U.S. at 431-32, 437. Further, "is there an adequate opportunity in the state proceedings to raise constitutional challenges"? *Id.* at 432. My separate analysis of each factor follows.

II. Impermissible interference with ongoing state proceedings

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

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

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

[2] I offer an explanation about shortform case names used in my opinion. In following what I consider to be the proper convention, the usual one-party names for some opinions are spurned. I believe proper practice is *not* to use the name of the governmental official. For example, multiple opinions arose from litigation brought by plaintiff Robert Pugh after he was detained in Dade County jail. *Gerstein v. Pugh*, 420 U.S. at 105-06. Defendant Richard E. Gerstein was the State Attorney for Dade County, Florida, *id.* at 107, while James Rainwater was one of three defendant Small Claims

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

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

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Court judges. *See* Complaint at 2-4, *Pugh v. Rainwater*, No. 71-CV-448 (S.D. Fla. Mar. 22, 1971), in Appendix filed with Petitioner's Brief after grant of Writ of Certiorari, *Gerstein v. Pugh*, 420 U.S. 103 (No. 73-477). Thus, *Pugh* is my shortform. In order to combine the exigencies of reader clarity with the eccentricities of writer preference, I will refer to both parties when rejecting a standard shortform for a case. Yet, I do not wish to be ridiculous. The governmental party was Younger, the private party Harris, but I refer to that case as *Younger*.

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

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

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

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

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

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

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

> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits.

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

Id. at 393.

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

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

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

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

The Seventh Circuit's allowing a federal court to get periodic reports and then to inject itself even further into the operation of local criminal courts was central to the Supreme Court's reversal. The plaintiffs had requested "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials." *Id.* at 500. "An injunction of the type contemplated by respondents and the Court of Appeals would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim *ab initio*." *Id.* at 501. Such an injunction "would require for its enforcement the continuous supervision by the federal court over the conduct of the petitioners in the course of future criminal trial proceedings involving any of the members of the respondents' broadly defined class." *Id.*

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

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

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

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

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

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

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

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

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

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

The Second Circuit summarized this history in its third opinion:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I return to Walker. The court implied that footnote 9 in *Gerstein v. Pugh* should be taken on its own terms:

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

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

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

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

Much less was being sought in *Walker*:

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

Id. at 1255 (citation omitted).

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

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

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

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

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

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

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

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

impermissibly involve the federal court in state criminal procedures.

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

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

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

could be detained for a substantial period solely on the decision of a prosecutor." *Id.* The Court's emphasis on timeliness is undeniable.

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

There are other Supreme Court opinions indicating the importance of timely remedies. One explicit statement is in an opinion analyzing abstention in the context of a state administrative scheme for disciplining optometrists. *See Gibson v. Berryhill*, 411 U.S. 564 (1973). Proceedings were ongoing against plaintiff Berryhill and others at a state administrative board. Berryhill and other optometrists sued board members in federal court, claiming that board members were biased against them. *Id.* at 570. The Supreme Court stated that dismissing a federal suit based on *Younger* abstention "naturally presupposes the opportunity to raise and have *timely decided* by a *competent* state tribunal the federal issues involved." *Id.* at 577 (emphasis added). The presupposition failed because of the district court's finding that the board members were biased. *Id.*[9] Admittedly, the

[9] In discussing whether state procedures were "adequate," the Court summarized that federal courts have found state agency

timeliness portion of the presupposition did not come into play, only the competence factor. Nevertheless, Supreme Court *dicta* "is entitled to great weight." *Hignell-Stark v. City of New Orleans*, 46 F.4th 317, 330 n.21 (5th Cir. 2022).

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

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

Id. at 437 (emphasis added).

The *Moore v. Sims* opinion cited in *Middlesex* analyzed abstention in a case involving the Texas Family Code, which allowed the state to take custody of abused

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remedies inadequate "on a variety of grounds. Most often this has been because of delay by the agency." *Id.* at 575 n.14 (emphasis added).

children. *Moore v. Sims*, 442 U.S. at 418-19. The parents of children who had been taken into state custody brought suit in federal court; the district court enjoined the state from prosecuting any suit under the relevant statutory provisions pending a final decision on their constitutionality. *Id.* at 422. The Supreme Court disagreed, holding that "the only pertinent inquiry [for *Younger* abstention] is whether the state proceedings afford an *adequate opportunity* to raise the constitutional claims." *Id.* at 430 (emphasis added). An earlier, similar statement was supported by the signal of "*see*" for *Berryhill*. *Id.* at 425 (citing *Berryhill*, 411 U.S. 564).

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

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

The federal district court stated that the 42-day delay for a hearing revealed that "in practice the state procedures operate in such a manner as to prevent or, at the very minimum, substantially delay the presentation of constitutional issues," which meant "abstention would be inappropriate." *Id.* at 1189. Obviously, there were state procedures to hear the constitutional claims almost immediately after the children were taken from their parents, but it took over a month for a hearing finally to be held. The plaintiffs complained about not being "granted a hearing at the time that they thought they were entitled to one." *Moore v. Sims*, 442 U.S. at 430. The Supreme Court rejected that such episodic delays defeated abstention, as there was no indication of bad faith on behalf of anyone. *Id.* at 432. That is the context for the statement that abstention should apply "unless state law clearly bars the interposition of the constitutional claims." *Id.* at 425-26.

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

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

> have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees.

Id. (emphasis in original). The Court emphasized that a party must "'first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford *adequate protection*.'" *Id.* (*quoting Younger*, 401 U.S. at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 244 (1926)) (emphasis added).

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

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

Another Supreme Court decision relying in large part on a party's shunning state procedures is *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). An historically large jury verdict of $10.5 billion was entered against Texaco after a jury trial in state court. *Id.* at 4. In Texas,

an appellant had to post a bond in the amount of the judgment, plus interest and costs. *Id.* at 5. Texaco could not afford the bond; instead of seeking relief in the state court itself, it filed suit in federal court and alleged the application of the requirement of so large a bond violated Texaco's constitutional rights. *Id.* at 6.

