No. 21-997

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

BRIEF OF ARIZONA VOICE FOR CRIME VICTIMS INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

COLLEEN CLASE
Counsel of Record
THOMAS E. LORDAN
ARIZONA VOICE FOR CRIME VICTIMS INC.
111 East Taylor Street
Phoenix, AZ 85004
480-600-2661
cclase@voiceforvictims.org
Counsel for Amicus Curiae

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS CURIAE[1] [2]

This Amicus Brief is filed by Arizona Voice for Crime Victims Inc. ("AVCV") in support of the Petitioners' Petition for Writ of Certiorari.

AVCV is an Arizona nonprofit corporation that works to promote and protect crime victims' rights and services throughout the criminal justice process. To achieve these goals, AVCV empowers victims of crime through legal advocacy and social services. AVCV also provides continuing legal education to the judiciary, lawyers, and law enforcement. AVCV seeks to foster a fair justice system which (1) provides crime victims with resources and information to help them seek immediate crisis intervention, (2) informs crime victims of their rights under the laws of the United States and Arizona, (3) ensures that crime victims fully understand those rights, and (4) promotes meaningful ways for crime victims to enforce their rights, including through direct legal representation. A key part of AVCV's mission is working to give the judiciary information and policy insights that may be helpful in the task of balancing an accused's constitutional rights

---

[1] No counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Sup. Ct. R. 37.6.

[2] Pursuant to Sup. Ct. R. 37(2)(a), counsel of record for the Petitioners and counsel of record for the Respondents received timely notice from AVCV's counsel of AVCV's intent to file the Brief, and consent was granted by each of them.

with the rights of crime victims, while also protecting the wider community's need for deterrence.

Part of AVCV's mission is to defend Arizona's laws that recognize, create, and maintain rights for victims of crime. The law of crime victims' rights is a relatively new branch of the law, and Arizona is proud that it has always been on the cutting-edge of that law. As the Arizona Supreme Court noted in *Morehart v. Barton*, 226 Ariz. 510, 512, ¶9, 250 P.3d 1139, 1141 (2011):

> Arizona has been a national leader in providing rights to crime victims. Adopted as a constitutional amendment in 1990, the Victims' Bill of Rights provides crime victims the right "[t]o be treated with fairness, respect and dignity . . . throughout the criminal justice process." Ariz. Const. art. II, § 2.1(A)(1); *see also* 1991 Ariz. Sess. Laws, ch. 229, § 2(2) (noting that the Victims' Bill of Rights seeks to ensure that "all crime victims are provided with basic rights of respect, protection, participation, and healing of their ordeals").

The specific law that the Respondents seek to attack is A.R.S. § 13-4433(B), which provides: "B. 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 statute contains important victims' rights, since without it a crime victim, having first undergone the trauma of the

crime itself, would be faced with the additional trauma caused by direct contact from the defendant, the defendant's attorney, or an agent of the defendant, without the protection that could otherwise be provided by the prosecutor.[3]

The statute is best understood within the context of the overall scheme of laws in which it exists.

After the voters of Arizona overwhelmingly adopted the Victims' Bill of Rights ("VBR") as an amendment to Arizona's Constitution in 1990 (Ariz. Const. art. II, § 2.1), the Arizona Legislature, pursuant to the VBR, enacted the Victims' Rights Implementation Act (the "Act") (1991 Ariz. Sess. Laws ch. 229, codified at A.R.S. §§ 13-4401 et seq.), the legislative intent of which 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.

---

[3] As the Petition points out, "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." (Petition at page 7.)

The VBR itself provides in relevant part:

Section 2.1. (A) To preserve and protect victims' rights to justice and due process, a victim of crime has a right:

1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.

. . .

5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.

. . .

11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.

12. To be informed of victims' constitutional rights.

. . .

(D) The legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section, including the authority to extend any of these rights to juvenile proceedings.

