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

BRIEF OF THE STATES OF LOUISIANA AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF THE DEFENDANT-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. This list may assist the judges of this Court as they evaluate possible disqualification or recusal:

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INTEREST OF *AMICI CURIAE*[1]

The Attala County NAACP and four individuals eligible to serve on juries in Mississippi's Fifth Circuit Court District brought this Section 1983 action against a Mississippi district attorney. Plaintiffs allege that the district attorney is violating their Fourteenth Amendment right to race-neutral peremptory challenges. They seek class certification to represent the rights of all black citizens eligible to serve on juries in Mississippi's Fifth Circuit Court District.

Federal courts are, of course, usually in the business of entertaining federal claims. But the scope of the remedy that Plaintiffs seek is staggering: They want a federal court to continuously supervise Mississippi—a sovereign State—as it administers its criminal jury selection process. Because federal courts are not in the business of managing States as they enforce their criminal laws, this case cries out for abstention. The district court got it right.

Louisiana and Texas write as *Amici Curiae* to support Mississippi. Plaintiffs' suit poses a threat to State sovereignty that is neither

[1] Under Federal Rule of Appellate Procedure 29(b)(2), Louisiana and Texas, as States, are not required to obtain the parties' consent or the Court's leave to file this brief.

hypothetical nor limited to one State. A different set of plaintiffs recently brought almost identical claims against Louisiana officials. *See Pipkins v. Stewart*, No. 5:15-cv-2722, 2019 WL 1442218 (W.D. La. Apr. 1, 2019). The district court there also correctly abstained.

This Court should reject Plaintiffs' invitation to upset the balance of power between the States and the federal government. *Amici* ask this Court to affirm the district court.

SUMMARY OF THE ARGUMENT

Although a federal court's jurisdiction to consider federal claims is "virtually unflagging"—*Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976))—there are circumstances when abstention is warranted. For example, if a plaintiff seeks a remedy that would effectively require a federal court to supervise state courts and correct future constitutional injuries that might occur "in the course of future state criminal trials," the Supreme Court explained in *O'Shea v. Littleton* that abstention is appropriate. 414 U.S. 488, 500 (1974). If federal courts fail to abstain in such cases, the balance of power will shift from the States to the federal judiciary.

The extraordinary remedy that the Court rejected in *O'Shea* is virtually identical to the remedy that Plaintiffs seek here. Plaintiffs want the practical equivalent of a federal "note-taker" in the back of every state courtroom—observing and second-guessing state prosecutors as they enforce the State's laws. This Court should not provide a remedy that the Supreme Court expressly withheld in *O'Shea*.

In any event, there is no need to place the State criminal justice system under federal supervision because Plaintiffs' constitutional rights are adequately safeguarded in State court. As criminal defendants employ the *Batson v. Kentucky* framework to ensure race-neutral peremptory challenges, they protect Plaintiffs' rights. *See* 476 U.S. 79, 85 (1986). To be sure, the Supreme Court has held that *individual jurors* "possess the right not to be excluded from [a petit jury] on account of race." 499 U.S. 400, 409 (1991). But, according to the Court, *defendants* are the "necessary and appropriate" litigants to raise the equal protection claims of potential jurors in state court. *Id.* at 414.

The district court was correct to abstain. *Amici* ask this Court to affirm.

ARGUMENT

I. ABSTENTION IS APPROPRIATE WHEN A PLAINTIFF REQUESTS A REMEDY THAT WOULD UPSET THE BALANCE OF POWER BETWEEN THE STATES AND THE FEDERAL GOVERNMENT.

"As every schoolchild learns, our Constitution establishes a system of *dual* sovereignty between the States and the Federal Government" in which their power is "*balance*[*d*]." *Gregory v. Ashcroft*, 501 U.S. 452, 457–58 (1991) (emphasis added) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). If the sovereigns are to remain "dual" and their power "balanced," *id.* at 457, the federal government, "anxious though it may be to vindicate and protect federal rights and federal interests, [must] always . . . do so in ways that will not unduly interfere with the legitimate activities of the States," *Younger v. Harris*, 401 U.S. 37 44–45 (1971). Otherwise, the dual-sovereign system is reduced to a single sovereign, and "Our Federalism" ceases to exist. *Id.* at 45.

