No. 20-1149

In the Supreme Court of the United States

BRISTOL-MYERS SQUIBB CO., SANOFI-AVENTIS U.S. LLC, SANOFI US SERVICES INC., FORMERLY KNOWN AS SANOFI-AVENTIS U.S. INC., AND SANOFI-SYNTHELABO LLC, PETITIONERS

v.

CLARE E. CONNORS, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF HAWAII

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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Statutes

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This Court has recently reaffirmed that federal courts' "obligation to hear and decide a case" within their jurisdiction "is virtually unflagging." *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 77 (2013) (quotation marks and citation omitted); accord *BP P.L.C.* v. *Mayor & City Council of Balt.*, 141 S. Ct. 1532, 1537 (2021). *Younger* abstention represents a "narrow" exception to that bedrock principle for cases so closely "'akin to a criminal prosecution,'" 571 U.S. at 77, 79, that exercising jurisdiction would be tantamount "to restrain[ing] a criminal prosecution," *id.* at 77.

The State concedes that, far from limiting *Younger* to "exceptional" circumstances as *Sprint* directed, *id.* at 73, the decision below would allow federal courts to close their doors to federal claims—even those involving serious constitutional violations—for any garden-variety "civil UDAP case" involving "a state actor," Opp.27. Hawai`i strains to portray that expansive holding as a "straightforward" application of *Younger* principles. Opp.1. But the decision below is irreconcilable with

Sprint, which rejected the kind of broad, categorical approach the Ninth Circuit adopted. It is equally impossible to square with decisions by other federal appellate courts recognizing that *Sprint* demands far more than a generic categorization based solely on whether a government entity was suing to enforce a statute. These courts, following *Sprint*, have analyzed the specific features of individual cases to determine whether they are truly "akin to a criminal prosecution" and deserving of comity. The Ninth Circuit's decision is an outlier that conflicts with these decisions and *Sprint*.

The State concedes that: (1) there is no evidence of any injury suffered in Hawai`i, Opp.24-25 & n.17; (2) State health officials *disagree* with private counsel's claim that Plavix has "limited efficacy" for certain populations and accordingly have not curtailed its use or reimbursement, *ibid.*; see Pet.7-8; (3) no State actor conducted an investigation, Opp.23 n.14; and (4) this case was initiated and litigated entirely by financially interested private counsel without meaningful State involvement, Opp.35.[1] Presented with those facts, any of the other federal appellate courts that have applied *Sprint* would have declined to abstain because the case is not *remotely* "akin to a criminal prosecution."

Review is particularly warranted given the growing trend of private counsel pitching consumer-protection cases to state and local governments and offering to litigate them on a contingency-fee basis at no financial risk to the government. The result is that financially interested lawyers bring "enforcement actions" that the government would not otherwise have pursued as a

[1] Hawai`i emphasizes the lag in filing the federal action. Opp.1. Petitioners promptly brought suit when state-court discovery confirmed that no government interest in health prompted the UDAP action.

matter of public interest. See Pet.30-31; WLF Br.7-12; PhRMA Br.17-20. This case puts in stark relief the dangers of granting self-interested private lawyers comity-based protection from federal-court oversight: Private counsel—indifferent to the medical judgments of the State's *own* health officials—pursued suspect theories to extract $834 million in civil penalties, and stand to reap a $166-million contingency fee. That outcome would be *unimaginable* in the criminal context, where federal constitutional and state law bar financially interested counsel from bringing prosecutions. In no sense is this civil UDAP suit "akin to a criminal prosecution."

Extending *Younger* to shield the acts of financially interested private counsel pursuing State claims for personal gain would eviscerate *Sprint*. This Court's review is necessary to ensure federal courts discharge their obligation to exercise the jurisdiction Congress conferred and remain a safeguard against violations of federal constitutional rights.

A. The Decision Below Conflicts With *Sprint*

1. In *Sprint*, this Court repudiated an expansive conception of *Younger* requiring abstention "whenever an ongoing state judicial proceeding implicates important state interests, and the state proceedings provide an adequate opportunity to raise federal challenges." 571 U.S. at 75-76 (cleaned up) (quoting lower court's description of *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423, 432 (1982)). Such a broad conception of abstention, which would "extend *Younger* to virtually all parallel state and federal proceedings" involving "a plausibly important state interest," is "irreconcilable with our dominant instruction that * * * abstention from the exercise of federal jurisdiction is 'the exception, not the rule.'" *Id.* at 81-82. Instead, *Middlesex*'s "*additional* factors" are considered

only after determining that the state proceeding is "akin to a criminal prosecution." *Id.* at 81.

