No._____

In the Supreme Court of the United States

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF ARIZONA, ET AL.,
Petitioners,

v.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1990, Arizona voters amended the Arizona Constitution to include the Victims' Bill of Rights. *See* Ariz. Const. art. II, §2.1. Arizona then passed the Victims' Rights Implementation Act, providing, in part, that a "defendant, the defendant's attorney or an agent of the defendant shall only initiate contact with the victim through the prosecutor's office." Ariz. Rev. Stat. §13-4433(B) (the "Statute"). Decades later, Respondents (a membership organization, criminal-defense attorneys, and an investigator) allege that the Statute violates their own First Amendment rights, not the rights of their clients, and seek injunctive and declaratory relief preventing enforcement of the Statute in state court criminal proceedings.

In *Younger v. Harris*, 401 U.S. 37 (1971), this Court held that federal courts are prohibited from enjoining ongoing state criminal proceedings. The Court later applied "*Younger* abstention" where a federal claim is derivative of a claim that could be litigated in ongoing state proceedings. The circuits have split, however, on the standard to be used when applying *Younger* abstention to such derivative claims. Below, the Ninth Circuit rejected *Younger* abstention because "the plaintiffs' interests are not 'so intertwined' with those of their clients in state court proceedings that 'interference with the state court proceeding is inevitable.'"

Does *Younger* apply when a federal claim is derivative of a claim that could be brought in ongoing state court proceedings or does *Younger* also require inevitable direct interference with state judicial proceedings?

PARTIES TO THE PROCEEDINGS

Petitioners Mark Brnovich, in his official capacity as Attorney General of the State of Arizona, and Colonel Heston Silbert, in his official capacity as Director of the Arizona Department of Public Safety, were defendants in the district court and appellees in the court of appeals.

Respondents Arizona Attorneys for Criminal Justice, Christopher Dupont, Rich Robertson, Richard L. Lougee, Richard D. Randall, Jeffrey A. Kirchler, and John Canby were plaintiffs in the district court and appellants in the court of appeals.

Respondent Maret Vessella, Chief Bar Counsel of the State Bar of Arizona, was a defendant in the district court and appellee in the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (D. Ariz.):

- *Arizona Attorneys for Criminal Justice, et al., v. Ducey, et al.*, No. 2:17-cv-01422-SPL (Feb. 27, 2020) (order granting motion to dismiss)
- *Arizona Attorneys for Criminal Justice, et al., v. Ducey, et al.*, No. 2:17-cv-01422-SPL (June 9, 2020) (order granting motion for reconsideration)

United States Court of Appeals (9th Cir.):

- *Arizona Attorneys for Criminal Justice, et al., v. Brnovich, et al.*, No. 20-16293 (Aug. 24, 2021) (opinion reversing judgments of the district court)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is not published in the Federal Reporter but is available at 2021 WL 3743888. App.1–6. The district court's order on reconsideration is reported at 465 F.Supp.3d 978. App.7–25. The district court's final dismissal order is reported at 441 F.Supp.3d 817. App.28–48.

JURISDICTION

The Ninth Circuit issued its opinion on August 24, 2021. App.1–6. Petitioners' timely petition for panel and en banc rehearing was denied on October 12, 2021. App.51–52. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The relevant provisions (U.S. Const. amend. I; Ariz. Rev. Stat. §13-4401(9), (19); Ariz. Rev. Stat. §13-4433; and Arizona Rule of Criminal Procedure 39(b)(12)) are reproduced in the appendix to this petition. App.53–58.

INTRODUCTION

Respondents (a membership organization, criminal-defense attorneys, and an investigator) seek to have a federal court issue injunctive and declaratory relief preventing Arizona's Attorney General and the director of Arizona's Department of Public Safety from "enforcing" state law applicable during ongoing criminal prosecutions in state court. Specifically, Respondents claim that an Arizona statute regulating how crime victims may be contacted during active criminal proceedings violates *their* First Amendment rights, and they seek declaratory and injunctive relief from a federal court allowing them, on behalf of their clients, unfettered access to crime victims during active state criminal prosecutions.

But allowing Respondents to proceed with their claims would violate well-established principles of equitable restraint and respect for state interests. For centuries, courts have recognized that equitable relief is not available where there is an adequate remedy at law. *See* Joseph Story, Commentaries on Equity Jurisprudence, 104-5 (1st ed., 1836) (citing English, Federal and State cases); *see also Hepburn & Dundas' Heirs & Ex'rs v. Dunlop & Co.*, 14 U.S. (1 Wheat.) 179, 203 n.d (1816) ("A specific performance will not be decreed where the parties have an adequate remedy at law."). For nearly as long, the Court has recognized the principle of comity between federal and state courts "that is essential to 'Our Federalism.'" *Fair Assessment in Real Estate Ass'n. v. McNary*, 454 U.S. 100, 103 (1981).

