COMMENT

ABSTAINING FROM ABSTENTION: WHY YOUNGER ABSTENTION DOES NOT APPLY IN 42 U.S.C § 1983 BAIL LITIGATION

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INTRODUCTION

Advocates of bail reform argue that the cash bail system has morphed into a wealth-based incarceration scheme.¹ Cash bail is meant to ensure that defendants appear in court for their trials.² Judges set an amount of money a defendant must pay to secure their release from pretrial detention, and the money is returned only after the defendant makes all the necessary court appearances.³ Otherwise, it is forfeited to the government.⁴ In many jurisdictions, when a person is arrested, bail is assigned through a “bail schedule” that has nothing to do with individualized circumstances.⁵ Defendants who are unable to pay bail are detained pretrial, many for weeks or months.⁶

Between 1970 and 2015, the pretrial detention population increased 433%.⁷ In 2019, pretrial detainees made up over 22% of the total incarcerated population in the U.S.⁸ Of these pretrial detainees, over 60% were detained

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⁴ See id. (describing what happens when defendants do not attend their necessary court appearances).


⁶ See Onyekwere, supra note 3 (explaining the cash bail technique of pretrial detention); Hunter, supra note 2 (highlighting the problems with cash bail, including the length of time people are detained before their trial).


⁸ This figure was calculated by adding the total prison and total jail populations in 2019 and dividing by the total pretrial detainee population in 2019. See ZHEN ZENG & TODD MINTON, U.S. DEPT OF JUST., BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 2019 1 (2021), https://bjs.ojp.gov/content/pub/pdf/ji19.pdf [https://perma.cc/6459-QDF5] (“About 65% (480,700) of jail inmates were awaiting court action on a current charge, while the remaining 35% (253,700) were serving a sentence or awaiting a sentencing on a conviction.”); E. ANN CARSON, U.S. DEPT OF JUST., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2019 1 (2020), https://bjs.ojp.gov/content/pub/pdf/p19.pdf [perma.cc/65UT-3DHC] (stating that the total prison population at the end of 2019 was 1,430,800).
due to an inability to afford bail. Those held pretrial are more likely to receive prison sentences or plead guilty, and may lose jobs, finances, housing, healthcare, and more. Additionally, the odds of being detained pretrial are twice as high for Latinx defendants than white defendants and 87% higher for black defendants than white defendants. In this way, cash bail criminalizes poor and minority populations, and contributes to cycles of poverty and racial oppression.

The current bail reform movement is built off of the prior two waves of reform that occurred in the 1960s and 1980s. The first wave occurred in the 1960s, promoting consideration of individual circumstances and pretrial factfinding to ensure fairness in bail determinations and that judges were using bail as a means to ensure court appearances rather than to punish. This wave resulted in the federal Bail Reform Act of 1966 that provided, “all persons, regardless of their financial status, shall not needlessly be detained” and set specific factors to determine bail, such as neighborhood of residence, financial, housing, and employment status. Subsequently, the rates of pretrial release in federal jurisdictions increased through the 1970s.

However, societal perceptions of “dangerous” pretrial defendants and the “tough-on-crime” era reversed much of the first wave progress. Many states implemented laws that allowed for consideration of a defendant’s “dangerousness” in bail decisions, rather than simply the likelihood of appearance in court. The Bail Reform Act of 1984 expanded the categories of individuals who could be detained pretrial, and states began adopting

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10 See Onyekwere, supra note 3 (detailing the impact of cash bail and pretrial detention on detainees who cannot pay); ACLU PENNSYLVANIA, supra note 1 (detailing the increased likelihood of negative outcomes from detainment).

11 Smart Justice-Ending Cash Bail, supra note 1.


13 See id. at 723-24 (documenting the first wave of bail reform which aimed to reduce the population in pretrial detention).


15 See Van Brunt & Bowman, supra note 12, at 725 (explaining the effect of the Bail Act of 1966 on rates of release on personal recognizance).

16 See id. at 730-31 (positing that public opinion shifted in the second wave).

17 See id. at 731 (highlighting the changes in bail statutes between the first and second waves). The Supreme Court upheld the legitimacy of considering dangerousness in pretrial release decisions in United States v. Salerno, 481 U.S. 739, 741 (1987).
aggressive policies towards the utilization of pretrial detention under the guise of public safety. After the Act, the likelihood of being held pretrial was 21% higher for persons charged with violent offenses involving firearms and 26% higher for persons charged with drug offenses. The second wave of bail reform was thus deemed unsuccessful by advocates.

Today, we are in the third wave of bail reform. Advocates have been pursuing bail reform through several avenues: storytelling regarding the disproportionate and excessive harms bail imposes on poor people, legislative lobbying, data collection, and litigation in both federal and state courts. On the legislative level, there were over 200 bail reform bills pending across states in 2021. Additionally, advocacy organizations have been assisting state judges in overhauling their bail systems by providing research and data surrounding pretrial release and detention schemes. Even judges themselves have been involved in reform. For example, state judges in New Jersey and California have created committees to study bail in anticipation of future reform, and judges in Colorado, Delaware, and Missouri have individually pushed for bail reform. Finally, litigators have been filing individual and class action 42 U.S.C. § 1983 civil rights claims in federal court.

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18 See Van Brunt & Bowman, supra note 12, at 732 (listing the four options for judges at the bail setting stage, which thereby expanded who could be detained before trial); NAT’L TASK FORCE ON FINES, FEES, & BAIL PRACTICES, NAT’L CTR. FOR STATE CTNS., BAIL REFORM: A PRACTICAL GUIDE BASED ON RESEARCH AND EXPERIENCE 2, https://www.ncsc.org/__data/assets/pdf_file/0023/16808/bail-reform-guide-3-12-19.pdf [https://perma.cc/E3WT-SSCC] (noting the Bail Reform Act of 1984 was followed by similar legislation in almost every state).
20 See Van Brunt & Bowman, supra note 12, at 734 (describing the Supreme Court’s upholding of the Act as a “blow to the progressive movement for bail reform”).
21 See id. at 703 (identifying the present third wave of U.S. bail reform and its aims).
24 See Timothy Schnacke, The Third Generation of Bail Reform, TRENDS IN STATE CTNS. (Nat’l Ctr. For State Cts., Williamsburg, V.A.), 2017, at 8, 10-11 (arguing that the current wave of bail reform has important advantages distinct from previous generations).
25 See id. at 11 (describing judicial assistance in guiding state and local bail reform proposals).
26 There are two other types of bail litigation: individual interlocutory appeals of bail determinations in the state system and individual habeas petitions in state or federal court. However, this comment will only focus on § 1983 claims, where Younger abstention concerns primarily arise.
Recent § 1983 bail cases have resulted in widespread reform. For example, litigation in Harris County, Texas resulted in an injunction requiring hearings to determine the defendants’ ability to pay prior to imposing bail and funding to provide representation to all misdemeanor arrestees at their bail hearings, among other reforms. Additionally, after litigants filed a complaint challenging the money bail system in Chicago's Cook County, the Chief Judge of the Cook County Circuit Court issued a standing order prohibiting judges from setting bail at amounts defendants could not pay. As a result, the Cook County jail has “now reached its lowest daily jail population in recorded history.” And finally, the City of Atlanta ended money bail for nonviolent misdemeanor offenses, citing the threat of litigation stemming from a letter sent by Civil Rights Corps and the Southern Center for Human Rights.

While there have been many notable successes, a major procedural barrier has arisen in almost every recent case: Younger abstention. In a § 1983 action, even though a federal court has subject matter jurisdiction, a court may decline to exercise that jurisdiction, relying on one or more judge-made abstention doctrines. Under an abstention doctrine, judges decline to exercise jurisdiction in cases or controversies which they would otherwise be authorized to adjudicate under Article III and Congress's delegation of

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27 Notably, these recent cases began with the legal organization Equal Justice Under Law in 2014. Since then, organizations like the Civil Rights Corps, ACLU, and Southern Poverty Law Center have been replicating these efforts.


29 STATE OF ILL., CIR. CT. OF COOK CTY., General Order No. 18.8A – Procedures for Bail Hearings and Pretrial Release (Sep. 18, 2017), https://www.cookcountycourt.org/Manage/Division-Orders/View-Division-Order/ArticleId/2362/GENERAL-ORDER-NO-18-8A-Procedures-for-Bail-%20Hearings-and-Pretrial-Release [https://perma.cc/9JPS-EPN4]; Cook County, IL: Bail, CIV. RTS. CORPS https://civilrightscorps.org/case/cook-county-il-bail/ [https://perma.cc/3347-YJTK] [hereinafter Cook County, IL: Bail]. The Civil Rights Corps has challenged wealth-based bail and detention systems in many other counties and cities, including currently pending cases in: Tulsa, Oklahoma; Lafayette Parish, Louisiana; Alamance County, North Carolina; Calhoun County, Georgia; Randolph County, Alabama; Cullman County, Alabama; and Hamblen County, Tennessee. They have successfully won injunctions in: Orleans Parish, Louisiana; Harris County, Texas; and St. Louis, Missouri. They are also challenging state-wide bail systems in: Arizona, Oregon, Nevada, and California. See Challenging the Money Bail System, CIV. RTS. CORPS, https://civilrightscorps.org/our-work [https://perma.cc/GP83-XDEH].

30 Cook County, IL: Bail, supra note 29; see also STATE OF ILL., CIR. CT. OF COOK CTY. OFFICE OF THE CHIEF JUDGE, BAIL REFORM IN COOK COUNTY 36 (May 2019) (detailing the successes of the Cook County bail reform).

