NO. _____

In the Supreme Court of the United States

MINNESOTA LIVING ASSISTANCE, INC.,
d/b/a BAYWOOD HOME CARE,
Petitioner,

v.

KEN B. PETERSON, *et al*.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The question presented is whether the principles enunciated in *Younger v. Harris* and its progeny require a federal court, having properly before it a claim that a federal statute preempts a state law, should abstain from the deciding the federal question of preemption because a state executive branch agency has initiated a civil administrative proceeding against the federal plaintiff solely under the state law.

II. The question presented is whether the Court of Appeals erred by applying an abuse of discretion standard to a District Court's decision to apply the abstention principle enunciated in *Younger v. Harris* and, therefore, erred in affirming the District Court's decision.

PARTIES TO THE PROCEEDINGS

Petitioner, Minnesota Living Assistance, Inc. doing business as Baywood Home Care, was the appellant in the court below. Respondents, Kenneth Peterson, Commissioner, Minnesota Department of Labor and Industry, and John Aiken, Interim Director of Labor Standards of the Minnesota Department of Labor and Industry, were the appellees in the court below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, Minnesota Living Assistance, Inc. doing business as Baywood Home Care is not publicly traded, has no parent companies, and no publicly traded company holds 10% or more of its membership shares.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Minnesota Living Assistance, Inc. doing business as Baywood Home Care, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the Eighth Circuit is reported at 899 F.3d 548, and reproduced in the appendix hereto ("App.") at 1. The opinion of the District Court for the District of Minnesota is reported at 2017 WL 2804905, and reproduced at App. 15.

JURISDICTION

The judgment of the Eighth Circuit was entered on August 8, 2018. App. 13. Petitioner filed a motion for rehearing by the Court of Appeals and for a rehearing *en banc,* which petition was denied on September 14, 2018. App. 26. This petition for certiorari is timely filed within ninety (90) days after entry of the Eighth Circuit's order denying rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the Constitution provides that Congress shall have power "To regulate Commerce with foreign Nations, and among the several States."

Article III, Section 2 of the Constitution provides that "[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution, the

laws of the United States, and treaties made, or which shall be made, under their authority."

Article VI, Clause 2 of the Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

The FLSA Savings Clause, 29 U.S.C. §218(a) provides in relevant part: "Relation to Other Laws: (a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter . . . ." App. 28.

INTRODUCTION

This Court has said that "it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans (NOPSI)*, 491 U.S. 350, 386 (1989); *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976). When a federal court cedes its authority to decide a case that is properly before it simply because

a state administrative agency is acting under a state law involving the same general subject matter in a civil administrative proceeding, it violates the Constitutional mandate and teachings of this Court to exercise that jurisdiction.

To reach a decision remarkably similar to one that this Court rejected only five years ago, the Eighth Circuit adopted a three-part paradigm or taxonomy developed by the First Circuit in different circumstances. *Sirva Relocation, LLC v. Richie*, 794 F.3d 185 (1st Cir. 2015). The taxonomy, however, is merely a recycled version of the Eighth Circuit's analysis of *Younger* abstention principles that this Court rejected unanimously in *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013). Thus, two courts of appeals have departed from this Court's *Younger* abstention teachings and have given *Younger* abstention principles a far-ranging and nearly limitless reach, well beyond the limits this Court articulated most recently in *Sprint*. This Court's review is warranted.

STATEMENT OF THE CASE

Congress acted to the full extent of its power under the Commerce Clause of the U.S. Constitution when it established in the FLSA a national standard for minimum wages and maximum hours in a workweek after which a premium or overtime rate of pay must be paid by covered employers. It reinforced this view in a Savings Clause enacted as part of the original FLSA. 29 U.S.C. §218(a). Under this provision, the states remained free to enact laws providing a higher minimum wage or shorter maximum workweek for overtime purposes. Nearly all states' laws meet at least

one or both of these "safe harbor" provisions. The Minnesota Fair Labor Standards Act, however, satisfied neither of these two requirements of the Savings Clause during the relevant time period of March 2012 to March 2014.

When it filed its complaint in federal court, Baywood was a respondent in a civil administrative proceeding brought by a state executive branch agency under the Minnesota Fair Labor Standards Act to recover allegedly due wages for overtime compensation to "companions," a subset of domestic service employees.[1] The case was brought under Minnesota Administrative Procedure Act and presented to an Administrative Law Judge ("ALJ"), who issued a recommended order.[2] Because the Minnesota state

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[1] At the time, Baywood's companion employees were completely exempt from the minimum wage and overtime provisions of the FLSA. 29 U.S.C. §213(a)(15) (2011). The exemption for companions employed and furnished by staffing agencies was eliminated by the U.S. Department of Labor by regulations that became effective January 1, 2015. See *Home Care Ass'n of Am. v. Weil,* 799 F.3d 1084, 1088-90 (D.C. Cir. 2015).

