No. 20-60913

In The
United States Court of Appeals
For the Fifth Circuit

ATTALA COUNTY, MISSISSIPPI BRANCH OF THE NAACP; ANTONIO RILEY; SHARON N. YOUNG; CHARLES HAMPTON; RUTH ROBBINS,

Plaintiffs-Appellants

v.

DOUG EVANS, In His Official Capacity as District Attorney of the Fifth Circuit Court District of Mississippi,

Defendant-Appellee

On Appeal from the United States District Court
For the Northern District of Mississippi, No. 4:19-cv-167-DMB-JMV
Judge Debra M. Brown

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February 5, 2021

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Honorable Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants:

1. Attala County, Mississippi Branch of the NAACP
2. Antonio Riley
3. Sharon N. Young

4. Charles Hampton

5. Ruth Robbins

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12. Christopher Kemmitt, NAACP Legal Defense & Educational Fund, Inc.

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Defendant-Appellee:

14. Doug Evans, District Attorney of the Fifth Circuit Court District, Mississippi

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Respectfully submitted,

/s/ Christopher Kemmitt
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Counsel for Plaintiffs-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5th Circuit Rule 28.2.3 and Federal Rule of Appellate Procedure 34, Plaintiffs-Appellants respectfully request oral argument. This case presents important issues regarding abstention, federalism, and the separation of powers between Congress and the judiciary. Oral argument will assist the Court in resolving these important issues.

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over this matter pursuant to 28 U.S.C § 1331 as this action arose under the Constitution and laws of the United States, specifically 42 U.S.C. § 1983 and the Fourteenth Amendment. The District Court granted Defendant's Motion to Dismiss and entered its dismissal without prejudice on September 4, 2020. Plaintiffs timely filed their notice of appeal on October 5, 2020. This Court has appellate jurisdiction to review the District Court's dismissal and entry of final judgment in favor of Defendant pursuant to 28 U.S.C § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in holding that it could abstain from jurisdiction in a federal civil rights lawsuit challenging the racially discriminatory jury selection practices of a prosecutor's office absent the conditions for *Younger* abstention set forth in *Middlesex Cty. Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982);
2. Whether the District Court erred in concluding that Plaintiffs' requested relief would interfere with state court proceedings, requiring abstention by the federal court under *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, when Plaintiffs are prospective jurors who are not parties to any state court proceedings, do not challenge any state court determinations, and do not seek to alter the administration of state judicial proceedings, and the relief

requested does not require a stay or interruption of any ongoing or future state court proceedings;

3. Whether the District Court erred in concluding that Plaintiffs had an available avenue of relief such that abstention was warranted where: 1) binding case law from this Court and the Supreme Court holds that Plaintiffs must have an adequate remedy at law in the state proceedings that they are challenging; and 2) it is undisputed that Plaintiffs do not have an adequate remedy at law in the state proceedings that they are challenging; and

4. Whether the Civil Rights Act of 1871 permits a federal court to decline jurisdiction in a lawsuit where Black Americans allege that a state official has systematically denied their Fourteenth Amendment rights and where the facts of the lawsuit fall outside the factual contexts considered in *Younger* and *O'Shea v. Littleton*, 414 U.S. 488 (1974).

STATEMENT OF THE CASE

I. Factual History

A. Defendant-Appellee Doug Evans established and continues to implement a policy, custom, and/or usage of exercising peremptory challenges to intentionally exclude African Americans from jury service.

Doug Evans is the District Attorney for the Fifth Circuit Court District, Mississippi, and is responsible for the prosecution of all criminal cases in the seven counties that comprise his district.[1] He has held this position since 1992. ROA.10; ROA.14.

Between 1992 and 2017, Evans' Office prosecuted 418 criminal trials. ROA.23. Of the 225 trials for which jury selection and race data is publicly available, Evans and his assistants exercised a markedly disproportionate share of their peremptory strikes against Black potential jurors. ROA.23-24 (citing American Public Media Reports). Across these 225 trials, 65% of the 5,131 potential jurors eligible to be struck by the prosecution were white. Yet only 29% of the potential jurors struck where white, while 71% were Black. ROA.24. Stated another way, in those 225 trials, Evans' Office used peremptory strikes to remove 50 percent of eligible Black jurors but only 11 percent of eligible white jurors. ROA.24.

The statistical disparity in the cases tried by Evans and his assistants from 1992 through 2017 is inexplicable on non-racial grounds. ROA.27. Indeed, the raw

[1] Attala, Carroll, Choctaw, Grenada, Montgomery, Webster, and Winston. *See* ROA.14.

strike data summarized above understates the extent of that disparity. After accounting for the effect of race-neutral variables, prospective Black jurors face 6.7 times higher odds of being struck than comparable white jurors. ROA.10; ROA.25. Additionally, Evans' Office struck Black jurors more than twice as often in trials when the defendant was Black than when the defendant was white. ROA.24. These significant disparities hold true for criminal trials in all seven counties of the Fifth Circuit Court District, and for trials of criminal charges of all degrees of severity. ROA.24.

B. The Curtis Flowers trials exemplify Evans' practice of racially-discriminatory jury selection.

In June 2019, the United States Supreme Court reversed the conviction of Curtis Flowers, finding that Evans and his Office had discriminated in the selection of the jury. ROA.27 (citing *Flowers v. Mississippi*, 139 S. Ct. 2228, 2246 (2019)). The State had tried Curtis Flowers six times for a 1996 quadruple murder in Winona, Mississippi. ROA.25. This reversal was the third time that a court found Evans and his Office had violated *Batson v. Kentucky*, 476 U.S. 79 (1986), over the course of the six trials in the Flowers case. ROA.25-27. In September 2020, by request of the State of Mississippi, the charges against Flowers were dismissed with prejudice; Flowers had been imprisoned for 23 years. Nicholas Bogel-Burroughs, *After 6 Murder Trials and Nearly 24 Years, Charges Dropped Against Curtis Flowers*, N.Y.

TIMES (Sept. 4, 2020), https://www.nytimes.com/2020/09/04/us/after-6-murder-trials-and-nearly-24-years-charges-dropped-against-curtis-flowers.html.

For five of the six Flowers trials, the records provide the race of the prospective jurors, and thus of the jurors struck by the State. ROA.25. In all five of those trials, Evans and his Office used his peremptory strikes to target Black prospective jurors:

- In the first Flowers trial, the State used peremptory challenges to strike all five Black prospective jurors. The all-white jury convicted Flowers, but the Mississippi Supreme Court reversed the conviction because of prosecutorial misconduct.[2]
- In the second Flowers trial, the State again tried to strike all five Black prospective jurors, but the trial court found that the prosecution's fifth attempted strike had been motivated by race and that the proffered, race-neutral reason for the strike was false. The Mississippi Supreme Court also reversed this conviction for prosecutorial misconduct. [3]
- Despite the *Batson* finding in the second trial, the State used all fifteen of its peremptory challenges to strike Black prospective jurors in the third

[2] ROA.25. Mr. Flowers raised a *Batson* challenge on appeal, but the Court's reversal on grounds of other misconduct by the prosecution did not require it to address the claim.
[3] ROA.25-26. Again, while Flowers raised an additional *Batson* claim on appeal, the Court's decision on grounds of other misconduct by the prosecution did not require it to address the claim.

Flowers trial. ROA.26. On appeal, the Mississippi Supreme Court addressed the *Batson* claim, noting the appeal presented "as strong a prima facie case of racial discrimination as [it had] ever seen in the context of a *Batson* challenge[,]" ROA.26 (quoting *Flowers v. State*, 947 So. 2d 910, 935 (Miss. 2007)), and that the prosecution "engaged in racially discriminatory practices during the jury selection process." ROA.26 (quoting *Flowers*, 947 So. 2d at 939). The Court reversed the conviction.

- In the fourth Flowers trial, the State used all eleven of its peremptory challenges to strike Black jurors. The jury hung, and the trial judge declared a mistrial. ROA.26.

- In the sixth Flowers trial,[4] the State accepted one Black juror and struck the remaining five. The jury convicted Flowers, and a divided Mississippi Supreme Court affirmed the conviction. ROA.27.

In the United States Supreme Court's reversal of this sixth trial conviction, Justice Kavanaugh explained that Evans and his Office approached jury selection in the Flowers trials "as if *Batson* had never been decided," ROA.27 (quoting *Flowers*, 139 S. Ct. at 2246), pursuing a "relentless, determined effort to rid the jury of black individuals[.]" *Flowers*, 139 S. Ct. at 2246. Evans and his Office employed a "blatant

[4] No race information for the prospective jurors is available from the fifth trial. But it also ended in a mistrial after the jury failed to agree upon a verdict. ROA.26.

pattern of striking black prospective jurors," using "peremptory challenges to strike 41 of the 42 black prospective jurors that [he] could have struck." ROA.27 (quoting *Flowers*, 139 S. Ct. at 2235, 2245). Twice noting "the extraordinary facts" before it, ROA.27 (quoting *Flowers*, 139 S. Ct. at 2235, 2251), the Supreme Court ruled that Evans and his Office had violated *Batson*, entitling Flowers to a new trial. ROA.27 (quoting *Flowers*, 139 S. Ct. at 2251).

