No. 20-1149

IN THE

Supreme Court of the United States

BRISTOL-MYERS SQUIBB CO., *et al.*,

Petitioners,

v.

CLARE E. CONNORS,
ATTORNEY GENERAL OF HAWAII,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS *CURIAE*[1]

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system to ensure fairness, balance, and predictability in civil litigation. ATRA is especially focused on pockets of the American judicial system where corporate defendants are subject to unfair and irrational treatment, as routinely occurs in the jurisdiction from which this case arises. For more than three decades, ATRA has filed amicus briefs highlighting these concerns.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Sprint Commc'ns, Inc. v. Jacobs*, this Court stressed that cases "fitting within the *Younger* doctrine" are "exceptional." 571 U.S. 69, 73 (2013). Parallel state proceedings permit federal-court abstention despite the "virtually unflagging" obligation to exercise jurisdiction, *id*. at 77, only where "vital state interests are involved," *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

Here, private counsel litigated from soup-to-nuts in the name of the State of Hawaii: it conducted the pre-suit investigation, signed and filed the complaint and every motion, presented all arguments, and paid

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[1] Counsel of record for all parties received timely notice of and consented in writing to this filing. Amicus *curiae* certifies that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus *curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

all the bills. Yet the Ninth Circuit, in affirming the district court's abstention decision, never asked whether the State of Hawaii had made a showing that the suit implicated "vital state interests."

Indeed, the Ninth Circuit dispensed with the idea of making a "case-specific inquiry," focusing instead on Hawaii's general interest in the "classes of proceedings." *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 737 (9th Cir. 2020). But this general-interests approach conflicts with the approach of other Circuits and flouts this Court's decision in *Sprint*, all of which carefully assess the particular state interests implicated in the particular suit. *E.g.*, *PDX N., Inc. v. Comm'r New Jersey Dep't of Lab. & Workforce Dev.*, 978 F.3d 871, 883 (3d Cir. 2020).

This case is all the more important because the use of private counsel by State Attorneys General is a growing practice that is fraught with due-process and fairness concerns. Private counsel, after all, has a pecuniary motive to sue, unlike public officials – thus risking a misalignment of incentives. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980) ("A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision" and thus may "raise serious constitutional questions.").

The Ninth Circuit's approach, by ignoring the particular case and training its attention on generalized state interests, ignores this critical issue. Yet only the interests of the *State* matter – due respect for sovereign interests is *the* basis for *Younger* abstention. Because a state and its citizens cannot count on private counsel to prioritize systemic interests – such as adjudicatory fairness – over profiteering, it is imperative

that federal courts scrutinize the state interests implicated by a particular case when private counsel is at the helm.

Thus, the Court should grant the petition to resolve the Circuit split and to clarify how *Younger* applies in the context of private-counsel-directed enforcement proceedings.

ARGUMENT

I. The Ninth Circuit's Abstention Decision Finds No Basis In Its Foundation.

A. Abstention Requires That a Civil Proceeding Resemble a Criminal Prosecution.

For two hundred years, the Supreme Court has recognized that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. State of Virginia*, 19 U.S. 264, 404 (1821). Federal courts thus have a "virtually unflagging obligation" to "exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

Abstention doctrines are a narrow exception to this rule. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). Under one of these doctrines, *Younger*, a federal court may abstain because of (1) an ongoing state criminal prosecution, (2) "certain 'civil enforcement proceedings'" that are "'akin to a criminal prosecution' in 'important respects,'" or (3) "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint*, 571 U.S. at 77-79. But even then, "only exceptional circumstances" justify abstention. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans* (*NOPSI*), 491 U.S. 350, 368 (1989).

Younger recognized the authority of federal courts to abstain given parallel state criminal proceedings and hinged on what Justice Black called "Our Federalism." *Younger v. Harris*, 401 U.S. 37, 44 (1971). This "vital consideration," the Court explained, inheres in our system of government, "in which there is sensitivity to the legitimate interests of both State and National Governments," and in which "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Ibid.*

This justification for *Younger* abstention was crystallized in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). There, the Court extended *Younger* to civil proceedings that were "in aid of and closely related to" criminal enforcement. "Central to *Younger*," the Court held, was a "proper respect for state functions," and abstention in the context of civil proceedings in aid of criminal enforcement was therefore appropriate. *Id.* at 601. Though *Huffman* extended *Younger* beyond criminal proceedings (while rejecting a bight-line division between civil and criminal matters), the doctrine remained rooted in the interests of the States: "The propriety of federal-court interference with an Ohio nuisance proceeding must . . . be controlled by application of those same considerations of comity and federalism." *Id.* at 607.

