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, Greenville Division Case No. 4:19-cv-167-DMB-JMV

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: February 12, 2021

/s/ Elizabeth B. Wydra
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 1983, a landmark civil rights statute dating to the Reconstruction era, provides a right to sue "[e]very person" who under color of state law or custom deprives another person of "any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Filing suit under Section 1983, Plaintiffs alleged that a Mississippi district attorney has for years "engaged in a discriminatory practice of using peremptory challenges to strike prospective black jurors from jury service," ROA.170, and they sought an injunction prohibiting the practice in the future.

Rather than address the merits of Plaintiffs' claim, the district court held that *Younger v. Harris*, 401 U.S. 37 (1971), and *O'Shea v. Littleton*, 414 U.S. 488 (1974),

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. All parties consent to the filing of this brief.

compelled it to dismiss the case. Under those precedents, federal courts should abstain from hearing challenges to the conduct of state officers in criminal proceedings where the injunctive relief sought would inevitably "disrupt the normal course of proceedings in the state courts . . . . by means of continuous or piecemeal interruptions of the state proceedings," and where, in addition, "there are available state and federal procedures which could provide relief." *O'Shea*, 414 U.S. at 500-02. But those precedents do not remotely compel dismissal here, and this Court should not extend them to the circumstances of this case.

After the Civil War, Congress passed a series of measures designed to permit the federal courts to help combat widespread discrimination in Southern criminal justice systems. In addition to crafting the Fourteenth Amendment, guaranteeing equal protection of the laws, Congress passed the Freedmen's Bureau Act and the Civil Rights Act of 1866, which demanded federal oversight of state criminal justice systems. And when Congress passed the Civil Rights Act of 1871, containing what is now Section 1983, the bill's proponents and detractors both understood that this provision would empower federal courts to enjoin unconstitutional conduct by state officers—including prosecutors and even judges—arising from criminal proceedings. Indeed, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). The statute thus authorized the federal

courts to assert "immediate jurisdiction" over alleged constitutional violations, "without the appeal or agency of the State in which the citizen is domiciled," Cong. Globe, 42nd Cong., 1st Sess. 389 (1871) (Rep. Elliott), providing an *additional* remedy for the deprivation of federal rights that would be "supplementary to any remedy any State might have," *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1963). The abstention doctrine of *Younger* and *O'Shea* is thus contrary to Section 1983's text and history, and it should not be extended beyond existing precedent.

No such precedent requires abstention here. The injunction that Plaintiffs seek—prohibiting a district attorney from maintaining an unconstitutional policy of excluding Black jurors—would not interfere with any particular criminal prosecution, nor would it "require for its enforcement" any "continuing intrusion . . . into the daily conduct of state criminal proceedings." *O'Shea*, 414 U.S. at 501-02. And because prospective jurors like Plaintiffs cannot challenge peremptory strikes at the time they are made, Plaintiffs do not have "other avenues of relief" available. *Id.* at 504. For these reasons, this Court should decline to extend *Younger* and *O'Shea* abstention doctrine to Plaintiffs' claim and should reverse.

ARGUMENT

I. The Abstention Doctrine of *Younger* and *O'Shea* Is Contrary to Section 1983's Text, History, and Purpose.

A. Enacted as part of the Civil Rights Act of 1871, Pub. L. No. 42-22, 17 Stat. 13, Section 1983 was created "to protect the people from unconstitutional action

under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum*, 407 U.S. at 242 (quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1879)). As Justice Thomas has pointed out, the text of Section 1983 "ma[kes] no mention of defenses or immunities." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment). "Instead, it applies categorically to the deprivation of constitutional rights under color of state law." *Baxter v. Bracey*, 140 S. Ct. 1862, 1862-63 (2020) (Thomas, J., dissenting from the denial of certiorari). Consistent with that broad scope, Section 1983 does not direct federal courts to abstain from exercising jurisdiction in deference to state courts. This is unsurprising given that one of the primary purposes of Section 1983 was to permit "the federal courts . . . to reform the administration of justice in the South." Donald H. Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 1983 Duke L.J. 987, 1016 (1983); *see id.* at 988 ("[T]he federal courts' refusal to use their equitable powers to reform state justice systems directly contravenes the intent of the Reconstruction Congresses that adopted the fourteenth amendment and enacted section 1983.").