31 See Smith, supra note 5, at 2312-13 (noting that the mayor of Atlanta ended money bail in part because of the possibility of litigation).

32 See ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 12.1 at 829 (7th ed. 2016) (explaining the concept of judicial abstention).
power. Younger abstention, specifically, instructs courts to refrain from hearing cases that might interfere with ongoing criminal proceedings.

The forum of litigation can be as outcome-determinative as the underlying merits of the case. When federal courts decline to exercise their jurisdiction to hear these cases, plaintiffs are forced into state courts, where their federal claims are far less likely to be successful. Therefore, the stakes for keeping § 1983 bail litigation in federal courts are high. So, the inquiry for litigants and judges alike is: can federal courts intervene in a state bail system and grant widespread relief?

This comment argues that Younger abstention should not apply in § 1983 civil rights bail litigation where the relief requested is tailored to avoid interference with pending prosecutions and does not foreclose state court discretion. Federal courts apply Younger abstention when an active state prosecution that implicates important state interests, and when the state criminal proceeding provides an adequate means to address the federal constitutional concerns. In instances where plaintiffs are challenging a state bail system, these Younger concerns are not present for several reasons. First, bail hearings are not part of active criminal prosecutions and should not be treated as such. Second, even if a court finds that there is an active prosecution, there is no adequate state remedy available that would be timely or responsive enough to address the specific harms of pretrial detention. Therefore, there is no need to apply Younger abstention in bail litigation where the requested relief does not interfere with a pending prosecution. This means federal courts can properly hear § 1983 bail litigation and grant widespread relief regarding bail systems.

33 See Joshua G. Urquhart, Younger Abstention and Its Aftermath: An Empirical Perspective, 12 Nev. L. J. 1, 4 (2011) (“Abstention doctrines are judge-created tests employed by federal courts that allow them to decline jurisdiction in cases or controversies where they would otherwise be authorized by Article III to exercise it.”).
34 See id. at 6-8 (explaining the Younger doctrine).
35 See Barry Friedman, A Revisionist Theory of Abstention, 88 Mich. L. Rev. 530, 530 (1989) (“There is a widespread perception that the forum of litigation may be as outcome-determinative as the underlying merits.”).
36 From 2004 to 2006, federal courts abstained from hearing a federal claim in favor of a state court pursuant to Younger in 16 cases. Only in one was the plaintiff successful in state court. However, in the 31 cases where federal courts refused to abstain under Younger, claimants won in federal court 38.7% of the time. Furthermore, between 1995 and 2006, plaintiffs with federal claims succeeded in 15.1% of cases before state courts and 43.6% of cases before federal courts. Urquhart, supra note 33, at 3.
37 See Stack v. Boyle, 342 U.S. 1, 12 (1951) (J. Jackson, in a separate opinion) (“But an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it can be reviewed before sentence, it never can be reviewed at all.”); see also Atkins v. Michigan, 644 F.2d 543, 549 (6th Cir. 1981) (“The issue of whether the right to bail has been denied is collateral to and independent of the merits of the case pending against the detainee.”).
Part I of this comment examines the *Younger* abstention doctrine and its exceptions. Part II begins to assess *Younger* abstention as applied to bail litigation by reconciling *O’Shea v. Littleton* and *Gerstein v. Pugh*, and explaining that their different outcomes stem from the relief requested by the plaintiffs. This examination reveals that narrowly tailored bail reform claims should properly be heard in federal courts under *Gerstein* and without conflict from *O’Shea*. Part III argues that *Younger* abstention does not apply in § 1983 bail litigation where the requested relief is narrowly tailored because bail litigation (1) does not implicate ongoing criminal procedures and (2) there is no adequate state relief available. Part IV then empirically analyzes all § 1983 bail litigation since 2012, providing a resource for litigants bringing these claims. And, finally, Part V argues that philosophical and equitable arguments against *Younger* abstention in bail litigation outweigh those in favor of its application. Importantly, this comment does not argue that a *Younger* abstention exception applies, but that the doctrine cannot be applied at all. This scholarship adds to the literature by surveying the application of *Younger* in all § 1983 bail litigation cases in the third wave of bail reform, and should be a tool for advocates to strategize challenging bail systems in the future.

I. THE DOCTRINAL BACKGROUND OF YOUNGER ABSTENTION

The *Younger* abstention doctrine holds that a federal judge should decline to exercise jurisdiction where there is (1) an ongoing state judicial proceeding (2) that implicates important state interests, and (3) offers adequate opportunity to raise constitutional challenges. In *Younger*, defendant Harris was indicted in California state court and charged under the state’s Criminal Syndicalism Act. He then filed a complaint in federal district court, requesting the court enjoin the prosecution against him because it, and the Act that he was charged under, violated his First and Fourteenth Amendment rights. The district court restrained the District Attorney from further

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40 If *Younger* abstention did apply, it would be almost impossible to apply an exception. *But see* Smith, *supra* note 5 at 2301-02 (proposing that the third *Younger* abstention exception—inadequate opportunity to be heard—should apply to bail litigation).
41 See Middlesex Cnty. Ethics Comm’n v. Garden State Bar Ass’n, 457 U.S. 423, 432 (1982) (summarizing the *Younger* doctrine as: “first, do [the proceedings] 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.”).
42 *Younger*, 401 U.S. at 38.
43 *Id.* at 39.
prosecution and voided the Act. However, the Supreme Court reversed, requiring the district court abstain so the state court could try the case.

First, the Court outlined the history of abstention doctrine and its importance. Since the Anti-Injunction Act of 1793, Congress has manifested a desire to prevent federal courts from interfering in the ongoing proceedings of state courts. The doctrine rests on the historical notions of equity and comity. Equity, derived from the English judicial system, counsels that courts at equity should not act when the moving party has an adequate remedy at law. And, comity, also referred to as “Our Federalism,” pertains to a proper respect for state functions and sensitivity to the legitimate concerns of state governments. The Younger Court emphasized that these principles have animated the U.S. system of government since its founding. Therefore, federal court abstention from interfering in ongoing state proceedings is important to maintaining the integrity of our system and Our Federalism.

In Harris’s case, the Court reasoned that the injury Harris faced—risk of conviction and chilled speech under the First Amendment—was “that incidental to every criminal proceeding.” Harris had an adequate opportunity to raise his constitutional claims in state court, the prosecution was not acting in bad faith, and there were no extraordinary circumstances warranting federal intervention. Therefore, the court reversed the injunction against the prosecution and ordered the district court to abstain.

The Younger court went on to outline three exceptions for when a federal court must act to enjoin a state court proceeding: when (1) the prosecution is acting in bad faith, (2) the statute is “patently unconstitutional,” or (3) “any

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44 Id. at 40.
45 Id. at 41.
47 Younger, 401 U.S. at 43. Today, 28 U.S.C. § 2283 (2006), the modern iteration of the Act, reaffirms this proposition: “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”
48 See Younger, 401 U.S. at 43-44 (explaining the origins of the concept of equity).
49 See id. at 44 (explaining the meaning of comity in relation to federalism).
50 See id. at 44-45 ("It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.").
51 See id. ("What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.").
52 Id. at 49.
53 See Younger, 401 U.S. at 49 (describing why abstention was proper given the facts of the case).
54 See id. at 54 ("The judgment of the District Court is reversed.").
other unusual circumstances that would call for equitable relief” exist. These exceptions stem from Ex parte Young, which held that a defendant about to be prosecuted in a state court can enjoin the proceedings if he can show that he otherwise would suffer irreparable harm. This is because federal courts must be able to protect constitutional rights where state courts may fail to do so, but also should not needlessly interfere with legitimate activities of state courts. In adhering to the considerations in Ex parte Young, an exception to the Younger doctrine may not be granted “except under extraordinary circumstances where the danger of irreparable loss is both great and immediate.”

However, subsequent case law has shown that once Younger abstention applies, it is extremely rare that a court will invoke an exception. The bad faith exception has been described as a “virtually empty universe.” The last time the Court employed this exception was prior to Younger in Dombrowski v. Pfister, in which the Court allowed a Louisiana district court to intervene in state proceedings due to the bad faith of the prosecution. Though the Younger court referenced Dombrowski, the Court has never sustained this exception. The Court has also never applied the patently unconstitutional exemption since defining it in Younger. In fact, seven years after Younger, in Trainor v. Hernandez, the Court essentially eviscerated the exception. While

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55 See id. at 53-54 (describing the instances when a federal court must act to enjoin a state court proceeding); see also Beth Shankle Anderson, “Our Federalism” The Younger Abstention Doctrine and Its Companions, 81 FLA. B. J. 9, 10 (2007) (enumerating and discussing these three exceptions).
56 See Younger, 401 U.S. at 43 (citing Ex parte Young, 209 U.S. 123, 152 (1908)) (explaining the origin of these exceptions, as well as the public policy considerations applicable thereto).
57 See id. at 45 (noting that federal courts should only interfere when necessary).
58 Id.
60 C. Keith Wingate, The Bad Faith-Harassment Exception to the Younger Doctrine: Exploring the Empty Universe, 5 REV. LITIG. 123, 124 (1986); see also CHEMERINSKY, supra note 32, § 13.5, at 907 (noting that there have been no instances in which the Supreme Court has applied this exception).
61 380 U.S. 479 (1965).
62 See Younger, 401 U.S. at 47-49 (explaining that the irreparable injury of the bad faith prosecutions in Dombrowski justified intervention in the state proceedings).
63 See CHEMERINSKY, supra note 32, § 13.5, at 907 (highlighting that there are no instances in which the court has applied the bad faith exception to state court action); see, e.g., Hicks v. Miranda, 422 U.S. 332, 350-51 (1975) (reversing a California court’s finding that federal intervention was acceptable due to a “pattern of seizure” because the plaintiffs failed to show that faulty warrants were either knowingly relied on or knowingly issued).
64 See CHEMERINSKY, supra note 32, § 13.5, at 909 (explaining that there are no cases since Younger where the Court applied the patently unconstitutional exception to justify federal intervention in pending state proceedings).
65 See 431 U.S. 434, 446-47 (1977) (holding that recent case law had made the patently unconstitutional exception from Younger unwarranted and inapplicable without extraordinary circumstances making the law unquestionably violative).
the Court found the statute at issue in the case to be patently unconstitutional, it found that the statute was not violative in “every clause, sentence and paragraph,” and so the exception did not apply.66 This standard is so searching that virtually no court has held a statute to be “patently unconstitutional” since.67

