Nos. 23-2270, 23-3560

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Walter Betschart, *et al.*, on behalf of themselves and all others similarly situated,

Petitioner-Cross Appellants,

v.

State of Oregon,

Respondent-Appellant, and

Washington County Circuit Court Judges,

Respondent-Cross-Appellees.

Appeal from the United States District Court for the District of Oregon

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CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae American Civil Liberties Union Foundation; American Civil Liberties Union of Oregon; New York University Center for Race, Inequality, and the Law; National Association of Criminal Defense Lawyers; Oregon Criminal Defense Lawyers Association; and Public Accountability state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE

This brief is on behalf of amici the American Civil Liberties Union Foundation; American Civil Liberties Union of Oregon; National Association of Criminal Defense Lawyers; New York University Center for Race, Inequality, and the Law; Oregon Criminal Defense Lawyers Association; and Public Accountability. Each organization advocates to improve fairness in the criminal legal system, and in furtherance of that goal, litigates cases challenging systemic violations of the right to counsel. These amici have argued right to counsel claims in support of criminal defendants who were actually or constructively denied representation in Oregon's criminal proceedings.

Amici file this brief by consent of all parties under FRAP 29(a)(2).

Amici submit this brief to further detail (1) why Oregon's appointment delays systematically violate the Sixth Amendment right to counsel, and (2) why Oregon's criminal proceedings do not provide Petitioners with an adequate opportunity to vindicate their Sixth Amendment right to counsel, which in turn means that the doctrine of *Younger* abstention does not bar federal court review of Petitioners' claims.

No party's counsel authored this brief in whole or in part. No party, party's counsel, or other person contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (citation omitted). The district court's undisputed factual findings show that over two thousand Petitioners throughout Oregon are not able to assert their right to fair criminal proceedings because they are unrepresented by counsel for weeks or months after arraignment. Because Petitioners do not have counsel to preserve evidence, argue for release, or negotiate plea deals during this period, they are at risk of suffering irreversible prejudice in plea bargaining and at trial. These facts are sufficient to demonstrate a violation of the Sixth Amendment, which requires competent counsel at any stage of prosecution that carries the *potential* for irreversible prejudice.

The State's response to this argument focuses almost exclusively on the district court's seven-day remedial order, conflating the merits of the Sixth Amendment claim with the proper remedy. The State also asserts that *Younger* abstention forecloses federal court review, an argument that ignores the crux of Petitioners' claims: state court criminal proceedings are not adequate to timely vindicate Petitioners' right to counsel.

ARGUMENT

I. Petitioners Are Likely to Succeed on their Sixth Amendment Claim.

The fairness of Petitioners' criminal proceedings is fatally undermined by the deprivation of counsel for weeks or months after arraignment. The district court's undisputed findings show that because Petitioners do not have counsel to preserve evidence, argue for release, or negotiate plea deals, they are at risk of suffering irreversible prejudice in plea bargaining and at trial. The State's failure to appoint counsel within a reasonable time to allow for representation at these critical stages violates the Sixth Amendment.

The State's argument focuses almost exclusively on the district court's seven-day remedial order, which conflates the merits of Petitioners' constitutional claim with the contours of the district court's remedy. Amici respectfully urge this Court to reject that approach and provide separate analyses of the constitutional and remedial issues raised in this appeal. Applying the correct standard, Petitioners have demonstrated that the deprivation of counsel for weeks or months after arraignment risks substantial prejudice in violation of the Sixth Amendment.

A. Critical Stages Depend on the Risk of Prejudice, Not Actual Prejudice.

The purpose of the Sixth Amendment right to counsel is "to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." *United States v. Wade*, 388 U.S. 218, 227 (1967). That

theory rests on the notion "that the clash of trained counsel will best serve the court's truth-seeking function." *Menefield v. Borg*, 881 F.2d 696, 698 (9th Cir. 1989). Accordingly, when adversarial proceedings begin, the right to counsel "attaches" and the state must appoint counsel "within a reasonable time . . . to allow for adequate representation at any critical stage" of prosecution. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 (2008).

Critical stages of prosecution are stages with the potential to irreparably prejudice the outcome of the criminal case, where counsel can help avoid that prejudice. The Supreme Court articulated this test in a number of ways in the era immediately following *Gideon v. Wainwright*, 372 U.S. 335 (1963). *E.g.*, *United States v. Ash*, 413 U.S. 300, 313, 316 (1973) (considering "whether the accused required aid in coping with legal problems or assistance in meeting his adversary," including the "risks inherent" in the stage and "the opportunity to cure" them); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967) ("[C]ounsel . . . is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."); *Wade*, 388 U.S. at 227 (asking whether "potential substantial prejudice to defendant's rights inheres" and counsel may "help avoid that prejudice"). From these precedents, this Court has gleaned three criteria that are "useful" to identify a critical stage: if (1) "failure to pursue strategies or remedies results in a loss of significant rights," (2) "skilled counsel would [help] the accused

understand the legal confrontation," or (3) "the proceeding tests the merits of the accused's case." *Menefield*, 881 F.2d at 698–99. Ultimately, critical stages "include all parts of the prosecution implicating substantial rights of the accused." *Id.* at 698 (citing *Mempa* 389 U.S. at 134; *Wade*, 388 U.S. at 218; and *White v. Maryland*, 373 U.S. 59 (1963) (per curiam)). Whether the formulation is "substantial rights" under *Mempa* and *Menefield*, or "substantial prejudice to the defendant's rights" under *Wade*, it means *potential* prejudice to the outcome of the criminal case. *Mempa*, 389 U.S. at 135–36 ("legal rights may be lost . . . [and] the incidence [of prejudicial waiver] . . . is not so slight as to be capable of being characterized as de minimis"); *Wade*, 388 U.S. at 235 (stages which "might determine the accused's fate").

