No. 20-1149

In the Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY, et al.,

Petitioners,

v.

CLARE E. CONNORS, in her official capacity as the Attorney General of Hawaii,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

CLARE E. CONNORS*
Attorney General
KIMBERLY T. GUIDRY
Solicitor General

NICHOLAS M. MCLEAN
Deputy Solicitor General
BRYAN C. YEE
T.F. MANA MORIARTY
Deputy Attorneys General

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 Queen Street
Honolulu, HI 96813
Phone: (808) 586-1360
Email: hawaiiag@hawaii.gov
**Counsel of Record*

Counsel for Respondent

MAY 13, 2021

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the court of appeals correctly determined that the state consumer-protection enforcement action at issue here—an enforcement action brought in state court by the State of Hawaii, through its Attorney General, to sanction petitioners for serious violations of state law by the imposition of civil monetary penalties and punitive damages—falls within the category of civil actions "akin to a criminal prosecution in important respects," *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 79 (2013) (quotation omitted), thus warranting federal court abstention under *Younger v. Harris*, 401 U.S. 37 (1971), and progeny.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

No. 20-1149

In the
Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY, et al.,

Petitioners,

v.

CLARE E. CONNORS, in her official capacity as the Attorney General of Hawaii,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

INTRODUCTION

This is a straightforward *Younger* abstention case. Petitioners are the defendants in a state civil enforcement action brought by the State of Hawaii, through its Attorney General, to sanction petitioners for serious and repeated violations of state consumer protection law. On the eve of trial—and after almost six years of litigation in the state court system—petitioners sued the State Attorney General in federal district court and requested an injunction "prohibiting the State

from pursuing a civil enforcement action" against petitioners. Pet. App. 68a. The district court dismissed petitioners' complaint on *Younger* abstention grounds. Pet. App. 11a-24a. A unanimous panel of the Ninth Circuit affirmed. Pet. App. 1a-9a.

In the decision below, the Ninth Circuit correctly applied this Court's precedents and concluded that abstention was warranted based on its assessment of the characteristics of the underlying state enforcement proceeding. That decision was consistent with the doctrinal framework applied in other circuits, and petitioners' argument that the Ninth Circuit created "a clear circuit split," Pet. 22, mischaracterizes the decision below.

Younger abstention, which draws its name from *Younger v. Harris*, 401 U.S. 37 (1971), advances the goals of federalism and comity by providing for federal court abstention when "particular kinds of state proceedings have already been commenced." *Ohio Civ. Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 625-26 (1986). In *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013), this Court clarified that *Younger* abstention is appropriate when three discrete categories of state proceedings are involved: (1) "state criminal prosecution," (2) "certain civil enforcement proceedings," and (3) "civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 78.

The civil enforcement proceeding at issue in this case, as the Ninth Circuit correctly held, falls squarely

into the second of the three *Sprint* categories. It was a "civil enforcement proceeding," *Sprint*, 571 U.S. at 78, "brought by the State in its sovereign capacity," Pet. App. 6a (quoting *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977)), through the State Attorney General, to sanction petitioners for violations of state consumer protection law involving the marketing of the prescription drug Plavix. Pet. App. 5a-6a. "The State's action," the court of appeals explained, was "brought under a statute that punishes those" who have engaged in unfair or deceptive acts in commerce, "and the State seeks civil penalties and punitive damages to sanction the companies for their allegedly deceptive labeling practices." Pet. App. 8a. When judged against the factors that *Sprint* identifies as relevant to whether a state civil enforcement proceeding warrants *Younger* abstention, the state enforcement action at issue here plainly qualifies: It was "initiated to sanction" petitioners "for [a] wrongful act"; "a state actor" was "a party to the state proceeding and" "initiate[d] the action"; and it involved an "[i]nvestigation[ ]" that "culminat[ed] in the filing of a formal complaint[.]" *Sprint*, 571 U.S. at 79-80.

In short: By any reasonable measure, the State's enforcement action against petitioners "was 'more akin to a criminal prosecution than are most civil cases.'" *Sprint*, 571 U.S. at 81 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)). Accordingly, the state enforcement proceeding was a "quasi-criminal" "civil enforcement action" within the meaning of this Court's

Younger abstention precedents. Federal abstention was thus warranted.

Petitioners argue that *Younger* abstention should turn on a more "fact-specific inquiry," Pet. 4—one that apparently requires, among other things, a wide-ranging assessment of state actors' subjective purposes and motives. For example, petitioners argue that the Ninth Circuit erred in concluding that abstention was proper because the court did not first "consider" whether "state health officials" had "expressed . . . concern[s] about" Plavix. Pet. 13. Petitioners further argue that *Younger* abstention requires the State to "demonstrat[e]" that its "civil enforcement proceeding is a bona fide exercise of . . . sovereign law-enforcement prerogatives," Pet. 21, and that the particular state action at issue truly "furthers" "legitimate interests" and "represents the exercise of a state function worthy of proper respect." Pet. 17, 21. According to petitioners, prior to applying *Younger* abstention, a federal court must evaluate the State's motives and assess whether the particular individuals the State chooses to prosecute its enforcement action have been truly "guided solely by their sense of public responsibility for the attainment of justice" rather than "an interest in pursuing profit." Pet. 20 (quotation omitted). Here, petitioners suggest that the Hawaii Attorney General's decision to designate private counsel as special deputy attorneys general to prosecute the State's enforcement action somehow means the State's enforcement action is ineligible for *Younger* abstention. Pet. 20.

Petitioners' proposed test is not the law, nor should it be. The Ninth Circuit properly rejected petitioners' attempt to limit the ability of state attorneys general to decide how to enforce state actions—and it correctly held that the free-form, subjective inquiry into motives and purposes urged by petitioners has no basis in this Court's *Younger* abstention precedents. "A federal court inquiry into why a state attorney general chose to pursue a particular case . . . would be entirely at odds with *Younger*'s purpose of leaving state governments 'free to perform their separate functions in their separate ways.'" Pet. App. 8a (quoting *Younger*, 401 U.S. at 44). Petitioners' proposed approach "also would make the application of *Younger* turn on a complex, fact-intensive analysis," which would violate the principle—often invoked by this Court—that federal "jurisdiction should be governed by 'straightforward rules under which courts can readily assure themselves of their power to hear a case.'" Pet. App. 8a (alteration omitted; quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)).

In sum, the decision below correctly and faithfully applied this Court's *Younger* abstention case law. There is no circuit split, despite petitioners' efforts to create the illusion of one by mischaracterizing the decision below. And the test petitioners invite this Court to introduce would be both unworkable and at odds with existing law. The Court should deny the petition.