[2] The Minnesota Administrative Procedure Act is found in chapter 14 of *Minnesota Statutes.* The Commissioner of the Department of Labor and Industry ("DLI"), however, and not the ALJ, is the final decision-maker in this proceeding under the state statute. Minn. Stat. §14.61 (2018). The Commissioner may accept, reject, or modify the recommended order, including legal conclusions reached by the ALJ. Minn. Stat. §14.62 (2018). Although the state appellate courts review the final decision of the Commissioner, they do so under a narrow and deferential standard of review. Minn. Stat. §14.69 (2018). The state appellate courts will not consider legal issues not raised before the Commissioner. In this case, on review of the Commissioner's final order, the Minnesota

agency, under state law, has no authority to decide constitutional challenges. Petitioner could not have raised the question of federal preemption in the state administrative proceeding.[3]

Baywood presented to the District Court a single issue arising under a federal statute and the U.S. Constitution: is the Minnesota Fair Labor Standards Act not saved against preemption by the FLSA because the state statute fails to satisfy the Savings Clause? To resolve this question, the District Court was not called on to halt or otherwise interfere with an ongoing state judicial criminal proceeding, a case implicating the state supreme court's authority, or a civil administrative proceeding that was akin to a criminal proceeding.

Court of Appeals rejected it, holding as Petitioner had argued that the agency engaged in unauthorized rulemaking under state law. *In the Matter of Minn. Living Assistance, Inc., d/b/a Baywood Home Care*, 919 N.W. 2d 87, 95 (Minn. Ct. App. 2018, *review granted* (Minn. Sup. Ct. Nov. 13, 2018). The Minnesota Supreme Court has granted review of that decision.

[3] The state's appellate courts have held that administrative agencies lack subject matter jurisdiction over constitutional issues. *Neeland v. Clearwater Mem. Hosp.,* 257 N.W.2d 366, 368 (Minn.1977). *Holmberg v. Holmberg,* 578 N.W.2d 817 (Minn. Ct. App. 1998). Generally, a legal issue not raised in the agency proceeding will not be considered on review by the state's appellate courts. *In re Minn. Living Assistance, Inc.*, 919 N.W. 2d at 93. The issue of FLSA preemption of the Minnesota FLSA was not considered in the agency proceeding or in the Minnesota Court of Appeals, nor is it an issue on which the Minnesota Supreme Court has granted review.

This is not a case where a federal plaintiff presented its federal constitutional argument to a state agency and, only when it became clear that the agency would go against it, filed a complaint in the federal court. *See Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 624-25 (1986). The federal court could have decided the federal preemption question without enjoining or impacting the state agency proceeding except to the extent any decision of a federal court controls on a question of federal law. See *NOPSI*, *supra* at 372-73. The FLSA's Savings Clause is a statute that allows compliant state laws to coexist with the federal statute and plainly contemplates that the question of whether a state law is within the ambit of its protection is a question of federal law.

This Court's abstention doctrines seek to avoid federal courts' interference with state government functions, including specialized tribunals, or by inserting themselves in matters of unsettled or uncertain state law interpretation, thereby generating unnecessary friction in federal-state relations.[4] *Younger v. Harris*, and its companion case *Samuels v. Mackell*, 401 U.S. 66 (1971), instructed the federal courts to stay their hand when a party sought to enjoin or to obtain a declaratory judgment that would halt run-of-the-mill state criminal proceedings. Later cases have applied *Younger* to civil proceedings that are akin to criminal prosecutions or to a state judiciary's discipline of attorneys licensed by that jurisdiction. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Middlesex Cty. Ethics Comm. v. Garden State Bar*

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[4] *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 500 (1941); *Harman v. Forssenius*, 380 U.S. 528, 534-35 (1965).

Ass'n, 457 U.S. 423 (1982). This deference to state criminal and certain judicial proceedings, however, requires careful discernment of the boundaries of "Our Federalism." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

When a case is properly before a federal district court and a federal question can be decided without enjoining a state administrative or judicial proceeding or directly interfering with it, the federal court should proceed to decide the case on the merits. This is especially so when no complex or unsettled issue of state law – or for that matter any issue of state law – is involved. In dismissing this case, the lower courts deprived a federal plaintiff of its right to seek a federal judicial determination of a matter of federal law.