A.R.S. § 13-4433 is one of the statutes authorized by Arizona's Constitution and implemented in the Act. The entire text of the statute appears in the Petitioners' Appendix, at App. 55-57. A.R.S. § 13-4433(B) should be read in the context of not only the rest of that statute, but especially of Ariz. Const. art. II, § 2.1(A)(1), (5), and (12) as well.

In addition to the VBR and the Act, Arizona protects victims' rights in its Rules of Criminal Procedure. Rule 39(b)(12)-(14), especially (12), sets out rights similar to those found in the statute, as follows:

> These rules must be construed to preserve and protect a victim's rights to justice and due process. Notwithstanding the provisions of any other rule, a victim has and is entitled to assert each of the following rights:
>
> . . .
>
> (12) 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:
>
> (A) the defense must communicate requests to interview a victim to the prosecutor, not the victim;
>
> (B) a victim's response to such requests must be communicated through the prosecutor; and
>
> (C) if there is any comment or evidence at trial regarding a victim's refusal to be interviewed, the court must instruct the jury

> that a victim has the right under the Arizona Constitution to refuse an interview;
>
> (13) at any interview or deposition conducted by defense counsel, the right to condition the interview or deposition on specification of a reasonable date, time, duration, and location of the interview or deposition, including a requirement that it be held at the victim's home, at the prosecutor's office, or at an appropriate location in the courthouse;
>
> (14) the right to terminate an interview at any time or refuse to answer any question during the interview; . . .

It is A.R.S. § 13-4433(B) that the Respondents seek to attack in federal court, claiming that it violates the First Amendment to the United States Constitution in that it abridges their own freedom of speech.[4]

The immediate issue raised by the Petition for Writ of Certiorari concerns the applicability of the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), to the underlying case, and not the constitutional validity of A.R.S. § 13-4433(B). However, since the ability of the Respondents to challenge the statute in federal (as opposed to state) court depends upon their narrow reading of *Younger*, with which reading the Ninth Circuit Court of Appeals (in contrast to the Second, Fourth, Sixth, Eighth, and Tenth Circuit Courts of Appeals) has agreed, AVCV files this Amicus

[4] The Respondents have not attacked Rule 39(b)(12), a failure which in part led to the lower Court dismissing some of those named as Defendants.

Brief in support of the Petition to protect not only the *Younger* doctrine in this important context but also and ultimately the rights of Arizona crime victims to be free of wholesale challenges to their rights brought in a federal court rather than the state courts of Arizona itself in which individual criminal cases are pending.

STATEMENT OF THE CASE

Respondents are Arizona Attorneys for Criminal Justice, a statewide membership organization of criminal defense lawyers, individual criminal defense attorneys, and a criminal defense investigator. They seek to have a federal court issue injunctive and declaratory relief pursuant to 42 U.S.C. § 1983 preventing Petitioners, Mark Brnovich, Arizona's Attorney General, and Colonel Heston Silbert, the Director of Arizona's Department of Public Safety, from "enforcing" A.R.S. § 13-4437(B), applicable during ongoing criminal prosecutions in state court, on the basis that it violates the Respondents' own First Amendment rights.

In a Memorandum dated August 24, 2021 (Appendix A to the Petitioners' Appendix, also at 2021 WL 3743888), the United States Court of Appeals for the Ninth Circuit reversed the dismissal of the Respondents' lawsuit by the United States District Court for the District of Arizona. The Ninth Circuit devoted exactly one paragraph of its Memorandum to *Younger*,

which, unfortunately, had escaped careful consideration by the District Court, in which the lawsuit otherwise had a long history.

The initial Complaint, filed in May of 2017, approximately twenty-five years after the adoption of A.R.S. § 13-4437(B), named only the Arizona Attorney General as a Defendant. The District Court granted the Attorney General's motion to dismiss on the basis that the Plaintiffs lacked standing, but granted Plaintiffs leave to amend. The Court did not address the *Younger* abstention argument raised in the motion.