STATEMENT

A. The State's Civil Enforcement Action.

In 2014, the State of Hawaii commenced a civil enforcement proceeding against petitioners—manufacturers and sellers of the anti-platelet prescription drug Plavix. The enforcement action—which was initiated by the State's filing of a formal complaint in state court—was brought under the State's Unfair and Deceptive Practices Act ("UDAP"), Haw. Rev. Stat. § 480-1, *et seq*. Pet. App. 2a-3a. The action was filed by then-Hawaii Attorney General David Louie under his *parens patriae* authority, Haw. Rev. Stat. § 480-3.1, and Haw. Rev. Stat. § 661-10. *See State v. Bristol-Myers Squibb Co.*, Civ. No. 14-1-0708-03, Dkt. 228 (Dec. 4, 2018), Second Amended Complaint ("SAC") ¶ 9; *see also* Haw. Rev. Stat. § 480-3.1 (providing specific authorization to the State Attorney General to recover civil penalties for UDAP violations); Haw. Rev. Stat. § 661-10 (providing that "the attorney general may bring and maintain an action" "in the name of the State" "[w]henever it is necessary or desirable for the State in order to collect or recover any money or penalty"). The State sought civil penalties, injunctive relief, and punitive damages. SAC ¶¶ 106, 110, 119, and Prayer for Relief.

The State's enforcement action alleged serious violations of State consumer protection law, including unfair or deceptive marketing and promotion of Plavix. SAC ¶¶ 24-65. The gravamen of the State's complaint was that petitioners marketed Plavix to all patients

with a history of heart attack, stroke, or peripheral artery disease, even though they knew Plavix had diminished or no effect for as many as thirty percent of patients. SAC ¶¶ 24-31. The State also alleged that persons of Asian and Pacific Islander descent, who comprise a significant portion of Hawaii's population, are more likely to have the genetic mutation that results in poor metabolization. SAC ¶ 27.

As authorized by State law, the State Attorney General appointed private counsel to serve as special deputy attorneys general for the purposes of litigating the State's action. Pet. App. 3a; Haw. Rev. Stat. § 28-8(b) (authorizing the Attorney General to retain private counsel who "shall serve at the pleasure of the attorney general" "to perform such duties and exercise such powers as the attorney general may specify").[1] The State's contract with private counsel expressly provided that " 'the Attorney General shall have final authority over all aspects of this Litigation' and 'must approve in advance all aspects of this Litigation.' " Pet. App. 52a.

---

[1] The Hawaii Legislature granted this authority to the Attorney General to "reduce costs as well as free up valuable resources," allowing government departments "to pursue other matters previously ignored because of the lack of in-house resources." H. Stand. Comm. Rep. No. 1216, *in* 1995 House Journal, at 1491. It was contemplated that this authority would be especially beneficial "[i]n complex litigation or cases in which the upfront costs may be high," "particularly in the . . . consumer protection area[.]" S. Stand. Comm. Rep. No. 304, *in* 1995 Senate Journal, at 940.

The enforcement "action was 'a result of an investigation or inquiry by the Attorney General[.]'" Pet. App. 48a.[2] The Attorney General became aware of potentially unlawful activities by petitioners from a relator action.[3] Additionally, private counsel conducted a nationwide investigation of petitioners' misconduct. Pet. App. 3a.

After almost six years of vigorous litigation in state court, petitioners "turned to federal court, seeking an injunction against the state court litigation." Pet. App. 2a.[4] They sued the State Attorney General

---

[2] This statement regarding the investigation was provided by the State to petitioners in discovery in the state court action, and thereafter included among petitioners' allegations in their federal complaint (Pet. App. 48a), and relied upon by the district court (Pet. App. 18a).

[3] In 2011, a relator filed a federal False Claims Act action against petitioners on behalf of the United States and a number of states, alleging fraudulent marketing of Plavix. *See In re Plavix Mrktg., Sales Practices & Prods. Liability Litig.*, 123 F. Supp. 3d 584, 590 n.1, 617 (D.N.J. 2015). On or around December 2011, after relator added a claim on behalf of Hawaii, relator served the State with the underlying evidence, as required by statute, Haw. Rev. Stat. § 661-25(b). *Id.*

[4] Petitioners previously diverted the State into federal court in 2014, when they improperly sought removal of the state enforcement action. *See Hawaii ex rel. Louie v. Bristol-Myers Squibb Co.*, Civ. No. 14-00180(HG)(RLP), 2014 WL 3427387, at *16 (D. Haw. July 15, 2014). The district court concluded that it lacked jurisdiction and remanded the case. Although petitioners affirmatively asserted a First Amendment defense in their responsive pleadings to the state court complaint and amended complaints, they did not invoke the First Amendment in the removal petition and did not ask the state court judge to take action regarding their First Amendment defense until *after* the unsuccessful filing

in her official capacity, Pet. App. 33a, and sought "[p]reliminary and permanent injunctive relief prohibiting the State from pursuing a civil enforcement action against" petitioners. Pet. App. 68a. In their federal complaint, petitioners conceded the underlying state court action was "a civil enforcement action" brought by "[t]he State[.]" *E.g.*, Pet. App. 32a (alleging that "[t]he State of Hawaii . . . brought a civil enforcement action"). Petitioners also alleged and conceded the State was "seeking to punish them." Pet. App. 16a (district court order; citing Compl. ¶¶ 1; 78); Pet. App. 25a, 51a.

The State moved to dismiss the federal action on *Younger* abstention grounds. Pet. App. 3a, 12a.

B. The District Court Abstains.

The district court dismissed petitioners' federal complaint because it determined that *Younger* abstention was warranted. Pet. App. 11a-24a. The district court explained that because the State enforcement proceeding was "a civil enforcement action brought by the Attorney General seeking civil penalties, injunctive relief, and damages for unfair and deceptive acts in violation of Hawaii consumer protection law," the action was properly categorized as "a quasi-criminal civil enforcement proceeding" under *Sprint*. Pet. App. 14a.

---

of their January 2020 federal court action for injunctive relief. Pet. App. 25a-68a, 3a, 12a.

The court observed that "there can be no dispute that the state action . . . seeks to eradicate what the State perceives to be [petitioners'] unfair and deceptive practices." Pet. App. 15a-16a. Similarly, the court concluded that "it is undisputed the state action is brought by the Attorney General on behalf of the State in its sovereign capacity." Pet. App. 16a-17a. The court likewise determined that neither *Sprint* nor any circuit precedent treated the presence of a pre-filing investigation as dispositive for *Younger* abstention but that, in any event, the State's private counsel had conducted such an investigation. The court further noted that petitioners themselves had "allege[d] the state action was the result of an investigation or inquiry by the Attorney General." Pet. App. 17a-18a.