The Eighth Circuit adopted an unwarranted and expansive view of *Younger* abstention, when it borrowed the taxonomy developed by the First Circuit in *Sirva Relocation, LLC v. Richie*, 794 F.3d 185 (1st Cir. 2015). The Court of Appeals took the view that because the state agency had initiated the proceeding and because it had imposed "liquidated damages" under the state statute, and that the statute provided for potential criminal penalties – although no criminal charge or prosecution had been commenced, nor was one likely to be commenced – the state administrative proceeding was like that in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.,* 477 U.S. 619 (1986).[5] Baywood sought rehearing *en banc* and informed the Court of Appeals of the Minnesota Court of Appeals' decision holding that the Commissioner had

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[5] For the reasons stated *infra* at part I.B., this case is distinguishable on its facts.

engaged in unlawful rulemaking, but the Court of Appeals denied rehearing. App. 26.

PROCEEDINGS BELOW

The District Court dismissed the case without prejudice on the ground that it should abstain from deciding the case based on this Court's decision in *Younger v. Harris*. On appeal, the Eighth Circuit affirmed. The Court of Appeals denied Baywood's petition for a rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

I. FEDERAL COURTS SHOULD NOT ABSTAIN FROM DECIDING A QUESTION OF FEDERAL LAW MERELY BECAUSE A STATE ADMINISTRATIVE PROCEEDING INVOLVING AN ISSUE OF STATE LAW ON A SIMILAR SUBJECT IS PROCEEDING

A. Abstention from Deciding a Federal Question Properly Raised in a Federal Court is the Exception, Not the Rule.

A federal court's obligation to hear and decide on the merits cases properly before it is "virtually unflagging." *Colo. River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 819 (1976). This Court has instructed that "there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *NOPSI*, *supra* at 373; *Sprint*, *supra* at 72. This case involves a state administrative agency civil proceeding, which does not qualify as one of *Younger's* three "exceptional circumstances" warranting abstention in the interest of comity or "Our Federalism."

Relying on a three-step taxonomy developed by a sister circuit in *Sirva Relocation, LLC v. Richie*, 794 F.3d 185 (1st Cir. 2015), the Eighth Circuit concluded the agency proceeding was a civil proceeding resembling a criminal prosecution. The Court of Appeals reasoned that the agency proceeding (1) was initiated by the state in its sovereign capacity, (2) involved sanctions against the federal plaintiff for some wrongful act, and (3) included an investigation and culminated in formal charges.

The Court of Appeals' reliance on *Sirva* is misplaced, first, because the First Circuit proceeded from a flawed premise. That court began its analysis of *Younger* preemption by stating: "Fidelity to that doctrine [*Younger* abstention] requires federal courts, *in the absence of extraordinary circumstances*, to refrain from interfering with certain state proceedings." *Sirva*, *supra* at 189 (emphasis added). The obvious misstep is that this Court has stated repeatedly and explicitly that the assumption of jurisdiction by federal courts is the rule and abstention is the exception. The taxonomy devised by the First Circuit, and adopted by the Eighth Circuit, misreads this Court's precedents. It conflates the initial determination of whether *Younger* applies at all with the consideration of extraordinary circumstances such as harassment or bad faith that dictate that, even when *Younger* would apply, a federal court should nevertheless exercise its jurisdiction and decide the case. Despite having the benefit of this Court's decision in *Sprint* available to it, the *Sirva* court merely repackaged the rejected analysis in *Sprint Communications, Inc. v. Jacobs*, 690 F.3d 864 (8th Cir. 2012). That rationale defies this Court's "dominant

instruction" that *NOPSI* restricts the application of *Younger* to only the three exceptional categories therein defined. *Sprint*, *supra* at 78.

The Court of Appeals also considered the additional factors in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). While adverting to the *Middlesex* factors as additional considerations, it is apparent that the Court of Appeals ascribed to them far more significance than is warranted. The First and Eighth Circuit's approach to *Younger* preemption will normally lead to preemption. This is so because reliance on the *Middlesex* factors in this manner creates a presumption of abstention. The first two *Middlesex* factors – (1) the existence of an ongoing state proceeding judicial in nature, which (2) implicates an important state interest – when applied to administrative agency proceedings nearly always will be satisfied. This Court has recognized the opportunity for manipulation that lies in the application of these factors "[d]ivorced from their quasi-criminal context." *Sprint*, *supra* at 81-82.