Before the Civil Rights Act of 1871, Congress already had enacted legislation that contemplated substantial federal intrusion into state criminal justice systems. These laws were passed in response to Southern states' refusal to treat all of their citizens equally. "Following the Civil War, Southern States enacted Black Codes to

subjugate newly freed slaves and maintain the prewar racial hierarchy." *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019). Many of these laws "expressly excluded blacks from voting, owning land, making contracts, [and] securing access to the courts," while the "oppressive racial impact [of others] depended on selective enforcement, customary caste relations, and private discrimination against blacks." Paul R. Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 Mich. L. Rev. 462, 474 (1982); *see Timbs*, 139 S. Ct. at 688 (citing "broad proscriptions on 'vagrancy' and other dubious offenses"). Notably, "[t]he framers of the Black Codes envisioned that the southern criminal justice system would be the primary enforcement mechanism." Zeigler, *supra*, at 994. Indeed, the Black Codes "bristled with harsh criminal sanctions," "new courts were created to handle the expected flow of cases," and "the jurisdiction of existing courts or officials was enlarged." *Id.*

"The 39th Congress focused on these abuses during its debates over the Fourteenth Amendment, the Civil Rights Act of 1866, and the Freedmen's Bureau Act." *Timbs*, 139 S. Ct. at 697 (Thomas, J., concurring in the judgment). Congress first considered the Freedmen's Bureau bill in 1866. Designed to address the Black Codes and the widespread maladministration of justice in Southern states, *see* Zeigler, *supra*, at 996-97, the bill contained a sweeping prohibition on disparate

treatment in state justice systems, imposed criminal penalties for violating that prohibition, and established a Freedmen's Bureau with jurisdiction to "hear and determine all offenses" committed against "persons who are discriminated against in any of the particulars" covered by the bill. Cong. Globe, 39th Cong., 1st Sess. 209-10 (1866); *see id.* at 340 (Sen. Wilson) (explaining the bill's intent to "set [Black Codes] aside and give the freedman a practical remedy by taking his case at once before the authorities of the United States"); *id.* at 516 (Rep. Eliot) (noting that measures had been instituted in the South "which are as repugnant to our sense of honor and justice as ever any arrangements under the old slave codes could have been"); *id.* at 653 (Rep. McKee) (stating that "[i]n none of those States has the black man a law to protect him in his rights," so "the Freedmen's Bureau is a necessity").

These provisions "contemplated extensive federal intervention in the administration of justice in the South." Zeigler, *supra*, at 997. Indeed, "Congress specifically and overwhelmingly rejected the concept of abstention during the debates on the Freedmen's Bureau bill." *Id.* at 998. The bill's opponents were concerned that it would "give rise to inevitable conflict between the jurisdiction of our State officers and courts and the Freedmen's Bureau," raising the possibility that the Bureau would send federal officers to imprison state clerks and judges. Cong. Globe, 39th Cong., 1st Sess. 418 (Sen. Davis). For that reason, a Senator introduced an amendment that would have codified an abstention doctrine for the Bureau,

providing that it "shall not exercise any judicial powers whatever in any State in which the laws can be enforced by the civil courts." *Id.* at 399. But that amendment failed by a vote of 36 to 9. *Id.*

Around the same time, Congress passed the Civil Rights Act of 1866. That Act, much like the Freedmen's Bureau bill, guaranteed "such citizens, of every race and color . . . full and equal benefit of all laws and proceedings for the security of person and property," while permitting them to be subject to "like punishment, pains, and penalties, and to none other." An Act to Protect All Persons in the United States in Their Civil Rights and Liberties, and Furnish the Means of Their Vindication, § 1, 14 Stat. 27 (Apr. 9, 1866). The Act provided for criminal penalties if these measures were violated, *see id.* § 2, and it gave federal district courts exclusive jurisdiction over "all crimes and offences committed against the provisions of this act," as well as concurrent jurisdiction, with the federal circuit courts, "of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act," *id.* § 3.