Only the third Younger abstention exception has ever been applied, which exempts “any other unusual circumstances that would call for equitable relief.”68 This exception has been interpreted to include due process concerns of state court bias and the lack of an adequate remedy in state court.69 However, even this last exception is invoked rarely.70 Gibson v. Berryhill, decided two years after Younger, is one of the few instances in which the Court permitted federal intervention on account of state bias.71 In Gibson, a board of optometrists was deemed incapable of fairly adjudicating a particular suit because every member of the board had a financial stake in its outcome.72 However, when the concern of bias is directed at the state judiciary, rather than an independent body as in Gibson, “the Court has not always been so generous in its application of the exception.”73

Overall, once a court invokes Younger abstention, the chances of a case falling into one of the three articulated exceptions is extremely rare. It is safe to assume, as the cases discussed infra reveal, that if Younger abstention were applied in bail litigation, courts would likely not apply an exception. In fact, in no case where a court has applied Younger abstention to § 1983 claims for bail reform has the court then determined that an exception applied.74 Thus, these exceptions are not a viable path forward for bail advocates seeking to bring claims under § 1983. Regardless, this Comment argues that Younger abstention does not apply to § 1983 bail litigation and so these exceptions are not of concern to this argument.

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66 Id. at 447 (quoting Younger, 401 U.S. at 53-54).
67 See Stagner, supra note 59, at 161 (“[The other] circuits also appear content to let the exception rest in peace.”).
68 Younger, 401 U.S. at 54.
69 See Stagner, supra note 59, at 164-65 (explaining how the Court has viewed the third Younger exception).
70 See Anderson, supra note 55, at 10-12 (nothing that the Court has used the third exception more than the other two, yet the Court has generally restricted the use of the third exception).
71 See 411 U.S. 564, 578 (1973) (holding federal intervention is appropriate if state tribunals are too biased to be trusted on a certain issue).
72 Id. at 578-79.
73 Stagner, supra note 59, at 167.
74 This was determined by conducting a search in Westlaw of the “citing references” to Younger for “bail” and “1983”, and then examining the resulting cases. This is current as of October 16, 2022.
II. RECONCILING GERRYSTEIN V. PUGH AND O’SHEA V. LITTLETON

Two lines of cases have been instrumental to the success and failure of § 1983 bail litigation. O’Shea v. Littleton, decided three years after Younger, “continues to cast a long shadow” on civil rights cases seeking criminal justice reform.75 On the other hand, Gerstein v. Pugh has been the basis for most successful bail reform cases.76 Though often cited as representing opposing understandings of Younger,77 this Section argues that the cases can be reconciled through examining the relief requested by the plaintiffs in each case. While in O’Shea the plaintiffs requested a blanket reform of many criminal procedures and continuous monitoring by the district court, the plaintiffs in Gerstein requested narrowly tailored relief directed only at pretrial procedures and without continuous monitoring. This Section therefore contends that together Gerstein and O’Shea stand for the proposition that Younger abstention is inapplicable to bail litigation where the relief requested does not interfere with the actual prosecution or state court discretion to set its own specific procedures. The cases also explain that bail litigation does not pose the Younger abstention concerns of (1) interference in a pending prosecution or (2) exhausting adequate opportunities to be heard in state court.

In O’Shea, the Court determined that Younger abstention was appropriate.78 The plaintiffs, nineteen residents of Cairo, Illinois, brought a civil rights class action on behalf of a class of those who had been subject to discriminatory enforcement by the county criminal justice system on account of their race or creed as well as those who were too poor to afford bail, counsel, or jury trials in the county, alleging patterns and practices in the County criminal justice system that intentionally deprived black residents of their constitutional rights.79 The Court held that the plaintiffs lacked standing—their injury was only abstract, and they could not show that they would be prosecuted in the future.80 However, even if standing was found, the Court found problematic the relief requested—broad injunctive relief against

76 For example, the three most recent successful bail reform cases, discussed in Part III infra, have all extensively relied on Gerstein. See Schultz v. Alabama, 42 F.4th 1298, 1312-13 (2022); Walker v. City of Calhoun, Ga., 901 F.3d 1245, 1254-55 (2018); ODonnell v. Harris Cnty., 892 F.3d 147, 156 (2018).
79 See id. at 490-92 (explaining that the plaintiffs brought a class action suit alleging deprivation of their First, Sixth, Eighth, Thirteenth, and Fourteenth Amendment rights by the county attorneys, police, and judges).
80 See id. at 493-97 (finding no case or controversy existed).
setting bond without regard to individual cases,\textsuperscript{81} setting higher bond for class members than white persons, and other sentencing and jury-fee practices.\textsuperscript{82} The Court took issue with the general nature of the harm alleged, stating that the requested injunction would be “nothing less than an ongoing federal audit of state criminal proceedings” of the sort that \textit{Younger} sought to prevent.\textsuperscript{83} Furthermore, the Court firmly rejected the appellate court’s conclusion that the relief requested might necessitate a periodic reporting system, stating that such a system would be an additional form of impermissible federal monitoring of state courts.\textsuperscript{84}

On the other hand, in \textit{Gerstein v. Pugh}, the Court held \textit{Younger} abstention to be inappropriate.\textsuperscript{85} The plaintiffs were Florida inmates who had been arrested, detained, and denied bail.\textsuperscript{86} They brought a class action challenging their pretrial detention without a probable cause hearing under the Fourth and Fourteenth Amendments.\textsuperscript{87} The district court subsequently granted broad injunctive relief.\textsuperscript{88} Affirming the district court’s reasoning, the Supreme Court acknowledged that the pending state proceedings necessarily would occur too late to address the alleged constitutional violation resulting from pretrial detention, and so the claimants had no opportunity to pursue their claims at the state level.\textsuperscript{89} The injunction requested—a post-arrest judicial probable cause hearing tailored to their pretrial detention status—did not interfere with the state prosecutions but rather concerned the legality of pretrial detention determinations without a hearing.\textsuperscript{90} Additionally, the requested relief was procedural and so would not impact the disposition of the case.\textsuperscript{91} However, the Court reversed the district court’s order in part

\textsuperscript{81} Defendants can use a third party bondsman or bond company to post their bail in exchange for a fee as a guarantee they will appear at all court dates. The collateral is the amount the defendant must pay the third party. \textit{Bail Information for Consumers}, DEPT OF FIN. SERVS., N.Y. STATE, \url{https://www.dfs.ny.gov/consumers/bail} \cite{https://perma.cc/8ALC-5K7M} (last visited Oct. 31, 2022).

\textsuperscript{82} See \textit{O’Shea}, 414 U.S. at 495 (summarizing the relief requested).

\textsuperscript{83} \textit{Id.} at 500.

\textsuperscript{84} \textit{See id. at 501 (“[I]t would require for its enforcement [] continuous supervision by the federal court.”).}

\textsuperscript{85} The \textit{Gerstein} Court addressed \textit{Younger} specifically in a footnote, stating that the “order to hold preliminary hearings could not prejudice the conduct of the trial on the merits.” \textit{Gerstein v. Pugh}, 420 U.S. 103, 108 n.9.

\textsuperscript{86} \textit{Id.} at 105.

\textsuperscript{87} \textit{Id.} at 106-07.

\textsuperscript{88} See \textit{Pugh v. Rainwater}, 322 F. Supp. 1107, 1115-16 (5th Cir. 1971) (describing the ordered procedures).

\textsuperscript{89} See \textit{Gerstein}, 420 U.S. at 110, n.11 (“[It is] unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted.”).

\textsuperscript{90} \textit{See id.} at 108, n.9. (“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.”)

\textsuperscript{91} \textit{See id.} at 124-25 (demanding states adopt “fair and reliable” procedures).
because it was overbroad.⁹² It held that the Fourth Amendment only necessitated an informal procedure to determine probable cause, not “the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses.”⁹³ The Court thus directed the court of appeals to revise the order so that the particular details of the pretrial procedure would be left to the states.⁹⁴

At first glance, the difference in outcomes of O'Shea and Gerstein seems stark: O'Shea applied Younger abstention to pretrial detention reform, while Gerstein rejected Younger abstention for pretrial detention reform. However, the difference lies in the overall relief requested. While the plaintiffs in Gerstein specifically requested “a timely judicial determination of probable cause as a prerequisite to detention,”⁹⁵ the plaintiffs in O'Shea requested a blanket injunction of many different criminal procedural practices.⁹⁶

Examining this proposition more closely, in O'Shea, the plaintiffs requested general relief from “illegal bond-setting, sentencing, and jury-fee practices,” a request the Court found to be in “the most general terms.”⁹⁷ Additionally, the plaintiffs’ complaint did not describe either the harmful activities or the nature of harm in depth.⁹⁸ The Court described the relief sought as “aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials.”⁹⁹ Thus, the Court not only abstained from intervening in pretrial practices but also from the totality of the relief sought by the plaintiffs, which included procedures during trial.¹⁰⁰ Throughout the Court’s discussion of Younger abstention, it did not once specifically address pretrial bond-setting;¹⁰¹ it only referred to the potential interruption of “state proceedings” or “future state criminal trials.”¹⁰² Furthermore, the Court was particularly concerned that the entirety

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⁹² See id. at 126 (“[W]e do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court’s decree.”).