Texaco insisted "that *Younger* abstention was inappropriate because no Texas court could have heard Texaco's constitutional claims within the limited time available." *Id.* at 14. The Supreme Court responded: "But the burden on this point rests on the federal plaintiff to show 'that state procedural law barred presentation of [its] claims.'" *Id.* (quoting *Moore v. Sims*, 442 U.S. at 432). "Moreover, denigrations of the procedural protections afforded by Texas law hardly come from Texaco with good grace, as it apparently made no effort under Texas law to secure the relief sought in this case." *Id.* at 15. The Court also quoted the same *Younger* language I earlier quoted: "'The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.'" *Id.* at 14-15 (quoting *Younger*, 401 U.S. at 45).

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

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

> It is significant, therefore, that the Supreme Court's opinion in *Gerstein* emphasizes at the outset that the federal plaintiffs there had no right to institute state *habeas corpus* proceedings except perhaps in exceptional circumstances and that their only other state remedies were a preliminary hearing which could take place only after 30 days or an application at arraignment, which was often delayed a month or more after arrest.

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

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

prisoner, and had it been, a hearing would have been conducted. *Id.* at 407.

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

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

The quoted *Spargo* case was brought by state judges claiming that judicial ethics rules restricted their First Amendment rights. *Spargo*, 351 F.3d at 69-70. The Second Circuit stated that "to avoid abstention, plaintiffs

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[10] I obtained the unpublished district court opinion reversed by *Wallace III* to see if it had fact-findings about delay. See *supra* n. 6. Findings included existence of lengthy pretrial detention, long delay in indicting those arrested for felonies, and substantial delays for trial. *Wallace*, No. 72-C-898 (Feb. 14, 1975), at *7-9. As to *habeas*, though, all the district court stated was that a prisoner could apply to the state trial court, and review of its decision would then be available in that court's appellate division. *Id.* at *9. Nothing useful there.

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

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

A distinction is appropriate here. Delays in a criminal prosecution do not allow a defendant to seek federal court relief unless there is bad faith in the proceedings.

Moore v. Sims, 442 U.S. at 432. "[T]he cost, anxiety, and inconvenience of having to defend against a single criminal prosecution" cannot amount to irreparable injury. *Younger*, 401 U.S. at 46. The prosecution likely violates no rights, so its tribulations must be endured. Quite differently, unconstitutional pretrial detention leads to injury that is different in kind as well as degree to the cost, anxiety, and inconvenience of being prosecuted. An unconstitutional pretrial detention is an immediate violation of a right. It should not have to be endured any longer than necessary. It is difficult for me to see, when dealing with a potentially unconstitutional "restraint of liberty following arrest," *Gerstein v. Pugh*, 420 U.S. at 114, how adequacy of a remedy can be divorced from its timeliness.

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

IV. Conclusion

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

must provide adequate, timely mechanisms for adjudicating constitutional claims.

For purposes of this opinion, I accept that *Younger* analysis should be applied to claims about bail. I do not see that impermissible interference with state courts will always result if a federal court enters orders regarding state court bail procedures and policies. We know that what some district courts have done, such as the relief granted in *Littleton* or in *Wallace*, is unacceptable. Those actions were impermissibly intrusive, and abstention was invoked. Lesser claims and remedies as in *Walker* might be permissible. There are guardrails for intrusions as to bail but not a locked gate.

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

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

Indigents have constitutional rights after an arrest. *See id.* at 1056-59. States must strive to protect those rights. In populous jurisdictions such as Dallas County, individualized determinations of the need for bail for

each arrestee may seem all but impossible. The record as to past practices supports that each arrestee was rapidly processed by a magistrate judge as to bail so the judge could then advance to the next arrestee. Even so, not releasing those who are dangerous or likely to disappear, or at least not releasing without some form of restraint such as bail, are vital state interests.

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX E

S.B. NO. 6

AN ACT

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

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

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

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

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

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

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

to provide more expeditiously to the person arrested the warnings described by this article, before a magistrate in any other county of this state. The arrested person may be taken before the magistrate in person or the image of the arrested person may be presented to the magistrate by means of a videoconference. The magistrate shall inform in clear language the person arrested, either in person or through a videoconference, of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, and of his right to have an examining trial. The magistrate shall also inform the person arrested of the person's right to request the appointment of counsel if the person cannot afford counsel. The magistrate shall inform the person arrested of the procedures for requesting appointment of counsel. <u>If applicable, the magistrate shall inform the person that the person may file the affidavit described by Article 17.028(f).</u> If the person does not speak and understand the English language or is deaf, the magistrate shall inform the person in a manner consistent with Articles 38.30 and 38.31, as appropriate. The magistrate shall ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person at the same time. If the person arrested is indigent and requests appointment of counsel and if the magistrate is authorized under Article 26.04 to appoint counsel for indigent defendants in the county, the magistrate shall appoint counsel in accordance with Article 1.051. If the magistrate is not authorized to appoint counsel, the magistrate shall without unnecessary delay, but not later than 24 hours after the person arrested requests

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

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

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

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

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

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

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

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

(b) The public safety report system must:

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

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

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

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

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

(A) previous misdemeanor or felony convictions;

(B) pending charges;

(C) previous sentences imposing a term of confinement;

(D) previous convictions or pending charges for:

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

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

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

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

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

(d) The public safety report system may not:

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

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

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

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

(1) the number for each category of offense;

(2) the number of personal bonds; and

(3) the number of monetary bonds.

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

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

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

Art. 17.022. PUBLIC SAFETY REPORT. (a) A magistrate considering the release on bail of a defendant charged with an offense punishable as a Class B

misdemeanor or any higher category of offense shall order that:

(1) the personal bond office established under Article 17.42 for the county in which the defendant is being detained, if a personal bond office has been established for that county, or other suitably trained person including judicial personnel or sheriff's department personnel, use the public safety report system developed under Article 17.021 to prepare a public safety report with respect to the defendant; and

(2) the public safety report prepared under Subdivision (1) be provided to the magistrate as soon as practicable but not later than 48 hours after the defendant's arrest.

(b) A magistrate may not, without the consent of the sheriff, order a sheriff or sheriff's department personnel to prepare a public safety report under this article.

(c) Notwithstanding Subsection (a), a magistrate may personally prepare a public safety report, before or while making a bail decision, using the public safety report system developed under Article 17.021.