Without judicial autonomy, a State cannot enforce its laws, operate its courts, or protect its citizens' state and federal rights. *See Oregon v. Ice*, 555 U.S. 160, 170 (2009) ("Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status."). When a federal court replaces a state court

as the authority over a state judicial process, it subverts "the fundamental constitutional independence of the States and their courts." *See Atl. Coast Line R. Co. v. Bhd. Of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970).

To be sure, a federal court bears a "'virtually unflagging . . . obligation' . . . to hear and decide cases." *Sprint Commc'ns*, 571 U.S. at 77 (quoting *Colo. River*, 424 U.S. at 817). But federal courts' obligation to entertain federal claims gives way when doing so would interfere with a State's judicial autonomy. The Supreme Court put it succinctly in *Younger v. Harris*: "[T]he normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." 401 U.S. at 44–45; *see Gates v. Strain*, 885 F.3d 874, 880 (5th Cir. 2018); *SKS & Assocs., Inc. v. Dart*, 619 F.3d 674, 682 (7th Cir. 2010) ("[F]ederal courts must defer to the state's sovereignty over the management of its courts . . . when the section 1983 action seeks to impose federal supervision on state court proceedings.").

In *Younger*, a state criminal defendant ran to federal court and sought to enjoin a state official from prosecuting him in state court under state law in alleged violation of his federal constitutional rights. 401 U.S.

at 40. The Court held that the requested remedy would amount to "a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings." *Id.* at 41. But, importantly, the Court "express[ed] no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." *Id.*

The Court soon filled that jurisprudential gap. In *O'Shea*, state criminal defendants brought a Section 1983 class-action suit seeking an injunction to correct alleged pervasive racial discrimination in the Illinois court system that they claimed violated their constitutional rights. 414 U.S. at 490–92. The *O'Shea* plaintiffs alleged that black defendants were subject to higher bail and harsher sentences than white defendants and that the federal court needed to step in to protect the constitutional rights of *future* defendants. *Id.*

The district court dismissed for lack of subject matter jurisdiction. *Id.* at 492. The *O'Shea* court of appeals reversed and remanded to "fashion appropriate injunctive relief to prevent petitioners from depriving others of their constitutional rights . . . in the future." *Id.* at 492–93. The court of appeals did not specify exactly how the district court

should administer the remedy but—much like what Plaintiffs seek here—the appellate court suggested "periodic reports of various types of aggregate data on actions on bail and sentencing." *Id.* at 493 n.1.

The Supreme Court granted certiorari and reversed, "firmly disagree[ing] with the Court of Appeals that an adequate basis for equitable relief against petitioners had been stated." *Id.* at 499. "What [the plaintiffs] seek," said the Supreme Court, "is an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials." *Id.* at 500.

When deciding that abstention was appropriate in *O'Shea*, the Supreme Court invoked *Younger*'s "principles of equity, comity, and federalism."[2] 414 U.S. at 499 (quoting *Mitchum v. Foster*, 407 U.S. 225, 243 (1972)). The Court extended *Younger* to "*anticipatory* interference in the state criminal process by means of continuous or piecemeal interruptions." *Id.* at 500 (emphasis added). The Court observed that, "just as" in *Younger*, the remedy sought *in O'Shea* "would disrupt" state proceedings. *Id.* at 500–01 (The requested remedy "would indirectly

[2] Although the *O'Shea* Court first concluded that the plaintiffs lacked standing, *see* 414 U.S. at 493, its application of *Younger* was an "alternative holding." *Gardner v. Luckey*, 500 F.2d 712, 715 (5th Cir. 1974) (discussing *O'Shea*).

accomplish the kind of interference that *Younger v. Harris* and related cases sought to prevent." (internal citation omitted)).