Opponents of these provisions objected that they would allow federal courts to interfere in state criminal justice systems. One opponent remarked, for instance, that the bill would "reform the whole civil and criminal code of every State government." Cong. Globe, 39th Cong., 1st Sess. 1293 (Rep. Bingham). Another

argued that the bill would "regulat[e] the internal affairs of the States" by "invad[ing] and defraud[ing] [them] of the right of determining . . . who shall sue and be sued, and who shall give evidence in [their] courts." *Id.* at 478 (Sen. Saulsbury). And another opined that the bill "not only proposes to enter the States to regulate their police and municipal affairs, but it attempts to destroy the independence of the State judiciary." *Id.* at 1154 (Rep. Eldridge). Opponents even suggested that the bill would "make it a penal offense for the judges of the States to obey the constitution and laws of their States, and for their obedience thereto to punish them by fine and imprisonment as felons." *Id.* at 1293 (Rep. Bingham); *see id.* at 1154 (Rep. Eldridge) (asserting that the bill would "affix a penalty to the decision which the judge of a State court may make in the exercise of the judicial function"). In short, opponents maintained that the bill "strikes at all the reserved rights of the States," including the application of their "criminal code." *Id.* at 1777 (Sen. Johnson).

The majority of Congress was unmoved by these objections, however. One of the bill's proponents, for example, "admit[ted] that a ministerial officer or a judge, if he acts corruptly or viciously in the execution or under color of an illegal act, may be and ought to be punished." *Id.* at 1758 (Sen. Trumbull). In the end, the Civil Rights Act of 1866 passed overwhelmingly in Congress over President Johnson's

veto. Zeigler, *supra*, at 1001.[2]

The next month, Congress passed legislation expanding an 1863 habeas corpus statute, which had permitted the removal to federal court of proceedings brought by states against individuals for acts done "under color of any authority derived from . . . the President of the United States." An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, § 5, 12 Stat. 755 (Mar. 3, 1863). The impetus for the 1866 expansion was a concern in Congress about "the hostility and anti-Union prejudice of the Southern state courts and of the use of state court proceedings to harass those whom the Union had an obligation to protect." Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 825 (1965) (footnote omitted). Thus, the 1866 amendments permitted damages suits against judges and other state officers who refused to properly consider motions to remove cases to federal court—another example of a substantial intrusion into state judicial proceedings. *See* An Act to Amend an Act Entitled "An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases," § 4, 14 Stat. 46 (May 11, 1866) (providing

[2] By the time a revised Freedmen's Bureau bill was passed in July 1866, the Civil Rights Act of 1866 had already been enacted, providing a broad grant of jurisdiction to the federal courts similar to the one earlier proposed for the Freedmen's Bureau. Hence, the final version of the Freedmen's Bureau contained no such provision.

that if state proceedings continued after a removal motion, "all parties, judges, officers, and other persons, thenceforth proceeding thereunder, or by color thereof, shall be liable in damages therefor to the party aggrieved").

In short, Congress did not trust state courts to protect federal rights. *See* Cong. Globe, 39th Cong., 1st Sess. 91 (Sen. Sumner) (arguing that ensuring the freedom of formerly enslaved people cannot "be intrusted to the old slave-masters, embittered against their slaves," but "must be performed by the national Government"). Far from embracing any "belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways," *Younger*, 401 U.S. at 44, the 39th Congress enthusiastically endorsed "federal court interference with state court proceedings," *id.* at 43.