Two aspects of the critical stage test are central to Petitioners' argument. First, the relevant prejudice includes prejudice to cases resolved through plea bargaining, not just prejudice to the outcome of trial. The right to counsel protects "not [only] the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it. . . . [T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Lafler v. Cooper*, 566 U.S. 156, 169–70 (2012). *Accord Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (observing that 94% of state criminal prosecutions end in guilty

pleas: "[P]lea bargaining is . . . not some adjunct to the criminal justice system; it is the criminal justice system."). Courts must determine the potential for prejudice by making a "pragmatic assessment" of the "realities of modern criminal prosecution," which relies on pleas induced through high-stakes pretrial proceedings. *Patterson v. Illinois*, 487 U.S. 285, 298 (1988); *Wade*, 388 U.S. at 224.

Second, the critical stage standard depends not on the certainty of prejudice, but on the *potential* for prejudicing a plea bargain or trial. *Mempa*, 389 U.S. at 134 ("substantial rights of a criminal accused may be affected"); *id.* at 135 ("certain legal rights may be lost if not exercised at this stage"); *Stovall v. Denno*, 388 U.S. 293, 298 (1967) (abrogated on other grounds) ("[t]he possibility of unfairness . . . is great"); *Wade*, 388 U.S. at 226–27 ("counsel's absence might derogate from the accused's right to a fair trial"); *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961) ("[a]vailable defenses may be . . . irretrievably lost"). Petitioners are likely to succeed on the merits because they have shown that they are not appointed counsel "within a reasonable time . . . to allow for adequate representation at any critical stage," *Rothgery* 554 U.S. at 212, where there is "potential substantial prejudice to [the] defendant's rights," *Wade*, 388 U.S. at 227.

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B. Counsel Is Not Appointed Within a Reasonable Time to Allow For Adequate Representation at Critical Stages.

1. Counsel Is Not Appointed Within a Reasonable Time to Allow For Adequate Representation in Pretrial Investigation, Bail Hearings, or Plea Negotiations.

The district court's uncontested findings show that counsel is not appointed within a reasonable time[1] to allow for adequate representation in pretrial investigation, bail hearings, or plea negotiations. The district court found that whether they are detained or not, Petitioners wait for weeks, sometimes months, without an attorney. 1-ER-11–12. Those who are detained are "unable to adequately . . . secure witnesses, review discovery, . . . [or] request the preservation of evidence." 1-ER-28. As for Petitioners who are under restrictive conditions, the evidence also demonstrated a litany of irreparable harms, including permanent loss of evidence like eyewitness accounts, security videos, toxicology screenings, forensic evaluations, and crime scene documentation in the hours or days

[1] The "reasonable time" for appointment does not necessarily require the occurrence or imminence of a critical stage. *Farrow v. Lipetzky*, No. 12-cv-06495-JCS, 2017 WL 1540637, at *15 (N.D. Cal. Apr. 28, 2017), *aff'd sub nom. Farrow v. Contra Costa Cnty.*, 799 F. App'x 520 (9th Cir. 2020) (noting that for Mr. Rothgery himself, counsel promptly secured his release and negotiated dismissal of his charges: "It is not clear from the Rothgery opinion that any critical stage of the proceeding was imminent, but that in no way diminishes the value of appointed counsel to protect Walter Rothgery's process and liberty interests after the right had attached."). The Court need not decide this question, however, because appointment for Petitioners is so delayed that it does not allow for adequate representation at multiple critical stages.

following arrest. 1-SER-228–34 (Houze Decl.), 2-SER-409–10 (Horst Decl.), 2-SER-448 (Boise Decl.).

The district court further found that Petitioners "are not receiving counsel at the critical stage of bail hearings." 1-ER-27. If the bail hearing is delayed after arraignment—which, under Oregon law, may happen on motion of the prosecution—Petitioners are required to appear unrepresented against a prosecutor who files exhibits, calls witnesses, and makes detailed arguments for continued pretrial detention. 1-ER-26; *see, e.g.*, Audio Recording, Polaski release hr'g (July 19, 2023);[2] Audio Recording, Dawkins release hr'g (May 18, 2023); Audio Recording, Owens release hr'g (July 10, 2023); Audio Recording, Dechenne release hr'g and guilty plea (Sept. 14, 2022). Oregon law is clear: absent waiver, "[u]nder no circumstances may the [bail] hearing be held more than five days after arraignment." Or. Rev. Stat. § 135.245(7)(a). Nevertheless, the district court found that some Petitioners were required to appear without counsel for *multiple* bail hearings reset over the course of more than a month, 1-ER-26–27. *See, e.g.*, 4-ER-812–25 (showing Mr. Owens's bail hearing reset repeatedly until he "waived"

[2] Petitioners submitted audio recordings to this Court, which are identified as Exhibit F in support of motion for temporary restraining order in Volume 2 of the Supplemental Excerpts of Record. Amici cite to these recordings by each Petitioner's last name and the date of the court proceeding.

counsel). Plainly, counsel is not appointed within a reasonable time to allow for adequate representation at bail hearings.