⁹³ Id. at 119.

⁹⁴ See id. at 124-25 (“There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State’s pretrial procedure viewed as a whole.”).

⁹⁵ Id. at 126.


⁹⁷ Id. at 495.

⁹⁸ See id. at 497 (“The nature of respondents’ activities is not described- in detail, and no specific threats are alleged to have been made against them.”).

⁹⁹ See id. at 500 (contextualizing the forward-looking nature of the plaintiff’s complaint).

¹⁰⁰ See id. at 491-92 (explaining the challenged practices that occurred prior to and during trials).

¹⁰¹ See id. at 499-504 (reviewing whether to apply Younger abstention in the case).

¹⁰² See id. at 500-01 (examining the potential impact of plaintiffs’ sought relief).
of the requested relief would require continuous monitoring of state courts by federal courts.103

Alternatively, in Gerstein, the Court, in declining to apply Younger abstention, instructed the court of appeals to amend the district court’s injunction requiring specific practices during the pretrial hearing so that it was narrowly tailored to address the specific constitutional harm alleged.104 The Court emphasized that “[t]here is no single preferred pretrial procedure”; all the Fourth Amendment requires is a “fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty” be made before or promptly after arrest.105 According to the Gerstein court, comity concerns restrict a federal court’s ability to outline specific procedures for state courts to follow.106 State courts must be able to maintain discretion.107 The Court in Gerstein therefore went through the same process of evaluating federalism concerns as it did in O’Shea, but instead of declining to intervene, ensured that the injunction was narrowed to avoid improperly intruding on a state’s ability to set its own pretrial procedures.

Additionally, a central concern in Gerstein was the lack of an adequate opportunity to be heard in state court for those waiting for an extended period in pretrial detention before challenging their detention.108 O’Shea did not address this concern because the plaintiffs there were asking for widespread relief from multiple different stages of the criminal process.109 Thus, there is no tension between Gerstein and O’Shea on this point.

Therefore, O’Shea and Gerstein are not at odds. Gerstein refers specifically to pretrial detention, when there is no ongoing criminal procedure, whereas O’Shea addresses requests for widespread criminal procedural reform that implicate monitoring future criminal trials. In fact, both cases yield the same takeaways and considerations for bail litigation—that bail litigation does not pose the Younger abstention concerns of (1) interference in a pending prosecution or (2) exhausting adequate opportunities to be heard in state court. And further, they reveal that Younger abstention is inapplicable where

103 See id. at 501 (rejecting injunctive relief that would require day-to-day supervision adverse to the principles of comity).
104 See Gerstein v. Pugh, 420 U.S. 103, 108 n.9., 126 (1975) (affirming the district court’s conclusion that Younger does not bar relief and remanding to the court of appeals to amend the judgment).
105 Id. at 123, 125.
106 See id. at 123 (“[W]e recognize the desirability of flexibility and experimentation by the States.”).
107 See id. (discussing the importance of state courts’ ability to flexibly adapt to their respective procedures).
108 See id. at 110, n.11 (explaining that pretrial detention is by nature temporary and so it is unlikely an individual could exhaust state avenues before being convicted or released).
109 See O’Shea v. Littleton, 444 U.S. 488, at 491-92 (1975) (describing three stages of criminal proceedings at which the plaintiffs alleged their rights were violated).
the relief requested does not interfere with the actual prosecution or state court discretion to set its own specific procedures. These considerations provide guidance for evaluating all future § 1983 bail litigation.\textsuperscript{110}

III. YOUNGER ABSTENTION IS INAPPLICABLE IN § 1983 BAIL LITIGATION WHERE THE REQUESTED RELIEF IS NARROWLY TAILORED

Together, Younger, O'Shea, and Gerstein stand for the proposition that Younger abstention is inapplicable where (1) there is no pending criminal prosecution or (2) there is no adequate state remedy available to address the alleged harms, and (3) the relief requested does not interfere with the actual prosecution or state court discretion to set its own specific procedures. This Part examines key § 1983 bail cases to argue that Younger abstention is inapplicable in bail litigation where the relief is narrowly tailored because the litigation targets pretrial procedures and not pending criminal prosecutions, and there is no adequate state remedy available that could address the irreparable harms stemming from pretrial detention. Therefore, while only one of the first two Younger-O'Shea-Gerstein abstention prongs must be met to avoid Younger abstention, both are necessarily met in bail litigation.

\textsuperscript{110} Importantly, many courts read O'Shea to stand for a doctrine separate from Younger that requires federal courts to abstain where federal supervision of state court systems might exist. Thus, while many courts include an analysis of federal court monitoring of state court systems as part of a Younger abstention analysis, other courts consider O'Shea abstention to be a separate evaluation. For example, the Second Circuit stated that O'Shea abstention should apply to all criminal matters as well as certain civil contexts that involve the operations of state courts. See Fishman v. Office of Court Admin. N.Y. State Courts, No. 20-1300, 2021 WL 4434698, at *2 (2d Cir. Sept. 28, 2021) (applying O'Shea abstention to a civil ADA accommodations dispute against a state court system). Therefore, it held that the federal courts must abstain from enjoining internal state court judicial assignment procedures, mandating the court system to adopt certain procedures in its guardianship proceedings, and providing new bail hearing procedures that fix the time of, nature of, and burden of proof in evidentiary hearings. See Kaufman v. Kaye, 466 F.3d 82, 86 (2d Cir. 2006) (discussing judicial assignment procedures); Disability Rts. N.Y. v. New York, 916 F.3d 129, 136 (2d Cir. 2019) (discussing guardianship proceedings); Wallace v. Kern, 520 F.3d 400, 403 (2d Cir. 1975) (discussing bail hearing procedures). Such relief, would "effect a continuing, impermissible 'audit'... which would offend the principles of comity and federalism." Fishman v. Off. of Ct. Admin. N.Y. State Cts., No. 18-CV-282, 2020 WL 1082560, at *11 (S.D.N.Y. Mar. 5, 2020) (quoting Disability Rts. N.Y. v. New York, 916 F.3d 129, 136 (2d Cir. 2019)). See also, Suggs v. Brannon, 804 F.2d 274 (4th Cir. 1986) (describing O'Shea and its warning that federal courts would have to continuously supervise state courts); Bauer v. Texas, 341 F.3d 352 (5th Cir. 2003) (further emphasizing the danger of federal court monitoring of state courts); Cohn v. Bracey, 28 F.3d 1213, 1214 (6th Cir. 1994) (denying relief to accommodate principles of comity and federalism); Hoover v. Wagner, 47 F.3d 845, 851 (7th Cir. 1995) (relying on O'Shea to reject relief against the "unseemliness" that would arise should state judges be subject to review for criminal contempt in federal court); Ogilala Sioux Tribe v. Flemin, 904 F.3d 603, 612 (8th Cir. 2018) (abstaining to avoid meddling in the state court system); Hall v. Valeska, 599 Fed. App'x 834, 836 (11th Cir. 2012) (warning of the "extremely intrusive" nature of intervention which would arise were courts to reject O'Shea).
Additionally, prong three is a controllable element of a plaintiff’s request for relief.

In this Part, Sections A and B argue that judges should recognize there are no ongoing prosecutions and no adequate opportunities to be heard in state court for § 1983 bail litigation. Section C explains how litigants can narrowly tailor their requested relief to preserve some state court discretion and thus avoid Younger abstention. These factors are vital to articulate and understand when bringing a § 1983 bail case.

A. Bail Litigation Does Not Implicate Pending Criminal Prosecutions

Younger, O’Shea, and Gerstein all stress the importance of the lack of a pending criminal prosecution for rejecting abstention. The proposition seems straightforward: when litigation challenges bail procedures, it does not interfere with ongoing criminal prosecutions.111 Yet not all courts follow this proposition.112 Moreover, some courts erroneously claim that Younger abstention must apply where there has been a determination of probable cause by a judicial officer.113 This Section argues that bail litigation does not implicate pending criminal prosecutions regardless of whether there has been a probable cause determination.

For example, the Eleventh Circuit in Walker v. City of Calhoun properly assessed bail procedures as pretrial, without referencing probable cause determinations.114 The court declined to apply Younger abstention in a class action brought by indigent arrestees to challenge a bail system under which arrestees who could afford bail were immediately released and those who

111 See, e.g., Schulz v. Gentry, 42 F.4th 1298, 1312 (11th Cir. 2022) (“Younger does not apply here because Hester is not asking us to enjoin any prosecution. He merely seeks a faster bail determination, which does not require enjoining or even interfering with any ongoing or imminent state prosecution.”).


113 See Moore v. Sims, 442 U.S. 415, 431 (1979) (criticizing the lower court’s decision not to apply Younger abstention because the plaintiffs were denied a judicial determination of probable cause before their children were removed from their custody); see also Stewart v. Abraham, 275 F.3d 220, 225–26 (3d Cir. 2001) (citing Moore for the same proposition).