B. In 1871, following reports of continued violence against African Americans in the South and the refusal of Southern states to take this breakdown of justice seriously, the 42nd Congress considered a second Civil Rights Act. As it debated this legislation, which ultimately created Section 1983, Congress heard about problems infecting almost every aspect of the criminal justice system, including a failure of judges and juries to ensure that justice was done. *See Monroe v. Pape*, 365 U.S. 167, 174 (1961) ("The debates are replete with references to the lawless conditions existing in the South in 1871.").

For instance, Congress received reports that Southern juries often refused to indict or convict individuals accused of violence against Black people and their allies, and that judges themselves refused to administer justice impartially. *See, e.g.*, Cong. Globe, 42nd Cong., 1st Sess. 157-58 (Rep. Sherman) (describing horrific crimes and noting that "no man has ever been convicted or punished for any of these offenses, not one"); *id.* at 201 (Sen. Nye) (declaring that the state courts have become "a mockery . . . where men perjured in advance are to fill your jury box and perjured witnesses in advance are to swear the rights of the poor away"); *id.* at 334 (Rep. Hoar) ("If the jurors of South Carolina constantly and as a rule refuse to do justice between man and man where the rights of a particular class of its citizens are concerned," it is "a denial to that class of citizens of the equal protection of the laws."); *id.* at 394 (Rep. Rainey) ("[T]he courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity."); *id.* at 429 (Rep. Beatty) (referencing "prejudiced juries" and "bribed judges"); *id.* at 481 (Rep. Wilson) (noting the "corruption of courts, or juries, or witnesses"); *id.* at 487 (Rep. Lansing) ("The courts are closed, juries intimidated or in complicity with the enemies of the Government, the laws are silent, officers of justice overawed, and the very genius of lawlessness and misrule triumphant."); *id.* at app. 108 (Sen. Pool) (observing that Klan members would "hang about the court and get upon the petit jury and upon the grand jury and prevent the conviction of

their members"); *id.* at app. 193 (Rep. Buckley) (explaining that it was "impossible, first, to get a grand jury to find a true bill, and if once found, it [was] still more impossible to convict before a petit or trial jury, however strong the proof").

As one Senator put it, "the State courts in the several States have been unable to enforce the criminal laws of their respective States," making it imperative that Congress "enact the laws necessary for the protection of citizens of the United States." *Id.* at 653 (Sen. Osborn); *see Monroe*, 365 U.S. at 174 (explaining that the 1871 legislation was prompted not by "the unavailability of state remedies," but by "the failure of certain States to enforce the laws with an equal hand"). President Grant agreed that "the power to correct these evils is beyond the control of State authorities," and he recommended that Congress pass "such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States." *Id.* at 173.

That is exactly what Congress did, enacting a broad remedy that provided a cause of action in law and equity against "any person" who, "under color of any law, statute, ordinance, regulation, custom, or usage of any State," deprived another of "any rights, privileges, or immunities secured by the Constitution of the United States . . . any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, § 1, 17

Stat. 13 (Apr. 20, 1871).

Consistent with that clear textual mandate, the provision's drafters expected federal courts to "act aggressively to protect federal rights." Zeigler, *supra*, at 1016 n.185. "Whenever . . . there is a denial of equal protection by the State," one Congressman explained, "the courts of justice of the nation stand with open doors, ready to receive and hear with impartial attention." Cong. Globe, 42nd Cong., 1st Sess. 459 (Rep. Coburn); *see also id.* at 376 (Rep. Lowe) ("this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired"); *id.* at 476 (Rep. Dawes) ("there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, *in severity, if need be*," than the federal courts (emphasis added)); *id.* at 449 (Rep. Butler) ("every citizen . . . should have a remedy against the locality whose duty it was to protect him and which had failed on its part"); *id.* at 653 (Sen. Osborn) ("We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves, *i.e.*, the full and complete administration of justice in the courts.").