Finally, the district court's findings show that counsel is not appointed within a reasonable time to allow for adequate representation in plea negotiations. Again, the district court found that delays in appointment for detained Petitioners lead to the inability to preserve evidence, denial of discovery, waiver of bail hearings, and waiver or extension of the speedy trial clock—each of which provides the State with crucial leverage for plea bargaining and leaves the defendant at a severe disadvantage. 1-ER-28. The court further observed that Petitioners who are detained "for weeks, and sometimes months, without an attorney" offer uncounseled guilty pleas in exchange for release. 1-ER-11. Petitioners' evidence demonstrated that people under restrictive conditions also pled guilty to end their cases. 3-ER-370–71 (Oborn Decl.), 3-ER-381 (Schmonsees Decl.); *cf.* 3-ER-378 (Swallow Decl.) (describing frustration of repeated, fruitless court appearances for people on restrictive conditions). These findings show that the delay in appointing counsel to Petitioners does not allow for adequate representation in plea negotiations.

For the reasons described below, each of these proceedings—pretrial investigation, bail hearings, and plea negotiations in the weeks immediately following arraignment—is a critical stage of prosecution.

2. Pretrial Investigation Is a Critical Stage.

The importance of pretrial investigation is well established. *Kansas v. Ventris*, 556 U.S. 586, 590 (2009). It is "perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). The Court reaffirmed "the 'vital' need for a lawyer's advice and aid during the pretrial phase" in *Estelle v. Smith*, 451 U.S. 454, 469 (1981). And in *Rothgery*, the Court emphasized the urgency of the start of adversarial proceedings: "a defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." 554 U.S. at 210. The right to pretrial investigation must "ensure that [government] manipulation does not render counsel entirely impotent—depriving the defendant of effective representation by counsel at the only stage when legal aid and advice would help him." *Ventris*, 556 U.S. at 591 (cleaned up).

Delaying pretrial investigation weeks or months after arrest does just that: Petitioners do not have effective representation by counsel at the only stage when crucial evidence can be documented and preserved. In litigation challenging pretrial investigation delays resulting from a similar attorney shortage, the

Massachusetts Supreme Judicial Court held that "the importance of prompt pretrial preparation cannot be overstated," and recounted "myriad responsibilities" that counsel must undertake early in pretrial investigation, like interviewing people and preserving evidence, "before the effects of the passage of time." *Lavallee v. Justices in Hampden Sup. Ct.*, 812 N.E.2d 895, 903–04 (2004) (cleaned up). The same is true in Oregon. The district court's undisputed findings establish that Petitioners are "unable to adequately . . . secure witnesses, review discovery, . . . [or] request the preservation of evidence" for "weeks, sometimes months," while they are detained without an attorney. 1-ER-11, 28. Petitioners demonstrated that similarly, for people who are under restrictive conditions, "there are numerous irreparable harms attendant to clients being unrepresented at the beginning of a criminal matter," and evidence like eyewitness accounts, security videos, toxicology screenings, forensic evaluations, and crime scene documentation can be lost in a matter of hours or days. 1-SER-228–34 (Houze Decl.), 2-SER-409–10 (Horst Decl.), 2-SER-448 (Boise Decl.).

Plainly, the failure to preserve helpful evidence has "potential substantial prejudice to [the] defendant's rights" in that it can result in worse plea deals or trial outcomes. *Wade*, 388 U.S. at 227. *Accord Menefield*, 881 F.2d at 698–99 (describing "loss of significant rights"). The district court found that the deprivation of counsel lasts so long that Petitioners offer uncounseled guilty pleas

in exchange for release—regardless of whatever valid defenses investigation may have revealed. 1-ER-11–12. *See also* 2-ER-87–88 (district court remarking "there's no way these are voluntary pleas . . . a 13-month prison term . . . [is] not a [good] deal"). The same is true for Petitioners on restrictive conditions. 3-ER-370–71 (Oborn Decl.), 3-ER-381 (Schmonsees Decl.); *cf.* 3-ER-378 (Swallow Decl.) (describing frustration of repeated, fruitless court appearances for people on restrictive conditions). It is also plain that counsel can "help avoid that prejudice" by undertaking pretrial investigation that Petitioners cannot, both because they are physically detained, and because they require counsel's professional expertise to understand what evidence matters and how to preserve it. *Wade*, 388 U.S. at 227. *Accord United States v. Bohn*, 890 F.2d 1079, 1080–81 (9th Cir. 1989) (considering whether "skilled counsel would . . . help[] the accused understand the legal confrontation"). The irreparable prejudice that can result from not having counsel to investigate during the weeks immediately following arraignment, demonstrates that pretrial investigation is a critical stage of prosecution.