114 See 901 F.3d 1245, 1254 (11th Cir. 2018) (explaining that the injunction would not interfere in ongoing prosecutions).
could not pay were held until a bail hearing took place. The district court injunction prescribed an affidavit-based process for making bail determinations, requiring officials to evaluate the affidavit within twenty-four hours of arrest. The court found the injunction did not violate Younger because it did not seek to enjoin any ongoing prosecution or involve “intrusive federal court interference with State prosecutions generally.” Rather, it “merely [sought] prompt bail determinations.” Notably, the potential existence of probable cause determinations for certain defendants did not factor into the court’s reasoning. The court simply referred to bail proceedings as “pretrial.” Therefore, the court did not hinge its analysis of whether Younger abstention was appropriate on whether there had been a probable cause determination or not.

On the other hand, in Stewart v. Abraham, the Third Circuit upheld the district court’s rejection of Younger abstention based in part of the lack of probable cause determinations. Litigants in Stewart challenged the Philadelphia District Attorney’s Office’s “rearrest policy,” under which the District Attorney could reinitiate criminal charges that had been dismissed at the preliminary hearing by rearresting the individual. The individual would then be subject to pretrial detention for a second time while awaiting a new preliminary arraignment. Finding for the plaintiffs, the district court enjoined the prosecution from this rearrest policy. The Third Circuit upheld the district court’s intervention, and thus rejection of Younger abstention, because the injunction was “not aimed at state prosecutions, but at the legality of the re-arrest policy and the pretrial detention” as well as

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115 See id. at 1252, 1254 (discussing the policy for releasing defendants under the challenged bail schedule and explaining that Younger abstention does not apply to the plaintiff’s request for prompt bail determinations).

116 See id. at 1253 (detailing the district court’s order granting preliminary injunctive relief).

117 Id. at 1254.

118 Id.

119 Id.

120 Id. at 1255. However, the court ultimately held the district court had abused its discretion in granting the injunction on grounds unrelated to Younger abstention. See id. at 1268-69 (concluding that the district court’s command that the City adopt an affidavit-based process, rather than allowing the City to use judicial hearings with court-appointed counsel, was an abuse of discretion).

121 See 275 F.3d 220, 225-26 (3d Cir. 2001) (concluding that Gerstein controls the resolution of the abstention issue and upholding the district court’s exercise of jurisdiction).

122 Id. at 224.

123 See id. (explaining that pursuant to Pennsylvania law, the District Attorney can reinstate criminal charges, rearrest the subject, and hold the person “to await a new preliminary arraignment within 48 hours”).

124 See id. ("[The prosecution is enjoined from] ordering the re-arrest and detention, without judicial authorization, of any persons on any charge which has been dismissed by a Philadelphia Municipal Court judge at a preliminary hearing because of the failure of the Commonwealth . . . to establish probable cause or a prima facie case.")
proceedings prior to a determination of probable cause.\textsuperscript{125} Therefore, while the court properly declined to abstain, it improperly based its decision in part on the lack of probable cause determinations.

Therefore, one consideration in \textit{Stewart}, as opposed to \textit{Walker}, was the fact that there was not yet a judicial determination of probable cause for the defendants. \textit{Stewart} stated that: “[\textit{Gerstein}] involved a challenge to pretrial restraint on the basis of prosecutor’s information alone, without the benefit of a determination of probable cause by a judicial officer.”\textsuperscript{126} Yet, \textit{Walker} did not even mention probable cause determinations when explaining why \textit{Younger} abstention was inappropriate.\textsuperscript{127} The \textit{Walker} court reasoning should prevail because the only relevant consideration for analyzing \textit{Younger} abstention on this prong is whether the proceedings challenged are pretrial, and not whether there is a judicial determination of probable cause.

This is the case because the lack of judicial determinations of probable cause in \textit{Gerstein} was only one minor aspect of why the Court held \textit{Younger} abstention inapplicable.\textsuperscript{128} And so, \textit{Gerstein} does not preclude the conclusion that pretrial procedures are not part of an active prosecution regardless of whether there is a determination of probable cause. Notably, \textit{Stewart} also uses the lack of a judicial determination of probable cause as simply an additional consideration to strengthen the conclusion that \textit{Younger} abstention should be rejected. In short, probable cause was not outcome-determinative.

The takeaway from this analysis is that \textit{Gerstein}, and therefore \textit{Younger}, do not preclude judicial consideration of claims that target pretrial bail procedures, even if there has been a judicial determination of probable cause, as such procedures are not pending criminal prosecutions. Judges should therefore not treat §1983 bail litigation as targeting ongoing criminal procedures.

B. Bail Litigants Do Not Have an Adequate Opportunity to be Heard in State Court

Regardless of how courts classify pretrial bail proceedings, and regardless of whether a judicial officer has made a probable cause determination yet, \textit{Younger} abstention cannot apply in §1983 bail litigation because state criminal proceedings never provide an adequate opportunity to be heard for pretrial detainees challenging bail proceedings.

As the Court stated in \textit{Moore v. Sims}, “the only pertinent inquiry [in considering \textit{Younger} abstention] is whether the state proceedings afford an

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\item \textsuperscript{125} \textit{Id.} at 225-26. However, the court reversed and remanded for other reasons. \textit{Id.}
\item \textsuperscript{126} \textit{Id.} at 226 (quoting \textit{Moore v. Sims}, 442 U.S. 415, 431 (1979)).
\item \textsuperscript{127} \textit{See generally} \textit{Walker v. City of Calhoun}, 901 F.3d. 1245 (11th Cir. 2018)
\item \textsuperscript{128} \textit{See supra}, Part II, for an analysis of the \textit{Gerstein} court reasoning.
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adequate opportunity to raise the constitutional claims.” 129 The Court in Moore then went on to cite Juidice v. Vail, 130 for the proposition that “the teaching of Gerstein was that the federal plaintiff must have an opportunity to press his claim in the state courts.” 131 As discussed supra, the plaintiffs in Gerstein did not have adequate relief at the state level because the state proceedings would necessarily occur too late to address the alleged harm resulting from pretrial detention. The harms that occur due to pretrial bail and detention—loss of income and housing, and detention itself—cannot be adequately addressed at any post-detention proceeding because the harms will have already actualized. Due in large part to a system of release based on ability to pay, pretrial detainees must often wait for an extended period of time in pretrial detention before challenging it. Thus, in any litigation challenging pretrial conditions or proceedings, such as bail, state proceedings are an inadequate means of relief.

Courts, however, have been inconsistent in acknowledging the principle that adequate relief from bail is not available in state court. Some courts follow Gerstein in practically considering whether plaintiffs truly will be able to address the harms of pretrial detention and proceedings through state court proceedings. For example, in ODonnell v. Harris County, the Fifth Circuit rejected the County’s argument that Younger abstention precluded review of the plaintiffs’ claims that the County’s bail system for indigent misdemeanor arrestees was unconstitutional. 132 The court held that the relief sought—specifically the improvement of pretrial procedures and practices via “nondiscretionary procedural safeguard[s]”—could not be “properly reviewed by criminal proceedings in state court.” 133 Citing Gerstein, the court noted that the injunction did not intervene in any state prosecutions; it only addressed the legality of pretrial detention procedures. 134 The court also distinguished the case from O’Shea in that the relief did not involve case-by-case “federal intrusion into pre-trial decisions.” 135 The court vacated and remanded the injunction, instructing the district court to tailor the order to

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129 442 U.S. at 430.  
131 442 U.S. at 432.  
132 See 892 F.3d 147, 152, 156 (5th Cir. 2018) (holding that Younger abstention precludes review of ODonnell’s claims because improvement of pretrial procedures and practice “is not properly reviewed by criminal proceedings in the state”). Notably, the Fifth Circuit in Daves v. Dallas County, 22 F.4th 522, 548 (2022) stated that after remand it would “take a fresh look at Younger” and “re-evaluate [its] own precedent” after remand, so ODonnell may not be good law in the foreseeable future.  
133 Id. at 156.  
134 See id. (“The injunction was not directed at the state prosecutions as such, but only at the legality of the pretrial detention.”).  
135 Id. at 156-57.
narrowly address implementing “constitutionally-necessary procedures to engage in a case-by-case evaluation of a given arrestee’s circumstances.”

Thus a central concern in *ODonnell* was the lack of availability of relief in state court.

Similarly, in *Dixon v. City of St. Louis*, the court rejected *Younger* abstention under *Gerstein* because the plaintiffs would otherwise be unable to challenge the constitutionality of their bail hearings at any other stage in their criminal cases. The plaintiffs had been detained pretrial because they were unable to afford bail and challenged the city practice of setting bail without an individualized determination. Despite the availability of a mandamus proceeding in state court, the court held that state court did not provide an adequate opportunity to be heard for the plaintiffs as there were no procedures available for systemic relief. Additionally, many of the plaintiffs’ cases would be ultimately dismissed, meaning they would not get a chance to bring bail challenges in state court. Therefore, the court held that state court provided an inadequate opportunity to hear the plaintiff’s bail claims.

On the other hand, many courts have found that the availability of *any* state procedures mandates *Younger* abstention. For example, in *Wallace v. Kern*, the court held that the availability of state habeas relief mandated federal abstention. Though the court acknowledged the “pre-trial delay” that prompted the litigation, it concluded that federal judges were not “ombudsmen charged with the responsibility of reforming the state penal

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136 *Id.* at 163. On remand, the district court lengthened the maximum time between arrest and the individual assessment from 24 to 48 hours, and limited the prohibition on pretrial detention of those unable to pay secured money bail after an adequate hearing to those who would be presumptively eligible for release on a personal bond and who would be released after arrest and before a hearing if they paid the prescheduled bail amount but could not afford to do so. *ODonnell v. Harris County*, 321 F. Supp. 3d 763, 766 (S.D. Tex. 2018).