The district court correctly rejected as irrelevant to the *Sprint* analysis petitioners' novel suggestion that the court should scrutinize the State's motive for bringing the action, the extent of the associated investigations, and the role of the State's retained counsel. Pet. App. 15a-18a. Petitioners suggested that "the state action [was] not a quasi-criminal enforcement proceeding because the State [was] merely a nominal plaintiff in a suit litigated by private counsel." Pet. App. 16a. The district court, however, correctly observed that petitioners "cite[d] no authority to support their argument that this impacts the *Younger* analysis where, as here, it is undisputed the state action was brought by the Attorney General as plaintiff, on behalf of the State in its sovereign capacity, and suing under certain

Hawaii statutes that authorize the Attorney General to bring such actions." Pet. App. 16a-17a.

Having determined that the underlying civil enforcement action was "a quasi-criminal enforcement action" for *Younger* abstention purposes, Pet. App. 14a, the district court also determined that the state enforcement proceeding implicated important state interests, Pet. App. 19a.[5]

Finally, the court concluded that no "extraordinary circumstances"—including the First Amendment claims petitioners had litigated in state court—justified an exception to *Younger* abstention. Pet. App. 22a.[6]

C. The Ninth Circuit Affirms.

A unanimous panel of the Ninth Circuit affirmed. Pet. App. 1a-9a. The court of appeals "agree[d] with the district court" that the state court action at issue was "a quasi-criminal enforcement proceeding" of the sort for which *Younger* abstention is warranted. Pet. App. 2a.

---

[5] Petitioners did not challenge this determination before the Ninth Circuit. Petitioners placed at issue only "[w]hether the district court erred in holding that" the underlying state enforcement proceeding was "a civil enforcement action akin to a criminal proceeding that warrants abstention under *Younger*[.]" *Bristol-Myers Squibb Co. v. Connors*, No. 20-15515, Opening Brief at 4 (quotation omitted).

[6] Petitioners disclaimed any reliance on the "bad faith" or "harassment" exceptions on appeal, Pet. App. 9a, and before the district court, Pet. App. 22a n.10.

After quoting *Sprint*'s recitation of characteristics typically associated with civil actions of the sort entitled to *Younger* abstention, Pet. App. 4a, the Ninth Circuit considered the characteristics of the State's civil enforcement action at issue in this case, Pet. App. 5a-8a. The panel concluded that because the enforcement action was "brought by the State," Pet. App. 5a, and because "the State seeks civil penalties and punitive damages to sanction the companies for their allegedly deceptive labeling practices," "the action fits comfortably within the class of cases described in *Sprint*, and abstention under *Younger* is warranted." Pet. App. 8a.

Like the district court, the Ninth Circuit declined petitioners' invitation to depart from this Court's case law and instead rely on additional, irrelevant factors—such as "the State's reliance on private counsel," Pet. App. 5a, petitioners' conclusory and unwarranted allegation that "the State's true motive in bringing" the state enforcement action was merely "to make a profit," Pet. App. 6a, and various criticisms by petitioners asserting a lack of "thoroughness" in "the State's pre-filing investigation," Pet. App. 8a. The court held that such an approach was not required by *Sprint*—and would, in fact, conflict with the approach this Court employed in its *Younger* abstention cases.[7]

---

[7] *Sprint* identifies three general characteristics of "quasi-criminal" "civil enforcement actions," none of which entails the sort of "rigorous inquiry" petitioners propose. Pet. App. 6a. And, as the Ninth Circuit explained, "[n]othing in [*Sprint*] suggests" the typical characteristics "should be treated as a checklist, every

As the Ninth Circuit explained, "in evaluating whether the characteristics of actions entitled to *Younger* abstention are present," this Court historically "has considered the nature of a State's interest in different classes of proceedings, not its interest in specific cases." Pet. App. 6a-7a (citing *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982), and *New Orleans Pub. Serv., Inc. v. Council of New Orleans* ("*NOPSI*"), 491 U.S. 350, 365 (1989)); *see also* Pet. App. 7a (explaining that "[w]hat matters for *Younger* abstention is whether the state proceeding falls within the general class of quasi-criminal enforcement actions"). The court held that inquiring into " 'the State's interest in the outcome of the particular case,' " Pet. App. at 7a, as petitioners urged, would conflict with this Court's established approach. Pet. App. 7a-8a.

The panel also determined that petitioners' "fact-intensive analysis" would run afoul of "the principles of comity" that lie "at the heart of the *Younger* doctrine"—and would conflict with this Court's "admonition that jurisdiction should be governed by 'straightforward rules under which [courts] can readily assure themselves of their power to hear a case.' " Pet. App. 8a (quoting *Friend*, 559 U.S. at 94). Accordingly, the Ninth Circuit held that regardless of the Attorney General's decision that the enforcement action should be "litigated by private counsel, it is still an action brought by the State." Pet. App. 5a; *see also* Pet. App.

---

element of which must be satisfied based on the specific facts of each individual case." Pet. App. 6a.

6a (recognizing that "[t]he Attorney General of Hawaii made the decision to bring the [state enforcement] action").

Finally, the court held that petitioners' First Amendment concerns did not preclude *Younger* abstention. Pet. App. 9a (recognizing that in *Younger*, "the plaintiffs argued that the state prosecution had a 'chilling effect' on their exercise of First Amendment rights, but the Court declined to apply any heightened scrutiny on that basis").[8]

Petitioners sought rehearing en banc, which was denied on December 8, 2020. Pet. App. 10a. No judge requested that a vote be taken on the petition. Pet. App. 10a.

D. The State Court Enters Judgment Against Petitioners In The Enforcement Action.

While petitioners' appeal was pending before the Ninth Circuit, the State's civil enforcement action proceeded to trial.[9] On February 15, 2021—following a four-week jury-waived trial—the state court awarded the State approximately $834 million in civil penalties, based on the court's finding that petitioners had engaged in more than 834,000 violations of State consumer protection law. Pet. App. 69a-126a. The court

---

[8] The panel also correctly observed that petitioners had "expressly disclaimed reliance" on the "extraordinary circumstances" exception to *Younger* abstention. Pet. App. 9a.