Congress fully understood that under Section 1983 the federal courts would oversee, and when necessary correct, the states' criminal justice systems. As one proponent explained, "when the courts of a State violate the provisions of the Constitution or the law of the United States there is now relief afforded by a review

in the Federal courts." *Id.* at 501 (Sen. Frelinghuysen). Opponents of the bill shared that understanding. One complained that the bill would "invade the provinces of the State courts with new laws and systems of administration," *id.* at app. 258 (Rep. Holman), while others argued that the bill "disparage[d]" the state courts by suggesting that they could not be "trusted," *id.* at app. 216 (Sen. Thurman); *see id.* at 361 (Rep. Swann) ("The first section of this law ignores the State tribunals as unworthy to be trusted . . . ."); *id.* at 385 (Rep. Lewis) ("the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal court and subject to damages for his decision against a suitor"); *id.* at app. 50 (Rep. Kerr) ("It is a covert attempt to transfer another large portion of jurisdiction from the State tribunals . . . to those of the United States."); *id.* at app. 112 (Rep. Moore) (warning that "the whole machinery of State governments is superseded"); *id.* at app. 304 (Rep. Slater) (arguing that if Congress passed the bill, "the local jurisdiction of the State [would be] a thing of the past").

Proponents were adamant, however, that these matters not be "left with the States," where "large classes of people" were "without legal remedy in the courts." *Id.* at app. 252 (Sen. Morton); *see id.* at app. 262 (Rep. Dunnell) (calling "repugnant" the notion that "our protection must come from the State in which we chance to reside" and that "the Federal Government has nothing to do [on] behalf of the citizen"). Section 1983's supporters therefore sought to grant individuals direct

access to the federal courts. As one explained:

> The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily.

Id. at 460 (Rep. Coburn).

Crucially, therefore, Section 1983 was intended to authorize the federal government, on behalf of "a citizen of the United States," to assert "immediate jurisdiction through its courts, *without the appeal or agency of the State in which the citizen is domiciled*." *Id.* at 389 (Rep. Elliott) (emphasis added); *see id.* at 571 (Rep. Stockton) ("the proceedings . . . shall be in the Federal courts"). Both the bill's proponents and its opponents shared this interpretation of Section 1983's scope. As one opponent argued, Section 1983 would "not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. *It takes the whole question away from them in the beginning*." *Id.* at app. 86 (Rep. Storm) (emphasis added); *see id.* at app. 216 (Sen. Thurman) ("jurisdiction of that civil action is given to the Federal courts *instead of* its being prosecuted as now in the courts of the States" (emphasis added)).

Throughout the debates, "[p]roponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were

powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Mitchum*, 407 U.S. at 240. Thus, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Id.* at 242.

In sum, Section 1983 was universally understood as empowering the federal courts to play an active role in reforming state criminal justice systems.

C. The Supreme Court's decisions fashioning the *Younger* abstention doctrine are "largely devoid of discussion of th[is] legislative history of Reconstruction." Zeigler, *supra*, at 1022. In *Younger* itself, the Court relied on its own "belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways," citing a supposed "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." 401 U.S. at 44, 41. The Court's discussion mentioned history only from the original Founding, *see id.* at 44 (citing "the profound debates that ushered our Federal Constitution into existence"), while ignoring the Constitution's amendment during the Reconstruction era—a development that, the Court has since acknowledged, "fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010); *see Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982) ("The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were

crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era.").