These principles of comity and restraint received their "fullest articulation," *id.* at 111–12, in *Younger*

v. Harris, 401 U.S. 37, 41 (1971), when the Court held that traditional principles of comity and equitable restraint bar federal courts from enjoining pending state criminal prosecutions. In *Samuels v. Mackell*—issued the same day as *Younger*—the Court held that "the same considerations that require the withholding of injunctive relief will make declaratory relief equally inappropriate." 401 U.S. 66, 69 (1971); *see also Younger*, 401 U.S. at 41 n.2. The Court later set forth the following three conditions for *Younger* abstention: "*first*, do [the proceedings at issue] constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 434, 432 (1982). If all three conditions apply, unless "exceptional circumstances dictate to the contrary, federal courts should abstain from interfering with the ongoing proceedings." *Id.* at 437.

As to the first condition, the lower courts are split on what it means for there to be an "ongoing state judicial proceeding." In *Hicks v. Miranda*, this Court held that *Younger* abstention applies even where a federal claimant is not a party to ongoing state proceedings in the technical sense so long as the federal claimant has interests that are "intertwined" with parties to ongoing state proceedings. 422 U.S. 332, 348–49 (1975). Six days later, the Court reiterated that "there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of

them." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928 (1975).

The Ninth Circuit adheres to a strict approach to *Hicks* and *Doran*, requiring "a party whose interest is so intertwined with those of the state court party that direct interference with the state court proceeding is inevitable." *Green v. City of Tucson*, 255 F.3d 1086, 1100 (9th Cir. 2001) (en banc), *overruled in part on other grounds by Gilbertson v. Albright*, 381 F.3d 965, 976–78 (9th Cir. 2004) (en banc).

This case fits squarely within the constraints of when a federal court must abstain under *Younger*. Yet the Ninth Circuit sanctioned the continuation of Respondents' claims in federal court by using its "inevitable direct interference" test to reject Petitioners' abstention request. *See* App.6.

The Ninth Circuit's approach diverges from at least five other circuits that do not require "inevitable direct interference," and instead apply *Younger* to non-parties where the federal-court plaintiff's claim is "derivative" of the state-court defendant, finding the interests of the parties to be "intertwined" in such circumstances. *See, e.g.*, *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1253 (8th Cir. 2012); *Citizens for a Strong Ohio v. Marsh*, 123 Fed. App'x 630, 635 (6th Cir. 2005); *D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1230 (10th Cir. 2004); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 83 (2d Cir. 2003); *Cinema Blue of Charlotte, Inc. v. Gilchrist*, 887 F.2d 49, 53 (4th Cir. 1989).

The question presented here implicates weighty considerations of state sovereignty and respect for

state court criminal proceedings. *See Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 237–38 (1984). The Ninth Circuit's "inevitable direct interference" test allows creative counsel to characterize their clients' constitutional claims as their own, and file in federal court, hoping to obtain injunctive relief impacting ongoing state court proceedings. In the guise of bringing a constitutional claim in their own name, counsel can now access federal court to challenge state court page limitations, discovery limitations, evidentiary rulings, limitations on argument, and any number of other state court rules or decisions. Under principles of federalism, equity, and comity, *Younger* should not be so easy to avoid. *See Kowalski v. Tesmer*, 543 U.S. 125, 133 n.4 (2004) (lamenting "[t]he mischief that resulted from allowing the attorneys to circumvent *Younger*").

STATEMENT

A. Arizona's Protections For Crime Victims

Arizona has a long history of protecting the rights of crime victims. In 1990, Arizona voters passed Proposition 104, the Victims' Bill of Rights ("VBR"). *See* Ariz. Const. art. II, §2.1. The VBR was enacted "to provide crime victims with 'basic rights of respect, protection, participation and healing of their ordeals.'" *Champlin v. Sargeant*, 965 P.2d 763, 767, ¶20 (Ariz. 1998) (quoting 1991 Ariz. Sess. Laws ch. 229, §2 (1st Reg. Sess.)). This includes the right to be present and to be informed of proceedings, the right to be heard at certain proceedings, the right to refuse an interview, the right to obtain prompt restitution, and the right to be informed of one's rights as a crime victim. Ariz. Const. art. II, §2.1(A)(3)–(5), (8), (12); *see also* 18 U.S.C. §3771(a) (listing

similar victims' rights including "[t]he right to be reasonably protected from the accused" and "to be treated with fairness and with respect for the victim's dignity and privacy"). The impetus behind this constitutional amendment was that "[f]or too long victims of crime have been second-class citizens." Dkt. 19-9 at ER1770.[1]

After the voters adopted the VBR, the Arizona Legislature enacted the Victims' Rights Implementation Act (the "Act"). 1991 Ariz. Sess. Laws ch. 229, codified at Ariz. Rev. Stat. ("A.R.S.") §§13-4401 et seq. The legislative intent was to "[e]nact laws that define, implement, preserve and protect the rights guaranteed to crime victims by [the VBR]" and "[e]nsure that [the VBR] is fully and fairly implemented and that all crime victims are provided with basic rights of respect, protection, participation and healing of their ordeals." 1991 Ariz. Sess. Laws ch. 229 §2.