The Court also emphasized that not all state proceedings warrant abstention, as "[s]uch 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." *NOPSI*, 491 U.S. at 368; *see also Moore v. Sims*, 442 U.S., 415, 423 n.8 (1979) ("[W]e do not re-

motely suggest 'that every pending proceeding between a State and a federal plaintiff justifies abstention unless one of the exceptions to *Younger* applies.'" (citation omitted)).

Instead, particularly as to parallel state civil proceedings, abstention is warranted only where the case implicates "important state interests." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). In that event, respect for state sovereignty displaces the federal courts' "virtually unflagging" jurisdiction obligations.

As to how to discern whether a case implicates "vital state interests," the Court explained in *Middlesex*, "[t]he importance of the state interest may be demonstrated by the fact that the noncriminal proceedings bear a close relationship to proceedings criminal in nature." *Ibid.* That, in turn, requires an exacting look at the state's proffered interests in the particular case. *See NOPSI*, 491 U.S. at 369 (1989) (assessing whether "the *Council proceeding* [is] the sort of proceeding entitled to *Younger* treatment" (emphasis in original)); *Middlesex*, 457 U.S. at 433 (assessing New Jersey's particular state interest in state bar disciplinary hearings).

Sprint, this Court's latest pronouncement, refined the point. *Younger*'s extension to civil proceedings, *Sprint* explained, stems from the State acting in a "sovereign capacity." 571 U.S. at 79-80. In that respect, *Sprint* homed in on three indicia bearing on fitness for abstention. First, a state civil enforcement proceeding brought in a sovereign capacity typically involves a "state actor" "initiat[ing] the action," much as a state launches a criminal proceeding, so the identity of the party bringing suit is relevant. *Id.* at 79. Second, a state typically acts in a sovereign (and

quasi-prosecutorial) capacity when it "sanction[s]" a party. *Ibid.* Finally, state civil actions fit for abstention under *Younger* usually begin with investigations and proceed with "a formal complaint or charges," much like their criminal counterparts. *Id.* at 79-80. In reversing in *Sprint*, this Court observed that none of the indicia it identified was present: "[1] A private corporation, . . . initiated the action . . . . [2] No state authority conducted an investigation into Sprint's activities, and [3] no state actor lodged a formal complaint against Sprint." *Id.* at 80.

In sum, the requirement that a state act in a sovereign capacity represents the core connection – and doctrinal justification – for extending *Younger*'s criminal-prosecution based abstention to civil actions "akin to a criminal prosecution in important respects." *Id.* at 79 (quotation marks omitted). After all, a State's "power[] to undertake criminal prosecutions derive[s] from separate and independent sources of power and authority originally belonging to them before admission[.]" *Heath v. Alabama*, 474 U.S. 82, 89 (1985). This inherent sovereign power and authority is what justifies abstention under *Younger* and its progeny – and courts must identify it when abstaining from jurisdiction because of a state civil suit. Otherwise, abstention will no longer be "exceptional," but will instead permit deference anytime a state civil enforcement proceeding takes place. *Sprint*, 571 U.S. at 73.

B. The Ninth Circuit's Decision Flouted *Sprint* and Creates a Clear Circuit Split.

The Ninth Circuit departed from clearly established law by skirting the sovereign interests implicated by the civil proceeding at issue. In so departing, moreover, the Ninth Circuit split with the approach taken by other circuits.

1. In this case, the Ninth Circuit declined to assess Hawaii's sovereign interests in the actual underlying state proceeding. Indeed, it ruled it would only look to the "classes of proceedings, not [the State's] interest in specific cases." *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 737 (9th Cir. 2020). The Ninth Circuit quoted *NOPSI* for support, but in the passage the Ninth Circuit quoted, *NOPSI* was addressing the argument that *Younger* does not apply anytime there is a preemption claim. *NOPSI*, 491 U.S. at 365. Moreover, *Sprint*'s careful analysis of the proceeding there (a proceeding before the Iowa Utilities Board) shows the need to scrutinize the proceeding at issue – rather than take a passing glance at the "class" of cases to which it belongs – to ensure the proceeding is "akin to a criminal prosecution in important respects." *Sprint*, 571 U.S. at 79 (quotation marks omitted); *id.* at 81 (declining to "extend Younger to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest.").