3. Bail Hearings Are a Critical Stage.

Petitioners are unrepresented at their bail hearings whenever prosecutors move to delay bail hearings until after arraignment. There are two primary ways that these bail hearings risk prejudicing plea bargaining or trial: first, the hearings prompt Petitioners to argue for release, raising the possibility that they irrevocably

waive defenses or make irreversible admissions of guilt. Second, detention orders issued at these hearings result in weeks or months of pretrial detention without counsel, effectively assuring that the Petitioner will be punished with a sentence of incarceration.

First, Petitioners making uncounseled arguments at these bail hearings risk waiving defenses or admitting guilt. A pretrial hearing is a critical stage when "[a]vailable defenses may be as irretrievably lost . . . as they are when . . . counsel waives a right for strategic purposes," and thus, what happens at arraignment "may affect the whole trial" if the accused makes harmful concessions leading to a conviction or harsher sentence. *Hamilton*, 368 U.S. at 52–55. If the pretrial hearing prompts an admission of guilt, there is a risk of prejudice serious enough to make the hearing a critical stage—even if a plea was not required by state law. *White*, 373 U.S. at 59–60 (concerning guilty plea prompted by preliminary hearing). Thus, a hearing need not involve direct questioning to create an unacceptable risk of prejudice.

The record shows that bail hearings prompt Petitioners to comment on their release, risking inculpatory admissions in the process. At uncounseled release hearings, judges typically receive exhibits from the prosecution, hear argument from the prosecution about why the Petitioner should be detained, and hear testimony from witnesses for the prosecution. After this presentation of argument

and evidence, the judge then instructs the Petitioner not to speak about their case, informs the Petitioner of their right to silence, and asks whether they would like to argue for release. Audio recordings in the record show Petitioners stating an intention to plead no contest, stating willingness to plead guilty for an indeterminate amount of prison time, requesting a psychiatric evaluation, insinuating that alleged victims are lying exes, commenting on their criminal histories, and commenting on past failure to appear. *See, e.g.*, Audio Recording, Polaski release hr'g (July 19, 2023); Audio Recording, Dawkins release hr'g (May 18, 2023); Audio Recording, Owens release hr'g (July 10, 2023); Audio Recording, Dechenne release hr'g and guilty plea (Sept. 14, 2022). As is apparent from these examples, even statements that are not facial admissions of guilt may waive defenses, concede relevant facts, create impeachment material that affects the choice whether the Petitioner will take the stand, or otherwise suggest investigative or strategic leads to the prosecution. Petitioners who are unaware of these legal implications are forced to "make critical decisions without counsel's advice" about waiving either the right to silence or right to be heard. *See Lafler*, 566 U.S. at 165.

The Supreme Court has outlined, in the context of psychiatric examinations, why it is unconstitutional to force defendants to make this strategic choice without counsel: defendants do not know "to what end the [] findings could be employed,"

or "what other evidence is available, [] the particular [judge's] biases and predilections, and of possible alternative strategies" for release. *Estelle v. Smith*, 451 U.S. 454, 471 (1981). *Cf. Perry v. Leeke*, 488 U.S. 272, 281 (1989) (noting although a defendant "has no constitutional right to consult" with counsel while the defendant is testifying, "he has an absolute right to such consultation before he begins to testify") (cleaned up). Nevertheless, the record shows that Petitioners elect to risk prejudicing their cases in order to argue for release. *See, e.g.*, Audio Recording, Polaski release hr'g (July 19, 2023); Audio Recording, Dawkins release hr'g (May 18, 2023); Audio Recording, Owens release hr'g (July 10, 2023); Audio Recording, Dechenne release hr'g and guilty plea (Sept. 14, 2022).

For Petitioners who are detained because they choose to remain silent, or who fail to make a persuasive case for release, these bail hearings carry a second inherent risk: the period of pretrial detention ordered at this hearing "might well settle the accused's fate and reduce the trial itself to a mere formality." *Wade*, 388 U.S. at 224. The Supreme Court recognized the potentially dispositive nature of the bail determination long ago, holding that Alabama's preliminary hearings were a critical stage in part because of the early opportunity to argue "on such matters as the necessity for . . . bail." *Coleman v. Alabama*, 399 U.S. 1, 9 (1970). Here, that precedent applies with strong force: if the court denies release, Petitioners are effectively sentenced to weeks or months of uncounseled pretrial detention. 1-ER-

11–12, 26–27. While Petitioners have a right to move for a subsequent bail hearing, they do not have counsel's assistance to file such a motion. Other than an uncounseled guilty plea, a motion for a subsequent bail hearing is "the only way to trigger [] release." *United States v. Budell*, 187 F.3d 1137, 1143 (9th Cir. 1999) (requiring appointment of counsel, in the context of civil commitment, to investigate and file a motion for release as a matter of due process). Similarly situated Petitioners might plead to probation or other non-carceral sentences if they are already under restrictive conditions, but ultimately plead to time served—jail time—if they are detained. *See* 2-SER-226 (Horst Decl.) (describing lighter sentences for people who are not detained). Detention orders thus risk jailing Petitioners who would not face another day of incarceration if counsel were available to argue for their release.