As relevant here, the Act added A.R.S. §13-4433(B) (the "Statute"), which, with minor amendment, now provides,

> The defendant, the defendant's attorney or an agent of the defendant shall only initiate contact with the victim through the prosecutor's office. The prosecutor's office shall promptly inform the victim of the defendant's request for an interview and shall advise the victim of the victim's right to refuse the interview.

The Act also includes a provision, unchallenged

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[1] Unless otherwise noted, docket citations reference the excerpts of record filed in the Ninth Circuit, No. 20-16293.

here, that the "victim shall not be compelled to submit to an interview on any matter . . . that is conducted by the defendant, the defendant's attorney or an agent of the defendant" unless the victim consents to the interview. A.R.S. §13-4433(A) (1991 Ariz. Sess. Laws ch. 229). The Statute ensures that victims can decide whether to speak with the defendant or the defendant's attorney in the pre-trial setting. *See Champlin*, 965 P.2d at 767, ¶23 (noting "any person accorded 'victim' status under [the VBR] may nevertheless waive the protections by voluntarily consenting to a pretrial interview at the request of the defendant or his attorney"). The Statute thus extends the same procedural protections provided in Model Rule 4.2, governing attorney contact with represented individuals, to victims. *See, e.g.*, Ariz. R. of Pro. Conduct r. 4.2.

Protection for crime victims is also provided in the Arizona Rules of Criminal Procedure. "Even before the constitutional amendment that added the VBR," the Arizona Supreme Court "had adopted Rule 39, Ariz. R. Crim. P., 'to preserve and protect a victim's rights to justice and due process.'" *State v. Nichols*, 233 P.3d 1148, 1150, ¶7 (Ariz. Ct. App. 2010) (quoting Ariz. R. Crim. P. 39(b), effective Aug. 1, 1989). In 1992, the Arizona Supreme Court amended Rule 39 to address the newly enacted VBR. Dkt. 19-9 at ER1896–98. Among other things, the Court added what is now Rule 39(b)(12), which, in relevant part, provides that

> a victim has and is entitled to assert . . . the right to refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on the defendant's behalf, and . . . the

> defense must communicate requests to interview a victim to the prosecutor, not the victim[.]

Ariz. R. Crim. P. 39(b)(12).

The Rule contains similar procedural protections to the Statute—that defendants or their defense team must seek pretrial contact with the victim through the prosecutor. *See id*.

Neither the Statute nor the Rule apply outside of ongoing criminal proceedings. Arizona law defines "defendant" for purposes of the Statute as "a person or entity that is formally charged by complaint, indictment or information of committing a criminal offense." A.R.S. §13-4401(9). Thus, a defendant, the defendant's attorney, or an agent of the defendant is only limited in contacting victims once state court criminal proceedings have been initiated. On the other hand, Respondents themselves are not subject to any restriction on contacting crime victims until they are retained by a "defendant" who is formally charged with a criminal offense. And Respondents admit that they only pursue victim contact in those ongoing proceedings to further the representation of their clients. *See* Dkt. 19-6 at ER1139.

B. Plaintiffs' Challenge To The Statute

In May 2017, approximately twenty-five years after the initial adoption of the Statute, Plaintiffs (a membership organization, criminal-defense attorneys, and an investigator) filed this lawsuit in the district court challenging the constitutionality of the Statute. Dkt. 19-9 at ER1949–64. Plaintiffs brought a facial First Amendment challenge, *on their own behalf*, to the Statute, though not to the Rule.