Plaintiffs amended their Complaint, without adding any new Defendants. The District Court granted the Attorney General's motion to dismiss the First Amended Complaint, again solely on standing grounds, again granting Plaintiffs leave to amend, and again not reaching the *Younger* issue.

Plaintiffs then filed a Second Amended Complaint, seeking identical relief, but adding as Defendants the State Bar of Arizona, its Chief Bar Counsel, Maret Vessella, and the Director of the Arizona Department of Public Safety ("DPS"), then Colonel Frank Milstead. In an Order filed February 27, 2020 (Appendix D to the Petitioners' Appendix, also at 441 F.Supp.3d 817), the District Court again granted the Attorney General's motion to dismiss for lack of standing, this time with prejudice and without leave to amend. The Court granted the State Bar of Arizona's motion to dismiss on the basis of the Eleventh Amendment to the United States Constitution, with prejudice. The Court denied

Vessella's motion to dismiss, which had argued that the Plaintiffs lacked standing, that the Plaintiffs failed to state a claim under § 1983, and that *Younger* abstention applied. The Court denied the motion to dismiss of the Director of the DPS, who had similarly argued that the Plaintiffs lacked standing. The Court entered its "Judgment of Dismissal in a Civil Case" on February 27, 2020 (Appendix E to the Petitioners' Appendix).

Vessella had joined in the Attorney General's *Younger* abstention argument. The District Court did not reach that argument as to the Attorney General, but, as indicated, did as to Vessella, and, in the only discussion by the District Court of *Younger*, found that the first of *Younger*'s requirements, "that a state-initiated proceeding is ongoing" (Petitioners' Appendix, at App. 45), was not met. "Defendant Vessella" said the Court,

> . . . has not pointed to any pending disciplinary proceedings against Plaintiffs based on violation of A.R.S. § 13-4433(B) and ER 8.4 but instead relied on the fact that Plaintiffs are currently representing some criminal defendants in pending state court proceedings. (Doc. 164 at 10) This is not enough to meet the first requirement for *Younger* abstention; indeed, if disciplinary proceedings were pending, the Court would likely conclude that the required ongoing state-initiated proceedings were present. *See Canatella v. California*, 404 F.3d 1106, 1110 (9th Cir. 2005) (holding that "California's attorney discipline proceedings are judicial in character for purposes of

> *Younger* abstention. . . . [s]uch proceedings commenced when the State Bar of California issued the notice of disciplinary charges against Bendel") (internal quotations omitted). The Court finds the fact that Plaintiffs are currently representing criminal defendants in state court and that they might violate A.R.S. § 13-4433(B), which might trigger disciplinary proceedings under ER 8.4, involves too many contingencies to satisfy the state-initiated ongoing proceedings prong of the *Younger* inquiry. Accordingly, because Defendant Vessella, through the arguments of the Attorney General, failed to prove the first prong of the *Younger* doctrine and she is required to prove all four prongs, the Court does not reach the remaining arguments she raised under *Younger* and it will not abstain based on *Younger*.

(Petitioners' Appendix, at App. 45-46.)

The District Court thus took a narrow view of *Younger*, applying its own "too many contingencies" test, a test to be found nowhere else, notwithstanding the Court's finding "that Plaintiffs are currently representing some criminal defendants in pending [Arizona] state court proceedings," which finding should have led to the opposite conclusion on the *Younger* issue. The Ninth Circuit, while agreeing with the District Court that *Younger* abstention is not required, would apply its own test to reach that result, as we shall see.

Vessella and the Director of the DPS next filed motions for reconsideration. In an Order filed June 9,

2020 (Appendix B to the Petitioners' Appendix, also at 465 F.Supp.3d 978), the District Court granted the motions and dismissed the Second Amended Complaint as to both Vessella and the Director, with prejudice, each on the basis of a factual rather than a facial challenge to standing, that is, on the basis that while the Plaintiffs challenged A.R.S. § 13-4433(B), they did not challenge Ariz. R. Crim. P. 39(b)(12) (the substance of which was then Rule 39(b)(11)), and in fact admitted that they would continue to comply with the Rule. The Court entered its "Judgment of Dismissal in a Civil Case" on June 9, 2020 (Appendix C to the Petitioners' Appendix).