(d) The magistrate shall:

(1) consider the public safety report before setting bail; and

(2) promptly but not later than 72 hours after the time bail is set, submit the bail form described by Section 72.038, Government Code, in accordance with that section.

(e) In the manner described by this article, a magistrate may, but is not required to, order, prepare, or consider a public safety report in setting bail for a

defendant charged only with a misdemeanor punishable by fine only or a defendant who receives a citation under Article 14.06(c). If ordered, the report shall be prepared for the time and place for an appearance as indicated in the citation.

(f) A magistrate may set bail for a defendant charged only with an offense punishable as a misdemeanor without ordering, preparing, or considering a public safety report if the public safety report system is unavailable for longer than 12 hours due to a technical failure at the Office of Court Administration of the Texas Judicial System.

Art. 17.023. AUTHORITY TO RELEASE ON BAIL IN CERTAIN CASES. (a) This article applies only to a defendant charged with an offense that is:

(1) punishable as a felony; or

(2) a misdemeanor punishable by confinement.

(b) Notwithstanding any other law, a defendant to whom this article applies may be released on bail only by a magistrate who is:

(1) any of the following:

(A) a resident of this state;

(B) a justice of the peace serving under Section 27.054 or 27.055, Government Code; or

(C) a judge or justice serving under Chapter 74, Government Code; and

(2) in compliance with the training requirements of Article 17.024.

(c) A magistrate is not eligible to release on bail a defendant described by Subsection (a) if the magistrate:

(1) has been removed from office by impeachment, by the supreme court, by the governor on address to the legislature, by a tribunal reviewing a recommendation of the State Commission on Judicial Conduct, or by the legislature's abolition of the magistrate's court; or

(2) has resigned from office after having received notice that formal proceedings by the State Commission on Judicial Conduct have been instituted as provided by Section 33.022, Government Code, and before final disposition of the proceedings.

Art. 17.024. TRAINING ON DUTIES REGARDING BAIL. (a) The Office of Court Administration of the Texas Judicial System shall, in consultation with the court of criminal appeals, develop or approve training courses regarding a magistrate's duties, including duties with respect to setting bail in criminal cases. The courses developed must include:

(1) an eight-hour initial training course that includes the content of the applicable training course described by Article 17.0501; and

(2) a two-hour continuing education course.

(b) The office shall provide for a method of certifying that a magistrate has successfully completed a training course required under this article and has demonstrated competency of the course content in a manner acceptable to the office.

(c) A magistrate is in compliance with the training requirements of this article if:

(1) not later than the 90th day after the date the magistrate takes office, the magistrate successfully completes the course described by Subsection (a)(1);

(2) the magistrate successfully completes the course described by Subsection (a)(2) in each subsequent state fiscal biennium in which the magistrate serves; and

(3) the magistrate demonstrates competency as provided by Subsection (b).

(c-1) Notwithstanding Subsection (c), a magistrate who is serving on April 1, 2 022, is considered to be in compliance with Subsection (c)(1) if the magistrate successfully completes the training course not later than December 1, 2022. This subsection expires May 1, 2023.

(d) Any course developed or approved by the office under this article may be administered by the Texas Justice Court Training Center, the Texas Municipal Courts Education Center, the Texas Association of Counties, the Texas Center for the Judiciary, or a similar entity.

Art. 17.027. RELEASE ON BAIL OF DEFENDANT CHARGED WITH FELONY OFFENSE COMMITTED WHILE ON BAIL. (a) Notwithstanding any other law:

(1) if a defendant is charged with committing an offense punishable as a felony while released on bail in a pending case for another offense punishable as a felony and the subsequent offense was committed in the same county as the previous offense, the defendant may be released on bail only by:

(A) the court before whom the case for the previous offense is pending; or

(B) another court designated in writing by the court described by Paragraph (A); and

(2) if a defendant is charged with committing an offense punishable as a felony while released on bail for another pending offense punishable as a felony and the

subsequent offense was committed in a different county than the previous offense, electronic notice of the charge must be promptly given to the court specified by Subdivision (1) for purposes of reevaluating the bail decision, determining whether any bail conditions were violated, or taking any other applicable action.

(b) This article may not be construed to extend any deadline provided by Article 15.17.

Art. 17.028. BAIL DECISION. (a) Without unnecessary delay but not later than 48 hours after a defendant is arrested, a magistrate shall order, after individualized consideration of all circumstances and of the factors required by Article 17.15(a), that the defendant be:

(1) granted personal bond with or without conditions;

(2) granted surety or cash bond with or without conditions; or

(3) denied bail in accordance with the Texas Constitution and other law.

(b) In setting bail under this article, the magistrate shall impose the least restrictive conditions, if any, and the personal bond or cash or surety bond necessary to reasonably ensure the defendant's appearance in court as required and the safety of the community, law enforcement, and the victim of the alleged offense.

(c) In each criminal case, unless specifically provided by other law, there is a rebuttable presumption that bail, conditions of release, or both bail and conditions of release are sufficient to reasonably ensure the defendant's appearance in court as required and the safety of the community, law enforcement, and the victim of the alleged offense.

(c-1) Subsections (b) and (c) may not be construed as requiring the court to hold an evidentiary hearing that is not required by other law.

(d) A judge may not adopt a bail schedule or enter a standing order related to bail that:

(1) is inconsistent with this article; or

(2) authorizes a magistrate to make a bail decision for a defendant without considering each of the factors in Article 17.15(a).

(e) A defendant who is denied bail or who is unable to give bail in the amount required by any bail schedule or standing order related to bail shall be provided with the warnings described by Article 15.17.

(f) A defendant who is charged with an offense punishable as a Class B misdemeanor or any higher category of offense and who is unable to give bail in the amount required by a schedule or order described by Subsection (e), other than a defendant who is denied bail, shall be provided with the opportunity to file with the applicable magistrate a sworn affidavit in substantially the following form:

"On this ___ day of _____, 2___, I have been advised by_____(name of the court or magistrate, as applicable) of the importance of providing true and complete information about my financial situation in connection with the charge pending against me. I am without means to pay ____ and I hereby request that an appropriate bail be set. (signature of defendant)."