The Ninth Circuit erred by relying on law *Sprint* changed. To determine whether the UDAP proceeding warranted abstention, the court explained that it "[l]ook[ed] to the general class of cases"—*i.e.*, cases seeking civil penalties under a consumer-protection statute. App.8a. It focused on "the State's interest in different classes of proceedings, not its interest in specific cases." App.6a-7a, 8a (citing *Middlesex*). The Ninth Circuit thus conflated *Middlesex*'s "additional factors" with the distinct, antecedent inquiry into whether a *particular* "act of civil enforcement" is like a criminal prosecution. See *Sprint*, 571 U.S. at 79, 81. The State's contention (Opp.19) that Petitioners seek merely to correct a "misappli[cation of] a correctly stated rule of law" (or, more outlandishly, to "reconsider" or "jettison" *Sprint*," Opp.15, 16, 31-32) is wrong: The Ninth Circuit erred by applying the *Middlesex* factors as a first-line test, which this Court specifically rejected.

The State concedes that "*Middlesex*'s broad * * * test" no longer governs, but maintains that "this Court historically has looked to the characteristics of the class or type of proceeding" to determine whether abstention is warranted. Opp.21, 26. Courts *do* "look to * * * the importance of the generic proceedings to the State" (rather than the importance of the particular case) to determine whether the *Middlesex* factors are satisfied. *E.g.*, *New Orleans Pub. Serv., Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 365 (1989). But *Sprint* clarified that that general analysis comes only after the court has first determined that the *specific* state civil proceeding is quasi-criminal. 571 U.S. at 81-82.

The State suggests that *Sprint* endorsed the Ninth Circuit's categorical approach by referring to "*[s]uch*

enforcement actions" and "cases of this *genre*." Opp.27. The "genre" *Sprint* referenced, however, was not the generic type of proceeding (*e.g.*, UDAP actions), but rather cases "akin to criminal prosecution[s]." *Sprint*, 571 U.S. at 79. That language does not support taking a categorical approach to determining which cases fall within the "genre" of cases akin to a criminal prosecution. Indeed, *Sprint*'s analysis was not categorical; it analyzed the facts of the individual case. *See id.* at 80.

2. Unable to refute Petitioners' argument, Hawai`i mischaracterizes it. It repeatedly claims that Petitioners advocate a "free-form, subjective inquiry into [the State's] motives and purposes." Opp.5; see also *id.* at 4, 10, 12, 13, 19, 20, 21-22, 30, 37. Not so. As Petitioners explained (Pet.21-22), *Sprint* requires a straightforward demonstration, based on readily ascertainable, objective information, that the State itself is treating the proceeding like a criminal prosecution: Whether a "state authority conducted an investigation into [the defendant's] activities," whether a "state actor" initiated enforcement proceedings, and whether responsible state officials identified wrongdoing, 571 U.S. at 80-81.

The Court's reasoning in *Sprint* demonstrates this point. To conclude that the Iowa Utility Board's proceeding was not quasi-criminal, this Court did not divine the Board's subjective intent, but examined the procedural history and the Board's publicly stated basis for invoking its adjudicative authority. *Id.* at 80. Nor have other appellate courts applying *Sprint* engaged in "elaborate fact-finding" about the State's motives or internal decision-making processes. Opp.19-20; see Pet.23-26; pp.8-10, *infra*.

3. The State contends that the record here "satisfie[s]" *Sprint*'s requirement of showing that the UDAP proceeding "is a bona fide exercise of its sovereign

law-enforcement powers." Opp.22-23 (citing Pet.21). The State's concessions refute that assertion.

The State concedes that the "State *itself* conduct[ed]" no "pre-filing investigation"; any "investigation" was done by financially interested private counsel *before* the State retained them. Opp.23 n.14; see also App.3a; cf. *Sprint*, 571 U.S. at 80 (abstention inappropriate where "[n]o state authority conducted an investigation into Sprint's activities").[2] Nor does the State dispute that contingency-fee counsel (not any State actor) conceived of the case, formulated the claims, and litigated the entire action. Pet.10; App.48a-49a, 63a; cf. *Sprint*, 571 U.S. at 80 (abstention inappropriate where "no state actor lodged a formal complaint against *Sprint*").[3]

The State protests that *Sprint* does not "prohibit a State from relying on * * * private counsel." Opp.23 n.14. Petitioners agree: States may retain private counsel on a contingency fee, and may exercise whatever control over private counsel they believe appropriate in *civil* cases. Pet.19-20, 31. But if the State has not treated the case like a criminal prosecution, it is not entitled to the narrow

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[2] The State selectively quotes the complaint (Opp.9) to suggest Petitioners conceded that the action resulted from an Attorney General investigation. The relevant section actually discusses how "[t]he State had exhibited no independent interest in pursuing an enforcement action * * * for deceptive marketing" and that "Hawai`i Medicaid" and "other public entit[ies]" had "reported no complaints." App.48a. The complaint squarely states that "the UDAP complaint reflects no investigation by the State." App.31a. Regardless, the State concedes that it conducted no pre-suit investigation.