O'Shea condemned a type of federal intrusion into State sovereignty categorically different from—and worse than—the intrusion rejected in *Younger*. "[T]he 'periodic reporting' system" in *O'Shea* imposed "continuous supervision by the federal court over the conduct of [state public defenders] in the course of future criminal trial proceedings involving any of the members of the . . . broadly defined class." *Id.* at 501. The Court found the reporting system to be "a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity." *Id.*

O'Shea answered the question that *Younger* expressly reserved, *see Younger*, 401 U.S. at 41, and amplified *Younger*'s protection of "Our Federalism," *see id.* at 44–45 ("It should never be forgotten that . . . '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.").

Since *O'Shea* was decided, the Supreme Court has explained that a federal court may abstain under *Younger* only if the state proceeding (1) is "exceptional," (2) is "an ongoing state judicial proceeding," (3)

"implicates important state interests," and (4) "provides an adequate opportunity to raise federal challenges." *Google, Inc. v. Hood*, 822 F.3d 212, 222 (5th Cir. 2016) (cleaned up). But these requirements do not apply under *O'Shea*.[3] *Younger* and *O'Shea* protect Our Federalism from similar yet different threats. One doctrine does not—and should not—limit the other's application. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12 n.9 (1987) ("The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases.").

Where *Younger* prohibits a federal court from equitably enjoining *one* state proceeding, 401 U.S. at 38–39, *O'Shea* prohibits "monitoring" or "supervision" of actions that state officials take in the course of criminally enforcing *any* state law in *any* state court, 414 U.S. at 501. Where *Younger* prohibits a federal court from interfering with an *in-progress* state proceeding, *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992)

[3] Contrary to Plaintiffs' contention, this Court in *ODonnell v. Harris County*, 892 F.3d 147, 157 (5th Cir. 2018) did not require satisfaction of the *Younger* requirements before abstaining under *O'Shea*. *See* Br. of Pls.-Appellants 11. The question before the *ODonnell* Court was whether the *Younger* prerequisites were satisfied. 892 F.3d at 156 ("The County next argues that *Younger* abstention precludes our review of ODonnell's claims."). There was no argument that the Court should abstain from *anticipatory interference* in state court proceedings under *O'Shea*. To support its conclusion that *Younger* abstention was not warranted, the Court distinguished the relief sought by ODonnell from the "federal intrusion" in *Younger* and merely cited *O'Shea* as support for that conclusion. *Id.* at 157.

("Absent any *pending* proceeding in state tribunals, therefore, application by the lower courts of *Younger* abstention was clearly erroneous."), *O'Shea* prevents "*anticipatory* interference in future criminal proceedings," 414 U.S. at 500–01 (emphasis added); *accord Rizzo v. Goode*, 423 U.S. 362, 380 (1976) (applying *O'Shea* to avoid "*prophylactic* procedures" to reform a city police misconduct grievance process (emphasis added)).

And where *Younger* "look[s] to the relief requested and the effect it would have on the [individual] state proceeding[]," *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 717 (5th Cir. 2012) (quoting *31 Foster Children v. Bush*, 329 F.3d 1255, 1276 (11th Cir. 2003)), *O'Shea* considers the relief's effect on "the operation of state court functions," 414 U.S. at 501, *i.e.*, the State's ability to operate its court system. *See Tarter v. Hury*, 646 F.2d 1010, 1013 (5th Cir. 1981) (stating that *O'Shea* prohibits "excessive federal interference in the operation of state criminal courts"); *Gibson v. Jackson*, 578 F.2d 1045, 1050 (5th Cir. 1978) ("Abstention will avoid such a 'continuous federal supervision of state functioning.'" (quoting Friendly, Federal Jurisdiction, A General View, 95 (1973))); *Gardner v. Luckey*, 500 F.2d 712, 715 (5th Cir. 1974) (stating that *O'Shea* "condemned . . .

supervision of state judicial processes").