(g) A defendant filing an affidavit under Subsection (f) shall complete a form to allow a magistrate to assess information relevant to the defendant's financial situation. The form must be the form used to request appointment of counsel under Article 26.04 or a form

promulgated by the Office of Court Administration of the Texas Judicial System that collects, at a minimum and to the best of the defendant's knowledge, the information a court may consider under Article 26.04(m).

(g-1) The magistrate making the bail decision under Subsection (a) shall, if applicable:

(1) inform the defendant of the defendant's right to file an affidavit under Subsection (f); and

(2) ensure that the defendant receives reasonable assistance in completing the affidavit described by Subsection (f) and the form described by Subsection (g).

(h) A defendant described by Subsection (f) may file an affidavit under Subsection (f) at any time before or during the bail proceeding under Subsection (a). A defendant who files an affidavit under Subsection (f) is entitled to a prompt review by the magistrate on the bail amount. The review may be conducted by the magistrate making the bail decision under Subsection (a) or may occur as a separate pretrial proceeding. The magistrate shall consider the facts presented and the rules established by Article 17.15(a) and shall set the defendant's bail. If the magistrate does not set the defendant's bail in an amount below the amount required by the schedule or order described by Subsection (e), the magistrate shall issue written findings of fact supporting the bail decision.

(i) The judges of the courts trying criminal cases and other magistrates in a county must report to the Office of Court Administration of the Texas Judicial System each defendant for whom a review under Subsection (h) was not held within 48 hours of the defendant's arrest. If a delay occurs that will cause the review under Subsection (h) to be held later than 48 hours after the

defendant's arrest, the magistrate or an employee of the court or of the county in which the defendant is confined must provide notice of the delay to the defendant's counsel or to the defendant, if the defendant does not have counsel.

(j) The magistrate may enter an order or take other action authorized by Article 16.22 with respect to a defendant who does not appear capable of executing an affidavit under Subsection (f).

(k) This article may not be construed to require the filing of an affidavit before a magistrate considers the defendant's ability to make bail under Article 17.15.

(l) A written or oral statement obtained under this article or evidence derived from the statement may be used only to determine whether the defendant is indigent, to impeach the direct testimony of the defendant, or to prosecute the defendant for an offense under Chapter 37, Penal Code.

(m) Notwithstanding Subsection (a), a magistrate may make a bail decision regarding a defendant who is charged only with a misdemeanor punishable by fine only or a defendant who receives a citation under Article 14.06 (c) without considering the factor required by Article 17.15(a)(6).

SECTION 6. (a) Article 17.03, Code of Criminal Procedure, as effective September 1, 2021, is amended by amending Subsection (b) and adding Subsections (b-2) and (b-3) to read as follows:

(b) Only the court before whom the case is pending may release on personal bond a defendant who:

(1) is charged with an offense under the following sections of the Penal Code:

(A) [~~Section 19.03 (Capital Murder);~~

[~~(B) Section 20.04 (Aggravated Kidnapping);~~

[~~(C) Section 22.021 (Aggravated Sexual Assault);~~

[~~(D) Section 22.03 (Deadly Assault on Law Enforcement or Corrections Officer, Member or Employee of Board of Pardons and Paroles, or Court Participant);~~

[~~(E) Section 22.04 (Injury to a Child, Elderly Individual, or Disabled Individual);~~

[~~(F) Section 29.03 (Aggravated Robbery);~~

[~~(G)~~] Section 30.02 (Burglary); or

(B) [~~(H)~~] Section 71.02 (Engaging in Organized Criminal Activity);

[~~(I) Section 21.02 (Continuous Sexual Abuse of Young Child or Disabled Individual); or~~

[~~(J) Section 20A.03 (Continuous Trafficking of Persons);~~]

(2) is charged with a felony under Chapter 481, Health and Safety Code, or Section 485.033, Health and Safety Code, punishable by imprisonment for a minimum term or by a maximum fine that is more than a minimum term or maximum fine for a first degree felony; or

(3) does not submit to testing for the presence of a controlled substance in the defendant's body as requested by the court or magistrate under Subsection (c) of this article or submits to testing and the test shows evidence of the presence of a controlled substance in the defendant's body.

(b-2) Except as provided by Articles 15.21, 17.033, and 17.151, a defendant may not be released on personal bond if the defendant:

(1) is charged with an offense involving violence; or

(2) while released on bail or community supervision for an offense involving violence, is charged with committing:

(A) any offense punishable as a felony; or

(B) an offense under the following provisions of the Penal Code:

i) Section 22.01 (a)(1)(assault);

ii) Section 22.05 (deadly conduct);

iii) Section 22.07 (terroristic threat); or

iv) Section 42.01 (a)(7) or (8) (disorderly conduct involving firearm).

(b-3) In this article:

(1) "Controlled substance" has the meaning assigned by Section 481.002, Health and Safety Code.

(2) "Offense involving violence" means an offense under the following provisions of the Penal Code:

(A) Section 19.02 (murder);

(B) Section 19.03 (capital murder);

(C) Section 20.03 (kidnapping);

(D) Section 20.04 (aggravated kidnapping);

(E) Section 20A.02 (trafficking of persons);

(F) Section 20A.03 (continuous trafficking of persons);

(G) Section 21.02 (continuous sexual abuse of young child or disabled individual);

(H) Section 21.11 (indecency with a child);

(I) Section 22.01 (a)(1)(assault), if the offense is:

(i) punishable as a felony of the second degree under Subsection (b-2) of that section; or

(ii) punishable as a felony and involved family violence as defined by Section 71.004, Family Code;

(J) Section 22.011 (sexual assault);

(K) Section 22.02 (aggravated assault);

(L) Section 22.021 (aggravated sexual assault);

(M) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(N) Section 25.072 (repeated violation of certain court orders or conditions of bond in family violence, child abuse or neglect, sexual assault or abuse, indecent assault, stalking, or trafficking case);

(O) Section 25.11 (continuous violence against the family);

(P) Section 29.03 (aggravated robbery);

(Q) Section 38.14 (taking or attempting to take weapon from peace officer, federal special investigator, employee or official of correctional facility, parole officer, community supervision and corrections department officer, or commissioned security officer);

(R) Section 43.04 (aggravated promotion of prostitution), if the defendant is not alleged to have

engaged in conduct constituting an offense under Section 43.02(a);

(S) Section 43.05 (compelling prostitution); or

(T) Section 43.25 (sexual performance by a child).