[9] The trial was originally scheduled for May 2020, but was delayed until October 2020 due to the COVID-19 pandemic.

entered judgment on February 25, 2021. *State v. Bristol-Myers Squibb Co.*, Dkt. 1387.[10] Petitioners have indicated that they intend to appeal the trial court's ruling in the state appellate courts.

REASONS FOR DENYING THE PETITION

The petition for writ of certiorari should be denied. The decision below fully accords with *Sprint*, as well as with other circuit court decisions applying *Sprint*. The Ninth Circuit correctly determined that *Sprint* controlled, quoted the characteristics *Sprint* identifies as relevant to whether a state action falls into the category of civil actions "more akin to a criminal prosecution than are most civil cases," *Sprint*, 571 U.S. at 81 (quotation omitted), and carefully analyzed the characteristics of the state enforcement action at issue. Because the State Attorney General brought the enforcement action at issue here on behalf of the State to hold petitioners accountable for unfair and deceptive marketing through the imposition of civil penalties and punitive damages, the state action qualifies as a "quasi-criminal" "civil enforcement action" under *Sprint*. Petitioners' suggestion that the decision below departed from *Sprint* is wrong; in fact, it is petitioners who urge a departure from the *Sprint* framework.

[10] On March 8, 2021, petitioners filed a motion for judgment as a matter of law or, in the alternative, to amend the judgment or grant a new trial. *Id.*, Dkt. 1414. The motion was denied on May 10, 2021. *Id.*, Dkt. 1570.

In the absence of any conflict with decisions of this Court or of the courts of appeals, the petition is, in reality, a request for this Court to jettison the straightforward *Sprint* framework. Petitioners, however, fail to demonstrate the sort of "special justification" that would be required to support such a step. *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). And even if the Court were inclined to revisit *Sprint*, this case would be a particularly poor vehicle to do so—because *Younger* abstention would very likely still be warranted here, even under petitioners' proposed test.

A. The Decision Below Correctly Applied *Sprint*.

1. Petitioners incorrectly contend the Ninth Circuit improperly rejected the *Sprint* factors as "merely suggestive" and instead applied a "different rule," Pet. 3, that "focus[ed] on the statute under which the state proceeding was initiated." Pet. 14. On the contrary, the panel's opinion expressly held that *Sprint* is the governing standard on whether the State's enforcement action is "akin to a criminal prosecution in important respects," *Sprint*, 571 U.S. at 79, such that *Younger* abstention applies. Pet. App. 4a.[11] The panel quoted

[11] This Court extended *Younger* abstention to civil enforcement actions because "comity and federalism" concerns required "expand[ing] the protection of *Younger* beyond state criminal prosecutions[.]" *NOPSI*, 491 U.S. at 367-68. This approach also honors the general precept that "[t]he notion of punishment . . . cuts across the division between the civil and the criminal law." *Austin v. United States*, 509 U.S. 602, 610 (1993) (quotation omitted).

Sprint's discussion of the characteristics that such actions typically have:

> Such enforcement actions are characteristically initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act. In cases of this genre, a state actor is routinely a party to the state proceeding and often initiates the action. Investigations are commonly involved, often culminating in the filing of a formal complaint or charges.

Pet. App. 4a (quoting *Sprint*, 571 U.S. at 79-80 (citations omitted)). The panel then addressed whether the State's enforcement action had these characteristics. Pet. App. 4a-8a.

The panel observed that because "[t]he Attorney General of Hawaii made the decision to bring the action," the action was "one 'brought by the State in its sovereign capacity.'" Pet. App. 6a. This, the panel explained, remained true "even though the state proceeding is being litigated by private counsel." Pet. App. 5a. Thus, the court held that one *Sprint* factor—whether a "'state actor is . . . a party'"—was satisfied. Pet. App. 6a.

Next, the panel turned to the other two *Sprint* factors: (1) whether the State's proceeding was one that sanctioned petitioners for wrongdoing and (2) whether it involved investigations and a formal complaint. Pet. App. 6a. The panel determined that "[t]he State's action has been brought under a statute that punishes

those who engage in deceptive acts in commerce, and the State seeks civil penalties and punitive damages to sanction the companies for their allegedly deceptive labeling practices." Pet. App. 8a. The court also noted that the "[t]wo private law firms" hired by the State to litigate its action conducted an investigation. Pet. App. 3a.

Based on these particular characteristics, the panel correctly concluded that the action at issue was a "quasi-criminal" civil enforcement action under *Sprint* and thus entitled to *Younger* abstention. Pet. App. 8a. Petitioners' bald assertion that the panel "broke with the case-specific inquiry embodied in *Sprint,*" Pet. 13, simply does not square with the panel's opinion.

2. Because the Ninth Circuit correctly articulated the *Sprint* framework, most of petitioners' objections (Pet. 19-22) center on the notion that the panel erred because it did not undertake a more rigorous factual analysis in applying *Sprint*. Specifically, petitioners contend the panel erred by concluding that the State action is a "civil enforcement action" within the meaning of *Younger* because: the State retained private counsel, the State relied—at least partially—on investigative work product of its retained counsel, and because the "State's true motive in bringing the case" was "to make a profit, not to punish wrongdoing." Pet. App. 6a. Petitioners are wrong, both legally and in their application of the facts.

As a threshold matter, the mere suggestion that a court misapplied a correctly stated rule of law is ordinarily not grounds for this Court's review.[12] In any event, petitioners are wrong on the merits: the Ninth Circuit faithfully and correctly applied this Court's *Younger* abstention precedents.

As the Ninth Circuit correctly explained, nothing in *Sprint* requires that federal courts must look beyond the limited set of characteristics identified by this Court in *Sprint* and instead assess the subjective motives of those enforcing State law, the State's subjective purposes in bringing an enforcement action, or the internal decision-making processes associated with the State's exercise of its enforcement discretion. Pet. App. 6a.