In any event, courts around the country have relied on *O'Shea* when abstaining because a plaintiff has requested a remedy that would require intrusive federal overreach. *See Tarter*, 646 F.2d at 1013 & n.5 (finding *O'Shea* "conclusive"); *Disability Rts. N.Y. v. New York*, 916 F.3d 129, 133 (2d Cir. 2019) (concluding "that the district court correctly abstained under *O'Shea*"); *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1073 (7th Cir. 2018) (relying in part on *O'Shea* to conclude "that [the] request for federal intrusion . . . calls for abstention"); *Miles v. Wesley*, 801 F.3d 1060, 1061 (9th Cir. 2015) ("We agree that *O'Shea* mandates abstention and affirm."). At least two courts have applied *O'Shea* to Section 1983 class actions targeting state prosecutors' future exercise of peremptory challenges against black jurors. *See, e.g.*, *Hall v. Valeska*, 509 F. App'x 834, 834–36 (11th Cir. 2012) (per curiam) (finding that the relief "implicates directly the concerns expressed in the *O'Shea* opinion"); *Pipkins*, 2019 WL 1442218, at *9 ("*O'Shea* a fortiori prohibits the Court from issuing such an injunction.").

At bottom, abstention is warranted whenever a plaintiff seeks relief that "contemplate[s] exactly the sort of intrusive and unworkable

supervision of state judicial processes condemned in *O'Shea*." *Gardner*, 500 F.2d at 715. This Court should not place "state prosecutorial decisions under federal court supervision." *Id.* (citing *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375 (2nd Cir. 1973)).

II. THIS CASE CRIES OUT FOR ABSTENTION.

A. Plaintiffs Seek an Extraordinary Remedy.

Plaintiffs want an injunction directing state prosecutors to keep records—*in every future criminal trial*—detailing the makeup of the jury pool and the use of any peremptory strikes. ROA.212. Plaintiffs also want prosecutors to file periodic reports with the federal court showing whether black jurors continue to be peremptorily excused at a disproportionate rate. ROA.209.

Plaintiffs want the practical equivalent of a federal "note-taker" in the back of every state courtroom to observe state prosecutors in every future criminal trial. For every trial, this note-taker will track "who was in the jury pool," "who has been struck" by the prosecutor, and "who wasn't struck" and will report "back" to the district court: "Look. Look at this. [The rate is] still four and a half times [that of white jurors]. Like, the exact same behavior is persisting despite your Honor's injunction."

ROA.212, 216.

If the racial disparity holds steady after about fifteen trials, Plaintiffs will file a motion alleging discriminatory intent supported by a statistical report showing that black jurors continue to be excused more often than white jurors. ROA.211–12. Plaintiffs will then "seek censure, contempt, or some other graduated sanction." ROA.210. While Plaintiffs appear to contemplate only one motion, prosecutors' reporting requirements never expire, and nothing prevents Plaintiffs from filing a similar motion year after year.

B. *O'Shea* Is Directly on Point.

Plaintiffs' relief offends the "principles of equity, comity, and federalism" in every way described by *O'Shea*. 414 U.S. at 499. Plaintiffs want the federal court to oversee "the operation of state court functions." *O'Shea*, 414 U.S. at 501. They ask the federal court to "monitor[]" or "supervise[]" *state* officials enforcing *state* laws in *state* courts. *See O'Shea*, 414 U.S. at 501; *Gardner*, 500 F.2d at 715. And Plaintiffs want to accomplish this by imposing a "periodic reporting system . . . antipathetic to established principles of comity." *O'Shea*, 414 U.S. at 501.

What Plaintiffs want is to put Mississippi's criminal jury selection

process under continuous federal supervision. This Court should not provide what *O'Shea* withheld.

C. The *Batson* framework Adequately Protects Plaintiffs' Federal Rights in State Court.

Before a federal court can abstain under *Younger*, it must satisfy itself that Plaintiffs' federal rights can be adequately protected in State court. *Hood*, 822 F.3d at 222. Here, the framework that the Court established in *Batson v. Kentucky* serves that essential purpose. *See Younger*, 401 U.S. at 43–44.