C. Evans has refused to accept the Supreme Court's judgment that his practice of jury selection is racially discriminatory.

In September 2019, Evans told the press that he disputed the Supreme Court's decision in *Flowers*, saying, "I think it was a ridiculous ruling." ROA.27 (citing to Amanda Sexton Ferguson, *Flowers case sent back to circuit court*, WINONA TIMES, Sept. 5, 2019, at 2, archived at https://www.flipsnack.com/winonatimes/win0905/full-view.html). "[The Supreme Court] basically said there was nothing wrong with the case and reversed it anyway." *Id*. Evans has continued his refusal to acknowledge, let alone change, his Office's practices in response to the Supreme Court's opinion in *Flowers*.[5] Records of jury

[5] *See* Sharyn Alfonsi, *How Curtis Flowers, Tried Six Times for the Same Crime, Was Saved from Death Row*, 60 MINUTES, CBS NEWS (Jan. 3, 2021), https://www.cbsnews.com/news/curtis-flowers-in-the-dark-60-minutes-2021-01-03/.

(Interviewer: "Do you think that Curtis could get a fair trial when the jury is predominately [sic] White?"

Evans: "Yes. Race has nothing to do with our part of what we do. A lot of times race gets thrown in as an excuse if there is no defense."

selection in the Fifth Circuit Court District since 2017 show that Evans' policy, custom, and/or usage of disparately employing peremptory strikes to exclude Black residents from jury service persists to this day. ROA.27.

II. Procedural History

In November 2019, the Attala County, Mississippi chapter of the NAACP and four individual Plaintiffs—Antonio Riley, Sharon N. Young, Charles Hampton, and Ruth Robbins—initiated this case. They alleged on behalf of themselves and all those similarly situated that Evans, in his official capacity as District Attorney for the Fifth Circuit Court District of Mississippi, employs a policy, custom, and/or usage of exercising peremptory challenges to strike Black prospective jurors because of their race, in violation of the Fourteenth Amendment to the United States Constitution. ROA.8-30. Further, in bringing this case under 42 U.S.C. § 1983, Plaintiffs alleged that Evans and his office exercise these discriminatory strikes while acting under color of state law, and that their conduct deprives Black citizens of "the rights, privileges, or immunities secured by the Constitution and laws." ROA.28-29. Plaintiffs sought a declaratory judgment that Evans' policy, custom,

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Interviewer: "Justice Brett Kavanaugh wrote there seemed to be a 'relentless, determined effort to rid the jury of Black individuals.' That's from the Supreme Court."

Evans: "And I can't understand that. Basically, what he is doing is accusing me like he was accused, before he was put on the Supreme Court.")

and/or usage violates the constitutional rights of Plaintiffs and of all others similarly situated, as well as injunctive relief that would ensure that Evans and his office cease this unconstitutional practice. *Id*.

Evans moved to dismiss the case, arguing that Plaintiffs lack standing, that their claims are not ripe, and that the District Court should abstain from considering Plaintiffs' claims. ROA.65-66; *see also* ROA.68-95 (Defendant-Appellee's Memorandum in Support of Motion to Dismiss). Plaintiffs opposed this motion, ROA.103-50, and Evans replied. ROA.158-66.

The District Court scheduled oral argument, confining the hearing to the abstention issue raised by Defendant Evans. ROA.168 (Notice of Hearing on Motion to Dismiss as to Abstention Issue). Following that argument, *see* ROA.198-272 (Transcript of Hearing on Motion to Dismiss as to Abstention Issue), the District Court granted Defendant's motion to dismiss. In finding abstention "compelled" by the United States Supreme Court's ruling in *O'Shea v. Littleton*, the District Court held "the plaintiffs have other avenues of relief available in state court and ... the relief the plaintiffs request would likely interfere with criminal proceedings in Mississippi's fifth circuit court district[.]" ROA.170.

In conclusion, the District Court recognized the right guaranteed by the Fourteenth Amendment and the Civil Rights Act of 1875, to not be excluded from a petit jury on account of race: "This Court's ruling today is in no way intended to

undermine this longstanding and crucial right. Nor is this decision intended to suggest that there is not merit to the plaintiffs' claims in this case. Indeed, the opposite seems to be true." ROA.192 (citing *Flowers*, 139 S. Ct. at 2245-46). The District Court did not explain how barring plaintiffs with valid Fourteenth Amendment claims from federal court could avoid "undermin[ing] this longstanding and crucial right." *See id.*

The District Court entered a final judgment for Defendant on September 4, 2020. ROA.193. Plaintiffs timely filed their notice of appeal on October 5, 2020. ROA.195-96.

III. Standard of Review

"This court reviews a district court's abstention ruling for abuse of discretion, but it reviews de novo whether the elements for *Younger* abstention are present." *Bice v. Louisiana Pub. Def. Bd.*, 677 F.3d 712, 716 (5th Cir. 2012). "A court necessarily abuses its discretion when it abstains outside of the doctrine's strictures." *Texas Ass'n of Bus. v. Earle*, 388 F.3d 515, 518 (5th Cir. 2004) (quoting *Webb v. B.C. Rogers Poultry, Inc.*, 174 F.3d 697, 701 (5th Cir. 1999)).

SUMMARY OF THE ARGUMENT

1. Federal courts have a "virtually unflagging" obligation to hear and decide cases over which they have subject-matter jurisdiction. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013). One of the limited exceptions to this rule is

the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, *O'Shea v. Littleton*, 414 U.S. 488 (1974). *Younger* abstention requires a district court to abstain from exercising federal jurisdiction over a civil action if, but only if, (1) the federal lawsuit would interfere with a pending state court case in which the federal plaintiff is a party; (2) the state court proceedings implicate important state interests; and (3) the federal plaintiff has an adequate opportunity to raise their constitutional claims in that same state court case. *Middlesex Cty. Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). This Court has recently emphasized that all three of these requirements must be satisfied before a court may abstain from a § 1983 claim under *Younger* and *O'Shea. ODonnell v. Harris Cty.*, 892 F.3d 147, 156 (5th Cir. 2018).

The District Court predicated its decision below on the belief that *O'Shea* created an independent ground for abstention that is unconstrained by the requirements of *Younger* and *Middlesex*. That was error. As both the Supreme Court and this Court have made clear, *O'Shea* is a *Younger* abstention decision. *Pulliam v. Allen*, 466 U.S. 522, 539 n.20 (1984) (stating that the Court decided *O'Shea* on "*Younger v. Harris* grounds"); *Bice*, 677 F.3d at 717 (explaining that *O'Shea* is an application of the *Younger* doctrine). Indeed, *O'Shea* expressly relied on *Younger* and applied the same test as *Younger*. *See* 414 U.S. at 499-504.

The district court's misinterpretation of *O'Shea* led it to disregard decades of binding case law from both this Court and the Supreme Court, and made possible the two errors discussed immediately below, each of which independently requires reversal.

2. First, the District Court misapplied the requirement in *Younger/O'Shea* that abstention is inappropriate unless a federal injunction would stay or continuously interfere with pending or future state court cases. The court misapprehended the type of "interference" required by *O'Shea* and improperly concluded abstention was appropriate under a lesser standard.

The Court in *O'Shea* was concerned that the "continuous or piecemeal interruptions" of state proceedings necessary to enforce the injunction at issue would bring the state's criminal legal apparatus to a virtual standstill—causing the stay of countless criminal proceedings as prohibited by *Younger*. 414 U.S. at 500. But under the District Court's interpretation of *O'Shea*, abstention would be appropriate in any case where injunctive relief might lead to contempt orders against a state official or might impact the occurrence of "specific events that might take place in the course of future state criminal trials." ROA.184, 191. This is error because courts applying *Younger* and *O'Shea* are not concerned with injunctions that might be enforced against state officials via contempt orders or that may have some theoretical effect on a state court. Rather, they are concerned with the type of interference that will

result in a stay of state court proceedings. The current case threatens no such interference because Plaintiffs—as prospective jurors, not criminal defendants—are not parties to any state court proceedings; the injunctive relief sought would not enjoin *any* criminal prosecutions; and the requested relief would not otherwise interfere with the judicial administration of state proceedings in the systemic manner required by *O'Shea*.