(b) This section takes effect on the 91st day after the last day of the legislative session if this Act does not receive a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution, this section has no effect.

SECTION 7. (a) Article 17.03, Code of Criminal Procedure, is amended by amending Subsection (b) and adding Subsections (b-2) and (b-3) to read as follows:

(b) Only the court before whom the case is pending may release on personal bond a defendant who:

(1) is charged with an offense under the following sections of the Penal Code:

(A) [~~Section 19.03 (Capital Murder);~~

[~~(B) Section 20.04 (Aggravated Kidnapping);~~

[~~(C) Section 22.021 (Aggravated Sexual Assault);~~

[~~(D) Section 22.03 (Deadly Assault on Law Enforcement or Corrections Officer, Member or Employee of Board of Pardons and Paroles, or Court Participant);~~

[~~(E) Section 22.04 (Injury to a Child, Elderly Individual, or Disabled Individual);~~

[~~(F) Section 29.03 (Aggravated Robbery);~~

[~~(G)~~] Section 30.02 (Burglary); or

(B) [~~(H)~~] Section 71.02 (Engaging in Organized Criminal Activity);

[~~(I) Section 21.02 (Continuous Sexual Abuse of Young Child or Children); or~~

[~~(J) Section 20A.03 (Continuous Trafficking of Persons);~~]

(2) is charged with a felony under Chapter 481, Health and Safety Code, or Section 485.033, Health and Safety Code, punishable by imprisonment for a minimum term or by a maximum fine that is more than a minimum term or maximum fine for a first degree felony; or

(3) does not submit to testing for the presence of a controlled substance in the defendant's body as requested by the court or magistrate under Subsection (c) of this article or submits to testing and the test shows evidence of the presence of a controlled substance in the defendant's body.

(b-2) Except as provided by Articles 15.21, 17.033, and 17.151, a defendant may not be released on personal bond if the defendant:

(1) is charged with an offense involving violence; or

(2) while released on bail or community supervision for an offense involving violence, is charged with committing:

(A) any offense punishable as a felony; or

(B) an offense under the following provisions of the Penal Code:

(i) Section 22.01 (a)(1)(assault);

(ii) Section 22.05 (deadly conduct);

(iii) Section 22.07 (terroristic threat); or

(iv) Section 42.01 (a)(7) or (8)(disorderly conduct involving firearm).

(b-3) In this article:

(1) "Controlled substance" has the meaning assigned by Section 481.002, Health and Safety Code.

(2) "Offense involving violence" means an offense under the following provisions of the Penal Code:

(A) Section 19.02 (murder);

(B) Section 19.03 (capital murder);

(C) Section 20.03 (kidnapping);

(D) Section 20.04 (aggravated kidnapping);

(E) Section 20A.02 (trafficking of persons);

(F) Section 20A.03 (continuous trafficking of persons);

(G) Section 21.02 (continuous sexual abuse of young child or children);

(H) Section 21.11 (indecency with a child);

(I) Section 22.01 (a)(1)(assault), if the offense is:

(i) punishable as a felony of the second degree under Subsection (b-2) of that section; or

(ii) punishable as a felony and involved family violence as defined by Section 71.004, Family Code;

(J) Section 22.011 (sexual assault);

(K) Section 22.02 (aggravated assault);

(L) Section 22.021 (aggravated sexual assault);

(M) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(N) Section 25.072 (repeated violation of certain court orders or conditions of bond in family violence, child abuse or neglect, sexual assault or abuse, indecent assault, stalking, or trafficking case);

(O) Section 25.11 (continuous violence against the family);

(P) Section 29.03 (aggravated robbery);

(Q) Section 38.14 (taking or attempting to take weapon from peace officer, federal special investigator, employee or official of correctional facility, parole officer, community supervision and corrections department officer, or commissioned security officer);

(R) Section 43.04 (aggravated promotion of prostitution);

(S) Section 43.05 (compelling prostitution); or

(T) Section 43.25 (sexual performance by a child).

(b) This section takes effect immediately if this Act receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution, this section has no effect.

SECTION 8. Chapter 17, Code of Criminal Procedure, is amended by adding Article 17.0501 to read as follows:

Art. 17.0501. REQUIRED TRAINING. The Department of Public Safety shall develop training courses that relate to the use of the statewide telecommunications system maintained by the department and that are directed to each magistrate, judge, sheriff, peace officer, or jailer required to obtain criminal history record information under this chapter, as necessary to enable the person to fulfill those requirements.

SECTION 9. Chapter 17, Code of Criminal Procedure, is amended by adding Article 17.071 to read as follows:

Art. 17.071. CHARITABLE BAIL ORGANIZATIONS. (a) In this article, "charitable bail organization" means a person who accepts and uses donations from the public to deposit money with a court in the amount of a defendant's bail bond. The term does not include:

(1) a person accepting donations with respect to a defendant who is a member of the person's family, as determined under Section 71.003, Family Code; or

(2) a nonprofit corporation organized for a religious purpose.

(b) This article does not apply to a charitable bail organization that pays a bail bond for not more than three defendants in any 180-day period.

(c) A person may not act as a charitable bail organization for the purpose of paying a defendant's bail bond in a county unless the person:

(1) is a nonprofit organization exempt from federal income taxation under Section 501(a), Internal

Revenue Code of 198 6, as an organization described by Section 501 (c)(3) of that code; and

(2) has been issued a certificate under Subsection (d) with respect to that county.

(d) A county clerk shall issue to a charitable bail organization a certificate authorizing the organization to pay bail bonds in the county if the clerk determines the organization is:

(1) a nonprofit organization described by Subsection (c)(1); and

(2) current on all filings required by the Internal Revenue Code.

(e) A charitable bail organization shall file in the office of the county clerk of each county where the organization intends to pay bail bonds an affidavit designating the individuals authorized to pay bonds on behalf of the organization.