First, consistent with this Court's recognition that *Younger* abstention is a "threshold" determination, *NOPSI*, 491 U.S. at 367, the application of the framework outlined in *Sprint* must turn on readily ascertainable or undisputed facts, rather than elaborate

---

[12] *See* Sup. Ct. R. 10 (certiorari ordinarily not granted to review "misapplication of a properly stated rule of law"); *United States v. Johnston*, 268 U.S. 220, 227 (1925) (observing that this Court generally "do[es] not grant . . . certiorari to review evidence and discuss specific facts"). That policy applies with particular force when, as here, both the "district court and court of appeals are in agreement as to what conclusion the record requires[.]" *Kyles v. Whitley*, 514 U.S. 419, 456-57 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [set forth in *Johnston*, 268 U.S. 220] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires." (citing *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949))).

fact-finding. *Sprint*, 571 U.S. at 79-80. Nothing in *Sprint*—or any other precedent of this Court—suggests that courts must engage in rigorous fact-finding or make subjective and qualitative assessments of a State's enforcement action. Petitioners identify no case that has done so, and with good reason. As the Ninth Circuit explained, interpreting *Sprint* to require courts to "scrutinize the particular facts of a state civil enforcement action would offend the principles of comity at the heart of the *Younger* doctrine." Pet. App. 8a; *id.* ("A federal court inquiry into why a state attorney general chose to pursue a particular case, or into the thoroughness of the State's pre-filing investigation, would be entirely at odds with *Younger*'s purpose of leaving state governments 'free to perform their separate functions in their separate ways.'" (quoting *Younger*, 401 U.S. at 44)); *id.* (recognizing the longstanding principle that "jurisdiction should be governed by 'straightforward rules under which [courts] can readily assure themselves of their power to hear a case'" (quoting *Friend*, 559 U.S. at 94)).

Nor does *Sprint* invariably require a state action to meet all three characteristics to warrant *Younger* abstention. As the Ninth Circuit properly recognized, none of the *Sprint* factors is dispositive as to whether a state's civil enforcement proceeding is "more akin to a criminal prosecution than are most civil cases." *Sprint*, 571 U.S. at 81 (2013) (quoting *Huffman*, 420 U.S. at 604); Pet. App. 6a (noting that this Court's use of "terms such as 'characteristically,' 'routinely,' and 'commonly,'" undermine any "suggest[ion] that the

characteristics [*Sprint*] identified should be treated as a checklist, every element of which must be satisfied").

As the Ninth Circuit correctly observed, in evaluating whether *Younger* abstention applies to a state action, this Court historically has looked to the characteristics of the class or type of proceeding, rather than to the facts of the particular proceeding. Pet. App. 7a (Supreme Court "has considered the nature of a State's interest in different classes of proceedings, not its interest in specific cases"); *see also Sprint*, 571 U.S. at 79-80 (referring to the characteristics of state enforcement actions and "cases of this genre"); *Middlesex*, 457 U.S. at 434 (considering the state's general interest in "the professional conduct" of its attorneys rather than its interest in disciplining particular attorney); *NOPSI*, 491 U.S. at 365 (looking to "the importance of the generic proceedings to the State" rather than "its interest in the *outcome* of the particular case"); *id.* at 367 (explaining that *Younger* abstention "must stand or fall upon the answer to the question whether the [state] court action is the *type of proceeding* to which *Younger* applies" (emphasis added)); *Dayton*, 477 U.S. at 628 (focusing on the state's general interest in preventing employers from engaging in sex discrimination, not whether particular teacher's firing was permissible); *Huffman*, 420 U.S. at 604 (considering the state's general "interest in the nuisance litigation" to prohibit distribution of obscene materials, not the subjective motives or purposes underlying that particular nuisance action). Petitioners' proposed factual inquiry into the State's "true" motives, its internal

decision-making processes, and the role of the State's retained counsel in this particular enforcement action—all of which turn on the State's interest in this particular proceeding—would be contrary to these settled precedents.

Petitioners' suggestion that the Ninth Circuit misapplied *Sprint* by failing to undertake a rigorous factual inquiry flounders, as this Court did not itself undertake such an inquiry in *Sprint*. In *Sprint*, this Court decided whether an administrative proceeding before the Iowa Utilities Board ("IUB proceeding") was "of the sort entitled to *Younger* treatment." *Sprint*, 571 U.S. at 79 (quotation omitted; cleaned up). This Court applied a practical and commonsense approach, asking whether the "IUB proceeding . . . resemble[d] the state enforcement actions this Court has found appropriate for *Younger* abstention." *Id*. at 80. The Court reasoned as follows: "A private corporation, Sprint, initiated the action. No state authority conducted an investigation into Sprint's activities, and no state actor lodged a formal complaint against Sprint." *Id.* And although the Court took into account whether the state proceeding merely involved "a civil dispute between two private parties," *id.* at 80, it did *not* engage in a wide-ranging, subjective investigation into whether that particular IUB proceeding sufficiently "embod[ied] the State's exercise of sovereign prerogatives" in a manner that was especially "deserving of comity or deference[.]" Pet. 18, 4.

Moreover, insofar as petitioners argue that a State must "provide a basic demonstration that its civil

enforcement proceeding is a bona fide exercise of its sovereign law-enforcement powers," Pet. 21, that standard, properly applied, is *satisfied* on this record. The State Attorney General (not a private corporation) filed the enforcement action on behalf of the State, seeking civil penalties and punitive damages against petitioners "to sanction the companies for their allegedly deceptive labeling practices[.]" Pet. App. 8a.[13] The State was a party, and the State filed a formal complaint.[14] The remedies sought by the State—civil penalties and punitive damages—further underscore that the enforcement action is directed at sanctioning petitioners. *See*, *e.g.*, *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) (observing that punitive damages "have been described as 'quasi-criminal'" and serve to "punish the defendant and to deter future wrongdoing" and "express[] . . . moral condemnation" (quotation omitted)). And this was clearly not a situation where state "adjudicative authority" was merely being "invoked to settle a civil dispute between two private parties." *Sprint*, 571 U.S. at 80 (2013).

---

[13] Petitioners "expressly disclaimed" any argument that there was bad faith on the part of the State. Pet. App. 9a.

[14] *Sprint* does not require that the State *itself* conduct the pre-filing investigation, and nothing in *Sprint* imposes a uniform federal standard regarding the extent or nature of pre-suit investigations associated with civil enforcement actions. *Sprint*, 571 U.S. at 79-80 ("Investigations are *commonly* involved, *often* culminating in the filing of a formal complaint or charges." (Emphasis added.)). Nor does *Sprint*—or any other *Younger* abstention decision from this Court—prohibit a State from relying on, or otherwise taking into account, investigations conducted by private counsel.