Dkt. 19-9 at ER1960–63. Plaintiffs asked for a declaration that the Statute violates *their* First Amendment rights, as well as injunctive relief enjoining Defendants "from enforcing" the Statute. Dkt. 19-9 at ER1963. Plaintiffs initially named only Arizona Attorney General Mark Brnovich ("AG Brnovich") as a defendant. Dkt. 19-9 at ER1954.[2]

C. District Court Proceedings

AG Brnovich moved to dismiss, arguing that (1) the suit was barred under the *Younger* abstention doctrine, (2) Plaintiffs lacked standing, and (3) Plaintiffs failed to join necessary parties under Federal Rule of Civil Procedure 19. Dkt. 19-9 at ER1728–48. The district court agreed, dismissing Plaintiffs' claims, but addressing only AG Brnovich's standing argument. Dkt. 19-1 at ER45–57. The court held that while it believed that "Plaintiffs ha[d] sufficiently alleged an injury-in-fact for Article III standing," Plaintiffs "fail[ed] to offer plausible allegations from which the Court c[ould] conclude that their injury [wa]s traceable to the actions of the Attorney General or the ambit of his enforcement authority," and "that it [was] not likely, much less plausible, that an injunction against him would redress their alleged injury." Dkt. 19-1 at ER49–50, 53. Thus, the court dismissed the action, but gave Plaintiffs leave to amend and "seek redress against an appropriate defendant." Dkt. 19-1 at ER54.

Plaintiffs tried again, amending their complaint, but failing to name any new defendants. Dkt. 19-4

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[2] Plaintiffs also initially named Governor Doug Ducey as a defendant, but the parties agreed to dismissal without prejudice. Order, *Ariz. Attorneys for Criminal Justice v. Ducey*, No. 17-cv-01422, Dkt. 21 (D. Ariz. May 30, 2017).

at ER683–704. Plaintiffs' new complaint merely repackaged the arguments previously advanced in their papers as "new" allegations. AG Brnovich filed another motion to dismiss, arguing the same grounds for dismissal, Dkt. 19-4 at ER670–81, and the district court *again* granted the motion, noting that the amended complaint, like the original complaint, failed to make sufficient allegations to meet Article III's traceability and redressability requirements. Dkt. 19-1 at ER36–43. The district court again did not address AG Brnovich's *Younger* argument.

Plaintiffs persisted, filing a second amended complaint. Dkt. 19-3 at ER554–75. This time, Plaintiffs added as defendants the State Bar of Arizona, its Chief Bar Counsel, Maret Vessella, and the director of the Arizona Department of Public Safety ("DPS"), Colonel Frank Milstead, who was later replaced by the new director of DPS, Colonel Heston Silbert ("Director Silbert").[3] Again, AG Brnovich, this time accompanied by Director Silbert (together, "State Defendants"), moved to dismiss. Dkt. 19-2 at ER312–27. In addition to AG Brnovich's previous arguments, State Defendants also brought a *factual* challenge to standing based on Plaintiffs' deposition admissions that "they will continue complying with [Rule 39] (i.e., will *not* initiate contact with a victim directly) until the Rule is also declared unconstitutional or compliance is otherwise excused by a court." Dkt. 19-2 at ER317. The third

[3] Defendant Milstead filed a notice of substitution in the latter stages of this case, substituting Director Silbert as a defendant. *See* Notice of Substitution of Def., *Ariz. Attorneys for Criminal Justice v. Ducey*, No. 17-cv-01422, Dkt. 203 (D. Ariz. Mar. 31, 2020). This petition will refer to Director Silbert as the operative defendant.

motion to dismiss also repeated the prior argument that the case must be dismissed based on *Younger* abstention. Dkt. 19-2 at ER321–24.

After full briefing on the third motion to dismiss, the court issued its order dismissing the case against AG Brnovich, finding that it did "not need to consider a factual challenge to the Second Amended Complaint because the Second Amended Complaint still fail[ed] to meet the traceability requirement for purposes of Article III standing under a facial challenge[.]" App.35. But as to Director Silbert, the district court denied the motion to dismiss, failing to recognize that Director Silbert had joined AG Brnovich's factual challenge to standing. *See* App.46.

Director Silbert filed a motion for reconsideration, Dkt. 19-2 at ER212–30, which the district court granted, dismissing Director Silbert from the action. The district court found that under the *factual* attack, Plaintiffs failed the redressability prong of Article III standing, and that "[w]ithout the Rule in front of it, the Court cannot afford complete relief to Plaintiffs[.]" App.19. The district court also rejected standing because "even if the Court enters the requested relief, declaring the statute (or the Rule which was not challenged) unconstitutional . . . state Judges are still free to sanction attorneys for violating those provisions." App.19–20.

Having dismissed the action due to lack of standing, the district court never addressed the State Defendants' argument that the case should be dismissed under the *Younger* abstention doctrine.[4]

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[4] The district court denied co-defendant Maret Vessella's *Younger* argument without substantial analysis. App. 45–46.

D. Ninth Circuit Proceedings

Plaintiffs appealed to the Ninth Circuit. After full briefing and oral argument, the Ninth Circuit reversed the district court's decision in a terse, six-page memorandum opinion. App.1–6.

In its short standing analysis, the Ninth Circuit held that "plaintiffs ha[d] established causation and traceability as to each defendant." App.4. The court further held that the redressability requirement was met notwithstanding Rule 39's continued effect on Plaintiffs' conduct. App.5 (reasoning that the Statute is "broader" than the Rule).