It is straightforward that counsel's presence at these bail hearings can "help avoid" the risk of coercive pretrial detention and harmful admissions. *Wade*, 388 U.S. at 227. *Accord Bohn*, 890 F.2d at 1080–81 (considering whether "skilled counsel would . . . help[] the accused understand the legal confrontation"). As the district court found, counsel's assistance is necessary for identifying space in appropriate programs and crafting a conditional release plan. *See* 1-ER-49 (finding Petitioners are "unable to adequately argue for conditional release"); 2-ER-213 (district court remarking: "if there's any hope of getting them out of custody . . .

there's going to be presentation of a plan . . . [like] attorneys do every day. And that's not happening"). *Cf. Estelle*, 451 U.S. at 471 (observing that effective representation requires background knowledge of institutional biases and alternative strategies). Counsel can also gather evidence and contact witnesses—an employer who verifies income, a family member who promises transportation to court—and proffer that evidence with the credibility of an officer of the court, or present witnesses themselves. Without counsel present, the district court found, Petitioners have no way to secure witness testimony. 1-ER-49.

Later appointment of counsel does not cure this prejudice. *See Ash*, 413 U.S. at 316 (asking "whether confrontation with counsel at trial can serve as a substitute for counsel at the pretrial confrontation"). Inculpatory statements infect plea negotiations from the moment they are uttered: "It is illogical to say that the right is not violated until . . . the statement's admission into evidence. . . . In such circumstances the accused continues to enjoy the assistance of counsel; the assistance is simply not worth much." *Ventris*, 556 U.S. at 592. Nor can subsequent appointment of counsel undo the fact that, by the time counsel could reasonably be heard on bail reduction, the Petitioner has already been jailed, often effectively serving their sentence. The prejudice has already accrued to the Petitioner's negotiation position and cannot be undone.

In sum, bail hearings risk substantial prejudice to Petitioners' rights, both through the coercive effect of pretrial detention imposed at that proceeding, and through irrevocable waiver of defenses or admissions of guilt Petitioners make trying to talk their way out of jail. Because counsel's presence can help avoid these prejudices, these bail hearings are a critical stage.

4. Plea Negotiations Are a Critical Stage.

Plea bargaining is also a critical stage of prosecution. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (negotiation); *White*, 373 U.S. at 60 (plea entry). Counsel is required to "reach [a] plea agreement" and "to advise a client to enter a plea bargain when it is clearly in the client's best interest." *United States v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003). *Accord Farrow v. Lipetzky*, No. 12-CV-06495-JCS, 2017 WL 1540637, at *15 (N.D. Cal. Apr. 28, 2017), *aff'd sub nom. Farrow v. Contra Costa Cnty.*, 799 F. App'x 520 (9th Cir. 2020) (observing that, in *Rothgery* itself, counsel was able to negotiate release shortly after appointment, and ultimately negotiated dismissal).

Here, counsel is not appointed within a reasonable time to allow for adequate representation in plea negotiations. Petitioners have no realistic chance of negotiating a plea deal in the weeks or months immediately following arraignment, even if an early plea deal would be the most favorable outcome. For example, a prosecutor may be amenable to a sentence of time served after a week of pretrial

detention—but if appointment of counsel is delayed six or eight weeks, the Petitioner's sentence is effectively extended based solely on the delay in appointment. In the meantime, the prosecutor knows they can refuse to negotiate without fighting motions to suppress, risking exposure of damaging information about law enforcement, or expending the time and resources to go to trial. *E.g. Premo v. Moore*, 562 U.S. 115, 126 (2011) ("Prosecutors . . . faced the cost of litigation and the risk of trying their case without [the] confession . . . . [C]ounsel could reasonably believe that a swift plea bargain would . . . take advantage of the State's aversion to these hazards."). As discussed above, the lack of counsel to preserve evidence deprives Petitioners of tools to undermine the prosecution's narrative and credibly demonstrate the risks of taking a case before a jury. Compounding Petitioners' lack of ability to gather exculpatory evidence, "[d]elaying the plea for further proceedings . . . give[s] the State time to uncover additional incriminating evidence that could [] form[] the basis of [higher charges]." *Id.*

The lack of counsel in the weeks immediately following arraignment also risks permanent loss of the opportunity for early cooperation with the government: "whenever cases involve multiple defendants, there is a chance that prosecutors might convince one defendant to testify against another in exchange for a better deal. [An early] plea eliminate[s] that possibility and end[s] an ongoing

investigation." *Id.* This Court has explicitly recognized the potential prejudice that can result from a "delay[ed]" or "late" plea in this context. *Leonti*, 326 F.3d at 1117 (holding attempted cooperation is a critical stage of federal prosecutions). Petitioners' evidence confirms that delayed plea negotiations pose the same risk in Oregon. 2-SER-225 (Horst Decl.), 2-SER-231, 233 (Houze Decl.), 2-SER-448 (Boise Decl.).