In *Batson*, the Supreme Court held that a "State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." 476 U.S. at 85. The Court observed that "reinstat[ing] . . . improperly challenged jurors" could be a possible *Batson* violation remedy—but the Court ultimately left it to state and federal trial courts to fashion their own remedies. *Id.* at 100 n.24. Mississippi trial courts, for example, often remedy *Batson* violations by reseating jurors.[4] *See, e.g.*, *Wilson v. State*,

[4] Louisiana and Texas also allow juror reinstatement for *Batson* violations. *See* La. C. Crim. Proc. art. 795(E) (providing that impermissibly excused jurors "may be ordered returned to the panel"); *State ex rel. Curry v. Bowman*, 885 S.W.2d 421, 425 (Tex. Crim. App. 1993) (allowing trial courts "to reinstate the excluded venire members to the jury").

72 So. 3d 1145, 1154 (Miss. Ct. App. 2011) (explaining that "the trial judge reseated [impermissibly excused jurors]"); *Church v. Massey*, 697 So. 2d 407, 414 (Miss. 1997) ("presum[ing] that [a sleeping] juror will not be reseated for service on remand"). The *Batson* framework adequately Plaintiffs' rights.

To be sure, since deciding *Batson*, the Court has held in *Powers v. Ohio* that *individual jurors* also "possess the right not to be excluded from [a petit jury] on account of race." 499 U.S. 400, 409 (1991). Plaintiffs contend that *Batson* does not provide *jurors* an adequate remedy or mechanism to vindicate their rights. Br. of Pls.-Appellants 13–14.

"An individual juror," however, "does not have a right to sit on any particular petit jury." *Powers*, 499 U.S. at 409. And although Plaintiffs hold specific rights as jurors, the *Powers* Court reasoned that criminal defendants are the "necessary and appropriate" litigants to raise the equal protection claims of potential jurors in state court.[5] *Id.* at 415.

[5] The *Powers* Court referred to this concept as "third-party standing"—"[A] defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race." 499 U.S. at 402, 415 (1991). But the question before the Court was not whether Powers had standing to be *in federal court* but whether he could raise the rights of prospective jurors *in state court*. Because principles of standing required for federal court jurisdiction of course have no application in state court, the mechanism for raising jurors' rights is actually part of the substantive federal right.

Because a defendant "has much at stake in proving that his jury was improperly constituted due to an equal protection violation, . . . there can be no doubt that [the defendant] will be a motivated, effective advocate for the excluded venire persons' rights" *Id.* at 414.

Plaintiffs also contend that the *Batson* framework is an ineffective mechanism for vindicating their rights because "adverse *Batson* rulings" have not sufficiently deterred state prosecutors from peremptorily excusing black jurors. ROA.26 ¶ 78. But, as the Supreme Court recognized in *Powers*, criminal defendants are motivated, effective advocates for Plaintiffs' rights. 499 U.S. at 414–15. Every time a state prosecutor exercises a peremptory challenge during jury selection, the criminal defendant sits ready to make a *Batson* challenge and the state court is ready to decide that challenge.

If necessary, a defendant can challenge the state trial court's *Batson* decisions through direct and collateral review. *See O'Shea*, 414 U.S. at 502 (listing "direct appeal," state "postconviction collateral review," and "federal habeas relief" as "available state and federal procedures"); *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1966) ("The most obvious remedy is . . . vindication of their federal claims on

direct review by [the Supreme Court], if those claims have not been vindicated by the trial or reviewing courts of the State."); *Atl. Coast Line R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970) ("Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the Supreme] Court.").

Thus, *Batson* adequately protects Plaintiffs' rights if the Court abstains. And, as Mississippi points out, Plaintiffs have other adequate avenues of relief. *See* Br. of Def-Appellee 23.This Court should not provide Plaintiffs with unnecessary and intrusive remedies that the Supreme Court has rejected.

CONCLUSION

The district court was right to abstain. *Amici* ask the Court to affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 14, 2021, I filed the foregoing brief with the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the brief contains 3,494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

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Dated: May 14, 2021