In an even shorter analysis, the Ninth Circuit dedicated one paragraph to State Defendants' argument that the action must also be dismissed under *Younger* abstention. App.6. The court concluded that *Younger* abstention was not required because "the presence of an ongoing state proceeding . . . [wa]s not satisfied." App.6. Citing to *Green v. City of Tucson*, the Ninth Circuit reasoned that "because the plaintiffs in this case assert their own First Amendment rights in this proceeding, not their clients' rights, the plaintiffs' interests are not 'so intertwined' with those of their clients in state court proceedings that 'interference with the state court proceeding is inevitable.'" App.6.

Defendants petitioned the Ninth Circuit for panel rehearing and rehearing en banc, but the Ninth Circuit denied the requests without opinion. App.51–52.

REASONS FOR GRANTING THE PETITION

This Court's review is needed to answer a question that strikes at the heart of a State's sovereign authority to conduct state criminal proceedings without federal judicial interference. Federal courts of appeals have reached inconsistent holdings on the test to be applied to determine under *Younger* whether there is an "ongoing state judicial proceeding" when the federal parties are not named parties in the state court proceeding. While the Ninth Circuit applies an "inevitable direct interference" test, other courts of appeals ask only whether a federal plaintiff's claims are derivative of a state court party's claim, without requiring direct interference. Furthermore, the Ninth Circuit's test conflicts with this Court's precedents on the proper approach to respecting state sovereignty.

This Court should grant review to resolve the important issues presented by this case and to resolve the conflict in authority they have engendered. And as this case demonstrates, those issues are of particular importance when counsel for state court defendants attempt to characterize derivative constitutional claims as their own to avoid an available state court forum in violation of long-standing abstention and equity principles.

I. This Court Should Grant Review To Decide The Correct Test To Determine When There Is An "Ongoing State Judicial Proceeding" For *Younger* Abstention.

"Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger*, 401

U.S. at 43. The Court has explained that there are two primary reasons for "this longstanding public policy against federal court interference with state court proceedings." *Id.* The first is that "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 43–44. The second is "a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 44. The Court in *Younger*, therefore, refused to adjudicate the plaintiff's constitutional claim because "a proceeding was already pending in the state court, affording [plaintiff] an opportunity to raise his constitutional claims," thus creating what is now known as *Younger* abstention. *Id.* at 49.

The same day the Court decided *Younger*, it also decided "whether under ordinary circumstances the same considerations that require the withholding of injunctive relief will make declaratory relief equally inappropriate." *Samuels*, 401 U.S. at 69. The Court held in *Samuels* that declaratory relief is equally inappropriate because such relief ordinarily "will result in precisely the same interference with and disruption of state proceedings that the longstanding policy limiting injunctions was designed to avoid." *Id.* at 72.

A tad more than a decade later, while extending *Younger* to state bar disciplinary proceedings, the Court distilled three inquiries for the application of *Younger*: "*first*, do [the proceedings at issue] constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state

interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex Cnty.,* 457 U.S. at 432. If all three conditions exist, then in the absence of extraordinary circumstances, a federal court must abstain. *Id.* at 437.

But here, the Ninth Circuit declined to abstain under *Younger*, reasoning that there was no "ongoing state proceeding" because the federal "plaintiffs' interests are not 'so intertwined' with those of their clients in state court proceedings that 'interference with the state court proceeding is inevitable." App.6. That conclusion perpetuates a split with the other Circuits that require only that the federal plaintiffs' interests be "derivative" of the parties in the state court action.

A. The Court Has Provided Limited Guidance On Abstention Under *Younger* When The Federal Plaintiff Is Not A Named Party In The Related State Court Proceeding.

Soon after *Younger* issued, the Court confronted the scope of the first condition—ongoing state judicial proceedings—when a federal plaintiff is not the named party to a related state proceeding but asserts injury derivative of the state court litigants.

In *Hicks v. Miranda*, the plaintiffs, owners of a movie theater, filed an action in federal court seeking a declaration that California's obscenity law was unconstitutional under the First Amendment. 422 U.S. at 337–38. Before they did so, however, local authorities had charged two of their theater employees in state court with several misdemeanor obscenity violations. *Id.* at 335. A three-judge

district court panel rejected the federal defendants' *Younger* abstention request because "no criminal charges were pending in the state court against [plaintiffs]." *Id.* at 340. The Court, however, disagreed and reversed, holding that dismissal under *Younger* was indeed required because "[Plaintiffs] had a substantial stake in the state proceedings" and "their interests and those of their employees were intertwined." *Id.* at 348–49. The Court concluded that "[p]lainly, the same comity considerations apply where the interference is sought by some, such as appellees, not parties to the state case." *Id.* at 349 (cleaned up). The Court also explained that it has never held "that for *Younger v. Harris* to apply, the state criminal proceedings must be pending on the day the federal case is filed." *Id.*