3. Second, the District Court erred by misapplying the holding in *Younger* and *O'Shea* that federal courts should not abstain unless federal plaintiffs have an adequate remedy at law in the state proceeding that their federal lawsuit is seeking to enjoin. *See, e.g.*, *O'Shea*, 414 U.S. at 502; *Middlesex Cty. Ethics Comm'n*, 457 U.S. at 432. According to the District Court, Plaintiffs possess such a remedy solely by dint of the fact that Mississippi state courts are competent to hear § 1983 claims, and thus Plaintiffs could always bring the same lawsuit in state court. ROA.183.

This ruling errs in multiple respects. To start, it contravenes binding precedent from both the Supreme Court and this Court holding that abstention is impermissible unless Plaintiffs have an adequate legal remedy *in the state proceedings* that they are challenging. *See, e.g.*, *Middlesex Cty. Ethics Comm'n*, 457 U.S. at 432; *Bice*, 677 F.3d at 717. Here, neither the District Court nor the State have ever disputed that Appellants lack such a remedy. Since the Appellants will be jurors, not defendants, at the proceedings that they have challenged, they are "not parties to" the

proceedings and "have no opportunity to be heard at the time of their exclusion" from jury service. *Powers v. Ohio*, 499 U.S. 400, 414 (1991). Thus, they have *no* "opportunity to raise [their] claim" in any "ongoing [state] court proceedings." *Bice*, 677 F.3d at 718.

The District Court's ruling also contravenes binding Supreme Court precedent holding that "there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans ("NOPSI")*, 491 U.S. 350, 373 (1989). The District Court rejects this binding precedent in favor of a single decision from the Eighth Circuit. *See* ROA.183 (citing *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 613 (8th Cir. 2018)). But the Eighth Circuit cannot overrule decisions of the United States Supreme Court or this Court and, in any event, *Oglala Sioux Tribe* supports Appellants' position and not the District Court's.

Finally, adopting the trial court's interpretation of *Younger* and *O'Shea* would wreak havoc on our federal system and introduce uncertainty into a doctrine that has been well-settled for half a century. Under the District Court's interpretation, almost every lawsuit against a state official will satisfy the "interference" prong of *Younger* because it is always theoretically possible that a state official will disobey a district court's lawful order, requiring contempt proceedings. Similarly, under the District Court's interpretation, every lawsuit seeking the vindication of a plaintiff's

constitutional rights will satisfy the "adequate remedy" prong of *Younger* because state courts are always competent to adjudicate federal constitutional claims. In combination, these two interpretive errors create a rule in which abstention is required in nearly *every* lawsuit against a state official. Such a rule would thwart Congress's decision to make the federal courts the primary guarantors of constitutional rights, *see Steffel v. Thompson*, 415 U.S. 452, 473 (1974), and transform Our Federalism from a doctrine that preserves both state and federal interests into one where federal interests are wholly subordinate to state interests. Nor would the effects be limited to civil rights cases because *Younger* abstention and its adequate remedy requirement apply to many cases that have nothing do with constitutional rights.

4. Additionally, both the text and the legislative history of the Civil Rights Act of 1871 make clear that abstention is inappropriate. Congress passed the Civil Rights Act (now codified in part as 42 U.S.C. § 1983) to ensure that Black Americans could vindicate their Fourteenth Amendment rights in federal court because state officials and state courts had failed to protect them. *See, e.g.*, *Monroe v. Pape*, 365 U.S. 167, 172-80 (1961), overruled on other grounds by *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, (1978). The District Court's decision to abstain in a case when Black Plaintiffs have alleged that a state official engaged in the systemic violation of Black Americans' Fourteenth Amendment rights, is

antithetical to the text and purpose of that Act. More problematic still, the District Court's view of abstention eviscerates § 1983 by requiring plaintiffs to bring most constitutional claims against state officials in state court even though the entire purpose of § 1983 was to ensure the existence of a federal forum for such cases. This Court should decline the District Court's invitation to extend *Younger* and *O'Shea* to the new factual context presented here.

ARGUMENT

I. The District Court's Erroneous Rulings in This Case Are Based, in Part, on the Mistaken Belief That It Could Abstain from the Exercise of Federal Jurisdiction Without Considering the Factors Required by *Younger v. Harris* and Its Progeny, Including *Middlesex Cty. Ethics Comm'n v. Garden State Bar Ass'n*.

A. *Younger v. Harris* established a narrow exception to the general rule of full federal jurisdiction, limited to a state criminal defendant trying to halt his prosecution by seeking federal injunctive relief.

As a general matter, federal courts "'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.'" *NOPSI*, 491 U.S. at 358 (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)). When jurisdiction exists, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc.*, 571 U.S. at 77 (citation omitted). "[O]nly exceptional circumstances ... justify a federal court's refusal to decide a case in deference to the States.'" *Id*. at 78 (quoting *NOPSI*, 491 U.S. at 368). These "exceptional

circumstances" are reflected in the United States Supreme Court's abstention cases, which "have carefully defined ... the areas in which such 'abstention' is permissible ...." *NOPSI*, 491 U.S. at 359. When a "suit comes within none of the exceptions" established by the Court, federal courts must exercise their jurisdiction. *See, e.g.*, *id*. at 373.

One of these limited exceptions is the abstention doctrine set forth in *Younger* and its progeny, including *O'Shea* and *Middlesex Cty. Ethics Comm'n*. The *Younger* abstention doctrine enshrines the straightforward maxim that "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Younger*, 401 U.S. at 45. In that case, the Supreme Court reversed an injunction entered by a three-judge court finding California's Criminal Syndicalism Act unconstitutional, and preventing the further prosecution of Plaintiff Harris, who had pending criminal charges against him under the act. *Id*. at 40-41.

The Supreme Court held that the injunction conflicted with "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *Id.* at 41; *Shaw v. Garrison*, 467 F.2d 113, 119 (5th Cir. 1972) (quoting same); *see also Sprint Commc'ns, Inc.*, 571 U.S. at 72 ("When there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution.").

The "primary sources" of this policy were twofold. The first was "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." *Younger*, 401 U.S. at 43-44. Simply put, that equitable principle forbids the defendant in a criminal case in the law courts from filing an action in equity for an injunction against his prosecution. Note, *Equity Jurisdiction to Enjoin Criminal Proceedings*, 24 Yale L.J. 327 (Feb. 1915) ("As a general rule a court of equity will not exercise jurisdiction by way of injunction to stay proceedings in any criminal matters, or in any case not strictly of a civil nature"); *see also Douglas v. City of Jeannette*, 319 U.S. 157, 163 (1943) ("[C]ourts of equity do not ordinarily restrain criminal prosecutions .... Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction.").

The second arises from the system of "Our Federalism" that is embedded in the provision of dual (federal and state) sovereignty in the Constitution. *See Younger*, 401 U.S. at 44-45. According to *Younger*, the comity required by the constitutional structure requires that individuals defending criminal charges in a state court may not sue in federal court to enjoin the state proceedings unless "the threat to the

plaintiff's federally protected rights [is] one that cannot be eliminated by his defense against a single criminal prosecution." *Id*. at 46.

This distinguished *Dombrowski v. Pfister*, 380 U.S. 479 (1965), which reversed a three-judge district court's dismissal of an action to enjoin enforcement of the Louisiana Subversive Activities and Communist Control Law against the plaintiffs, who were leaders of a civil rights organization. As the *Younger* Court pointed out, *Dombrowski* specifically noted that "the allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights." *Younger*, 401 U.S. at 48-49 (quoting *Dombrowski*, 380 U.S. at 485-86).

Unlike in *Dombrowski*, the *Younger* Court ruled that abstention was proper because "a proceeding was already pending in the state court, affording Harris an opportunity to raise his constitutional claims." *Younger*, 401 U.S. at 49. Since Harris could challenge the constitutionality of the prosecution as a defense in his state court prosecution, it would offend the principles of equity and comity to halt his state prosecution through a federal injunction, and abstention was appropriate.

B. Although the Supreme Court's subsequent *Younger* abstention cases modified the doctrine in two modest respects, they did not eliminate or dilute *Younger*'s core holding that abstention is impermissible unless the federal lawsuit would interrupt state court proceedings, and the federal plaintiffs possess an adequate legal remedy in the challenged state proceedings.

Following *Younger*, the Supreme Court decided a number of "*Younger* abstention" cases.[6] These cases expanded *Younger* in two respects. First, they held that *Younger* required abstention when no "ongoing" state prosecution existed, but plaintiffs requested relief from a federal court that would interrupt prosecutions against them in the future. *See O'Shea*, 414 U.S. at 500. Second, they ruled that *Younger* did not only apply to federal lawsuits that would enjoin state criminal proceedings; it also applied to "certain 'civil enforcement proceedings'" and to "pending 'civil proceedings involving certain orders ... uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Sprint Commc'ns, Inc.*, 571 U.S. at 73 (quoting *NOPSI*, 491 U.S. at 367-68). But the Supreme Court has not otherwise altered the requirements of *Younger* or expanded its scope.