The district court found that, instead of negotiating on a level playing field, Petitioners are detained without counsel for so long that they waive counsel and plead guilty in exchange for release. 1-ER-11–12; 2-ER-87–88 (district court remarking "there's no way these are voluntary pleas. . . . a 13-month prison term . . . [is] not a [good] deal."). Petitioners demonstrated that people who are under restrictive conditions also waive counsel and plead guilty to end their cases. 3-ER-370–71 (Oborn Decl.), 3-ER-381 (Schmonsees Decl.); *cf.* 3-ER-378 (Swallow Decl.) (describing frustration of repeated, fruitless court appearances for people on restrictive conditions). The deprivation of counsel for weeks or months deprives Petitioners of critical leverage to secure a plea to less time served, no jail time at all, diversion programs, or otherwise "to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation" or other collateral consequences. *Padilla*, 559 U.S. at 373. *E.g.* 2-SER-231, 33 (Houze Decl.) (describing legal nuances of plea negotiation). Without

timely appointment, the guilty pleas extracted from Petitioners are not the product of a reliable, functioning adversarial system. They instead result from the unfair imbalance of power between the prosecutor and unrepresented Petitioner. The Sixth Amendment right to counsel prohibits such a system.

C. The State's Argument Applies an Incorrect Standard for Critical Stages of Prosecution and Waiver of Counsel.

1. The State Incorrectly Implies That Critical Stages Require a Showing of Actual Prejudice.

The State argues that a seven-day delay before appointment is not necessarily prejudicial. Resp. Br. at 32–33. This argument is wrong for two reasons. First, it is undisputed that Petitioners are suffering *weeks or months* of delay before appointment of counsel. 1-ER-11–12. For purposes of the merits, the question before this Court is whether appointment of counsel weeks or months after arraignment is "within a reasonable time . . . to allow for adequate representation at any critical stage." *Rothgery*, 554 U.S. at 212. As discussed above, it is undisputed that the delays Petitioners suffered deprived them of counsel who could preserve evidence, argue for release, or negotiate a plea bargain, for weeks or months.

Second, the State implies that critical stages of prosecution are unpredictable because "the same period of delay may be insignificant in one case yet prejudicial in another." Resp. Br. at 33. That is true, and beside the point. The solution is not,

as the State argues, to wait for Petitioners to suffer prejudice and provide a remedy afterward. Instead, where there is a *potential* for substantial prejudice from deprivation of counsel, courts *presume* prejudice. *United States v. Cronic*, 466 U.S. 648, 659 (1984). Courts do so precisely because "the degree of prejudice can never be known." *Hamilton*, 368 U.S. at 55. *See Cronic*, 466 U.S. at 659 ("[T]he adversary process itself [becomes] presumptively unreliable."). As this Court has observed, "the evil lies in what the attorney does not do, and is either not readily apparent on the record, or occurs at a time when no record is made." *Cooper v. Fitzharris*, 586 F.2d 1325, 1332 (9th Cir. 1978) (en banc). *Cf. Holloway v. Arkansas*, 435 U.S. 475, 491 (1978) (presuming prejudice from conflicts: "[T]o assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible."). *Accord Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) ("Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief . . . rather than to the question of whether such a right exists and can be protected prospectively."). Here, Petitioners have demonstrated the potential for substantial prejudice.

2. The State's Waiver Argument Fails to Take Seriously the Duty to Provide Counsel.

The State repeatedly implies Petitioners' right to counsel is not violated because, if no lawyer is available, "the court may decide to postpone the [release] hearing or the defendant may decide to waive counsel for the purpose of that

hearing." Resp. Br. at 9–10; *see also id.* at 34–36 (postponement of bail hearings), 37–38 (postponement of statutory speedy trial deadline). This assertion ignores the clear command of Oregon law that "[u]nder no circumstances may the [bail] hearing be held more than five days after arraignment . . . unless the defendant consents." Or. Rev. Stat. § 135.245(7)(a). The State further claims that "there is no basis to conclude, as a categorical matter, that *every* unrepresented defendant who has waived a statutory deadline or agreed to proceed without a lawyer at a [bail] hearing has not done so voluntarily." Resp. Br. at 36. This assertion is incorrect.

"Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *United States v. Hamilton*, 391 F.3d 1066, 1071 (9th Cir. 2004) (quoting *Carnley*, 369 U.S. at 514). Waivers of constitutional rights must be knowing, intelligent, and voluntary. *Iowa v. Tovar*, 541 U.S. 77, 88 (2004). In the context of guilty pleas, this Court has held that a plea is not voluntary if the alternative is submitting to a proceeding conducted in violation of the Sixth Amendment. *United States v. Hernandez*, 203 F.3d 614, 626–27 (9th Cir. 2000), *overruled on other grounds by Indiana v. Edwards*, 554 U.S. 164 (2008). In order to be voluntary, a defendant's choice must be among two "lawful alternatives." *Id.* at 627. "Were it otherwise, a plea would be valid even if procured by a court ruling that, absent a plea, a criminal defendant would be required to proceed to trial without counsel . . . . Obviously, this is not the law." *Id.* at 626.