2. Making matters worse, the Ninth Circuit took the rationale that underlies the abstention doctrine and forms its contours – federalism, and the important state interests implicated by criminal and quasi-criminal state proceedings – and turned it on its head. Thus, the Ninth Circuit observed that federal courts should defer to states' decisions to permit private persons to prosecute cases, because "[c]onducting litigation on behalf of a State is a core sovereign function." *Bristol-Myers Squibb*, 979 F.3d at 736. That ruling, however, directly contravenes *Sprint*'s instruction (and indeed, *Younger*'s ruling) that abstention depends on a state proceeding being "akin to a criminal prosecution." *Sprint*, 571 U.S. at 77-80.

The Ninth Circuit also observed that probing the particular facts of a state enforcement proceeding

would "offend the principles of comity at the heart of the *Younger* doctrine." *Bristol-Myers Squibb*, 979 F.3d at 737. But that puts the cart before the horse, because it presupposes that *any* state proceeding implicates the federalism concerns at the heart of *Younger*. Instead, the state must have interests like those at stake in criminal prosecutions before abstention is warranted.

3. Finally, the Ninth Circuit's approach creates a clear split with the approach taken by other courts of appeals. For example, in *PDX N., Inc. v. Comm'r New Jersey Dep't of Lab. & Workforce Dev.*, 978 F.3d 871, 883 (3d Cir. 2020), the Third Circuit went through each of the *Sprint* factors for the specific civil proceeding at issue – not the "class of proceedings" to which the civil proceedings belonged, *contra Bristol-Myers Squibb*, 979 F.3d at 737 – and concluded that the enforcement proceeding reflected the sovereign interests of New Jersey. *See also* Petition for Writ of Certiorari, *Bristol-Myers Squibb Co. v. Connors*, No. 20-1149 (U.S. Feb. 17, 2021) at 22-26.

II. Litigants Should Be Able to Challenge the Use of Private Counsel by State Attorneys General in Federal Court.

The Ninth Circuit's failure to consider whether the civil proceeding here implicates Hawaii's sovereign interests is particularly troubling because Hawaii itself did not litigate this case. And Hawaii's lack of involvement suggests the underlying civil proceeding did not involve state interests so important that they warrant abstention. Additionally, the Ninth Circuit's decision will effectively immunize state civil enforcement proceedings from challenge in federal court – even though the relationship between private counsel and State

Attorneys General implicate due-process and constitutional concerns that should be subject to federal-court review.

A. Courts Should Carefully Evaluate State Interests if Private Counsel Is Involved.

By holding that the inquiry into whether a civil proceeding is "quasi-criminal," *Sprint*, 571 U.S. at 81, may be satisfied by recourse to generic assessments and not case-specific inquiries, there will be no meaningful federal-court check on the important and sometimes curious relationship between State Attorneys General and private counsel.

Hawaii, like other states, permits the hiring of private, contingency-fee lawyers to prosecute civil actions – not criminal ones – in the State's name. *See* Haw. Rev. Stat. § 28-8(b). These engagements represent a "dangerous trend" in state-level civil enforcement. Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 81-83 (2010).

Most notably, it drives the state's use of legal power away from "democratic and constitutional principles," because the private-attorney arrangement foments "an ominous mixture of public power and private motivation" – i.e., the pursuit of a payday. *Id.* at 77. This runs directly into the deeply held belief that the government, including its lawyers, are "the representative[s] not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). And infusing the profit motive into a sovereign's enforcement authority scrambles these incentives. *Compare Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987) ("[W]e must have assurance that those

[prosecutors] who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.").

Thus, to disregard the fact that private counsel is prosecuting a civil enforcement proceeding in the name of the State, as the Ninth Circuit did here, is to implicitly equate the *sovereign* interests traditionally at the core of *Younger* – respect for a state's prosecutorial power – with the *private* interest in capturing profit. But this Court's teachings in *Younger* and *Sprint* counsel that not *all* state interests justify abstention – only the "vital" ones that resemble the state's interest in criminal cases. *Middlesex*, 457 U.S. at 432. So the Ninth Circuit's blurring of the various interests at play – state versus private and enforcing versus profiteering – ignores *Younger*'s instructions and limitations. *See NOPSI*, 491 U.S. at 364 ("[T]he prerequisite of *Younger* abstention" is that "the State" – not a private party – have a "legitimate, *substantial* interest" in the proceeding. (emphasis added)).