The Supreme Court made the first of these modifications in *O'Shea*, where plaintiffs brought a § 1983 complaint alleging that the prosecutor, magistrate, and judge in the state courts of Cairo, Illinois, discriminated against Black residents and

[6] Introducing its discussion of *Younger* and the concept of "Our Federalism," Wright & Miller's treatise notes that "[t]he doctrine seems to be a special application of the abstention doctrines, and has repeatedly been so characterized by the Supreme Court." Vikram D. Amar, 17B FED. PRAC. & PROC. JURIS. § 4251 (3d ed.) n.5 (collecting cases).

against persons of any race who protested racial injustice. Plaintiffs sought a wide-ranging and intrusive injunction against the bail-setting, sentencing, and jury-fee practices of the state courts. *O'Shea*, 414 U.S. at 491-92.

The Supreme Court ruled against plaintiffs on two grounds. First, the Supreme Court found that the plaintiffs had failed to allege a case or controversy against the magistrate and judge. *Id*. at 495. Second, the Court ruled that the district court should have abstained under *Younger*.

In so doing, *O'Shea* applied the same test as *Younger*. It considered whether the plaintiffs' requested relief would restrain state prosecutions and ruled that it would. The Court determined that the relief requested by the plaintiffs "would contemplate interruption of state proceedings to adjudicate assertions of noncompliance by petitioners ... which would indirectly accomplish the kind of interference that *Younger v. Harris*, *supra*, and related cases sought to prevent." *See id*. at 500.

Next, the *O'Shea* Court considered whether the federal plaintiffs could litigate their federal constitutional claims in state court if they faced prosecution there. *See id*. at 502. Put otherwise, the Court asked whether plaintiffs would have "an adequate remedy at law[,]" *see Younger*, 401 U.S. at 43-44, in a state prosecution. The Court found that the state court proceedings did provide plaintiffs an adequate remedy: "if any of the respondents are ever prosecuted and face trial, or if they are illegally

sentenced, there are available state and federal procedures which could provide relief from the wrongful conduct alleged." *O'Shea*, 414 U.S. at 502. The Court then enumerated the available procedures. *See id.* (discussing the availability of seeking recusal of the judge, change of venue, state direct appeal and postconviction remedies, and federal habeas relief).

The year after *O'Shea*, the Court made clear in *Gerstein v. Pugh*, 420 U.S. 103 (1975), that *Younger* abstention was inappropriate—even in federal lawsuits that challenged state prosecutions—where the federal lawsuit would not restrain a criminal prosecution, and the federal plaintiffs had no adequate remedy in the underlying state proceeding. The *Gerstein* Court held that abstention was inappropriate for a federal court confronted with a complaint for injunctive relief that would forbid state courts from detaining pretrial arrestees without conducting a judicial hearing. The Court distinguished *Younger* in a footnote:

> 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 (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 (emphases added).

Several years later, in *Middlesex Cty. Ethics Comm'n*, 457 U.S. at 432, the Court considered whether *Younger* required abstention in a case in which the federal plaintiff sought to restrain state bar disciplinary proceedings against him. It held that abstention under that doctrine applied, given affirmative answers to three questions: "*first*, do state bar disciplinary hearings ... constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges." *Id*.

As this Court has made clear, the three *Middlesex* criteria are the *sine qua non* of a district court's authority to invoke *Younger* abstention. In particular, this Court has not deviated from its precedent that "the *Younger* doctrine requires that federal courts decline to exercise jurisdiction over lawsuits when three conditions 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*, 677 F.3d at 716. Thus, when any one *Middlesex* element is not met, *Younger* abstention is improper.

C. Contrary to the district court's view, abstention under *O'Shea v. Littleton* requires the same three-part analysis as any other version of the abstention doctrine set forth in *Younger v. Harris*.

The District Court acknowledged the holdings of this Court that the three *Middlesex* conditions "set out a three-part test describing the circumstances under which abstention was advised." ROA.181 (citing *Wightman v. Tex. Supreme Ct.*, 84 F.3d 188, 189 (5th Cir. 1996), and *Texas Ass'n of Bus.*, 388 F.3d at 519). But it asserted that these requirements "have no role in an *O'Shea* inquiry." ROA.182. The District Court stated that "*Middlesex*'s focus on ongoing proceedings is anathema to the circumstances under which *O'Shea* abstention would be invoked—when there are no ongoing proceedings to interrupt." *Id*. It concluded: "the Court finds the *Middlesex* factors inapplicable to the *O'Shea* inquiry. Rather, in accordance with *O'Shea*, the propriety of abstention must be evaluated based on the level of interference with future proceedings and the availability of other avenues of relief." ROA.183.

The fundamental error in this holding is that *O'Shea* did not create an abstention doctrine separate and independent of *Younger*. Rather, *O'Shea* expressly relied on *Younger* and applied the earlier decision's analysis in its discussion of abstention. *O'Shea*, 414 U.S. at 499-504. All three of what would become the *Middlesex* conditions were present in *O'Shea*: (1) the federal lawsuit would interfere with state criminal cases "by means of continuous or piecemeal interruptions of the

state proceedings by litigation in the federal courts[,]" 414 U.S. at 500; (2) the state proceedings at issue would be criminal prosecutions, which, as *Younger* held, involve a significant state interest, *see* 401 U.S. at 43; and (3) "if any of the respondents are ever prosecuted and face trial, or if they are illegally sentenced, there are available state and federal procedures which could provide relief from the wrongful conduct alleged." 414 U.S. at 502.

It should come as no surprise, then, that the Supreme Court itself has said that it decided *O'Shea* on "*Younger v. Harris* grounds." *Pulliam,* 466 U.S. at 539 n.20. So, too, has this Court. *See Bice*, 677 F.3d at 717 (explaining that *O'Shea* is an application of the *Younger* doctrine).

No cases from this Circuit support the District Court's misreading of *Younger* abstention. Rather, in the context of criminal or quasi-criminal proceedings, this Court continues to require the *Middlesex* conditions as a *sine qua non* of abstention. Only two years ago, this Court held that to justify abstention from a federal civil action that seeks injunctive relief to prevent constitutional violations in state criminal court practices, "[t]here must be (1) "an ongoing state judicial proceeding" (2) that "implicate[s] important state interests" and (3) offers "adequate opportunity" to "raise constitutional challenges." *ODonnell*, 892 F.3d at 156 (emphasis added) (denying abstention because the third requirement was not met: "the relief sought by

ODonnell—i.e., improvement of pretrial procedures and practice—is not properly reviewed by criminal proceedings in state court").

The District Court erred by ignoring or rejecting this abundance of binding precedent. And by unmooring itself from five decades of binding case law, the District Court made possible the two interpretive errors discussed in the ensuing sections: its rulings that abstention is permissible even where (1) the federal plaintiffs are not seeking to interrupt or halt a pending or anticipated state court proceeding in which they are parties, and (2) the anticipated state court proceedings do not provide the federal plaintiffs with an adequate remedy at law by which they can raise their federal constitutional claims. The result of these rulings is a dramatically expanded abstention doctrine that is "irreconcilable with [the Supreme Court's] dominant instruction that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" *Sprint Commc'ns, Inc.*, 571 U.S. at 81-82 (citations and quotations omitted) (emphasis added).

II. Abstention Is Improper Here Because the Relief Requested Would Not Interfere with Ongoing or Future State Proceedings.

A. The kind of interference contemplated by *Younger* and its progeny requires the restraint or interruption of state judicial proceedings.

The doctrine of *Younger* abstention is founded on "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except

under special circumstances." *Younger*, 401 U.S. at 41; *see also id.* at 43 ("Congress has ... manifested a desire to permit state courts to try state cases free from interference by federal courts"). *O'Shea* applied this proscription against interference to future state proceedings, and applied *Younger* to federal orders that would have the effect of staying "the state criminal process by means of continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts[.]" *O'Shea*, 414 U.S. at 500. But *O'Shea* did not command that "litigation in the federal courts" in and of itself constituted such interference. Rather, because the relief requested in *O'Shea* would have required the federal court to review bond determinations, jury fee practices, and sentences in individual criminal prosecutions, it "would [have] disrupt[ed] 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. It was the injunction's potential to repeatedly halt future state proceedings that the Court found akin to the "request for injunctive relief from an ongoing state prosecution against the federal plaintiff which was found to be unwarranted in *Younger*." *Id.*

Thus, *Younger* abstention is not concerned with injunctions that might have some impact on state court, but with interruptions of such a magnitude as to effectively enjoin state proceedings or otherwise "interfere with the state court's ability to conduct proceedings[.]" *Bice*, 677 F.3d at 717. To satisfy the first *Middlesex* condition requiring interference, the prospective federal injunctive relief

must enjoin ongoing or future state judicial proceedings, or indirectly accomplish such restraint through the "continuous or piecemeal interruptions of the state proceedings." *O'Shea*, 414 U.S. at 500. Consistent with this rule, the U.S. Supreme Court did not conclude abstention was appropriate in *O'Shea*'s companion case, brought by the same Plaintiffs against the state's attorney, rather than the state court judges. Instead, the Court remanded for a determination whether Plaintiffs' claims applied to the original named prosecutor's successor. *Spomer v. Littleton*, 414 U.S. 514, 522 (1974).