"Justice Black's historical essay in *Younger*," therefore, is "both *antebellum* and anti-Reconstruction, effectively deleting the nineteenth century and the Civil War from 'history' altogether. Even the existence of the Civil Rights Act would seem anomalous from this perspective." Aviam Soifer & H.C. Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 Tex. L. Rev. 1141, 1170 (1977). But Americans ratified the Fourteenth Amendment knowing that they were "altering the relationship between the States and the Nation with respect to the protection of federally created rights," *Mitchum*, 407 U.S. at 242, and Congress enacted Section 1983 to provide "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution," *Wilson v. Garcia*, 471 U.S. 261, 271-72 (1985) (quotation marks omitted). Moreover, as discussed above, the Reconstruction Congress specifically "considered and rejected the possibility that federal courts should decline to exercise their jurisdiction over cases challenging actions in ongoing state criminal proceedings." Zeigler, *supra*, at 1024.

The Court's decision in *O'Shea v. Littleton* is even further unmoored from the text and history of Section 1983. In *O'Shea*, the plaintiffs alleged that a local prosecutor and police chief systematically applied the criminal laws more harshly to

Black residents than to others, and that local judges set bonds and sentences higher for Black residents. 414 U.S. at 490-92. The Court held that no Article III case or controversy existed because the plaintiffs "allege[d] injury in only the most general terms" based on "speculation and conjecture." *Id.* at 495, 497. Nevertheless, the Court went on to decide that even if the plaintiffs could demonstrate standing, abstention would be required because "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials" would "contemplate interruption of state proceedings to adjudicate assertions of noncompliance" by criminal defendants who were members of the plaintiffs' proposed class. *Id.* at 500. This, in the Court's view, would require "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings," amounting to an impermissible "federal audit of state criminal proceedings." *Id.* at 500, 502.

As in *Younger*, the *O'Shea* Court wholly failed to consider the history and purpose of Section 1983, even though the plaintiffs' allegations bore "an uncanny resemblance to the abuses in the post–Civil War South." Zeigler, *supra*, at 1028. Had the Court considered that history, it would have discovered that a "continuing intrusion" by the federal courts into the "conduct of state criminal proceedings" was precisely what Section 1983 was meant to facilitate. Indeed, the penal sanctions of the Civil Rights Act of 1866—to which the civil remedy in Section 1983 was

intended to be an analog, *see* Zeigler, *supra*, at 1016 n.186; Cong. Globe, 42nd Cong., 1st Sess. app. 68—specifically contemplated actions against state judges and prosecutors. *See* 14 Stat. at 27, § 2 (authorizing fines and imprisonment for "any person" who, under color of state law or custom, "shall subject, or cause to be subjected" any inhabitant "to different punishment, pains, or penalties . . . by reason of his color or race, than is prescribed for the punishment of white persons").

Furthermore, the Court's suggestion in *O'Shea* that abstention was warranted in part because the plaintiffs could obtain relief in state court, *see* 414 U.S. at 502, is also at odds with Section 1983's history. As described above, "Congress did not intend the federal courts to withhold [Section 1983's] remedies if complainants could seek relief in the state courts," Zeigler, *supra*, at 1017, and the Reconstruction Congress specifically *rejected* the notion that federal relief should be unavailable if individuals could pursue such relief in the state court system, *see supra* at 6-7.

In short, by unduly restricting the federal courts' ability to prevent constitutional violations from occurring in state criminal proceedings, the abstention doctrine of *Younger* and *O'Shea* runs contrary to the text, history, and purpose of Section 1983.

II. Because the District Court Extended *Younger* and *O'Shea* Abstention Further than Precedent Requires, This Court Should Reverse.

Given the tenuous legal foundation for *Younger* and *O'Shea* abstention, that doctrine should be confined to circumstances that clearly fall within existing

precedent. And nothing in existing precedent forecloses Plaintiffs' claim for relief from a district attorney's long-running pattern of using peremptory strikes to deny African Americans the ability to serve on juries.