These facts regarding the State's civil enforcement action, especially when taken together, are plainly sufficient to demonstrate that *Younger* abstention is appropriate.[15]

Petitioners' suggestion (Pet. 22) that the State's action is not a "bona fide" exercise of sovereignty because the State supposedly did not perform its own investigation—or because it did not rely on particular State health officials' identification of injuries associated with Plavix—goes nowhere. The State's enforcement action punishes petitioners' unfair and deceptive marketing of Plavix. *See*, *e.g.*, SAC ¶ 8 (expressly disclaiming recovery for personal injuries caused by Plavix). A decision to bring a civil penalty action for a violation of state consumer protection law is squarely within the Attorney General's discretion, not that of State health officials. *See* Haw. Rev. Stat. § 480-3.1. Whether, and to what extent, Plavix has caused particular injuries is irrelevant to the State's claims, which concern unfair and deceptive marketing[16]—

---

[15] Petitioners' effort to draw a distinction between whether the State's enforcement proceeding had a "punitive *effect*"—which they apparently concede it did—and whether the State's enforcement proceeding had a "punitive *purpose*," Pet. 21, finds no support in this Court's *Younger* precedents. Moreover, petitioners' suggestion that no "punitive purpose" existed is inconsistent with the allegations in petitioners' own complaint. Pet. App. 25a (allegation by petitioners that "[t]he State of Hawaii" was "seeking to punish them").

[16] Under Hawaii law, a civil enforcement action does not require the Attorney General to establish injury as an element of that action. *Compare State v. Shasteen*, 9 Haw. App. 106, 826 P.2d 879 (1992) (in civil penalty action, court reviews only whether

and such considerations plainly would not be appropriate at the threshold *Younger* abstention stage in any event. Evidence regarding personal injuries (or the views of State health officials as to the safety and efficacy of Plavix) do not belong in this record, and their absence in no way supports petitioners' claim that the Attorney General's action against them was not a bona fide enforcement action by the State.[17]

3. Next, petitioners contend (Pet. 18) that the Ninth Circuit's analysis, which focused on the fact that the State's enforcement action was "brought under a consumer protection statute," effectively "resurrect[ed]" the broad *Middlesex* analysis that *Sprint* curtailed. Petitioners are wrong, and their argument mischaracterizes the panel's opinion.

---

there is unfair practice in violation of section 480-2), *with Davis v. Wholesale Motors, Inc.*, 86 Hawaii 405, 417, 949 P.2d 1026, 1038 (App. 1997) (*damages* action *by a consumer* under section 480-13 requires proof of a violation, injury, and damages). That is consistent with the Hawaii Legislature's intent, which was to deter unfair and deceptive acts at their inception and before injury occurred. *See*, *e.g.*, 1968 *Hawaii Session Laws*, Act 10, Section 1 ("Amendment to provide for civil penalties would tend to deter such violators. It is in the public interest that such 'sanctions' be provided as soon as possible.").

[17] Petitioners' argument also misconstrues the nature of the State's enforcement action, which was premised on petitioners' concealment of Plavix's limited efficacy for a significant percentage of the population. As a result of this deception, patients and their physicians did not know to consider alternative, more effective treatments. Such harm does not depend on proof of personal injury.

In *Middlesex*, this Court held that *Younger* abstention turned on three factors: (1) whether there is an ongoing state judicial proceeding, (2) which implicates important state interests, and (3) provides an adequate opportunity to raise federal challenges. 457 U.S. at 432. *Sprint* later clarified that the abstention decision should not turn solely on those three factors, explaining that they would "extend *Younger* to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest." *Sprint*, 571 U.S. at 81. *Sprint* thus teaches that the *Middlesex* factors are "*additional* factors appropriately considered by the federal court," only after the court has already determined that the state action falls within one of the three categories of cases to which *Younger* abstention applies. *Id.* at 81.

Petitioners misconstrue (Pet. 18) the Ninth Circuit's citation to *Middlesex*, Pet. App. 7a, to mean that it improperly relied on *Middlesex*'s broad, three-factor test. But that is not what the Ninth Circuit did. Rather, the panel addressed the narrow question on appeal: whether the State's enforcement action is "akin to" a criminal prosecution under *Sprint* such that *Younger* abstention could apply. Pet. App. 2a, 4a-6a, 8a.[18]

[18] Petitioners did not challenge the district court's determination that the *Middlesex* factors were also satisfied, and the issue presented to the Ninth Circuit was limited to "[w]hether the district court erred in holding that" the state enforcement proceeding was "a civil enforcement action akin to a criminal proceeding that warrants abstention under *Younger*[.]" *Bristol-Myers*

The Ninth Circuit cited *Middlesex* for the limited proposition that when determining whether *Younger* abstention applies, courts should focus on the characteristics of the *type* of proceeding at issue—not facts relevant to the *outcome* of the particular case, as petitioners had urged. Pet. App. 7a. The Ninth Circuit's approach accords with this Court's, *see supra* pp. 14-15, and is confirmed by *Sprint*, which looked to the characteristics of "*[s]uch* enforcement actions" and "cases of this *genre*." *Sprint*, 571 U.S. at 79 (emphasis added).[19]

Petitioners are wrong to suggest (Pet. 27) that the Ninth Circuit's analysis would impermissibly expand the scope of *Younger* abstention. Applying the factors this Court set forth in *Sprint* to decide whether an action falls into the category of "civil enforcement actions" within the meaning of *Younger* case law—as the Ninth Circuit did here—ably avoids the risk that *Younger* abstention would be extended "to virtually all parallel state and federal proceedings." *Sprint*, 571 U.S. at 81. For example, a civil UDAP case that only "involve[d] private parties," *Huffman*, 420 U.S. at 604, might implicate "important state interest[s]," *Sprint*, 571 U.S. at 81, but if "a state actor" was not "a party to the state proceeding," *id*. at 79, the action likely would not be subject to *Younger* abstention insofar as it does

---

Squibb Co. v. Connors, No. 20-15515, Opening Brief at 4 (quotation omitted).

[19] The First Circuit has similarly recognized that the *Sprint* analysis should focus on the characteristics of the type of proceeding at issue. *See Sirva Relocation*, 794 F.3d at 195 (explaining that "courts ordinarily should look to the general class of proceedings in determining whether *Younger* abstention applies").

"not resemble the state enforcement actions this Court has found appropriate for *Younger* abstention." *Id*. at 80.

B. There Is No Circuit Split.

Petitioners wrongly assert that the Ninth Circuit created a circuit split by failing to assess "basic facts and characteristics of the underlying state proceeding[.]" Pet. 27. According to petitioners, a division in authority has arisen between eight courts of appeals, which apply a "case-specific inquiry," Pet. 3, and the Ninth Circuit, which applies "a broad, categorical inquiry[.]" Pet. 3. There is no such circuit split.