Plaintiffs appealed to the Ninth Circuit. In its Memorandum filed August 24, 2021, the Ninth Circuit reversed the District Court, and remanded the case to the District Court. Thus, in the absence of this Court granting the Petition for Writ of Certiorari, reversing the Ninth Circuit, and allowing the District Court's dismissal of the case to stand, nothing can prevent the Respondents from challenging the constitutional validity of A.R.S. § 13-4433(B) in the District Court.

In their appeal to the Ninth Circuit, all Defendants defended the District Court's rulings on standing, and the Attorney General and the Director further argued that the District Court should have abstained under *Younger*. Most of the Memorandum was taken up with the standing issues, and the Ninth Circuit found that the Plaintiffs have standing as to the Attorney General, the Director, and Vessella. In its one paragraph on *Younger* (Petitioners' Appendix, at App. 6), the Ninth Circuit reasoned and ruled as follows:

> "Critically, the first *Younger* requirement—the presence of an ongoing state proceeding—is not satisfied." *See ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014). In contrast to *Dubinka v. Judges of the Superior Court*, 23 F.3d 218 (9th Cir. 1994), the plaintiffs in this case are not parties to any pending proceedings in Arizona state court. And 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." *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). Further, no plaintiffs are currently parties in disciplinary proceedings for violations of § 13-4433(B).

The Ninth Circuit entered its Order on October 12, 2021, denying the petitions for panel rehearing and the petitions for rehearing en banc filed by the Attorney General and by Vessella (Appendix F to the Petitioners' Appendix).

The Petition for Writ of Certiorari was filed in this Court on January 10, 2022, and docketed on January 13, 2022.

SUMMARY OF ARGUMENT

The Ninth Circuit misreads the first *Younger* requirement, and therefore threatens "Our Federalism" in relationship to an important Arizona crime victims' rights statute, the constitutionality of which should be challenged, if at all, only in actual individual criminal cases pending in Arizona state courts.

Pursuant to the first clause of Sup. Ct. R. 10(a), this Court should grant the Petition; resolve the split among the Circuits as to the scope of the first *Younger* requirement in favor of the Second, Fourth, Sixth, Eighth, and Tenth Circuits, and against the Ninth Circuit, by holding that *Younger* applies when a federal claim is derivative of a claim that could be brought in ongoing state court proceedings; and reverse the Order of the Ninth Circuit reversing and remanding this case.

ARGUMENT

The three conditions for *Younger* abstention[5] are, "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

[5] *Younger* involved a request for injunctive relief. In *Samuels v. Mackell*, 401 U.S. 66, 69 (1971), 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." *See also Younger*, 401 U.S. at 41 n. 2.

to raise constitutional challenges." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 434, 432 (1982). If all three conditions are met, unless "exceptional circumstances [not present here] dictate to the contrary, federal courts should abstain from interfering with the ongoing proceedings." *Id*. at 437.

The second and third requirements are not at issue. The Respondents could not argue that the proceedings challenging this Arizona statute do not implicate important Arizona state interests, or that they do not have an adequate opportunity in individual state criminal proceedings to raise constitutional or other challenges to the statute.

The question raised by the Petition concerns the scope of the first requirement: "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?" (Petition, at page i.)

The Ninth Circuit has taken a cramped, narrow reading of the first requirement, which violates the spirit of *Younger*, based as it is in principles of federalism, comity, and equity. "Since the beginning of this country's history," said the Court in *Younger*, "Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." 401 U.S. at 43. The Court went so far as to characterize the broad doctrine it formulated in *Younger* as "Our Federalism," thus making explicit the doctrine's relationship to the

principles at the heart of our Constitutional Founding: "This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.'" *Id*. at 44.

"Our Federalism" is at stake in the instant case. As the Petition puts it:

> 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*").