The Court of Appeals fashioned an unwarranted expansion of *Younger* by labeling an administrative agency proceeding as "judicial" in character. Most state agency proceedings, as in this case, involve some type of proceeding that is designed to meet minimal standards of procedural due process. The involvement of an administrative law judge and the development of a record at an evidentiary or summary disposition hearing, create the appearance of a judicial proceeding. But, that does not make them the *type* of judicial proceeding envisioned by this Court for the special deference that *Younger* abstention accords to them.

Fundamentally, the type of administrative proceeding involved in this case falls squarely within the category of proceedings to which this Court has held no deference is due under *Younger*. *NOPSI*, *supra* at 365; *Sprint*, *supra* 571 U.S. at 81-82.

The risk to federal court jurisdiction in the approach adopted by the courts below is that there are innumerable state administrative agencies that exist to enforce an ever-expanding array of state laws. The Eighth Circuit's decision in reliance on the First Circuit's taxonomy, establishes a rule that the mere commencement of a state agency proceeding deprives a federal court of the authority to decide a question of federal law that relates in some way to the same subject matter. This Court addressed this point in *NOPSI*: "it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." 491 U.S. at 368. This Court's precedents recognize the right of a party to choose a federal forum in which to present a claim that is within the federal courts' jurisdiction. *Willcox v. Consol. Gas Co. of New York*, 212 U.S. 19, 40 (1909); *NOPSI*, *supra* at 359.

B. The State Administrative Agency Proceeding did not Afford Baywood the Opportunity to Raise the Preemption Issue.

Even if the state proceeding were akin to a criminal proceeding and implicated important state interests, a further requirement of *Younger*, and the final *Middlesex* factor, is that the federal plaintiff must be able to raise federal constitutional issues in the state proceeding. Under Minnesota law, the state agency may not hear constitutional challenges. *Holmberg v. Holmberg*, 578 N.W.2d 817 (Minn. Ct. App. 1998). In contrast to the situation in *Sirva*,[6] the decision on which the Eighth Circuit relied, Baywood did not seek a ruling on the preemption issue from the administrative law judge or the agency head, nor did

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[6] The situation in *Sirva* was materially different than the facts in this case. In *Sirva*, the federal plaintiff argued that the Massachusetts Law Against Discrimination, which is enforced by the Massachusetts Commission Against Discrimination ("MCAD") was "preempted by the Employment Retirement Income Security Act of 1974 (ERISA) in a case initiated by a private complainant, who challenged his employer's long-term disability plan on the basis that it offered less favorable benefits to certain classes of individuals with disabilities. The case dragged on in the MCAD for nearly six years before the federal plaintiff (respondent in the state agency proceeding) sought a federal declaration of preemption. But, previously the federal plaintiff had raised the preemption issue before the agency and could have presented that argument to the MCAD and later to a state court on review. The First Circuit also observed that the MCAD could and would be able to address the federal issue. Essentially, the federal plaintiff in *Sirva* attempted to wrest an ongoing proceeding from a state agency after litigating the issue of federal preemption and not receiving the response it desired rather than take an appeal to the state court under the applicable statutory procedure.

Baywood seek to enjoin the state agency proceeding or seek review of the agency's final decision in federal court.[7] The preemption issue was presented solely to the federal court and is not presented in the state appellate courts, which do not consider a legal issue unless it was presented to the agency.[8]

C. Federal Preemption of the State Statute is Facially Apparent and Should be Decided on the Merits.

The FLSA contains an express Congressional Finding and Declaration of Policy. The FLSA evinces Congress's intention to establish a national standard for minimum wages, overtime hours for a broad range of covered employers and employees, eliminate many forms of child labor, and to ensure the free flow of goods in interstate commerce. 29 U.S.C. §202 (2011). To remove obstacles to achieving these goals, Congress addressed the FLSA's provisions in relation to state and local laws on the same subject and included a Savings Clause that states unambiguously that states are free to provide for a *higher* minimum wage or a

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[7] Although the complaint contemplated a request for injunctive relief, Baywood did not file a motion to enjoin the state proceeding.