The central problem with petitioners' argument is that it mischaracterizes the Ninth Circuit's opinion as either failing to apply or misapplying *Sprint*. Pet. 22. The Ninth Circuit correctly understood *Sprint* to call for the consideration of a limited set of characteristics associated with the State's enforcement action. The case-specific characteristics considered by the Ninth Circuit included the State's status as a party to this particular state court proceeding, the type of relief sought in this particular action, and the statute under which this particular action was brought. Pet. App. 4a-8a. Based on its analysis, the Ninth Circuit concluded that *this* enforcement action was a "civil enforcement proceeding" of the sort entitled to *Younger* abstention. Pet. App. 4a-8a. In other words, the decision below manifestly *did* "consider the basic facts and characteristics of the underlying state proceeding," Pet. 27—the

very thing petitioners are now accusing it of having failed to do.[20]

None of the post-*Sprint* circuit court decisions cited by petitioners engaged in a materially different analysis, despite petitioners' assertion to the contrary. Pet. 23. Rather, the cases identified by petitioners made threshold determinations based on readily ascertainable or undisputed facts—just as this Court did in *Sprint*, and just as the Ninth Circuit did below.

For example, in *Doe v. Univ. of Kentucky*, 860 F.3d 365 (6th Cir. 2017), the Sixth Circuit concluded that although a school disciplinary proceeding "may lack all the formalities found in a trial, it contains enough protections and similarities to qualify as 'akin to criminal prosecutions' for purposes of *Younger* abstention." *Id*. at 370. The analysis in *Doe* was straightforward and concise. *See id.* ("Here, the disciplinary proceeding was brought to sanction Doe and could have severe consequences, such as expulsion and future career implications. A state actor, the public University, is a party to the proceeding and initiated the action. Additionally, the case against Doe involved a filed complaint, an

[20] When properly considered in context, it is clear that the Ninth Circuit's statement that it was declining to "[a]ccept[ ] [petitioners'] invitation to scrutinize the particular facts of [the] state civil enforcement action," Pet. App. 8a, simply confirmed it was declining petitioners' inappropriate invitation to "look behind the curtain to see what is really going on," *Bristol-Myers Squibb Co. v. Connors*, No. 20-15515, Opening Brief at 2, by conducting an in-depth, subjective "inquiry into" such factors as "why a state attorney general chose to pursue a particular case, or into the thoroughness of the State's pre-filing investigation[.]" Pet. App. 8a.

investigation, notice of the charge, and the opportunity to introduce witnesses and evidence."). If that constitutes a "meticulous consideration [of] the individual facts of a case," as petitioners suggest (Pet. 24), the Ninth Circuit's decision plainly also does.[21]

There is no reason to think that any other circuit would have reached a different result in this case on the issue whether *Younger* abstention is appropriate. None of the cases cited by petitioners involve a State-initiated civil enforcement proceeding analogous to the one at issue here, and certainly none of them withheld *Younger* abstention based on the kinds of factors—a State's decision to retain private counsel, or a supposedly inadequate pre-filing investigation—that petitioners identify here.

Indeed, it appears that no court has *ever* undertaken anything like the sort of detailed, subjective, and fact-intensive inquiry petitioners urge. Petitioners propose taking into account such things as a State's underlying motives, its internal decision-making processes regarding its exercise of enforcement discretion, and its choice of counsel. Petitioners also suggest that whether to apply *Younger* abstention should turn on

---

[21] Additionally, three of the decisions cited by petitioners are unpublished and thus could not generate a true inter-circuit division in authority even if they *had* diverged from the approach the Ninth Circuit took. *See* Pet. 23-25 (citing *Helms Realty Corp. v. City of New York*, 820 F. App'x 79 (2d Cir. 2020) (unpublished); *Hunter v. Hirsig*, 660 F. App'x 711 (10th Cir. 2016) (unpublished); *Watson v. Fla. Jud. Qualifications Comm'n*, 618 F. App'x 487 (11th Cir. 2015) (per curiam; unpublished)).

such factors as what might have triggered the State's investigation or complaint, or the thoroughness of the investigations on which the State relied. There is no support for such an approach.

Moreover, at least two circuits have expressly *rejected* invitations to look beyond the *Sprint* factors. *See*, *e.g.*, *Sirva Relocation, LLC v. Richie*, 794 F.3d 185, 194-95 (1st Cir. 2015) (explaining that the fact a state proceeding was "sparked by a private complaint" and that the complainant's lawyer assisted in the investigation "does not alter the fundamental character of the proceeding"); *Minnesota Living Assistance, Inc. v. Peterson*, 899 F.3d 548, 552 (8th Cir. 2018) (concluding that where a state agency "conducted the investigation, issued the compliance order, and brought the contested case proceeding," the fact that case was "triggered by an employee complaint" did not deprive the action of *Younger* abstention).

Thus, in light of the Ninth Circuit's proper application of *Sprint* and its thorough analysis of the individual characteristics of the State's enforcement action, the alleged circuit split is illusory.

C. There Is No Reason To Revisit *Sprint*.

Given the absence of any conflict with decisions of this Court or between the courts of appeals, the petition effectively amounts to a request to this Court to reconsider *Sprint*. Along those lines, petitioners suggest (Pet. 28-32) that if First Amendment rights are at stake, or if a state enforcement action is litigated by

private counsel, then *Younger* abstention should not apply.

But that is not the law, and this case presents no reason to revisit established precedent. Petitioners fall far short of demonstrating the sort of "special justification" that this Court demands when it is asked to revisit settled law. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019). And this case presents a particularly poor vehicle for review because the Court already considered and rejected petitioners' proposed arguments for narrowing *Younger* abstention. Because of this, the outcome here likely would not change even if this Court granted review.

1. First Amendment Concerns Do Not Preclude *Younger* Abstention.

Petitioners assert that "[a]bsent this Court's review, the decision below will have deprived petitioners of the opportunity to bring their First Amendment claim in a *federal forum*." Pet. 30 (emphasis added). This, petitioners suggest, means that their claims must now be "relegate[d] . . . to state court[.]" Pet. 29. But this Court has properly and consistently rejected "any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex*, 457 U.S. at 431; *accord Moore v. Sims*, 442 U.S. 415, 430 (1979) ("[W]e have repeatedly and emphatically rejected" the proposition that "state courts [are] not competent to adjudicate federal constitutional claims[.]"); *Huffman*, 420 U.S. at 611 ("Appellee is in truth urging

us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do.").

This Court has refused to mandate that a federal forum decide First Amendment claims absent a showing that those claims cannot be adequately litigated in state court. *Middlesex*, 457 U.S. at 435; *Dayton*, 477 U.S. at 629; *NOPSI*, 491 U.S. at 365 ("[T]he mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction."). Accordingly, the existence of a First Amendment claim would not preclude *Younger* abstention. In *Younger* itself, the Court rejected a First Amendment claim as a basis for a federal court to enjoin a state prosecution. *See Younger*, 401 U.S. at 53 ("We do not think that . . . a federal court can properly enjoin enforcement of a [state] statute solely on the basis of a showing that the statute 'on its face' abridges First Amendment rights."); *see also Middlesex*, 457 U.S. at 435-36 (*Younger* abstention applied despite First Amendment claims); *Dayton*, 477 U.S. at 628-29 (same).