"In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction" and "should not 'refus[e] to decide a case in deference to the States.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72-73 (2013) (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989)). "Circumstances fitting within the *Younger* doctrine" are "'exceptional.'" *Id.* at 73 (quoting *New Orleans Pub. Serv.*, 491 U.S. at 368). *Younger* and *O'Shea* call for abstention only when two criteria are met: (1) a federal injunction "would contemplate interruption of state proceedings to adjudicate assertions of noncompliance" made by criminal defendants, causing "continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts," *and* (2) "there are available state and federal procedures which could provide relief from the wrongful conduct alleged." *O'Shea*, 414 U.S. at 500, 502.

Neither of those conditions exists here. First, unlike in *O'Shea*, the injunction requested in this case would not interfere with current or future state proceedings. In *O'Shea*, the Court explained, the injunction sought "would be operative only where permissible state prosecutions are pending against one or more of the beneficiaries of the injunction," who feared prosecution based on their race or First

Amendment activities. *Id.* at 500. Had the injunction been issued, criminal defendants inevitably could have brought federal challenges to individual rulings by state judges during ongoing criminal proceedings, halting those proceedings pending a federal ruling. *See id.* at 501-02 ("any member of respondents' class who appeared as an accused before petitioners could allege and have adjudicated a claim that petitioners were in contempt of the federal court's injunction order"). Therefore, as the Court stressed, the *O'Shea* injunction "would *require* for its enforcement the continuous supervision by the federal court over the conduct of [prosecutors and judges] in the course of future criminal trial proceedings involving any of the members of the [plaintiffs'] broadly defined class." *Id.* at 501 (emphasis added).

The injunctive relief sought here—which would prevent a district attorney from maintaining a custom or policy of making race-based peremptory strikes—is entirely different. Because the injunction is being requested for the protection of prospective jurors, not potential criminal defendants, neither the injunction itself nor its enforcement would require federal courts to interrupt state criminal prosecutions at the request of defendants. Indeed, the injunction would not "require for its enforcement," *id.*, that anyone be permitted to challenge any particular jury-selection decision or the composition of any particular jury. As Plaintiffs argued below, moreover, the district court can issue an injunction with "sensitivity to valid state interests and the avoidance of unnecessary intrusions into state actions," including

"by deciding that it will not order relief that interrupts state proceedings." ROA.137.

The district court believed that an injunction would interfere with state proceedings because, in a potential federal enforcement action, the inquiry into whether the district attorney was violating the injunction "would necessarily require a review of numerous instances of allegedly improper juror exclusions to determine whether a custom or policy exists." ROA.190. Even assuming the validity of this premise, the district court's conclusion does not follow. The court spun out a chain of hypothetical developments that, in the court's view, could have an incidental "impact" on subsequent state court proceedings involving individuals who are neither Plaintiffs in this case nor members of the proposed class:

> *[I]f* such [juror] exclusions were allowed by the state court, any petition for enforcement *could* require this Court to hold such rulings were error, improperly *calling into question* the validity of any number of criminal proceedings . . . . Each defendant in these proceedings . . . *would be able to argue* that a federal court had already determined that a juror was improperly stricken in violation of the Equal Protection Clause, thus requiring reversal. This finding, *[e]ven if not determinative in every instance*, would undoubtedly *impact* state proceedings . . . .

ROA.190 (emphasis added) (citations and quotation marks omitted).

Such speculation, however, about a potential impact on future criminal proceedings—based on the type of enforcement order that the district court "could" need to issue, along with a questionable account of the effect this order would necessarily have in state proceedings because of what a defendant "would be able to argue," *id.*—is not sufficient to demonstrate that the injunction Plaintiffs seek would

require "the type of plenary review of state court proceedings *O'Shea* strove to avoid." ROA.190.