137 No. 4:19-CV-0112, 2021 WL 616151, at *7 (E.D. Mo. Feb. 17, 2021) (holding that *Gerstein* is controlling because “[p]laintiff class members cannot challenge the constitutionality of their bail hearings at any stage in their criminal cases”).

138 *Id.* at *1.

139 *Id.* at *8 n.8 (“The cases Defendants cite from other circuits involve state court litigation in individual cases warranting individual mandamus relief . . . . These cases are inapposite to the present class action challenging systemic bail hearing practices.”).

140 *Id.* at *7 n.7 (“According to The Bail Project, of the approximately 1,300 bails paid over the course of one year, 53.4% of resolved cases ended in the dismissal of all charges.”).

141 *Id.* at *8.

142 520 F.2d 400 (1975).

143 See *id.* at 407 (noting that New York procedures provide pretrial detainees with the right to petition for a writ of habeas corpus in the state Supreme Court and can be appealed to the Appellate Division).
Thus, the court improperly declined to consider whether state procedures could actually alleviate the harms of pretrial delay.\(^{145}\)

Courts that properly consider the realities of pretrial procedures and detention—that any available state procedures necessarily are only available after the harms have already occurred—must conclude that *Younger* abstention should be rejected in § 1983 bail litigation. Judges should look not just to the facial availability of state procedures to hear bail claims, but whether those procedures will practically address the unique harms stemming from bail and pretrial detention.

**C. Where the Requested Relief Preserves Some State Court Discretion, Younger Abstention Is Inapplicable**

While Subsections A and B argued that judges should recognize the realities of bail litigation—that there is no ongoing prosecution and no adequate opportunity to be heard in state court—this Section explores how litigants can properly tailor their claims to avoid *Younger* abstention. Overall, where courts believe that the relief sought would require ongoing monitoring of state courts or interfere with state court discretion, they apply *Younger* abstention.\(^{146}\) On the other hand, when courts believe that the relief sought would not require ongoing monitoring and is narrowly directed at pretrial procedures, they decline *Younger* abstention. Thus, litigants should narrowly tailor their requested relief to preserve some state court discretion in its procedures and to avoid federal court monitoring.

For example, in *Luckey v. Miller*, the Eleventh Circuit applied *Younger* abstention to a suit requesting relief from the systemic denial of counsel for indigent defendants.\(^{147}\) The plaintiffs broadly requested relief for all individuals affected by “the unconstitutional practices of the indigent defense system in Georgia” at the pretrial, trial, and post-judgment attorneys’ fees award stages.\(^{148}\) The plaintiffs argued that their request did not raise *Younger*

\(^{144}\) Id. at 408-09.

\(^{145}\) Id.

\(^{146}\) *See* Parker v. Turner, 626 F.2d 1, 8 (6th Cir. 1980) (“*O’Shea*, in effect, extends this near-absolute restraint rule to situations where the relief sought would interfere with the day-to-day conduct of state trials.”); *see also* Kaufman v. Kaye, 466 F.3d 83, 87 (2d Cir. 2006) (rejecting implementation of an injunction requiring New York to establish a new system of assigning appeals because it would invite potential future challenges that might disrupt state proceedings of the sort condemned in *O’Shea*); Ballard v. Wilson, 856 F.2d 1568, 1570 (5th Cir. 1988) (reasoning that a federal court ruling on the practices and procedures of municipal courts offends the principles of federalism and noting the practice was condemned by *O’Shea*).

\(^{147}\) *See* 976 F.2d 673, 676-77 (11th Cir. 1992) (holding that even though “[p]laintiffs do not seek to contest any single criminal conviction” it is clear they “intend to restrain every indigent prosecution” until the systemic improvements are in place and as such, *Younger* applies).

\(^{148}\) Id. at 676.
concerns because, were relief granted, the state would be required to “reform their own system” without “ongoing review from the outside.” However, the court, relying heavily on O’Shea, concluded that the plaintiffs’ requested relief would “restrain every indigent prosecution and contest every indigent conviction until the systemic improvements they sought were in place” because the plaintiffs sought reform of almost every stage of a criminal case. Moreover, the court held that any possible remedy would necessitate impermissible future monitoring and intervention by federal courts in state court procedures. Therefore, Younger prohibited the court from hearing the case.

Additionally, in Wallace v. Kern, the Second Circuit applied Younger abstention in a case where the plaintiffs requested relief left the state court with no discretion in implementing remedial procedures. The court reversed the district court order that mandated new bail procedures in state courts, including requiring “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.” Under that order, the State would be required to present evidence of the need for monetary bail and reasons why alternate forms of release were inadequate. Moreover, the defendant would be permitted to present evidence of why monetary bail was unnecessary, and would be entitled to a written statement of the judge’s reasons for denying or setting bail. The Second Circuit applied Younger abstention, noting the district court’s order was “precisely the [sort of] mischief” O’Shea and Younger sought to prevent—“continu[ous] surveillance” by federal courts of state bail hearing procedures and overly specific instructions for the state court to follow.

Luckey and Wallace demonstrate that where the plaintiffs request broad reform for criminal procedures generally and monitoring from district courts, courts are likely to apply Younger abstention. In Luckey, the plaintiffs requested broad relief for multiple practices spanning the pretrial, trial, and

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149 Id. at 678.
150 Id. at 677.
151 See id. at 679 (refusing to enter relief laying the groundwork for more detailed relief that would violate the comity principles of Younger and O’Shea).
152 Id.
153 520 F.2d 400, 408 (2d Cir. 1975).
154 Id. at 403.
155 See id. (explaining the new bail procedures that were put in place by the district court).
156 See id. (describing the defendant’s rights in the district court’s ordered procedures).
157 Id. at 406 (“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 pre-trial detainee who claimed that the order was not complied with to proceed to the federal court for interpretations thereof.”).
Abstaining From Abstention

Post-judgment attorney's fees award stage that the court thought would necessitate continuous federal court monitoring of state courts. And, in Wallace, the court reversed a district court order that implemented specific requirements for state evidence standards in bail hearings, a timeline for when new evidentiary hearings would be required, and the ability for the defendants to request a written explanation for their bail determination. In both cases, as in O'Shea, the plaintiffs requested relief for more than just pretrial procedures, sought continuous monitoring of state courts, or proposed multiple specific procedures that gave state courts little discretion. Thus, Luckey and Wallace are not at odds with Gerstein and the courts might have declined to abstain if the relief requested had been narrowly tailored and focused on pretrial procedures.

Conversely, Stewart, Walker, and O'Donnell, discussed supra, demonstrate that when plaintiffs request narrow procedural pretrial reforms while maintaining state discretion, courts are unlikely to apply Younger. In Stewart, an injunction narrowly directed at pretrial procedures—rather than prosecutions—did not raise Younger concerns. Similarly, the injunction at issue in Walker, which prescribed an affidavit-based process for making bail determinations that had to be evaluated twenty-four hours post-arrest also did not trigger Younger abstention. Though Walker seemed to prescribe detailed procedures to state courts, the injunction was only directed at one specific pretrial procedure, and so it was sufficiently narrowly tailored to avoid Younger concerns. And, in O'Donnell, the court did not apply Younger abstention to an injunction aimed at pretrial bail procedures, though it remanded for a more narrowly tailored injunction. In all three cases, as in Gerstein, the plaintiffs requested relief solely from pretrial procedures and the ensuing injunctions gave state courts control over how to specifically implement constitutional processes.

Therefore, Stewart, Walker, and O'Donnell are not at odds with O'Shea, as none request relief beyond pretrial procedures, and all either leave the state courts with discretion or sufficiently narrowly tailor the relief. Luckey, Miles, and Wallace are not at odds with Gerstein, and the courts might not have abstained if the relief requested had been narrowly tailored and focused on pretrial procedures. Therefore, where litigants narrowly tailor their requested relief for bail procedures to preserve state court discretion, courts should not and likely will not apply Younger abstention.
IV. AN EMPIRICAL ANALYSIS OF § 1983 BAIL LITIGATION POST-2012

This Section provides insight into court approaches to Younger abstention in § 1983 bail litigation in the past ten years.158 The good news for litigants is that several district courts and two circuit courts have correctly declined to apply Younger abstention challenges in systemic bail system challenges.159 However, some courts have inaccurately interpreted the takeaways from O’Shea and Gerstein and applied Younger abstention in several cases. These courts have often mistakenly labeled pretrial bail procedures as part of “ongoing” cases— a proposition that is directly at odds with Gerstein—or have determined that state procedures are an adequate forum for relief from the bail system.160 Additionally, the Fifth Circuit in Daves v. Dallas County, as discussed supra, has signaled its intent to overrule ODonnell v. Harris County and hold that Younger requires abstention in systemic bail challenges. In order to adequately ensure correct court approaches to Younger abstention in § 1983 bail litigation, it is important to catalogue court approaches in recent years.

Since 2012, there have been four circuit court cases and six district court cases that explicitly address the issue of whether Younger mandates abstention from § 1983 challenges to bail procedures. Three of the four circuit cases, Walker, ODonnell, and Schultz, discussed supra, declined to apply Younger abstention because bail practices are pretrial and thus do not interfere with ongoing state criminal proceedings.161 In these cases, the Fifth and Eleventh

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158 I chose to evaluate cases decided after December 31, 2011 because it was a manageable time frame and encompassed the “third wave” bail reform cases. I searched Westlaw for “bail” and “1983” and “abstention” and “Younger.” The cases surveyed exclude cases where courts address challenges to both bail proceedings and trial proceedings, without distinguishing between the two. This is current as of October 18, 2022.