Nothing about this case suggests a different result is warranted here. Petitioners have litigated their First Amendment defenses to the State's enforcement action in the state court—and presumably will continue to press such arguments in their appeal of the state enforcement action. Pet. 29. The mere fact that petitioners disagree with the state trial court's resolution of this issue, Pet. 29-30, is plainly not grounds for demanding a federal forum. *See* Pet. App. 9a

(explaining that petitioners' First Amendment claim did not establish "extraordinary circumstances" to exempt them from *Younger* abstention).

2. The State's Retention of Private Counsel Does Not Alter the *Younger* Abstention Analysis.

Although petitioners concede (as they must) that "state attorneys general have the prerogative to use contingency-fee counsel to assist them in enforcing state law," Pet. 31, they argue that a State's designation of private, contingency-fee counsel to serve as special deputy attorneys general somehow prevents that action from being "akin to a criminal prosecution" in "important respects," *Sprint*, 571 U.S. at 79 (quotation omitted), for *Younger* purposes. Pet. 30-32. This issue does not warrant the Court's review.

First, petitioners' proposed rule would depart from the framework this Court provided in *Sprint*. As explained above, *Sprint* identifies characteristics that courts may consider in determining whether a particular state action is a civil action "of the sort entitled to *Younger* treatment." *Sprint*, 571 U.S. at 79 (2013) (quotation omitted; cleaned up). The State's choice of counsel is not among these factors. *Cf. Sirva Relocation*, 794 F.3d at 195 (where private counsel for an individual who had filed a discrimination complaint with a state entity had assisted state's investigation, that did "not alter the fundamental character of the proceeding"); *Trump v. Vance*, 941 F.3d 631, 638 n.10 (2d Cir. 2019)

("Our conclusion [that *Younger* abstention does not apply] is unaltered by the fact that the President is represented by private counsel."), *aff'd*, 140 S. Ct. 2412 (2020). Just as private counsel may litigate a False Claims Act case—another category of cases sometimes described as "quasi-criminal" in nature, *e.g.*, *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006)[22]—so may a State retain private counsel in connection with an enforcement action.

Second, even if this Court *were* to hold that a State's use of private counsel is somehow relevant to whether a civil enforcement action is "akin to a criminal proceeding" in "important respects," *Sprint*, 571 U.S. at 79 (quotation omitted), the outcome here would be the same. That the State Attorney General deputized retained counsel to litigate the enforcement action plainly is not a sufficient basis on which to conclude that the State lacks a sovereign interest in the action—particularly where, as here, the State's contract with its retained counsel makes clear that the Attorney General retains ultimate control over the litigation. Pet. App. 52a.[23] This strongly counsels against this Court's review. *See*, *e.g.*, *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (when a legal question may not affect the ultimate judgment,

---

[22] *Cf. Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 784 (2000) (describing False Claims Act civil penalties as "essentially punitive in nature").

[23] Notably, the State's action for civil penalties is one that private counsel, acting on its own, could not have brought. *See* Haw. Rev. Stat. § 480-3.1.

resolution "can await a day when the issue is posed less abstractly"); Gressman, et al., *Supreme Court Practice* § 4.4(f), at 248 (9th ed. 2007) (certiorari usually denied where resolution of legal issues will not affect outcome of case).

Petitioners assert that the State's decision to retain private counsel means the State somehow faces no "downside" in bringing suit, thereby barring the State from exercising its sovereign authority to bring such an action at all. Pet. 30-31. As the Ninth Circuit recognized, this is simply not correct: a state attorney general who decides to bring and maintain an enforcement action litigated by the State with the assistance of private counsel is politically accountable for that decision, just as she would be for any other enforcement decision. Pet. App. 6a. In such circumstances, the State and the Attorney General have appropriate incentives to ensure proper supervision and control, as they would in the context of a criminal prosecution litigated by full-time State employees. Additionally, petitioners' assertion (Pet. 31-32) that contingency-fee counsel have "free rein" to steer the State's enforcement action is not only unfounded, but contrary to the allegations in petitioners' own federal complaint. *See* Pet. App. 52a.

Moreover, petitioners' supposition that it would be appropriate for courts to second-guess the State's reasons for hiring outside counsel, as well as its relationship with that counsel, runs counter to the principles of comity that underlie *Younger* abstention. *See*, *e.g.*, *Younger*, 401 U.S. at 44 (recognizing that the "underlying reason for restraining courts of equity" is the

"notion of 'comity,' that is, a proper respect for state functions"). As the Ninth Circuit observed, "[c]onducting litigation on behalf of a State is a core sovereign function, and the people of each State" should retain "the right to decide whether that function should be carried out by full-time government employees or, as here, by outside counsel retained for a particular case." Pet. App. 5a.

Younger abstention exists to protect State sovereignty and preserve our federal system by ensuring that the States are accorded a meaningful capacity "to perform their separate functions in their separate ways." *Huffman*, 420 U.S. at 601 (quoting *Younger*, 401 U.S. at 44). The ill-defined, subjective, and fact-intensive test petitioners urge this Court to adopt would undermine this fundamental principle—deeply impairing, rather than protecting, State sovereignty. Under petitioners' proposed approach, intrusive discovery into the circumstances surrounding a State's decision to exercise its enforcement discretion—and even the State's relationship with its own lawyers—might well be required before a federal court could even decide whether to abstain from hearing the case or not. This dramatic change to existing law is not warranted by the facts presented here, and would conflict with the tenets underlying this Court's *Younger* abstention cases. The Court should deny certiorari and maintain the straightforward test set forth in *Sprint*, which the Ninth Circuit faithfully applied below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CLARE E. CONNORS*
Attorney General
KIMBERLY T. GUIDRY
Solicitor General
NICHOLAS M. MCLEAN
Deputy Solicitor General
BRYAN C. YEE
T.F. MANA MORIARTY
Deputy Attorneys General

STATE OF HAWAII
DEPARTMENT OF THE
ATTORNEY GENERAL
425 Queen Street
Honolulu, HI 96813
Phone: (808) 586-1360
Email: hawaiiag@hawaii.gov
**Counsel of Record*

Counsel for Respondent

MAY 13, 2021