Just six days later, the Court decided *Doran*, in which the operators of three bars brought a federal lawsuit to enjoin enforcement of a town ordinance prohibiting topless dancing. 422 U.S. at 924. The day after plaintiffs filed the federal complaint, one of the plaintiffs resumed its presentation of topless dancing and was served with state criminal summonses. *Id.* at 925. Based on the existence of criminal proceedings against one of the plaintiffs, defendants argued *Younger* abstention should apply as to all three. But the Court concluded that abstention was only warranted in regard to the claims of the federal plaintiff involved in the state criminal proceedings. The Court rejected application of *Younger* to the other two federal plaintiffs, reasoning that "while [they] are represented by common counsel, and have similar business activities and problems, they are apparently unrelated in terms of ownership, control, and management." *Id.*

at 928–29. Nevertheless, the Court confirmed that "there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them." *Id.* at 928.

But that is the extent of the Court's guidance on the application of *Younger* to federal plaintiffs who are not named parties to any pending state proceeding. As a result, the courts of appeals have split over the standard to be applied and, specifically, whether direct interference is required.

B. The Courts Of Appeals Have Applied Diverging Standards When Determining Whether There Are Ongoing Judicial Proceedings.

When confronted with the question of whether ongoing judicial proceedings exist for the purposes of *Younger* abstention, the Second, Fourth, Sixth, Eighth, and Tenth Circuits all apply a similar test.

The Eighth Circuit, for example, analyzes whether the claims of the federal plaintiff are derivative of claims or injuries pending in state court, without requiring that direct interference is inevitable. In *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245 (8th Cir. 2012) ("*TACM*"), a church and two of its members brought a federal action against Arkansas officials, challenging the removal of children from the custody of church members under the First and Fourth Amendments. The plaintiffs sought "an order declaring the policies and practices of the Defendant's . . . unconstitutional, void and unenforceable." *See* Compl., *TACM*, No. 09-4031, Dkt. 1 at 47 (W.D. Ark. Apr. 9, 2009), 2009 WL

5057332. They also sought "a preliminary and permanent injunction enjoining and restraining the Defendant's . . . from taking custody of children" unless certain conditions were met. *See id.* On defendants' motion for judgment on the pleadings, the district court concluded that *Younger* abstention applied to the individual church members' claims and that the church lacked standing. *TACM*, 664 F.3d at 1248.

On appeal, the Eighth Circuit concluded that "the district court should have dismissed not only the individual Plaintiffs, but also TACM, based on *Younger* abstention." *Id.* The court first observed that "[t]he fact that TACM itself was not a party to any of the state-court proceedings does not preclude the application of *Younger* abstention in federal court." *Id.* at 1251. *Younger* abstention still "applies to TACM because it alleges standing based on injuries that are either directly or indirectly derivative of those of the individual plaintiffs." *Id.* at 1253. This was true despite that the church claimed it was asserting its own rights and injuries: "[W]ith respect to TACM's own rights and alleged injuries, not only are TACM's interests generally aligned with those of its members, the church shares a close relationship with its members." *Id.*

Like the Eighth Circuit, the Second, Fourth, Sixth, and Tenth Circuits similarly apply *Younger* to non-parties where the federal-court plaintiff's claim is "derivative" of the state-court defendant, finding the interests of the parties to be "intertwined" in such circumstances. *See, e.g.*, *Citizens for a Strong Ohio v. Marsh*, 123 Fed. App'x 630, 635 (6th Cir. 2005) ("*Younger* abstention may also be appropriate for non-parties to the state action when '[s]uccess on

the merits . . . is entirely derivative' of the rights of the state action parties."); *D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1230 (10th Cir. 2004) ("[W]hen in essence only one claim is at stake and the legally distinct party to the federal proceeding is merely an alter ego of a party in state court, *Younger* applies."); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 83 (2d Cir. 2003) (*Younger* applies where the federal-court plaintiff's claim is "entirely derivative of whatever rights that" the state-court defendant may have (internal quotation mark omitted)); *Cinema Blue of Charlotte, Inc. v. Gilchrist*, 887 F.2d 49, 53 (4th Cir. 1989) (*Younger* abstention applied because "federal plaintiffs are in a position to raise the constitutional claims that they seek to vindicate in this action by federal injunction as defenses in the pending state proceeding").