(f) Not later than the 10th day of each month, a charitable bail organization shall submit, to the sheriff of each county in which the organization files an affidavit under Subsection (e), a report that includes the following information for each defendant for whom the organization paid a bail bond in the preceding calendar month:

(1) the name of the defendant;

(2) the cause number of the case;

(3) the county in which the applicable charge is pending, if different from the county in which the bond was paid; and

(4) any dates on which the defendant has failed to appear in court as required for the charge for which the bond was paid.

(f-1) A sheriff who receives a report under Subsection (f) shall provide a copy of the report to the Office of Court Administration of the Texas Judicial System.

(g) A charitable bail organization may not pay a bail bond for a defendant at any time the organization is considered to be out of compliance with the reporting requirements of this article.

(h) The sheriff of a county may suspend a charitable bail organization from paying bail bonds in the county for a period not to exceed one year if the sheriff determines the organization has paid one or more bonds in violation of this article and the organization has received a warning from the sheriff in the preceding 12-month period for another payment of bond made in violation of this article. The sheriff shall report the suspension to the Office of Court Administration of the Texas Judicial System.

(i) Chapter 22 applies to a bail bond paid by a charitable bail organization.

(j) A charitable bail organization may not accept a premium or compensation for paying a bail bond for a defendant.

(k) Not later than December 1 of each year, the Office of Court Administration of the Texas Judicial System shall prepare and submit, to the governor, lieutenant governor, speaker of the house of representatives, and presiding officers of the standing committees of each house of the legislature with primary jurisdiction over the judiciary, a report regarding the information submitted to the office under Subsections (f-1) and (h) for the preceding state fiscal year.

SECTION 10. (a) Article 17.15, Code of Criminal Procedure, is amended to read as follows:

Art. 17.15. RULES FOR SETTING [~~FIXING~~] AMOUNT OF BAIL. (a) The amount of bail and any conditions of bail to be required in any case in which the defendant has been arrested are [~~is~~] to be regulated by the court, judge, magistrate., or officer taking the bail in accordance with Articles 17.20, 17.21, and 17.22 and [~~; they~~] are [~~to be~~] governed [~~in the exercise of this discretion~~] by the Constitution and [~~by~~] the following rules:

1. Bail and any conditions of bail [~~The bail~~] shall be sufficient [~~sufficiently high~~] to give reasonable assurance that the undertaking will be complied with.

2. The power to require bail is not to be [~~so~~] used [~~as~~] to make bail [~~it~~] an instrument of oppression.

3. The nature of the offense and the circumstances under which the offense [~~it~~] was committed are to be considered, including whether the offense:

(A) is an offense involving violence as defined by Article 17.03; or

(B) involves violence directed against a peace officer.

4. The ability to make bail shall [~~is to~~] be considered [~~regarded~~], and proof may be taken on [~~upon~~] this point.

5. The future safety of a victim of the alleged offense, law enforcement, and the community shall be considered.

6. The criminal history record information for the defendant, including information obtained through the statewide telecommunications system maintained by the Department of Public Safety and through the

public safety report system developed under Article 17.021, shall be considered, including any acts of family violence, other pending criminal charges, and any instances in which the defendant failed to appear in court following release on bail.

7. The citizenship status of the defendant shall be considered.

(a-1) Notwithstanding any other law, the duties imposed by Subsection (a)(6) with respect to obtaining and considering information through the public safety report system do not apply until April 1, 2022. This subsection expires June 1, 2022.

(b) For purposes of determining whether clear and convincing evidence exists to deny a person bail under Section 11d, Article I, Texas Constitution, a magistrate shall consider all information relevant to the factors listed in Subsection (a).

(c) In this article, "family violence" has the meaning assigned by Section 71.004, Family Code.

(b) Article 17.15(a), Code of Criminal Procedure, as amended by this Act, and Article 17.15(c), as added by this Act, take effect immediately if this Act receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, Article 17.15(a), Code of Criminal Procedure, as amended by this Act, and Article 17.15(c), as added by this Act, take effect on the 91st day after the last day of the legislative session.

SECTION 11. Article 17.20, Code of Criminal Procedure, is amended to read as follows:

Art. 17.20. BAIL IN MISDEMEANOR. (a) In cases of misdemeanor, the sheriff or other peace officer,

or a jailer licensed under Chapter 1701, Occupations Code, may, whether during the term of the court or in vacation, where the officer has a defendant in custody, take the defendant's [~~of the defendant a~~] bail [~~bond~~].

(b) Before taking bail under this article, the sheriff, peace officer, or jailer shall obtain the defendant's criminal history record information through the statewide telecommunications system maintained by the Department of Public Safety and through the public safety report system developed under Article 17.021.

(c) Notwithstanding Subsection (b), a sheriff, peace officer, or jailer may make a bail decision regarding a defendant who is charged only with a misdemeanor punishable by fine only or a defendant who receives a citation under Article 14.06(c) without considering the factor required by Article 17.15(a)(6).

(d) If the defendant is charged with or has previously been convicted of an offense involving violence as defined by Article 17.03, the sheriff, officer, or jailer may not set the amount of the defendant's bail but may take the defendant's bail in the amount set by the court.

SECTION 12. Article 17.22, Code of Criminal Procedure, is amended to read as follows:

Art. 17.22. MAY TAKE BAIL IN FELONY. (a) In a felony case, if the court before which the case [~~same~~] is pending is not in session in the county where the defendant is in custody, the sheriff or other peace officer, or a jailer licensed under Chapter 1701, Occupations Code, who has the defendant in custody may take the defendant's bail [~~bond~~] in the [~~such~~] amount set [~~as may have been fixed~~] by the court or magistrate, or if no amount has been set [~~fixed~~], then in any [~~such~~] amount that the

[~~as such~~] officer considers [~~may consider~~] reasonable and that is in compliance with Article 17.15.

(b) Before taking bail under this article, the sheriff, peace officer, or jailer shall obtain the defendant's criminal history record information through the statewide telecommunications system maintained by the Department of Public Safety and through the public safety report system developed under Article 17.021.

(c) If the defendant is charged with or has previously been convicted of an offense involving violence as defined by Article 17.03, the sheriff, officer, or jailer may not set the amount of the defendant's bail but may take the defendant's bail in the amount set by the court.