B. The relief requested would neither directly nor indirectly enjoin or interrupt state court proceedings.

"In order to decide whether the federal proceeding would interfere with the state proceeding, [a federal court] look[s] to the relief requested and the effect it would have on the state proceedings." *Bice*, 677 F.3d at 717. As the District Court correctly recognized, "'whether *O'Shea* abstention applies is heavily fact-dependent." ROA.184 (citing *Miles*, 801 F.3d at 1063). But the District Court misconstrued the type of interference required by *Younger* and *O'Shea* and, as a result, misapplied those cases to the facts here.

Plaintiffs seek "a permanent injunction forbidding the Defendant [District Attorney Doug Evans] and his agents, employees and successors in office from maintaining a custom, usage and/or policy of exercising peremptory challenges against prospective Black jurors because of their race." ROA.29.

Contrary to the District Court's interpretation, the relief requested would neither directly nor indirectly enjoin or interrupt any ongoing or future state proceedings, as required by *Younger* and *O'Shea*. At the outset, Plaintiffs do not seek to enjoin ongoing or future prosecutions. Plaintiffs are not criminal defendants and so do not seek to enjoin their prosecutions—which do not exist. Plaintiffs do not challenge the constitutionality of criminal laws under which they are currently—or might be prospectively—prosecuted. Nor could injunctive relief here directly enjoin other criminal prosecutions. As prospective jurors, Plaintiffs are "not parties to" those state criminal proceedings and "have no opportunity to be heard at the time of their exclusion" from jury service. *Powers*, 499 U.S. at 414. As non-parties, Plaintiffs cannot and do not seek to enjoin the prosecutions of any criminal defendants in those cases. Nor will they be told the basis of their removal from the jury venire; they will simply be excused from jury service, and the trial will proceed uninterrupted. The District Court did not dispute this.

Moreover, the relief requested would not otherwise interfere with the state prosecutions as contemplated by *O'Shea*—"by means of continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts[.]" 414 U.S. at 500. Plaintiffs do not seek to invalidate individual court rulings permitting the exclusion of particular jurors. Unlike the plaintiffs in *O'Shea*, Plaintiffs have not

sued judges in the Fifth Circuit Court District and do not challenge their administration of voir dire.

Plaintiffs seek *ex post* review of Evans' custom, usage and/or policy by the federal court to limit his office's future exercise of discriminatory peremptory challenges. Because Plaintiffs seek an injunction to address systemic violations by Evans' office, nothing in the relief requested requires the federal court to halt voir dire or otherwise interrupt state court proceedings for determinations of compliance with the injunction. Even if the District Court had any concern about the injunction's potential scope, "equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.'" *Milliken v. Bradley*, 418 U.S. 717, 808–09 (1974) (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955)). It is well within the District Court's powers to craft a remedy that would comport both with Plaintiffs' constitutional rights and state interests. At this stage, it is enough that the relief requested does not require an interruption of state court proceedings in the manner contemplated by *O'Shea*. Beyond that, it is premature to determine the precise contours of that injunctive relief before discovery has even begun. Where, as here, "an unconstitutional result has consistently been produced," courts are obligated to "at a minimum" exercise jurisdiction to investigate into the conduct alleged prior to determining that equitable

relief is impossible. *Ciudadanos Unidos de San Juan v. Hidalgo Cty. Grand Jury Comm'rs*, 622 F.2d 807, 827 (5th Cir. 1980).

C. The District Court misconstrued the kind of "interruption" required of *Younger* and its progeny and erred in concluding abstention was appropriate.

The District Court's decision did not conclude that Plaintiffs' requested relief would require the interruption of a single state court proceeding, in the manner contemplated by *O'Shea*. Instead, the District Court began its discussion of "interference with future proceedings" with the premise that "abstention will ordinarily be appropriate when a plaintiff seeks to 'control[] or prevent[] the occurrence of specific events that might take place in the course of future state [proceedings].'" ROA.184 (quoting *O'Shea*, 414 U.S. at 500). But the District Court divorced this passage from its critical context in *O'Shea*, thereby impermissibly extending the definition of "interference" contemplated by abstention doctrine.

Under *O'Shea*, this admonition applies only if such injunctions "would contemplate interruption of state court proceedings," and the "specific events" *O'Shea* contemplated were particular decisions by state judges, including bond, jury fee, and sentencing determinations. 414 U.S. at 500. That is, interruption would occur under *O'Shea* when a federal injunction would "prevent" a state court judge from exercising their independent authority to issue decisions. *O'Shea*'s proscription

does not—indeed, could not—purport to immunize every act involved in state legal proceedings from federal review.

By contrast, under the District Court's extreme reading of *O'Shea*, *Younger* abstention might well be appropriate where the relief requested might cast some doubt or have some impact on current or future criminal proceedings, even where interruption of those proceedings does not occur. But this is not and cannot be the law. "Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *NOPSI*, 491 U.S. at 368.

This broad misinterpretation of "interference" infects the District Court's application of *O'Shea* to the facts here. The District Court ultimately concluded that abstention was required "[b]ecause the requested injunctive relief would place the Court in the position of holding a district attorney's office in contempt during (or after) criminal proceedings and would require the Court to independently review specific decisions by state courts[.]" ROA.191. But this rationale is not only speculative, it also misapprehends *Younger's* interference requirement and has no basis in *Younger* or its progeny.

Contrary to the District Court's conclusion, ROA.197, enforcement of an injunction against Evans via contempt order would not offend *O'Shea* principles. In that case, plaintiffs sought an injunction against state judges' bond, jury fee, and

sentencing determinations. Because the requested injunction sought to review these state judicial determinations, the Court found untenable the possibility that federal judges would have to halt state proceedings in order to sit in judgment of—and censure—their state counterparts for compliance with the federal injunction during the course of state proceedings. *O'Shea*, 414 U.S. at 499.[7] It was this "major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings" that *O'Shea* found intolerable. *Id.* at 502. *O'Shea*'s concerns were fundamentally about interruption of state proceedings and comity between state and federal judges—not about the enforcement of federal orders through contempt proceedings against state prosecutors, as in this case. *O'Shea*, 414 U.S. at 502. Furthermore, the enforcement of an injunction against a state official inherently involves the possibility of contempt because the official may choose to defy a court's lawful order. If that possibility itself constituted "interference" as the District Court has ruled, *see* ROA.188, then every lawsuit against a state official does.

In reaching a contrary conclusion, the district court relies on the Eleventh Circuit's flawed reasoning in an unpublished opinion, *Hall v. Valeska*, that even if

[7] Consistent with *O'Shea*'s focus on unique comity concerns when federal courts enjoin state court judges, an amendment to § 1983 added the language "except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

"enforcement of the injunction would not interfere with individual state criminal cases ... enforcement of the injunction might ... involve holding [the district attorney] in contempt." ROA.185 (quoting 509 F. App'x at 836). But the language from *Hall* itself highlights the Eleventh Circuit's error—if "enforcement of the injunction would not interfere with individual state criminal cases[,]" then abstention would be inappropriate under the first *Middlesex* condition and the Eleventh Circuit should have stopped there.[8]

The District Court's further reliance on *Oglala Sioux Tribe v. Fleming,* 904 F.3d 603, 612 (8th Cir. 2018), and *Rizzo v. Goode*, 423 U.S. 362 (1976), is likewise misplaced. ROA.187-88. The plaintiffs in *Rizzo* and *Oglala Sioux Tribe* sought injunctions altering the nature of state quasi-judicial proceedings, and both courts' concern about contempt orders was fundamentally about the interruption of state court proceedings, as in *O'Shea*. Neither case holds that abstention is required in federal cases simply because injunctive relief could ultimately be enforced against non-compliant state actors through contempt.