[3] For the first time, the State suggests (Opp.8 n.3) that a 2011 *qui tam* suit prompted the 2014 UDAP action. Nothing in the record supports that assertion or explains the three-year delay. Petitioners allege (and the State has not previously disputed) that private counsel approached the State with the proposed lawsuit. App.48a.

deference *Younger* affords. Pre-litigation research by private counsel does not remotely resemble the kind of formal inquiry that precedes a criminal prosecution. Moreover, the State *never acknowledges* that federal and Hawai`i law sharply curtail its ability to hire contingency-fee counsel in criminal prosecutions. Pet.19; *Young* v. *U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804, 814 (1987); Haw. Rev. Stat. § 28-8; *id.* § 661-10. Those authorities logically inform the *Sprint* analysis: If a case is brought in a manner that would be impermissible for a criminal case, it can hardly be described as "akin to a criminal prosecution." Pet.19; see also Cato/Rutherford Br.7-11; WLF Br.10-12; ATRA Br.9-10.

The State asserts that its choice of counsel is irrelevant to whether a particular action is entitled to *Younger* abstention. Opp.34. But neither of the State's cited cases addresses whether contingency claims developed and pursued by *financially interested* private counsel in the State's name are quasi-criminal.

Moreover, the State never disputes that its health officials had no concerns about Plavix or its marketing and identified no injuries from the drug. See Pet.7-8. Instead, the State asserts that injury is not an element of UDAP claims, Opp.24 n.16, and, as such, "[e]vidence regarding personal injuries (or the views of State health officials as to the safety and efficacy of Plavix) do[es] not belong in this record," Opp.25. But even the State's repackaging of its UDAP suit as concerning "unfair and deceptive marketing" (rather than personal injury), Opp.24, necessarily turns on medical concerns about Plavix's safety and efficacy—concerns that the State has never expressed aside from the allegations of financially interested counsel. Hawai`i has never restricted use or reimbursement of Plavix in response to the allegations here. Cf. *Universal Health Servs., Inc.* v. *U.S. ex rel. Escobar,* 136 S.Ct. 1989, 2003 (2016) (government

payment despite knowledge of allegations suggests claims not fraudulent). The State's concessions belie the notion that the UDAP proceeding was brought to "sanction" Petitioners "for some wrongful act." *Sprint*, 571 U.S. at 79.

In short, this case's "readily ascertainable or undisputed facts," Opp.29, make clear that, had the Ninth Circuit followed *Sprint*, it would have held the UDAP case is not akin to a criminal prosecution.

B. The Circuit Split Is Real

The Ninth Circuit's categorical approach to determining whether a case resembles a criminal prosecution departs from every other court of appeals to have applied *Sprint*. Pet.22-28. Only this Court can resolve the conflict.

The State asserts that "[n]one of the post-*Sprint* circuit court decisions cited by petitioners engaged in a materially different analysis" from the Ninth Circuit's. Opp.29. But the State analyzes *just one* of those decisions. *Ibid.* It does not mention, for example, *PDX North, Inc.* v. *Commissioner New Jersey Department of Labor & Workforce Development*, 978 F.3d 871 (3d Cir. 2020). *PDX* considered more than just "the State's status as a party," "the type of relief sought," and "the statute under which th[e] action was brought." Opp.28. It emphasized that a state agency *itself* had "performed multiple audits * * * and issued multiple formal assessments" before initiating proceedings to sanction conduct state officials deemed "wrongful." 978 F.3d at 883-884. And *ACRA Turf Club, LLC* v. *Zanzuccki*, 748 F.3d 127 (3d Cir. 2014), rejected *Younger* abstention because "no state actor conducted an investigation," nor was there any "indication that the policies implicated in the state proceeding could have been vindicated through * * * a parallel criminal statute," *id.* at 138-139. Under such analysis, the Ninth

Circuit could not have concluded that the UDAP action was quasi-criminal. Pp.6-8, *supra*.