SECTION 13. Chapter 17, Code of Criminal Procedure, is amended by adding Articles 17.51, 17.52, and 17.53 to read as follows:

Art. 17.51. NOTICE OF CONDITIONS. (a) As soon as practicable but not later than the next business day after the date a magistrate issues an order imposing a condition of release on bond for a defendant or modifying or removing a condition previously imposed, the clerk of the court shall send a copy of the order to:

(1) the appropriate attorney representing the state; and

(2) the sheriff of the county where the defendant resides.

(b) A clerk of the court may delay sending a copy of the order under Subsection (a) only if the clerk lacks information necessary to ensure service and enforcement.

(c) If an order described by Subsection (a)prohibits a defendant from going to or near a child care facility or

school, the clerk of the court shall send a copy of the order to the child care facility or school.

(d) The copy of the order and any related information may be sent electronically or in another manner that can be accessed by the recipient.

(e) The magistrate or the magistrate's designee shall provide written notice to the defendant of:

(1) the conditions of release on bond; and

(2) the penalties for violating a condition of release.

(f) The magistrate shall make a separate record of the notice provided to the defendant under Subsection (e).

(g) The Office of Court Administration of the Texas Judicial System shall promulgate a form for use by a magistrate or a magistrate's designee in providing notice to the defendant under Subsection (e). The form must include the relevant statutory language from the provisions of this chapter under which a condition of release on bond may be imposed on a defendant.

Art. 17.52. REPORTING OF CONDITIONS. A chief of police or sheriff who receives a copy of an order described by Article 17.51 (a), or the chief's or sheriff's designee, shall, as soon as practicable but not later than the 10th day after the date the copy is received, enter information relating to the condition of release into the appropriate database of the statewide law enforcement information system maintained by the Department of Public Safety or modify or remove information, as appropriate.

Art. 17.53. PROCEDURES AND FORMS RELATED TO MONETARY BOND. The Office of Court

Administration of the Texas Judicial System shall develop statewide procedures and prescribe forms to be used by a court to facilitate:

(1) the refund of any cash funds paid toward a monetary bond, with an emphasis on refunding those funds to the person in whose name the receipt described by Article 17.02 was issued; and

(2) the application of those cash funds to the defendant's outstanding court costs, fines, and fees.

SECTION 14. Article 66.102(c), Code of Criminal Procedure, is amended to read as follows:

(c) Information in the computerized criminal history system relating to number; felony; an arrest must include:

(1) the offender's name;

(2) the offender's state identification number;

(3) the arresting law enforcement agency;

(4) the arrest charge, by offense code and incident number;

(5) whether the arrest charge is a misdemeanor

(6) the date of the arrest;

(7) for an offender released on bail, whether a warrant was issued for any subsequent failure of the offender to appear in court;

(8) the exact disposition of the case by a law enforcement agency following the arrest; and

(9) [~~(8)~~] the date of disposition of the case by the law enforcement agency.

SECTION 15. Section 27.005, Government Code, is amended by amending Subsection (a) and adding Subsection (c) to read as follows:

(a) For purposes of removal under Chapter 87, Local Government Code, "incompetency" in the case of a justice of the peace includes the failure of the justice to successfully complete:

(1) within one year after the date the justice is first elected:

(A) [;] an 80-hour course in the performance of the justice's duties; and

(B) the course described by Article 17.024 (a)(1), Code of Criminal Procedure;

(2) each following year, a 20-hour course in the performance of the justice's duties, including not less than 10 hours of instruction regarding substantive, procedural, and evidentiary law in civil matters; and

(3) each following state fiscal biennium, the course described by Article 17.024 (a)(2), Code of Criminal Procedure.

(c) A course described by Subsection (a)(1)(A) may include a course described by Subsection (a)(1)(B).

SECTION 16. Subchapter C, Chapter 71, Government Code, is amended by adding Section 71.0351 to read as follows:

Sec. 71.0351. BAIL AND PRETRIAL RELEASE INFORMATION. (a) As a component of the official monthly report submitted to the Office of Court Administration of the Texas Judicial System under Section 71.035, the clerk of each court setting bail in criminal cases shall report:

(1) the number of defendants for whom bail was set after arrest, including:

(A) the number for each category of offense;

(B) the number of personal bonds; and

(C) the number of surety or cash bonds;

(2) the number of defendants released on bail who subsequently failed to appear;

(3) the number of defendants released on bail who subsequently violated a condition of release; and

(4) the number of defendants who committed an offense while released on bail or community supervision.

(b) The office shall post the information in a publicly accessible place on the agency's Internet website without disclosing any personal information of any defendant, judge, or magistrate.

(c) Not later than December 1 of each year, the office shall submit a report containing the data collected under this section during the preceding state fiscal year to the governor, lieutenant governor, speaker of the house of representatives, and presiding officers of the standing committees of each house of the legislature with primary jurisdiction over the judiciary.

SECTION 17. Subchapter C, Chapter 72, Government Code, is amended by adding Section 72.038 to read as follows:

Sec. 72.038. BAIL FORM. (a) The office shall promulgate a form to be completed by a magistrate, judge, sheriff, peace officer, or jailer who sets bail under Chapter 17, Code of Criminal Procedure, for a defendant charged with an offense punishable as a Class B

misdemeanor or any higher category of offense. The office shall incorporate the completed forms into the public safety report system developed under Article 17.021, Code of Criminal Procedure.

(b) The form must:

(1) state the cause number of the case, if available, the defendant's name and date of birth, and the offense for which the defendant was arrested;

(2) state the name and the office or position of the person setting bail;

(3) require the person setting bail to:

(A) identify the bail type, the amount of the bail, and any conditions of bail;

(B) certify that the person considered each factor provided by Article 17.15(a), Code of Criminal Procedure; and

(C) certify that the person considered the information provided by the public safety report system; and

(4) be electronically signed by the person setting the bail.

(c) The person setting bail, an employee of the court that set the defendant's bail, or an employee of the county in which the defendant's bail was set must, on completion of the form required under this section, promptly but not later than 72 hours after the time the defendant's bail is set provide the form electronically to the office through the public safety report system.

(d) The office shall publish the information from each form submitted under this section in a database that is publicly accessible on the office's Internet

website. Any identifying information or sensitive data, as defined by Rule 21c, Texas Rules of Civil Procedure, regarding the victim of an offense and any person's address or contact information shall be redacted and may not be published under this subsection.