159 See, e.g., Dixon v. City of St. Louis, No. 4:19-CV-0112, 2021 WL 616151, at *7 (E.D. Mo. Feb. 17, 2021) (holding that Gerstein was controlling for plaintiffs unable to challenge bail proceedings at any point in their criminal cases, such that Younger abstention did not apply); Booth v. Galveston Cnty., 352 F. Supp. 3d 718, 732-33 (S.D. Tex. 2019) (citing Gerstein in holding that improvement of pretrial procedures are not reviewable in a criminal case in state court, such that Younger does not apply).

160 See, e.g., Menter v. Mahon, No. 3:17-CV-1029, 2018 WL 4335527, at *3-4 (M.D. Fla. Sept. 11, 2018) (applying Younger abstention to a challenge to the county bond system because there were adequate state court procedures available to raise the claim).

161 See Walker v. City of Calhoun, 901 F.3d 1245, 1254 (11th Cir. 2018) (“Younger 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.”); ODonnell v. Harris Cnty., 892 F.3d 147, 156 (5th Cir. 2018) (“The relief sought by ODonnell—i.e., improvement of pretrial procedures and practice—is not properly reviewed by criminal proceedings in state court.”); Schultz v. Alabama, 42 F.4th 1298, 1312 (11th Cir. 2022) (“Younger does not apply here because Hester is not asking us to enjoin any prosecution. He merely seeks a faster bail determination, which does not require enjoining or even interfering with any ongoing or imminent state prosecution.”). Another possible explanation for why the Fifth and Eleventh Circuits adjudicating those cases declined to apply Younger abstention is that Sprint Communications v. Jacobs, 571 U.S. 69 (2013) made abstention
Circuits instead heavily relied on *Gerstein* to hold that the litigants did not have an adequate opportunity to be heard in state court and that the requested relief did not implicate comity and federalism concerns.\(^2\) However, *Daves* throws a wrench in the evaluation of the Fifth Circuit jurisprudence.\(^1\) After noting that neither party raised *Younger* abstention in their briefings, the Fifth Circuit remanded the case so that *Younger* abstention could be evaluated, stating that it would "take a fresh look at *Younger*" and "re-evaluate our own precedent" after remand.\(^3\) Thus, *ODonnell* may potentially be overruled. Therefore, the Eleventh Circuit is the only circuit that has a consistent and proper approach to *Younger* abstention in § 1983 bail litigation, and its reasoning should be referenced when litigants bring challenges in other jurisdictions.

In the realm of district courts, courts in five of the six cases declined to apply *Younger* abstention where plaintiffs were challenging bail or bond procedures.\(^4\) Three of these cases primarily cited the proposition that pretrial procedures were not ongoing criminal procedures and thus did not

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\(^1\) See *Schultz*, 42 F.4th at 1312 (stating that *Gerstein* is "instructive"); *ODonnell*, 892 F.3d at 156 (citing *Gerstein* after stating that the test for *Younger* abstention fails); *Walker*, 901 F.3d at 1254 (stating here, *Gerstein* is "instructive").

\(^2\) See *Schultz*, 42 F.4th at 1312 (stating that *Gerstein* is "instructive"); *ODonnell*, 892 F.3d at 156 (citing *Gerstein* after stating that the test for *Younger* abstention fails); *Walker*, 901 F.3d at 1254 (stating that here, *Gerstein* is "instructive").

\(^3\) Id. at 548. In fact, the Fifth Circuit seems poised to overturn *ODonnell* on the issue of *Younger* abstention. In oral argument on May 26, 2021, multiple judges raised questions about why there is not an adequate opportunity to be heard through state procedures and why *O'Shea v. Littleton* and *Wallace v. Kern* do not mandate abstention. See generally Oral Argument, *Daves* v. *Dallas County*, 22 F.4th 522 (5th Cir. 2022) (No. 18-11268), https://www.courtlistener.com/audio/76799/daves-v-dallas-county [https://perma.cc/3UPK-HK8A].

raise Younger concerns.166 The other two cases reasoned that there was no adequate ability to raise the constitutional issue in state court and so Younger abstention was improper.167 These cases are further support that litigants can point to when bringing systemic bail challenges.

On the other hand, in Menter v. Mahon, the district court applied Younger abstention to a challenge to a county bond system because it reasoned that there were adequate state court procedures available for the litigants to raise their claim.168 The litigants had requested that state court judges consider an arrestee's ability to pay when setting bond.169 The court expressly declined to follow Eleventh Circuit precedent in Walker v. Calhoun, discussed supra, and reasoned that reconsidering bond would be an impermissible intrusion into state court procedures.170 While this is the only district court case that has applied Younger abstention over the past ten years, the sample size of § 1983 bail reform cases is small and litigants should use Menter as a cautionary tale.

Additionally, in an analogous group of cases where an individual brings a challenge to their particular bail procedure under § 1983, every court to hear such a case has applied Younger abstention. While these cases are not within the scope of this comment, it is important to note them as courts may cite them in systemic bail challenges. Over the past ten years, there have been twenty-six individual § 1983 challenges to bail proceedings. In all twenty-six cases, courts applied Younger abstention and declined to hear litigants’ bail claims.171 Most of these cases state that bail procedures were part of “ongoing

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166 See Holland, 277 F. Supp. 3d at 737 (“Plaintiffs, here do not seek to enjoin the state prosecution against Holland; instead, they challenge the procedure by which the conditions of pre-trial release during that prosecution was decided and seek an injunction ordering a different procedure.”); Welchen, 2016 WL 5930563, at *7 (holding there were no ongoing proceedings at the time the case was filed); Buffin, 2016 WL 374230, at *4 (“The lack of an ongoing state judicial proceeding when plaintiffs filed the instant lawsuit is fatal to defendants' efforts.”).

167 See Dixon, 2021 WL 716151, at *7 (“Plaintiff class members cannot challenge the constitutionality of their bail hearings at any stage in their criminal cases. . . .”); Booth, 352 F. Supp. 3d at 733 (citing O'Donnell for the proposition that improvement of pretrial procedures cannot be properly reviewed by criminal proceedings in state court).


169 See id. at *1 (describing the relief sought by Plaintiffs).

170 See id. ("It is clear that granting Plaintiffs the relief they seek in this Court would unduly ‘disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim ab initio.’") (citing O'Shea v. Littleton, 414 U.S. 488, 501 (1974)).

or “pending” criminal proceedings and therefore within the discretion of the state courts.\textsuperscript{172} Additionally, many of them also reference the fact that there were state court remedies available, such as habeas relief or the ability to appeal should the petitioner ultimately be convicted.\textsuperscript{173} Litigants should be aware of these cases when bringing systemic § 1983 bail cases.

Overall, over the past ten years, courts have generally refrained from applying Younger abstention in cases of civil rights systemic bail litigation claims. However, there are only ten cases in this sample size, including only two circuit courts, and so this positive trend should be treated with a grain of salt, particularly as the Fifth Circuit looks to overrule its prior precedent. Additionally, courts have abstained in every individual § 1983 bail challenge in the past ten years. As the third wave of bail reform progresses and more litigants bring such cases, this section can be used as a reference for how courts most recently have treated the principles of Younger, Gerstein, and O’Shea.
V. BALANCING PHILOSOPHICAL AND EQUITABLE ARGUMENTS FOR AND AGAINST YOUNGER ABSTENTION IN § 1983 BAIL LITIGATION

The final considerations in assessing whether Younger abstention should apply in § 1983 bail litigation are philosophical and equitable arguments found in scholarship and underlying the Younger case itself.

Arguments in favor of Younger abstention have little merit in the pretrial bail litigation context because they do not distinguish between pretrial procedural considerations and criminal proceedings broadly, and they fail to consider central equity concerns that animated the enactment of § 1983. They therefore ignore key facts about bail litigation that mandate the rejection of Younger abstention. On the other hand, arguments against Younger abstention in bail litigation properly account for federalism concerns and the practical realities of pretrial bail reform. Therefore, arguments against Younger abstention outweigh those in favor.

First, proponents of Younger abstention in bail litigation argue that when federal courts interfere in state bail systems, they are interfering in states’ “most profound interest in protecting the community and ensuring defendants’ appearance for trial” and the legitimate ability of state courts to consider federal constitutional claims in that context. Proponents argue that comity and equity demand a proper respect for state functions, a recognition of state governments, and the belief that the Union will fare best “if the States . . . are left free to perform their separate functions in their separate ways.” For example, in Daves, the defendant argued that the day-to-day functioning of a state's criminal justice system, including bail procedures, is an area of core state responsibility protected from federal interference by baseline principles of comity. Additionally, when federal courts decide issues that could be resolved by state courts, “federal courts implicitly may call into question the ability or willingness of state courts to apply federal law faithfully.” Therefore, proponents argue, federal courts “should assume that state procedures will afford an adequate remedy, in the

175 See Younger v. Harris, 401 U.S. 37, 44-45 (1971) (arguing that besides equity, comity also serves as a rationale for restraining federal courts from interfering with criminal proceedings); see also William P. Marshall, Abstention, Separation of Powers, and Recasting the Meaning of Judicial Restraint, 107 NW. L. REV. 881, 895-96 (2013) (arguing that equity and minimizing disruption to the state criminal process remain valid reasons to utilize the Younger standard).
177 Friedman, supra note 35, at 536.
absence of unambiguous authority to the contrary.\textsuperscript{178} This implies that, where bail litigants have not fully exhausted every possible avenue for relief available to them in state court, \textit{Younger} abstention must apply.