By contrast, the Ninth Circuit believes that "*Hicks* and *Doran* circumscribe the quite limited circumstances under which *Younger* may oust a district court of jurisdiction over a case where the plaintiff is not a party to an ongoing state proceeding." *Green*, 255 F.3d at 1100. "Congruence of interests is not enough, nor is identity of counsel." *Id.* Instead, the Ninth Circuit believes *Younger* applies when the federal plaintiff is not a named party to an ongoing state proceeding only when the plaintiff's "interest is so intertwined with those of the state court party that direct interference with the state court proceeding is inevitable." *Id.* And that court has defined an action that would directly interfere as one seeking "to enjoin, declare invalid, or otherwise involve the federal courts in terminating or truncating the state court proceedings." *Id.* at 1098.

In *Green*, which the Ninth Circuit exclusively relied upon below (*see* App.6), certain residents of an unincorporated town in Arizona brought a federal court challenge to a state statute regarding municipal consent for incorporation. The federal plaintiffs claimed the statute violated the Fourteenth Amendment's Due Process and Equal Protection Clauses, as well as the Guaranty Clause. *Green*, 255 F.3d at 1091. In pre-existing state court litigation, other residents of the same town had brought identical constitutional claims against the same state statute. *See id.* Yet the Ninth Circuit refused *Younger* abstention, resulting in identical constitutional litigation in state and federal court. The Ninth Circuit reasoned that it was insufficient for abstention "[t]hat these individuals share[d] an interest in [the town's] incorporation—even if their interests [we]re 'essentially identical[.]'" *See id.* at 1104. Moreover, the court believed that hearing the case could not "in any way have precluded the state case from being litigated to completion." *Id.*

The Ninth Circuit is therefore an outlier in applying *Younger* when non-parties to a state court action bring a related federal action. While at least five circuits require abstention when the federal claim is "derivative" of the state parties, the Ninth Circuit heightens that standard and requires that "direct interference with the state court proceeding is inevitable." This Court's intervention is needed to resolve the split in authority in the Circuits on this important question that implicates state sovereignty, comity, and equitable restraint.

II. The Ninth Circuit's Strict Approach Is Inconsistent With This Court's Precedent And Proper Respect For State Sovereignty.

A "direct interference" requirement, like that applied by the Ninth Circuit, is inconsistent with the Court's precedent and state sovereignty. Decades before *Younger*, the Court explained that "[i]t is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943); *see also Matthews v. Rodgers*, 284 U.S. 521, 525 (1932) (referring to "the rightful independence of state governments which should at all times actuate the federal courts"). Similarly, Article III "does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them." *Younger*, 401 U.S. at 52. Thus, federal courts should refrain from interfering with a state's interest in "carrying out the important and necessary task of enforcing" its criminal laws. *Id.* at 51–52.

In *Younger*, the Court rejected a request to enjoin state proceedings altogether. 401 U.S. at 49. But the Court did not stop there. In *Samuels*, the Court extended *Younger* beyond injunctions to declaratory judgments because "declaratory relief alone has virtually the same practical impact as a formal injunction would." 401 U.S. at 72. *Samuels*, for example, involved, in part, a request for a declaratory judgment that "the New York laws under which the grand jury had been drawn violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment." *Id.* at 67. Later, the Court

acknowledged that it has "extended the [abstention] doctrine to all cases in which a federal court is asked to provide some form of discretionary relief." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730 (1996). This includes damages actions where recovery first requires a determination of the constitutionality of state law that would halt its operation. *Id.* at 719.

Where the three-part test articulated in *Middlesex* is met, requiring more—like direct interference akin to actually stopping state proceedings—is inconsistent with *Samuels* and like precedent. Withholding abstention unless a federal claim will result in halting state proceedings also gives short shrift to state sovereignty. While a declaration regarding the constitutionality of a state statute may not actually halt state proceedings, granting such relief has a domino effect of the type the Court sought to avoid in *Samuels* and *Quackenbush*.

The same is no less true—and the domino effect no less real—when the federal claim is derivative of a claim that could be asserted in ongoing state proceedings. A derivative claim, such as that asserted in this case seeking a declaration that a state statute applicable in virtually every criminal prosecution in Arizona is unconstitutional, is no less disruptive than an injunction actually stopping an ongoing prosecution. Otherwise, "the federal judgment serves no useful purpose as a final determination of rights." *Pub. Serv. Comm. of Utah v. Wycoff Co.*, 344 U.S. 237, 247 (1952); *see also Samuels*, 401 U.S. at 72. Limiting abstention to cases in which a derivative claim will result in the type of direct interference the Ninth Circuit requires is not adequately protective of state interests.