SECTION 18. (a) Section 411.083(c), Government Code, is amended to read as follows:

(c) The department may disseminate criminal history record information under Subsection (b)(1) only for a criminal justice purpose. The department may disseminate criminal history record information under Subsection (b)(2) only for a purpose specified in the statute or order. The department may disseminate criminal history record information under Subsection (b)(4), (5), or (6) only for a purpose approved by the department and only under rules adopted by the department. The department may disseminate criminal history record information under Subsection (b)(7) only to the extent necessary for a county or district clerk to perform a duty imposed by law to collect and report criminal court disposition information. Criminal history record information disseminated to a clerk under Subsection (b)(7) may be used by the clerk only to ensure that information reported by the clerk to the department is accurate and complete. The dissemination of information to a clerk under Subsection (b)(7) does not affect the authority of the clerk to disclose or use information submitted by the clerk to the department. The department may disseminate criminal history record information under Subsection (b)(8) only to the extent necessary for the office of court administration to perform a duty imposed by law, including the development and maintenance of the public safety report system as required by Article 17.021, Code of Criminal Procedure, or to compile court statistics or prepare reports. The office of court

administration may disclose criminal history record information obtained from the department under Subsection (b)(8):

(1) in a public safety report prepared under Article 17.022, Code of Criminal Procedure; or

(2) in a statistic compiled by the office or a report prepared by the office, but only in a manner that does not identify the person who is the subject of the information.

(b) This section takes effect on the 91st day after the last day of the legislative session.

SECTION 19. Section 117.055, Local Government Code, is amended by amending Subsection (a) and adding Subsections (a-1) and (a-2) to read as follows:

(a) Except as provided by Subsection (a-1), to [~~To~~] compensate the county for the accounting and administrative expenses incurred in handling the registry funds that have not earned interest, including funds in a special or separate account, the clerk shall, at the time of withdrawal, deduct from the amount of the withdrawal a fee in an amount equal to five percent of the withdrawal but that may not exceed $50. Withdrawal of funds generated from a case arising under the Family Code is exempt from the fee deduction provided by this section.

(a-1) A clerk may not deduct a fee under Subsection (a) from a withdrawal of funds generated by the collection of a cash bond or cash bail bond if in the case for which the bond was taken:

(1) the defendant was found not guilty after a trial or appeal; or

(2) the complaint, information, or indictment was dismissed without a plea of guilty or nolo contendere being entered.

(a-2) On the request of a person to whom withdrawn funds generated by the collection of a cash bond or cash bail bond were disbursed, the clerk shall refund to the person the amount of the fee deducted under Subsection (a) if:

(1) subsequent to the deduction, a court makes or enters an order or ruling in the case for which the bond was taken; and

(2) had the court made or entered the order or ruling before the withdrawal of funds occurred, the deduction under Subsection (a) would have been prohibited under Subsection (a-1).

SECTION 20. Article 17.03(f), Code of Criminal Procedure, is repealed.

SECTION 21. As soon as practicable but not later than April 1, 2022, the Office of Court Administration of the Texas Judicial System shall create the public safety report system developed under Article 17.021, Code of Criminal Procedure, as added by this Act, and any related forms and materials and shall provide to the appropriate officials in each county and each municipality access to the system, forms, and materials at no cost. If those items are made available before April 1, 2022, the office shall notify each court clerk, judge or other magistrate, and office of an attorney representing the state.

SECTION 22. (a) As soon as practicable but not later than April 1, 2022, the Office of Court Administration of the Texas Judicial System shall:

(1) promulgate the forms required by Articles 17.028(g) and 17.51(g), Code of Criminal Procedure, as

added by this Act, and by Section 72.038, Government Code, as added by this Act; and

(2) develop or approve and make available the training courses and certification method as described by Article 17.024, Code of Criminal Procedure, as added by this Act, and develop the procedures and prescribe the forms required by Article 17.53, Code of Criminal Procedure, as added by this Act.

(b) If the items described by Subsection (a) of this section are made available before April 1, 2022, the office shall notify each court clerk, judge or other magistrate, and office of an attorney representing the state.

SECTION 23. Section 117.055, Local Government Code, as amended by this Act, applies only to a withdrawal of funds from a court registry under Section 117.055, Local Government Code, made on or after the effective date provided by Section 23(c) of this Act. A withdrawal of funds from a court registry made before the effective date provided by Section 23(c) of this Act is governed by the law in effect on the date the withdrawal was made, and the former law is continued in effect for that purpose.

SECTION 24. The changes in law made by this Act apply only to a person who is arrested on or after the effective date of this Act. A person arrested before the effective date of this Act is governed by the law in effect on the date the person was arrested, and the former law is continued in effect for that purpose.

SECTION 25. (a) Except as provided by Subsection (b) or (c) of this section or another provision of this Act, this Act takes effect January 1, 2022.

(b) Article 17.15(b), Code of Criminal Procedure, as added by this Act, takes effect June 1, 2022, but only if

the constitutional amendment proposed by the 87th Legislature, 2nd Called Session, 2021, requiring a judge or magistrate to impose the least restrictive conditions of bail that may be necessary and authorizing the denial of bail under some circumstances to a person accused of a violent or sexual offense or of continuous trafficking of persons is approved by the voters. If that amendment is not approved by the voters, Article 17.15(b), Code of Criminal Procedure, has no effect.

(c) Articles 17.021 and 17.024, Code of Criminal Procedure, as added by this Act, and Sections 4, 17, 19, 20, and 21 of this Act take effect on the 91st day after the last day of the legislative session.

_____ _____

President of the Senate Speaker of the House

I hereby certify that S.B. No. 6 passed the Senate on August 9, 2021, by the following vote: Yeas 27, Nays 2; and that the Senate concurred in House amendments on August 31, 2021, by the following vote: Yeas 26, Nays 5.

_____

Secretary of the Senate

I hereby certify that S.B. No. 6 passed the House, with amendments, on August 30, 2021, by the following vote: Yeas 85, Nays 40, one present not voting.

_____

Chief Clerk of the House

Approved:

_____

Date

_____

Governor