Nor does the State meaningfully address *Helms Realty Corp.* v. *City of New York*, 820 F. App'x 79 (2d Cir. 2020), which looked beyond the government's statutory enforcement authority and emphasized that the "action was initiated by the City—not a private actor" and "was predicated on * * * investigations undertaken by [City] officers." *Id.* at 81. Instead, the State dismisses *Helms*, along with *Hunter* v. *Hirsig*, 600 F. App'x 711 (10th Cir. 2016), and *Watson* v. *Florida Judicial Qualifications Commission*, 618 F. App'x 487 (11th Cir. 2015), as unpublished cases. Opp.30 n.21. But this Court frequently considers unpublished opinions in determining whether review is warranted. *E.g.*, *Davis* v. *United States*, 140 S. Ct. 1060, 1061 (2020); *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 583 n.5 (2008); *Jones* v. *Bock*, 549 U.S. 199, 206 n.3 (2007). Numerous appellate decisions—published and unpublished—conducted rigorous, case-specific analyses of the *Sprint* factors that are irreconcilable with the Ninth Circuit's approach.

The State also does not meaningfully address *Sirva Relocation, LLC* v. *Richie*, 794 F.3d 185 (2015), where the First Circuit looked beyond the general nature of the proceeding to consider whether *that case* "satisfie[d] the *Sprint* Court's state-involvement and investigation criteria." *Id.* at 193. Instead, the State relies on out-of-context language about considering "the general class of proceedings in determining whether *Younger* abstention applies." Opp.27 n.19. That statement addressed the separate issue of whether the State's procedural missteps "placed it beyond *Younger*[]." *Sirva* then undertook a detailed factual analysis of the state proceedings. 794 F.3d 194-195.

The only case that the State considers in any detail is *Doe* v. *University of Kentucky*, 860 F.3d 365 (6th Cir. 2017). There, too, the State employs selective quotation to suggest that the Sixth Circuit's approach was as cursory and categorical as the decision below. Opp.29-30. But that court emphasized that a "state actor" had conducted "an investigation" in determining that the case "qualifi[ed] as 'akin to criminal prosecution[] for [abstention] purposes." 860 F.3d at 370.

Finally, the State argues that the First and Eighth Circuits "expressly *rejected* invitations to look beyond the *Sprint* factors" because they abstained even though the state proceedings had been prompted by private complaints. Opp.31. But Petitioners are not asking the Court to "look beyond" *Sprint*, only to correct departures from it. Regardless, state investigations based on private complaints are commonplace in criminal prosecutions. By contrast, it is unheard of for criminal investigations to be conducted by financially interested private counsel *instead of* the State, where responsible State officials received *no* complaints and identified no wrongdoing or injury.

C. This Case Is Exceptionally Important

For two centuries, this Court has reaffirmed the federal courts' "virtually unflagging obligation" to decide cases within their jurisdiction. *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976); accord *BP*, 141 S. Ct. at 1537; *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). The correct approach for determining when a federal court may decline that weighty obligation is extraordinarily important, and this Court should address the issue now.

The State never acknowledges that principle, much less that "[p]arallel state-court proceedings do not detract from that obligation." *Sprint*, 571 U.S. at 77. Even as it

asserts state courts' presumptive competence to resolve federal constitutional claims (Opp.32-33), the State does not argue that Petitioners received a fair state-court adjudication. It does not contest that the state court judge, after deciding *every motion* in the State's favor, copied his final judgment—including the cursory dismissal of Petitioners' First Amendment challenge—essentially verbatim from private counsel's proposal. Pet.29-30. The Ninth Circuit's sweeping approach to abstention freed the State to impose staggering penalties for Petitioners' refusal to adopt contingency-fee counsel's opinions about a matter of scientific debate. That result is particularly unjustified where the scientific and medical judgments that gave rise to the UDAP claims are not traditionally matters of state concern, but are subject to pervasive *federal* regulation. See PhRMA Br.14-15.

The question presented is of heightened importance given the proliferation of private contingency-fee arrangements to pursue consumer-protection litigation. See Pet.30-31; WLF Br.7-10; PhRMA Br.17-18. This "outsourcing [of] public enforcement of state law away from public officials with subject-matter expertise and obligations to serve the public interest" and into the hands of "private, self-interested attorneys" poses acute risks of abuse. PhRMA Br.18, 20. This case illustrates those dangers: Hawai`i's private counsel stands to receive $166 million in contingency fees for pushing dubious theories of liability contrary to the views of the *State's own health officials*.

Given the increasingly prominent role of financially interested private attorneys in bringing enforcement actions in the name of state and local authorities, "[t]he federal judiciary * * * stands as an important bulwark" in protecting rights. ATRA Br.13; accord Pet.32. Only when objective facts show a state enforcement action actually embodies the bona fide pursuit of legitimate sovereign

interests—*i.e.*, when it is "akin to a criminal prosecution"—should *Younger* abstention allow federal courts to refuse the jurisdiction conferred upon them. The decision below cannot stand.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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