[8] The district court also relied on *Pipkins v. Stewart*, No. 5:15-cv-2722, 2019 WL 1442218 (W.D. La. Apr. 1, 2019), for the proposition that "'[i]nherent" in the requested injunction 'is the ability of African-American potential jurors in criminal trials who are subjected to a District Attorney's peremptory challenge to seek federal review before the Court.'" ROA.186. (quoting 2019 WL 1442218, at *10). But that case, too, fails to address why such review constitutes interference as contemplated by *O'Shea.*

In *Oglala Sioux Tribe*, the Eighth Circuit concluded that "[a] federal court order dictating what procedures must be used in an ongoing state proceeding would 'interfere' with that proceeding by inhibiting the legitimate functioning of the individual state's judicial system." *Oglala Sioux Tribe*, 904 F.3d at 611 (citation omitted). In that case, two indigenous tribes sued challenging South Dakota's temporary child custody proceedings. Plaintiffs alleged that the state failed to provide sufficient due process to parents seeking to prevent the state from taking their children into state custody in its existing "48 hour hearing" process and in failing to hold a post-deprivation hearing. *Id.* at 607–08. The Eighth Circuit concluded that while the relief requested in that case sought to impose particular procedures, contempt orders enforcing those procedures in ongoing state proceedings would contravene *Younger*'s admonition of interference with state proceedings—not because the act of holding state officials in contempt in any context would offend *Younger* principles. Moreover, to the extent *Oglala Sioux Tribe* protects "the legitimate functioning of the individual state's judicial system[,]" illegitimate functions such as striking jurors on the basis of race by a state actor fall outside that scope. *Id.* at 611.

Similarly, in *Rizzo*, plaintiffs sought and obtained an injunction from the federal district court overhauling Philadelphia's police misconduct grievance procedures. In that case, plaintiffs alleged that the grievance procedures were

constitutionally deficient, and the district court entered an injunction that altered the very nature of the quasi-judicial proceedings by creating a new evidentiary hearing structure. *Rizzo,* 423 U.S. at 369–70. Importantly, the district court did so even though it found plaintiffs "had no constitutional right to improve[] police procedures for handling civilian complaints." *Id.* at 370.

Against this backdrop, the court found intolerable such "a sharp limitation on the department's latitude in the dispatch of its own internal affairs[.]" *Id.* at 379. In that case, the injunction specifically sought to alter practices affecting the nature of the state proceedings in question, and the federal court would have retained jurisdiction to enforce those procedures on state officials charged with administering the police department's civilian complaints. *Id.* at 379. By contrast, this case does not seek to change state court procedures, which already prohibit race discrimination in the exercise of peremptory challenges. Rather, Plaintiffs seek to enjoin Evans' office from committing constitutional violations within the confines of existing procedures. Thus, the District Court's reliance on *Rizzo* is wholly inapposite.

Rather, as the District Court recognizes, contempt orders are squarely within the District Court's authority in holding violators of valid federal court orders accountable. ROA.188. ("The proper method to enforce an injunction is through the power of contempt.") (quoting *Dominguez-Perez v. Chertoff,* 294 F. App'x 981, 983 (5th Cir. 2008)). Thus, where contempt orders are implicated, the proper inquiry is

whether the contempt order would interfere with state court proceedings. Here, a contempt order against Evans in his official capacity would interrupt no state proceedings, and the District Court did not contend otherwise.

The District Court's second justification for abstention—that "the requested injunctive relief would ... require the Court to independently review specific decisions by state courts," ROA.191—not only engages in conjecture, it displays a fundamental misunderstanding of the type of interference required to abstain under *Younger*. First, the relief requested does not require the federal court to "independently review specific decisions by state courts[.]" ROA.191. Rather, Plaintiffs request review of decisions made by Evans' Office in furtherance of its exercise of peremptory strikes. Regardless of the state courts' ultimate determinations in an individual criminal case, Plaintiffs have asked the District Court to review an overarching pattern across cases to confirm whether there exists a policy, custom, and/or usage of striking jurors on the basis of race in Evans' Office.

Second, even if the court were to review, *i.e.* evaluate or consider, specific state court decisions over specific peremptory challenges, nothing about such review would interrupt any state court proceedings. This is simply not the type of "review" contemplated by *O'Shea.* If injunctive relief is granted, no mandate restraining any state court judge's behavior would issue. The decisions of the federal court would be available to state judges to inform their future decisions, but any reports or

contempt orders against Evans' Office would not bind state judges to rule in any particular manner.

Although the court warns such a process might "call[] into question the validity of any number of criminal proceedings which may be mid-trial, on appeal, or undergoing post-conviction review[,]" ROA.190, any information that a criminal defendant might glean from federal court orders here would not interrupt state court proceedings. At the outset, as non-parties to this case, criminal defendants would have no recourse to seek relief in this federal action with respect to their underlying state criminal proceedings. Moreover, a criminal defendant could only present evidence from this case in state court during the course of their appeals or collateral attacks on any criminal convictions—not any earlier. Thus, the availability of new evidence might "call into question" rulings on past peremptory strikes in the sense that a state judge would be free to consider the federal court orders as part of the totality of collateral evidence in the context of future state post-conviction hearings. But permitting Evans' practice of striking jurors on the basis of race already "call[s] into question" the validity of criminal proceedings. ROA.190; *see also Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").

And state judges are already free to consider new evidence in post-conviction proceedings. This impact is different from interruption by means of a federal court order invalidating a state court's determination and restraining state court discretion, as in *O'Shea.* No interruption of state proceedings would be necessary or possible under existing state procedures.

Thus, in the absence of interruption of state court proceedings, abstention under *Younger* was improper.

III. Abstention Is Inappropriate Because Plaintiffs Do Not Have an Adequate Legal Remedy in the Underlying State Proceedings.

A. As prospective jurors, Plaintiffs have no remedy at all in the state proceedings that they are challenging.

As discussed in Section I *supra*, a federal court may not abstain under *Younger*—or its progeny, *O'Shea*—unless the plaintiffs possess an adequate remedy at law in the state proceeding that their federal lawsuit is seeking to enjoin. *See, e.g.*, *O'Shea*, 414 U.S. at 502; *Middlesex Cty. Ethics Comm'n*, 457 U.S. at 432; *Bice*, 677 F.3d at 718. Here, neither the State nor the District Court has ever contended that this requirement is satisfied. Nor could they.

By definition, Plaintiffs here have not and will not possess the "opportunity to raise [their] claim" in any "ongoing [state] court proceedings." *See Bice*, 677 F.3d at 718. Because Plaintiffs will be jurors—and not defendants—at the proceedings they seek to challenge, Plaintiffs are "not parties to" the proceedings and "have no

opportunity to be heard at the time of their exclusion" from jury service. *Powers*, 499 U.S. at 414.

If Evans dismisses Plaintiffs from jury service at a future trial because they are Black, they cannot argue to the criminal trial judge that their dismissal is part of Evans' and his Office's unconstitutional, three-decade practice of discriminatory peremptory strikes. As jurors, they are powerless to do anything but leave the courthouse and go home. They may not even be told that they were struck by peremptory challenge, let alone the identity of the party who made the strike. Because Appellants cannot raise their constitutional claim in the underlying state proceeding—a fact that neither the State nor the District Court has ever disputed—abstention is impermissible, and the trial court's ruling must be reversed.

Indeed, Appellants do not merely lack an adequate legal remedy in the state proceedings that they challenge; they lack an adequate legal remedy period. They cannot sue Evans for damages in his individual capacity under § 1983 because of absolute immunity. *See Esteves v. Brock*, 106 F.3d 674, 677 (5th Cir. 1997). They cannot sue Evans' Office for damages under § 1983 because of sovereign immunity. *See id.* at 678 (plaintiffs may not recover damages from district attorney's office if district attorney is an agent of the state); *Chrissy F. v. Miss. Dept. of Welfare*, 925 F.2d 844, 849 (5th Cir. 1991) (Mississippi district attorneys are agents of the state). And they cannot sue Evans in state court for damages both because the Mississippi

Tort Claims Act grants him immunity, *see* Miss. Code Ann. § 11–46–9(1)(a), (d) (Rev. 2013), and because Mississippi law does not provide a relevant cause of action. Neither the State nor the District Court has ever disputed any part of this analysis. And neither the State nor the District Court has ever identified any legal remedy to which they believe Appellants are entitled.

B. The District Court's novel view that federal courts should abstain even when plaintiffs have no adequate legal remedy in any underlying state proceeding is demonstratively wrong and creates a serious risk of harmful externalities.