The State's argument simply adopts this Court's *reductio ad absurdum*. Petitioners who waive their rights are choosing between two unlawful options: proceed in your bail hearing, or your speedy trial, without counsel; or delay past the statutory deadline (in some cases, return to jail), and resume your indefinite wait for a lawyer. The State's own example reinforces this point: Mr. Owens's bail hearing was delayed "multiple times" while he awaited counsel, until he ultimately "waived" this illusory right. Resp. Br. at 10 n.4; *see also* Audio Recording, Owens release hr'g (July 10, 2023). At best, the State's argument begs the question whether these alternatives violate the Constitution—but Petitioners' "waiver" under these circumstances demonstrates nothing about the validity of their constitutional claims.

II. *Younger* Abstention Does Not Apply.

The district court correctly determined that, for Petitioners who are detained, this case presents extraordinary circumstances meriting an exception to *Younger* abstention. It was unnecessary to reach that step in the *Younger* analysis, however. Whether Petitioners are detained or not, a threshold requirement for *Younger* abstention is not met: Petitioners' criminal proceedings do not provide an adequate opportunity to decide their constitutional claims.

"[T]he federal courts' obligation to adjudicate claims within their jurisdiction is virtually unflagging." *Meredith v. Oregon*, 321 F.3d 807, 817 (9th

Cir. 2003) (quotation omitted). *Younger* abstention excuses that obligation only in "exceptional" cases, *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013), to "avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted." *Younger v. Harris*, 401 U.S. 37, 44 (1971); *see also Sprint Commc'ns*, 571 U.S. at 77 (quoting *Younger*). This Court permits *Younger* abstention only if four criteria are met: "(1) there is an ongoing state judicial proceeding; (2) the proceeding implicates important state interests; (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges; and (4) the requested relief . . . enjoin[s] the ongoing state judicial proceeding." *Arevalo v. Hennessy*, 882 F.3d 763, 765 (9th Cir. 2018) (quotations omitted). The absence of any one of these criteria renders *Younger* abstention improper. Outside these exceptional circumstances, federal courts "should not refuse to decide a case in deference to the States." *Sprint Commc'ns, Inc.*, 571 U.S. at 73 (cleaned up).

A. Oregon Criminal Proceedings Do Not Provide an Adequate Opportunity to Decide Petitioners' Claims.

This case fails the third criterion. *Younger* abstention is inappropriate unless state proceedings are "adequate" to "raise *and have timely decided* . . . the federal issues involved." *Meredith*, 321 F.3d at 818 (quoting *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973)). The plaintiff in *Meredith* was a sign owner seeking to enjoin an administrative order, which required him to remove his sign within thirty days, on

First Amendment grounds. *Id.* at 810. The owner had "several options for challenging the . . . order and for presenting his federal constitutional claims in state court." *Id.* at 818. Nonetheless, this Court held that state proceedings were inadequate, and abstention inappropriate, because none of those options would have resulted in a merits ruling before the order took effect. *Id.* at 819–20.

The same was true in *Gibson*, 411 U.S. at 564, which this Court relied on to decide *Meredith*. *Gibson* concerned optometrists seeking to enjoin proceedings before an allegedly biased state licensing board as a violation of due process. *Id.* at 566–570. The Supreme Court held that state court proceedings were inadequate because by the time of appeal, the licensing board would have unlawfully revoked the optometrist's licenses, causing "irreparable" reputational harm. *Id.* at 577 & n.16.

These cases establish the rule that state proceedings are inadequate if they would require Petitioners to suffer irreparable constitutional harm *before* their claims are decided. The State argues that Petitioners have not established the requisite "procedural bar" that renders state proceedings inadequate. Not so. The lack of counsel acts as a procedural bar because the disadvantage and risk of making a legal argument without counsel are the very harms that Petitioners seek to avoid. *Baffert v. Cal. Horse Racing Bd.*, 332 F.3d 613, 620 (9th Cir. 2003) (holding state procedures inadequate where they "required the plaintiff to suffer all

the consequences of the state's [unconstitutional] decision before any review of his federal claims"). The lack of a timely decision "act[s] as a procedural bar" to adequate proceedings in state court. *Meredith*, 321 F.3d at 819.

Federal courts treat the lack of counsel as a procedural bar in another, analogous context: federal habeas petitions challenging state court convictions. Federal courts generally require petitioners to present their constitutional claims to state courts, in compliance with state procedures, before seeking federal review. Like *Younger* abstention, this doctrine is motivated by comity. Notwithstanding this prudential concern, the requirement is excused if the failure to properly present claims in state court results from violation of the right to counsel: "[I]f the attorney appointed . . . is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits." *Martinez v. Ryan*, 566 U.S. 1, 11 (2012).

Here, the case is even more extreme than an attorney failing to preserve a claim for federal review. Petitioners have a right to counsel, but no attorney was appointed to represent their interests *at all*. It would be untenable to hold that Petitioners must make an uncounseled argument to vindicate their right to counsel. There is no realistic sense in which uncounseled Petitioners have an adequate "opportunity to comply with the State's procedures and obtain an adjudication on the merits." *Id. Cf. Penson*, 488 U.S. at 84 ("Of all the rights that an accused

person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.") (citation omitted).