[8] The Minnesota Court of Appeals, on August 20, 2018, reversed and remanded the agency's decision for further proceedings, holding that the equivalent of a summary judgment in favor of the agency was inappropriate. The state Court of Appeals also held that the agency had engaged in unauthorized rulemaking. 919 N.W. 2d at 96. The Minnesota Supreme Court has granted review of the intermediate appellate court's decision. The Minnesota Court of Appeals' decision was called to the attention of the Eighth Circuit in Petitioner's Request for Rehearing *En Banc*.

lower maximum workweek. Only in those circumstances is a state's law compliant with the FLSA's Savings Clause and "saved" from preemption. This Court has not had occasion to consider the application of the Savings Clause.[9]

There is no doubt, and the record evidence is uncontroverted, that during the relevant time period, March 2012 to March 2014, The Minnesota Fair Labor Standards Act ("MFLSA") required a lower minimum wage than the FLSA and a greater maximum workweek standard for overtime than the FLSA. What is presented is a question of federal law: whether the FLSA preempts a state law that plainly does not fall within the terms of its Savings Clause. Consistent with this Court's decision in *NOPSI*, the issue of federal preemption was ripe for review when the state agency issued its final order. *NOPSI*, *supra* at 372-73.

The Court of Appeals reasoned that the question had not been considered previously by the Circuit, and the few cases that had considered FLSA preemption or the Savings Clause had delved into details of whether a state could reject a FLSA exemption. App. 9-11. Yet, even the First Circuit acknowledged that merely

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[9] The Eighth Circuit adverted to two federal court opinions that considered the Savings Clause. Those cases addressed whether a state may "regulate" by simply rejecting a federal exemption or whether state wage and hour class actions may coexist in a FLSA "collective action." See App. 12, n.6. Briefing in the District Court and Court of Appeals enumerated all or nearly all of the federal cases that have dealt with the Savings Clause. No reported case, however, involved a state statute that satisfied neither criterion – minimum wages *and* maximum hours – as is the case with the Minnesota statute.

because an issue is one of first impression it would not result in a court abstaining from deciding a federal question. See *Sirva Relocation, LLC v. Richie*, 794 F.3d 185, 198 (1st Cir. 2015). The type of inquiry that apparently concerned the Eighth Circuit and that was involved in *Sirva* would have been unnecessary in this case because it can be easily and reliably determined – indeed it is conceded by the state – that the Minnesota Statute did not satisfy either prong of the Savings Clause. No detailed examination of the state statute or determination of unsettled issues of state law are involved.

Stripped to its essence, the lower courts departed from this Court's *Younger v. Harris* abstention teachings by constructing an analytical framework that will almost always result in abstention. The taxonomy employed by the Court of Appeals is nothing more than a recycled or "new and improved" version of the same rationale this Court soundly rejected in *Sprint*. It ignores the bedrock principle recognized and reiterated by this Court in *NOPSI* that federal courts are obligated to decide cases that are properly brought before them. There this Court said:

> Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred. *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L. Ed. 257 (1821); *Chicot Cty. v. Sherwood*, 148 U.S. 529, 534 (1893). And, it follows that [w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where

> there is a choice cannot be properly denied. *Willcox v. Consol. Gas. Co.*, 212 U.S. 19, 40 (1909).

NOPSI, 491 U.S. at 358.

This case presents an analogous factual setting to that in *NOPSI*, where this Court held that abstention was improper. There, as here, the federal court could decide the federal question without interfering with the state proceeding. As the Court said in *NOPSI*, "It is true, of course, that the federal court's disposition of such a case may well affect, or for practical purposes pre-empt, a future – or as in the present circumstances, even a pending – state-court action. But there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *NOPSI*, *supra* at 373.

This Court's cases hold that abstention in any case is the exception and exercising jurisdiction is the norm for the federal courts. Only in "exceptional circumstances" should a federal court consider abstaining from deciding a case – particularly one involving a question of federal law – that is properly before it. Due respect for the functioning of a state's judicial system, including its enforcement of criminal laws and its attorney discipline procedures, does not extend to executive or legislative administrative proceedings. *NOPSI*, *supra* at 373; *Sprint*, *supra* at 78. If *Younger* abstention were to be extended to every case in which a state administrative agency initiated an investigation or case under a state law similar in subject matter to a federal statute, federal courts would be unable to fully perform their constitutional functions.

The Eighth Circuit's decision turns this Court's *Younger* jurisprudence on its head and makes abstention the rule, leaving the lower courts no choice except to search for an "exceptional circumstance" to adjudicate the case. Federal-state comity does not require federal courts to stand down from deciding cases arising under the laws or Constitution of the United States merely because a state administrative agency is considering a case with a similar subject matter. This is especially true with the FLSA, which contemplates that both federal and state courts or agencies will administer and interpret their respective laws. This federal-state interplay exists, for example, with respect to Title VII of the Civil Rights Act of 1964, the Occupational Safety and Health Act of 1980, both of which contemplate roles for the state and national governments. The decision of the United States Court of Appeals for the Eighth Circuit should be reversed or, alternatively, vacated and remanded in light of *Sprint*.