Rather than argue that Plaintiffs possess an adequate legal remedy in the underlying state proceedings as demanded by the United States Supreme Court and by this Court, the District Court's ruling attempts an end run around that requirement. Relying on a single case from the Eighth Circuit, the ruling redefines this fundamental requirement so that federal plaintiffs always have an adequate remedy at law if they can bring their federal constitutional claim—including, as here, a claim for equitable relief—in state court. ROA.183. Based on this newly created standard, the court dismissed Appellants' lawsuit, ruling that abstention was appropriate because Appellants' ability to file the same cause of action in state court constituted an "avenue[] of available relief to challenge any improper exclusion from the jury." *See id*. This ruling is manifestly incorrect and adopting its standard for abstention contradicts fifty years of precedent with ramifications that extend far beyond the field of civil rights.

1. The District Court erred by contravening an unbroken line of cases from both this Court and the Supreme Court, which establish that abstention is inappropriate unless a plaintiff has an adequate remedy at law in the state court proceedings that he is challenging.

According to the District Court, *O'Shea* holds that a plaintiff has an adequate remedy at law "so long as the relevant state courts are competent to adjudicate federal constitutional claims." ROA.183 (citing *Oglala Sioux Tribe*, 904 F.3d at 613). In other words, if Appellants can raise their constitutional claims in a state court lawsuit, they have an adequate legal remedy and abstention is appropriate. Based on this view of *O'Shea*, the District Court ruled that Appellants have an adequate legal remedy merely because they can bring the same § 1983 lawsuit for equitable relief in Mississippi state courts. *See id.*

The District Court's ruling flouts the well-settled holdings of the Supreme Court and this Court that plaintiffs must have an adequate remedy at law in the state proceedings under challenge by the federal lawsuit. This requirement is not incidental to the abstention inquiry; it is the linchpin of the abstention inquiry and the very concept of abstention requires it. "Abstention is based upon the theory that '[t]he accused should first set up and rely on his defense in the state courts'" if those proceedings can "'afford adequate protection.'" *Middlesex*, 457 U.S.at 435 (quoting *Younger*, 401 U.S. at 45); *see also Steffel*, 415 U.S. at 460 (explaining that abstention rests on the idea "that a pending state proceeding, in all but unusual cases, would

provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights"). If there is no state proceeding that "afford[s plaintiffs] adequate protection" and at which plaintiffs may "first set up and rely [on their] defense in the state courts," *Younger*, 401 U.S. at 45 (citation omitted), there is no justification for abstention by a federal court. In this scenario, a federal court must heed its "virtually unflagging" obligation to hear and decide cases over which it has subject-matter jurisdiction. *Sprint Commc'ns, Inc.*, 571 U.S. at 77.

Indeed, the Supreme Court has directly rejected the District Court's view that the mere availability of a competent state forum supports abstention. As the Court stated in *NOPSI*, "there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *NOPSI*, 491 U.S. at 373.

Consistent with *NOPSI*, decades of undisputed law hold that abstention is inappropriate where plaintiffs lack an adequate opportunity to litigate their federal claims in the underlying state proceeding, even if a state court claim is theoretically available. *See, e.g.*, *Middlesex*, 457 U.S. at 432; *Juidice v. Vail*, 430 U.S. 327, 337 (1977). *O'Shea*—like every other *Younger* abstention case—imposed the same requirement. Thus, before the *O'Shea* Court ruled that abstention was appropriate, it considered whether plaintiffs' "remedies at law" were "inadequa[te]" and ultimately held that plaintiffs possessed adequate legal remedies given the opportunity to raise their claims within their criminal proceedings if prosecuted. 414 U.S. at 502.

Like the Supreme Court, this Court has uniformly imposed the same requirement. *See, e.g.*, *Bice*, 677 F.3d at 718 (plaintiff must have "an adequate opportunity to raise his claim in the ongoing [state] court proceedings"); *DeSpain v. Johnston*, 731 F.2d 1171, 1180 (5th Cir. 1984) (same); *Texas Ass'n of Bus.*, 388 F.3d at 519 (same); *Google, Inc. v. Hood*, 822 F.3d 212, 222–23 (5th Cir. 2016) (same). Yet the District Court simply disregarded this binding precedent and ruled that abstention was appropriate despite the undisputed fact that Plaintiffs did not possess an adequate remedy in the underlying state proceedings. ROA.182-83. This was error.

2. The District Court erred by basing its decision on an Eighth Circuit opinion that does not support the rule of law for which the District Court cited it.

The District Court's ruling disregards this wealth of precedent in favor of *Oglala Sioux Tribe*, an Eighth Circuit case that, in the trial court's description, disavows the need for an adequate legal remedy in the underlying proceedings. *See* ROA.183. But of course, the Eighth Circuit is powerless to overturn decisions from this Court or the United States Supreme Court. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Gahagan v. U.S. Citizenship & Immigration Servs.*, 911 F.3d 298, 302 (5th Cir. 2018), cert. denied sub nom. *Gahagan v. Citizenship & Immigration Servs.*, 140 S. Ct. 449 (2019). Thus, even if *Oglala Sioux Tribe* had ruled that abstention were permissible where plaintiffs had no adequate legal remedy in the

underlying state proceedings, that (legally incorrect) ruling would not support the District Court's decision because this Court and the Supreme Court have held the opposite. *See supra* at 42-43.

In any event, *Oglala Sioux Tribe* did not issue any such ruling and, in fact, refutes the proposition for which the District Court cites it. According to the District Court, *Oglala Sioux Tribe* holds that *O'Shea* abstention is distinct from *Younger* abstention and is not bound by the *Younger* test set forth in *Middlesex*. *See* ROA.182-83. In the District Court's understanding, *O'Shea*—as explained by *Oglala Sioux Tribe*—permits abstention if there are state courts "competent to adjudicate federal constitutional claims," *see* ROA.182-83, while *Younger* and *Middlesex* require that plaintiffs must have relief "available in the ongoing state court proceedings," *see* ROA.183.

Beyond the fact that the District Court fundamentally mischaracterizes the relationship between *O'Shea* and *Middlesex/Younger*, *see supra* section I, its interpretation of *Oglala Sioux Tribe* cannot withstand scrutiny. First, *Oglala Sioux Tribe* does not hold that *O'Shea* abstention is distinct from *Middlesex*/*Younger*. To the contrary, *Oglala Sioux Tribe* recognizes that both *O'Shea* and *Middlesex* are *Younger* abstention cases, and it relies on both to reach its determination that abstention was appropriate under *Younger*. *See Oglala Sioux Tribe*, 904 F.3d at 610-

13 (ruling that "the district court should have abstained under *Younger*" and relying on both *O'Shea* and *Middlesex*).

Second, the Eighth Circuit did not reject the "ongoing state judicial proceeding[s]" requirement from *Middlesex*. It endorsed it and then applied it. Near the start of its legal discussion, the Eighth Circuit cited the "ongoing state court proceeding" requirement from *Middlesex*. *See id.* at 610 (citing *Sprint Commc'ns, Inc.*, 571 U.S. at 81, and *Middlesex Cty. Ethics Comm'n*, 457 U.S. at 432). Then, it applied that standard, analyzing whether plaintiffs had an adequate opportunity to litigate their federal claims within the state court temporary custody proceedings that their federal lawsuit challenged. The court ruled that plaintiffs did have an adequate opportunity to litigate their claims in the state proceedings because they "could raise their federal claims in [those] temporary custody proceedings"; they could appeal unsuccessful challenges in those proceedings and seek review in the state supreme court; and they could seek mandamus relief in the state supreme court. *Id.* at 613.

The Eighth Circuit considered whether the state courts "are competent to adjudicate federal constitutional claims," *see* ROA.183, but only to determine whether the plaintiffs had an adequate opportunity to litigate their federal claims in the challenged proceedings themselves. Here, the District Court took that one sentence out of context and presented it as if it were the standard adopted by the *Oglala Sioux Tribe*. But the Eighth Circuit's decision makes clear that this focus on

whether the state courts were competent to adjudicate federal constitutional claims was simply one component of the court's analysis of whether plaintiffs had an adequate opportunity to litigate their claims in the underlying state court proceedings.

Third, the District Court's construction of *O'Shea* relies on a single sentence from *Oglala Sioux Tribe*, but that sentence is not about *O'Shea* at all. Rather, as the citation following the sentence makes clear, that sentence is discussing *Moore v. Sims*, 442 U.S. 415, 430 (1979). *Moore* is a *Younger* abstention case, but it does not mention *O'Shea*, and it specifically rejects the proposition for which the District Court relies on it. *See id.* at 418-35. The very next sentence in *Moore* after the one cited in *Oglala Sioux Tribe* expressly acknowledges that abstention depends on an adequate remedy in the underlying state proceedings: "[T]he only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims." *Id.* at 430.