The Petitioner class is, by definition, entitled to counsel, and the State has failed to timely honor that right. By the time Petitioners are aware that the State has failed to provide counsel, they are appearing before a judge unrepresented, days or weeks after arraignment. They have now suffered the deprivation of counsel during the critical stages of investigation into evidence and early plea bargaining, and suffered harms that may be permanent. In this proceeding, Petitioners must make many uncounseled strategic decisions that could affect their constitutional rights: should they waive the right to counsel, and the right to silence, to make an argument on bail or restrictive conditions? Should they plead guilty and hope for time served or probation? Or should they make an uncounseled argument insisting on their right to counsel, which will result in their continued detention, or restrictive conditions, and may functionally extend their sentence? No matter what the Petitioner chooses, their uncounseled decision risks irreparable prejudice to the outcome of their criminal case. These are the very harms against which due process and the right to counsel were meant to protect. *See Baffert*, 332 F.3d at 620; *Meredith*, 321 F.3d at 818.

Notably, at least one Petitioner *has* explicitly asserted, during an uncounseled detention hearing in his criminal case, that the deprivation of counsel

was "unconstitutional." The court did not rule on the merits of the claim or set a schedule for doing so. Instead, the court responded "I know . . . you won't get disagreement from me . . . It is an unfortunate circumstance," and proceeded to hold an uncounseled bail hearing with argument from the prosecution and witness testimony. 1-ER-41; Audio Recording, Polaski release hr'g (July 19, 2023). Nothing about this response suggests that Petitioners' constitutional claims will be timely decided—or decided at all—in their underlying criminal proceedings. *See also* 3-ER-370 (Oborn Decl.) (courts refuse Petitioners' uncounseled requests to be heard), 3-ER-381 (Schmonsees Decl.) (courts instruct Petitioners not to speak because they are not represented).

The State's assertion that state courts can provide a complete remedy if Petitioners are convicted ignores these irreparable harms.[3] Reversing a conviction does not return the liberty taken from Petitioners during weeks or months of uncounseled pretrial detention. In a case concerning deprivation of counsel

[3] Specifically, none of the State's authorities concerns an untimely decision that functions as a procedural bar. *Moore v. Simms*, 442 U.S. 415, 431 (1979), excused delays in the state court ruling only because there was no ongoing constitutional harm; the children in question had "already been placed in the custody of their parents." *Communications Telesystems International v. California Public Utility Commission*, 196 F.3d 1011, 1020 (9th Cir. 1999) did not concern ongoing harm or untimely state court decisions. And *Baffert v. California Horse Racing Board,* 332 F.3d 613, 620 (9th Cir. 2003), explicitly acknowledged that state procedures are inadequate if they "would have required the plaintiff to suffer all the consequences of the state's administrative decision before any review of his federal claims had taken place."

resulting from a similar attorney shortage, the Massachusetts Supreme Judicial Court explained why the State's argument is incorrect: this violation cannot be remedied in the "normal course," because the normal course requires counsel. "[T]he loss of opportunity to confer with counsel to prepare a defense is one that cannot be adequately addressed on appeal after an uncounseled conviction." *Lavallee*, 812 N.E.2d at 907. The Court should reject the State's argument that a postconviction remedy is a "timely" decision on Petitioners' constitutional challenge to the lack of counsel. Because Petitioners' criminal proceedings are inadequate to timely decide their constitutional claims, *Younger* abstention is impermissible.

B. Extraordinary Circumstances Warrant an Exception to *Younger* Abstention.

In any case, for Petitioners in and out of detention, the extraordinary circumstances surrounding this case warrant exercising jurisdiction. Even when the four *Younger* factors are satisfied, courts must exercise jurisdiction "under extraordinary circumstances where the danger of irreparable loss is both great and immediate." *Arevalo*, 882 F.3d at 766 (citation omitted). This "irreparable harm" exception applies when "full vindication of the right necessarily requires intervention before trial," *id.* at 767 (citation omitted), which is true for any rights that "implicate[] the integrity of *pretrial* . . . procedures." *Page v. King*, 932 F.3d 898, 904–05 (9th Cir. 2019).

The right to counsel implicates the integrity of pretrial procedures: it protects "not [only] the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it." *Lafler*, 566 U.S. at 169–70. Given the nature of a right to counsel claim, the irreparable harm exception applies for the same reasons that Petitioners are likely to succeed on the merits. Deprivation of counsel for pretrial investigation, bail arguments, and plea negotiations in the weeks and months following arraignment risks irreparable prejudice to the outcome of a criminal case. *Supra* Sections (I)(B)(2)–(4).

Though the district court correctly concluded that detention is irreparable harm, 1-ER-14, the risk of irreparable prejudice applies regardless of whether Petitioners are detained. The potential harm to Petitioners under restrictive conditions goes well beyond "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution." 1-ER-16. Lost opportunities to preserve evidence and negotiate an early plea deal risk irreparable harm. *Supra* Sections (I)(B)(2), (B)(4).

CONCLUSION

For the foregoing reasons, the Court should hold that there is a strong likelihood of success on the merits of Petitioners' Sixth Amendment claim, and Petitioners' individual ongoing criminal prosecutions are not an adequate forum in which to raise this claim.

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Dated: January 5, 2024

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FOR THE NINTH CIRCUIT

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