II. THE PROPER STANDARD OF REVIEW THAT APPELLATE COURTS SHOULD EMPLOY WHEN REVIEWING A DISTRICT COURT'S DECISION TO ABSTAIN UNDER *YOUNGER v. HARRIS* IS THE *DE NOVO* STANDARD OF REVIEW

This Court's cases do not expressly state its views concerning the appropriate standard of review of a lower court's decision to abstain under *Younger*. It may be gleaned, perhaps, from the Court's exposition in *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), a case involving the application of the abstention principles of *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942), applicable to actions commenced under the

Federal Declaratory Judgments Act, then codified at 28 U.S.C. §400 and now at 28 U.S.C. §2201. There, the Court rejected the view that *Brillhart's* standard of review that allowed district courts broad discretion to exercise, or not, jurisdiction in a case should apply more generally in abstention cases. The Court distinguished cases brought under the Declaratory Judgment Act, which "has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Id.* at 286. The appropriate comparator, the Court said, was its decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), in which the more rigorous "exceptional circumstances" test of *Colorado River* was applied to an action to compel arbitration under §4 of the Federal Arbitration Act. *Id.* at 281.

In its concluding paragraph in *Wilton*, *supra*, the Court said:

> In sum, we conclude that *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942), governs this declaratory judgment action and that district courts' decisions about the propriety of hearing declaratory judgment actions, which are necessarily bound up with their decisions about the propriety of granting declaratory relief, should be reviewed for abuse of discretion. We do not attempt at this time to delineate the outer boundaries of that discretion in other cases, for example, cases raising issues of federal law or cases in which there are no parallel state proceedings. Like the Court of Appeals, we conclude only that the District

> Court acted within its bounds in staying this action for declaratory relief where parallel proceedings, presenting opportunity for ventilation of the same state law issues, were underway in state court.

Id. at 289-90.

A. The Eighth Circuit Applied an Abuse of Discretion Standard of Review.

The Eighth Circuit applied an abuse of discretion standard of review to the District Court's decision to abstain under *Younger*. More precisely, it appears that this is a two-part standard: (1) the application of the abstention principles is reviewed *de novo*, but (2) the District Court's decision to abstain is reviewed for an abuse of discretion. According to the Court of Appeals, an error of law would constitute an abuse of discretion. The Eighth Circuit is in the minority of the courts of appeals that have ruled on this point. The Eleventh Circuit has applied a similar standard. *Hughes v. Att'y Gen.*, 377 F.3d 1258 (11th Cir. 2004). The Fifth Circuit has applied a two-step standard that appears to be the same as that applied in this case. *Tex. Ass'n of Bus. v. Earle*, 388 F.3d 515 (5th Cir. 2004).

B. Five Other Circuits Apply a *De Novo* Standard of Review.

The Second, Third, Seventh, Ninth, and Tenth Circuits have held that the appropriate standard of review is the *de novo* standard. *Diamond D. Constr. Corp. v. McGowan*, 282 F.3d 191 (2d Cir. 2002); *Gwynedd Prop. v. Lower Gwynned Twp.*, 970 F.2d 1195 (3d Cir. 1982); *Trust & Inv. Advisers, Inc. v. Hogsett*, 43 F.3d 290 (7th Cir. 1994); *Green v. City of Tucson,* 255

F.3d 1086 (9th Cir. 2006); *Yellowbear v. Wyo. Att'y Gen.*, 525 F.3d 921 (10th Cir. 2008); *Taylor v. Jaquez*, 126 F.3d 1294 (10th Cir. 1997). Recognizing the significance of a federal court's decision to abstain from exercising jurisdiction in a case that it is empowered to hear, and mindful of this Court's instructions that abstention in any case is the exception and not the rule, these courts of appeals have exercised plenary review over District Court *Younger* abstention decisions.

A *de novo* standard comports with the "virtually unflagging" obligation of federal courts to decide cases that are properly before them. *See Colo. River*, *supra* at 816 & n.22, 818; *see also NOPSI*, *supra* at 358. To ensure appropriate judicial review of *Younger* abstention decisions and to protect the jurisdiction of the federal courts, a district court's decision to abstain in a case properly before it should be tested by the *de novo* standard of review.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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