Thus, both *Moore* and *Oglala Sioux Tribe* support Appellants' argument and stand for the opposite of the proposition for which the trial court cited them. Because *Oglala Sioux Tribe* was the only case cited in support of the trial court's holding that "the availability requirement [is] satisfied so long as the relevant state courts are competent to adjudicate federal constitutional claims," ROA.18, the District Court

dismissed Appellants' lawsuit on a basis that lacks supporting authority from any court. This Court should reverse.

C. The District Court's interpretation of the third *Younger* requirement creates untenable consequences.

Beyond these doctrinal errors, the District Court's ruling also creates two distinct harms that warrant reversal. First, the ruling upends the delicate balance between state and federal interests embodied in Our Federalism. In *Younger*, the Supreme Court explained that Our Federalism was a "vital consideration" behind the doctrine of abstention. 401 U.S. at 44. The concept of Our Federalism represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments" and "does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts." *Id.*

Abstention strikes a sensitive balance between these legitimate interests by creating a limited and carefully cabined exception to the federal courts' exercise of jurisdiction. In most cases, federal courts "'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.'" *NOPSI*, 491 U.S. at 358 (1989) (quoting *Cohens*, 6 Wheat. at 404). "[O]nly exceptional circumstances ... justify a federal court's refusal to decide a case in deference to the States.'" *Sprint Commc'ns, Inc.*, 571 U.S. at 78 (quoting *NOPSI*, 491 U.S. at 368). The Supreme Court's

abstention cases codify these "exceptional circumstances" and "have carefully defined ... the areas in which 'abstention' is permissible ...." *NOPSI*, 491 U.S. at 359.

Our Federalism limits abstention to these exceptional cases because "Congress has assigned to the federal courts" "the paramount role" "to protect constitutional rights." *Steffel*, 415 U.S. at 473. If federal courts regularly declined to exercise their jurisdiction in favor of the state courts, it would flout Congress's design by elevating state courts over federal courts in the protection of constitutional rights.

That is precisely the effect of the District Court's ruling. The District Court held that federal courts should abstain where state courts are competent to adjudicate constitutional claims. ROA.183. Of course, because "state courts are courts of general jurisdiction," *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 337 (2d Cir. 2006), state courts will always be competent to adjudicate these claims. *See, e.g.*, *Crawford v. Fisher*, 213 So.3d 44, 49 ¶ 20 (Miss. 2016) ("state courts possess concurrent jurisdiction of suits brought pursuant to Section 1983 with their federal counterparts") (*citing Felder v. Casey*, 487 U.S. 131, 139 (1988)). Thus, under the District Court's view, the adequate-remedy-at-law inquiry will <u>always</u> support abstention.

To understand the full implications of this view, it is important to remember that the District Court also believes that lawsuits against state officials will

inherently entail "interference" with state proceedings for abstention purposes. *See* supra at Section II.C. Taken together, these two rulings mean that abstention would be required in nearly every lawsuit against a state official, and there would be no federal forum available for plaintiffs whose constitutional rights were violated by state actors. Abstention would no longer be limited to "exceptional circumstances," *see Sprint Commc'ns, Inc.*, 571 U.S. at 78, and the federal courts would no longer serve their Congressionally-mandated role as the paramount guarantor of constitutional rights. That result would violate "the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *NOPSI*, 491 U.S. at 359.

Adopting the District Court's ruling would also unsettle an area of law that has been well established for decades, with consequences for legal disputes far afield from civil rights cases. Because the District Court's decision dramatically revises two requirements that apply to all *Younger* abstention cases—the interference requirement, *see NOPSI*, 491 U.S. at 372 (interference required by *Younger*), and the adequate remedy requirement *Middlesex*, 457 U.S. at 432 (adequate opportunity to raise constitutional challenge in state proceedings required by *Younger*)—adopting the District Court's abstention ruling will not be limited to civil rights cases; it will apply to all cases in which defense counsel alleges that the federal court

should abstain under *Younger* and its progeny. If this Court adopted the District Court's ruling, uncertainty would stalk countless litigants' decisions over the proper forum in which to sue, and defense counsel could seek dismissal on abstention grounds in countless cases, increasing litigation costs and expending scarce judicial resources.

In short, binding precedent from this Court and the Supreme Court directly forecloses the District Court's ruling, and its adoption would destabilize the law and harm litigants across a broad and diverse swath of cases. This Court should reverse.

IV. Both the Purpose and the Text of § 1 of the Civil Rights Act of 1871 Preclude Abstention Here.

This Court should also reject the District Court's expansive view of abstention because it cuts against both the intent of the 42nd Congress, which enacted § 1983, and the text of the jurisdictional grant that accompanied § 1983.[9] Following the Civil War, the Reconstruction Congresses transformed "the concepts of federalism that had prevailed in the late 18th century." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Section 1983 played a central role in this effort. Originally enacted as § 1 of the Civil Rights Act of 1871, the "very purpose of § 1983 was to interpose the federal courts between the States and the people." *Id.*

[9] "Section 1 of the Civil Rights Act of 1871 is the source of both the jurisdictional grant now codified in 28 U.S.C. § 1343(3) and the remedy now authorized by 42 U.S.C. § 1983." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979).

"To the Reconstruction Congresses, abstention was anathema." Donald H. Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 1983 Duke L.J. 987, 1020 (1983). "Congress specifically and overwhelmingly rejected the concept of abstention" in a forebear of § 1983, *see id.* at 998, and then it reached the same conclusion when debating § 1983, *see id.* at 1017 ("Congress did not intend the federal courts to withhold section 1 remedies if complainants could seek relief in the state courts.").

Congress reflected its opposition to abstention in the text of Section 1, which admitted no exception to its grant of jurisdiction. *See* 42 U.S.C. § 1983, 17 Stat. 13. Section 1 stated "That any person who, under color of any law ... of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall ... be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States." *Id.* (emphasis added).

Judicial abstention raises serious separation of powers concerns because "Congress has the constitutional authority to define the jurisdiction of the lower federal courts," Keene Corp. v. United States, 508 U.S. 200, 207 (1993), and abstention amounts to judicial law-making that changes the terms of Congress's

jurisdictional grants. *See generally* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71 (1984).[10] In so doing, judge-made "abstention conflicts with congressional goals embodied in the seemingly unlimited grants of jurisdiction." *Id*. at 78.

To be sure, the Supreme Court has adopted an abstention doctrine in *Younger* and *O'Shea*, and this Court must fairly apply those Supreme Court decisions. But it also must not extend them to new contexts, which would conflict with the text and purpose of Section 1983.

Here, the Supreme Court's recent cases interpreting the remedy it first created in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), are instructive. *Bivens* created an implied damages action to compensate individuals whose Fourth Amendment rights were violated by federal officers. *Id.* at 399. But subsequent cases "reflect[ed] a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508, n.9 (1990). These cases did not overrule *Bivens*, but they declined to apply it to new

[10] Prof. Redish explained the separation of powers concerns in these terms: "Well accepted principles of separation of powers mandate that an electorally accountable legislature make the basic policy decisions concerning how the nation is to be governed. The authority to make these policy decisions necessarily includes the authority to employ the federal judiciary to enforce the substantive statutory programs adopted by Congress. Absent a finding of unconstitutionality, it is not the judiciary's function to modify or repeal a congressional enforcement network unless Congress has clearly delegated such authority to the judiciary."

contexts.

For example, the Court in *Ziglar* ruled that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity," though *Bivens* itself remains settled law. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (citation omitted). When plaintiffs seek to apply *Bivens* to a new context now, "courts must refrain from creating the remedy" "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong." *Id.* at 1858. This approach is necessary "to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *Id.*

Similarly, to "respect the role of Congress in determining the nature and extent of federal court jurisdiction under Article III," courts should not extend *O'Shea* to new contexts if "there are sound reasons to think that Congress might doubt" the propriety of that extension. *Id.* When Black plaintiffs have brought a federal suit alleging that a state prosecutor has discriminated against them in violation of the Fourteenth Amendment, Congressional intent counsels against abstention—especially because that discrimination deprives them of a basic right of citizenship. Congress enacted Section 1983 "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise … the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe v. Pape*,

365 U.S. 167 (1961), overruled on other grounds by *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). It is inconceivable that the 42nd Congress would permit a federal court to bar the courtroom doors to Black plaintiffs complaining that a state official denied Black citizens the enjoyment of their Fourteenth Amendment rights for a quarter century. This Court should not extend *O'Shea* to the new context presented by this case.

CONCLUSION

This Court should reverse the District Court's order dismissing Plaintiffs' lawsuit.

Dated: February 5, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was electronically filed on February 5, 2021 using the Court's CM/ECF system which will provide notice of electronic filing to all counsel of record. I further certify that to the best of counsel's knowledge, information, and belief, all parties to this appeal are represented by CM/ECF participants.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,873 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

Dated: February 5, 2021

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