Consider this case. Hawaii conducted no pre-suit investigation of Plavix. Instead, it appears undisputed that only private counsel investigated. *See* Petition for Writ of Certiorari, *Bristol-Myers Squibb Co. v. Connors*, No. 20-1149 (U.S. Feb. 17, 2021), App.6a. The record suggests Hawaii never received a single patient or physician complaint about Plavix or its label. *Id*. at App.30a, 48a. And private attorneys controlled the lawsuit from start to finish – they pitched the suit to the Attorney General of Hawaii, signed every single filing (including the complaint) and argued every motion. *Id*. at App.49a, 63a.

As a result, whether the civil action litigated by these private attorneys vindicates the type of state in-

terests rooted in criminal prosecutions requires, contrary to the Ninth Circuit's opinion, careful assessment of the State's "interest in [the] specific case[]," and not just a gesture to a "class[] of proceedings," *Bristol-Myers Squibb*, 979 F.3d at 737. Otherwise, looking only to the latter and not the former fails to appreciate the distinct lack of a *sovereign* interest in a suit conceived, prosecuted, and paid for by private counsel.

B. Civil Cases Prosecuted by Private Counsel Raise Constitutional Concerns That Federal Courts Must Be Able to Review

The failure to assess the State's sovereign interest in specific cases will tend to favor abstention precisely when federal-court intervention is most relevant, as civil actions brought in the name of the State by private counsel implicate serious due-process and other constitutional concerns.

1. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). *Marshall* thus rejected the argument "that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors," *id.* at 248-49; instead, "they too must serve the public interest," *id.* at 249. As the Court observed, "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision" and thus may "raise serious constitutional questions." *Id.* at 249–50; *see Young*, 481 U.S. at 811 ("[The] appointment of an interested prosecutor creates an appearance of impropriety . . . whose effects are pervasive [and] calls into question . . . the conduct of the entire prosecution[.]").

Although the Court in *Marshall* faced a situation in which "[n]o governmental official st[ood] to profit economically," 446 U.S. at 250, precisely the opposite is true here. The party suing in the name of the government – private, contingency-fee counsel – is by design motivated by pecuniary gain in bringing a case to the State's attention (and in prosecuting it). *See* Petition for Writ of Certiorari, *Bristol-Myers Squibb Co. v. Connors*, No. 20-1149 (U.S. Feb. 17, 2021), App.48a, 49a (detailing how private firm pitched the case to state officials, how the state conducted no independent investigation of the facts, and how the State and private counsel agreed to a 20% contingency fee).

Not only is the right to due process implicated. Creating these structurally misaligned incentives heightens the risk of abuse of a litany of constitutional rights, such as the rights protected by the First Amendment (as this case shows). All in all, once prosecutorial decision-making is subject to pecuniary influence, the State's interest in protecting the constitutional rights of citizens will play second fiddle to chasing cases that will generate profit for private counsel.

Unsurprisingly, other jurisdictions have acknowledged the perils of these relationships and sought to cut them back. For instance, it is the policy of the federal government "that organizations or individuals that provide such services to or on behalf of the United States shall be compensated in amounts that are reasonable, not contingent upon the outcome of litigation or other proceedings." The written purpose of this policy is "[t]o help ensure the integrity and effective supervision" of legal services provided to the federal government. *Protecting American Taxpayers from Payment of Contingency Fees*, Exec. Order No. 13433, 72 Fed. Reg. 28441 (May 16, 2007). Similarly, several

state supreme courts have restricted the use of contingencies in like settings. *Cnty. of Santa Clara v. Atlantic Richfield*, 235 P.3d 21, 38-39 (Cal. 2010); *Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 469-70 (R.I. 2008). The federal judiciary thus stands as an important bulwark in remedying any constitutional infirmities posed by these relationships.

2. To be sure, these constitutional concerns may differ among cases and across states. The Ninth Circuit's decision, however, will effectively immunize these issues from federal-court review, because the civil cases in which they arise necessarily belong to a "class[] of proceedings" that the State could always characterize as implicating some generic state interest.

This runs right into this Court's caution that "*Younger*, and its civil counterpart . . . do of course allow intervention in those cases where . . . the state proceeding is motivated by a desire to harass or is conducted in bad faith." *Huffman*, 420 U.S. at 611. But despite this express instruction, any constitutional right implicated in cases such as the one here will be rendered a parchment guarantee with no right of review by a federal court.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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