In short, there is no reason to think that the injunction sought here will result in anything like the "major continuing intrusion . . . into the daily conduct of state criminal proceedings," 414 U.S. at 502, that the Supreme Court found impermissible in *O'Shea*.[3]

Second, Plaintiffs have available no alternative avenues that "could provide relief from the wrongful conduct alleged." *O'Shea*, 414 U.S. at 502. Unlike the criminal defendant in *Younger* and the potential criminal defendants in *O'Shea*, Plaintiffs cannot bring their constitutional challenge in the state proceedings where they are allegedly being discriminated against. *See Younger*, 401 U.S. at 49 ("Here a proceeding was already pending in the state court, affording Harris an opportunity to raise his constitutional claims."); *O'Shea*, 414 U.S. at 502 (citing "the right to a substitution of judge or a change of venue" and "review on direct appeal or on postconviction collateral review"). Although in theory "individual jurors subjected to racial exclusion have the legal right to bring suit on their own behalf," potential

[3] The injunction requested here is also far different from that sought in *Rizzo v. Goode*, 423 U.S. 362 (1976), which would have required "significantly revising the internal procedures of the [city] police department." *Id.* at 379. Unlike such a broad rewrite of city procedures, simply prohibiting an unconstitutional policy of making race-based peremptory strikes would not impose "a sharp limitation on the [Mississippi fifth circuit court district's] latitude in the dispatch of its own internal affairs." *Id.* (quotation marks omitted).

jurors "have no opportunity to be heard at the time of their exclusion." *Powers v. Ohio*, 499 U.S. 400, 414 (1991). Moreover, the "barriers to a suit by an excluded juror" are so "daunting" as to be effectively prohibitive, in part because "it would be difficult for an individual juror to show a likelihood that discrimination against him at the *voir dire* stage will recur." *Id.* at 414-15. Because Plaintiffs cannot litigate their challenge in criminal cases where they are called as potential jurors, and because "[t]he reality" is that "practical barriers" prevent them from altering the district attorney's policy through discrete challenges to individual jury-selection decisions, *id.* at 415, those avenues do not offer Plaintiffs "an adequate remedy." *O'Shea*, 414 U.S. at 499 (quoting *Younger*, 401 U.S. at 43-44).

What avenue remains? The district court's only answer was that "Mississippi courts exercise concurrent jurisdiction with their federal counterparts over § 1983 claims," ROA.183 (quoting *E. Miss. State Hosp. v. Callens*, 892 So. 2d 800, 812 (Miss. 2004)), and so Plaintiffs could file their Section 1983 suit in state court. But the option of filing one's challenge in state court is available for *any* Section 1983 challenge to *any* constitutional violation by *any* state actor. The district court's reasoning, therefore, would always preclude bringing a Section 1983 claim in federal court. That cannot be right, as *Younger*'s "exception" would swallow the "general rule" that "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging,'" and that potential "'[p]arallel state-court proceedings do not detract

from that obligation.'" *Sprint Commc'ns*, 571 U.S. at 77 (quoting *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976)).

In addition to "mak[ing] a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States," *New Orleans Pub. Serv.*, 491 U.S. at 368, the district court's reasoning flies in the face of Section 1983's most basic purpose, which was to provide "a uniquely federal remedy," *Wilson*, 471 U.S. at 271, that would be "supplementary to any remedy any State might have," *McNeese*, 373 U.S. at 672. Regardless of what recourse might be available in state court, "[p]roponents of the measure repeatedly argued that . . . an independent federal remedy was necessary," *Briscoe v. LaHue*, 460 U.S. 325, 338 (1983), precisely *because* state courts were often not receptive to challenges to their own justice systems. *See supra* at 13-16.

* * *

The district court's rationale for dismissing Plaintiffs' case would preclude virtually any suit in federal court alleging unconstitutional discrimination in state criminal justice systems. No precedent requires this dramatic expansion of *Younger* and *O'Shea* abstention doctrine, and such an expansion is especially unwarranted given the dubious legal foundation on which the entire doctrine rests. There is no basis for shielding the district attorney's alleged misconduct from judicial review in federal court.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's ruling.

Respectfully submitted,

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Dated: February 12, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on February 12, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 12th day of February, 2021.

/s/ Elizabeth B. Wydra
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,381 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 12th day of February, 2021.

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