However, arguments rejecting \textit{Younger} abstention in bail litigation adequately address these same comity and equity concerns and outweigh proponents’ contentions. Even where bail litigants have not necessarily exhausted every state court remedy available to them, if there is no adequate opportunity to be heard in state court, then equity considerations preempt any comity concerns.\textsuperscript{179} This is because litigants might suffer irreparable harm if forced to exhaust all state remedies first. For example, in \textit{Daves}, the plaintiffs argued that there was no adequate opportunity to be heard in state court because people arrested had to wait anywhere from weeks to months to raise any challenge to pretrial detention.\textsuperscript{180} Furthermore, raising a bail claim on appeal or after conviction necessarily means the harms of pretrial detention and procedures have already occurred. Therefore, where a litigant does not practically have an opportunity to be heard in state court, \textit{Younger} abstention should not apply.\textsuperscript{181}

Additionally, in a seminal paper from 1984, Professor Redish argues in part that equity mandates that federal courts exercise jurisdiction in § 1983 claims.\textsuperscript{182} Redish details the origins of the “traditional grounds of equity,” on which \textit{Younger} relied, from the English unitary system, a system distinct from the U.S. federalism model that is divided into two separate judicial structures.\textsuperscript{183} Thus, federal equitable power derived its limitations on equitable relief from the English system, and so “traditionally confined [its limitations] to prosecutions in the \textit{federal} courts,” and not federal interference in state court proceedings.\textsuperscript{184} Therefore, Redish argues, “it is unreasonable to

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\textsuperscript{179} See Pugh v. Rainwater, 483 F.2d 778, 782 (5th Cir. 1973), aff’d in part and rev’d in part, Gerstein v. Pugh, 420 U.S. 103 (1975) (“If these plaintiffs were barred by \textit{Younger} from this forum, what relief might they obtain in their state court trials? Since their pre-trial incarceration would have ended as of the time of trial, no remedy would exist. Their claims to pre-trial preliminary hearings would be mooted by conviction or exoneration.”).
\textsuperscript{180} See Response and Reply Brief for Appellants-Cross Appellees Dallas Cnty. Crim. Dist. Ct. at 10 \textit{Daves} v. Dallas Cnty., Texas, 22 F.4th 522 (5th Cir. 2022) (No. 18-11368), 2019 WL 2577842, at *24 (contending that arrestees in Dallas County could not challenge constitutionality of pretrial detention until weeks or months after the pretrial detention begins).
\textsuperscript{181} The argument is not that the irreparable harm exception from \textit{Younger} should apply but that \textit{Younger} is completely inapplicable in such a scenario.
\textsuperscript{182} See Martin H. Redish, \textit{Abstention, Separation of Powers, and the Limits of the Judicial Function}, 94 YALE L. J. 71, 74-75 (1984) (arguing that judge-made abstention is not acceptable based on principles of separation of powers and legal process but should be based on equitable limitations and federal rights at issue).
\textsuperscript{183} Id. at 85-86.
\textsuperscript{184} Id.
impute to the enacting Congress [of § 1983] the understanding that the equitable relief that they were providing would not be used against ongoing state prosecutions.”

Suits under § 1983 are exceptions to the absolute bar against federal injunctions directed at state court proceedings provided in 28 U.S.C. § 2283. And the idea that state courts provide an adequate remedy at law for the vindication of federal rights is completely inconsistent with the basic premise underlying § 1983—that state courts were not adequate protectors of federal rights. Where the state’s interest in the outcome of the dispute is very high, so is the potential for state court bias against the federal claimant. Younger abstention ignores this central equity concern.

Second, proponents of Younger abstention in bail litigation argue an “implied delegation' defense”—that Congress, in its governing statutes, intended to give the federal courts the authority to modify or limit the exercise of its jurisdiction to avoid ‘friction within the federal system.” So, even in the bail litigation context, federal courts have the authority to withhold jurisdiction. Furthermore, they argue Congress acquiesced to this proposition by not overturning abstention doctrines by statute.

However, opponents argue that simply relying on Congress’s failure to overturn judge-made abstention doctrine is not enough of a rationale to justify a federal court’s decision to withhold its mandated jurisdiction. Federal courts have a “virtually unflagging” obligation to adjudicate claims that are properly within their jurisdiction. Accordingly, “abstention from the exercise of federal jurisdiction is the exception, not the rule.” When federal courts improperly abstain from “exercising the jurisdiction vested in

185 Id. at 86.
187 See Redish, supra note 182, at 86 (contending that since the drafters of § 1983 were concerned with state courts’ good faith, they probably did not assume raising a federal defense in state court was adequate).
188 See id. at 91-92 (arguing that state judges may be driven by sympathies to state concerns, such that they may not be as well-positioned to enforce federal rights against state action).
189 Marshall, supra note 175, at 890.
190 See id. (acknowledging that federal courts were impliedly given the power to withhold jurisdiction over bail litigation).
191 See id. (summarizing the contention that even if Congress did not originally intend to give federal courts ability to abstain, it acquiesced by not statutorily overturning the doctrine).
192 See Redish, supra note 182, at 81-82 (contending that the argument claiming Congress’ failure to overturn abstention implies tacit approval is not realistic and condones improper usurpation of legislative authority).
194 Colo. River, 424 U.S. at 813; SCHWARTZ, supra note 193, at 177 (quotations omitted).
them by Congress” they risk engaging in “illegitimate judicial incursions.” 195
Thus, Younger abstention must be narrowly applied only to ongoing criminal
procedures, as distinct from pretrial bail procedures. Declining to hear bail
claims that do not implicate ongoing criminal procedures is a rejection of the
jurisdiction vested to federal courts by Congress.

Third, proponents of abstention in the bail context argue that “abstention
is merely a judge-made restriction on a judge-made expansion of federal
jurisdiction . . . .”196 They argue that § 1983 was never intended to create such
a broad cause of action but rather was created only to protect black persons
from oppression by groups like the Ku Klux Klan in states that failed to
protect them.197 Essentially, the argument is that the Court simply allowed
for the broad expansion of the statute, and so it should allow courts to restrict
the statute when they see fit. However, this argument does not mandate that
courts apply Younger abstention, and so it is not truly at odds with the
argument that Younger abstention should not apply in bail litigation.

As a last consideration, the historical context of Younger reveals its shaky
underpinnings and inapplicability to narrowly tailored bail reform claims.198
At the time Younger was decided in 1971, federal judicial intervention in racial
and criminal justice, including a broader interpretation of § 1983, faced
resistance “in the form of a reimagined and reinvigorated dualist conception
of federalism.”199 Younger was part of this wave of resistance, with the Court
even acknowledging that “[t]he precise reasons for this longstanding public
policy against federal court interference with state court proceedings have
never been specifically identified.”200 Thus, Younger can be understood as a
politically-motivated response to the broadening of civil rights claims, and
should not be read expansively to require abstention in the pretrial procedure
context or to cases where defendants do not practically have an opportunity
to be heard in state court. This historical context further supports rejecting
Younger abstention in bail litigation.

Arguments rejecting Younger abstention in bail litigation are stronger than
those in favor of it, properly separating pretrial procedures from ongoing
criminal proceedings, and centering equity concerns. As such, federal courts
can properly reject Younger abstention in § 1983 bail litigation.

195 Marshall, supra note 175, at 889; Redish, supra note 182, at 86.
196 Marshall, supra note 175 at 893; see also, Michael Wells, Why Professor Redish Is Wrong About
Abstention, 19 GA. L. REV. 1097, 1098 (1985) (arguing that abstention represented a forum rule for a
cause of action, both of which were judicially created).
197 See Wells, supra note 197 at 1098 (arguing that at inception, § 1983 only meant to address
narrow issue of protecting black persons from oppression).
198 See Smith, supra note 5, at 2293–94 (arguing that the Younger decision developed during a
time of significant political and legal turmoil).
199 Id.
200 Id. at 2295 (quoting Younger).
CONCLUSION

Younger abstention does not apply to § 1983 bail litigation where the requested relief is narrowly tailored. Under both Gerstein v. Pugh and O'Shea v. Littleton, cases in which the requested relief is directed solely at pretrial procedures and that allow for state discretion in implementation, do not require Younger abstention. However, several courts have inaccurately labeled pretrial bail procedures as part of ongoing state proceedings, and thus improperly interpreted Younger to mandate abstention in the bail litigation context. As litigants continue to challenge bail procedures as unconstitutional wealth-based detention schemes, it is for both litigants and courts to understand the underlying concerns in Younger, Gerstein, O'Shea and related arguments. Comity and equity considerations, a federal court's obligation to exercise its mandated jurisdiction, and the historical underpinnings of Younger further support the proposition that Younger abstention does not apply to § 1983 bail litigation.

Finally, as a practical consideration, litigants pursuing § 1983 bail litigation should narrowly tailor their requested relief to target specific pretrial bail practices and leave the mechanics of the remedy up to the state courts. Stewart v. Abraham, Walker v. City of Calhoun, O'Donnell v. Harris County, and Daves v. Dallas County all demonstrate that plaintiffs have the greatest likelihood of overcoming Younger abstention when they do so.201 This comment should serve as a resource for litigants and judges alike in ensuring that the third wave of bail reform is a success—that bail procedures are sufficiently individualized, fair, narrowly tailored to ensure court appearance, and do not perpetuate the existing wealth-based incarceration scheme.

201 The Court recently stated in Whole Woman's Health v. Jackson that “an injunction against a state court or its machinery would be a violation of the whole scheme of our Government,” indicating a broad reading of Younger. No. 21-463, slip op. at 5 (Dec. 10, 2021) (internal quotation marks omitted). However, this need not impact bail litigation where pretrial procedures are an entirely separate consideration.