Allowing derivative claims to easily bypass abstention also encourages creative pleading in federal court. The Court has frowned upon attempts to use a federal forum to short circuit state court proceedings through creative theories of standing. *See Kowalski v. Tesmer*, 543 U.S. 125, 132–33 (2004). The plaintiffs in *Kowalski*, a group of criminal defense attorneys, argued that *Younger* did not apply because they were not parties to ongoing state court proceedings. They argued they had standing based on hypothetical future clients and those clients' inability, through the attorneys, to prosecute future appeals. *Id.* at 127–28. The Court rejected standing, emphasizing the need to avoid encouraging criminal defense attorneys to bypass *Younger* by asserting their own claims in federal court. *Id.* at 133. The Court even lamented "[t]he mischief that resulted from [the lower courts] allowing the attorneys to circumvent *Younger*[.]" *Id.* at 133 n.4.

As demonstrated by this case, the same mischief results from the Ninth Circuit's standard. The "direct interference" test allows parties to avoid *Younger* through creative theories of standing and crafty non-joinder of parties. Under the Ninth Circuit's standard, *Kowalski* would have been decided differently had the attorney plaintiffs merely been clever enough to allege that they were asserting their own First Amendment right to represent indigent defendants who plead guilty. The Court should grant certiorari to prevent the Ninth Circuit's standard from being used to harm the important values underlying *Younger*.

III. Under The Proper Standard, *Younger* Abstention Applies.

By applying the wrong standard, the Ninth Circuit incorrectly held that abstention under *Younger* is not required here. But under the Court's precedents, Respondents' federal claims are directly derivative of the claims of their criminal defendant clients in state court and *Younger* should apply.

To begin, the statute Respondents challenge, A.R.S. §13-4433(B), applies only after Respondents' clients are formally charged with a crime (*i.e.*, only when there is an ongoing state court criminal proceeding). *See* A.R.S. §13-4401(9) (defining "defendant" for purposes of §13-4433 as "a person or entity that is formally charged by complaint, indictment or information of committing a criminal offense"). Respondents themselves are not subject to any restriction on contacting crime victims until they are retained by a "defendant" who is formally charged with a criminal offense. And Respondents only pursue victim contact in those ongoing proceedings to further the representation of their clients. *See* Dkt. 19-6 at ER1139. Because the applicability of the restriction on Respondents is purely contingent upon the restriction on their clients, all of which is contingent upon the institution of formal criminal proceedings against a "defendant," "[Respondents] ha[ve] a substantial stake in the state proceedings" and "their interests and those of their [clients are] intertwined," so *Younger* applies. *Hicks*, 422 U.S. at 348–49.

Moreover, as Petitioners explained to the Ninth Circuit, there are several ways in which Respondents or their clients could raise their First Amendment

challenge to the Statute during ongoing state judicial proceedings. Ans. Br. at 41–44, No. 20-16293, Dkt. 36. Thus, the Ninth Circuit's rejection of abstention here conflicts with the Court's statement that federal courts should "abstain from jurisdiction whenever federal claims have been or *could be* presented in ongoing state judicial proceedings that concern important state interests." *Haw. Housing Auth.*, 467 U.S. at 237–38 (emphasis added); *see also Middlesex Cnty.*, 457 U.S. at 436–37 (applying *Younger* abstention where constitutional claims could be made in state disciplinary proceedings).

The Ninth Circuit's decision also risks impinging upon state sovereignty and federalism by creating a large loophole for criminal defense attorneys to take up the mantle of constitutional challenges in federal court. Counsel, in the guise of bringing a claim on their own behalf, can now challenge state court page limitations, discovery limitations, evidentiary rulings, limitations on argument, or any number of other state court rules or decisions that can be morphed into federal constitutional challenges through creative lawyering. Those challenges will certainly interfere with ongoing state criminal proceedings. *See Kugler v. Helfant*, 421 U.S. 117, 130 (1975) ("'If the federal equity power must refrain from staying State prosecutions outright to try the central question of the validity of the statute on which the prosecution is based, how much more reluctant must it be to intervene piecemeal to try collateral issues.'").

Finally, Respondents cannot simultaneously establish Article III standing and avoid abstention. Either Respondents are involved in ongoing criminal proceedings and *Younger* applies, or Respondents are

not involved in any ongoing criminal proceedings and face no threat of enforcement, and thus lack standing. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987) ("In some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficient to justify abstention, even if there are no pending state proceedings in which the question could be raised."); *see also Kowalski*, 543 U.S. at 133.

Regardless of what term one uses to describe the relationship between Respondents' claims here and those of their clients in ongoing state proceedings—intertwined, dependent, derivative, overlapping—Respondents should not be permitted to avoid *Younger* solely because they are not technically named as parties in ongoing state court proceedings in which they are clearly involved. The Statute here applies only when there are ongoing state proceedings and the sole reason Respondents seek direct victim contact is to further their clients' interests in those proceedings. The Court should grant certiorari to clarify *Younger*'s application.

CONCLUSION

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

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