Arizona's own courts, in individual cases, should be the ones to consider challenges to Arizona's criminal victims' rights laws.

It is interesting to note that one of the pre-*Younger* cases discussed by the Court with approval in *Younger* was *Dombrowski v. Pfister*, 380 U.S. 479 (1965), in which the Court refused to enjoin certain state criminal statutes on the basis that they had a "chilling" effect on freedom of speech. Injunctive relief did issue in *Dombrowski* but only because the Court found bad faith and harassment motivated by racial animus. While perhaps we are jumping ahead to the constitutional challenge the Respondents wish to present to the enforceability of A.R.S. § 13-4433(B), we note that *Younger*'s discussion of *Dombrowski* suggests why such a challenge must fail.

As the Court said in *Younger*, despite the fact that the District Court in *Younger* thought "the *Dombrowski* decision substantially broadened the availability of injunctions against state criminal prosecutions and that under that decision the federal courts may give equitable relief, without regard to any showing of bad faith or harassment, whenever a state statute is found 'on its face' to be vague or overly broad, in violation of the First Amendment," the sort of "chilling effect" such statutes may have "should not by itself justify federal intervention." 401 U.S. at 50. Indeed, the Court continued, "Beyond all this is another, more basic consideration" (*id*. at 52), which is that the federal courts should refrain from judging the constitutionality of a state criminal statute in the abstract, before its application

in a specific case. The responsibility of the federal judiciary to pass on the constitutionality of statutes,

> . . . broad as it is, 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. Ever since the Constitutional Convention rejected a proposal for having members of the Supreme Court render advice concerning pending legislation it has been clear that, even when suits of this kind involve a 'case or controversy' sufficient to satisfy the requirements of Article III of the Constitution, the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary. The combination of the relative remoteness of the controversy, the impact on the legislative process of the relief sought, and above all the speculative and amorphous nature of the required line-by-line analysis of detailed statutes, [citation omitted], ordinarily results in a kind of case that is wholly unsatisfactory for deciding constitutional questions, whichever way they might be decided. In light of this fundamental conception of the Framers as to the proper place of the federal courts in the governmental processes of passing and enforcing laws, it can seldom be appropriate for these courts to exercise any such power of prior approval or veto over the legislative process.
>
> For these reasons, fundamental not only to our federal system but also to the basic

> functions of the Judicial Branch of the National Government under our Constitution, we hold that the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions. We do not think that opinion stands for the proposition that a federal court can properly enjoin enforcement of a statute solely on the basis of a showing that the statute 'on its face' abridges First Amendment rights.

Id. at 52-53.

It was in applying these principles that the *Younger* Court itself was able to hold in the case before it as follows:

> . . . It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief.

Id. at 54.

Returning now to the Ninth Circuit's Memorandum in the instant case, in finding that the first *Younger* requirement was not satisfied, the Ninth Circuit said that "the plaintiffs in this case are not parties to any pending proceedings in Arizona state court"

(Petitioners' Appendix, at App. 6), and, citing the Court's own precedent in *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), went on to say: "And 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.' . . . Further, no plaintiffs are currently parties in disciplinary proceedings for violations of § 13-4433(B)."

The Ninth Circuit's test for *Younger*'s first requirement, that the interests of plaintiffs be "so intertwined" with those of their clients in state court proceedings that "interference with the state court proceeding is inevitable," first, manifests a constricted reading of the only two of this Court's cases which bear on the issue, namely, *Hicks v. Miranda*, 422 U.S. 332 (1975) and *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), cases in which, as the Petitioners argue, the federal plaintiff was not the named party to a related state proceeding but asserted injury derivative of the state court litigants (Petition, at pages 3-4 and 15-17); apparently stands alone among the Circuits; and, moreover, stands in opposition to the tests applied by five other Circuits in the cases cited and discussed in the Petition (Petition, at pages 4 and 17-20), namely, *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); and *Cinema Blue of Charlotte, Inc. v. Gilchrist*, 887 F.2d 49, 53 (4th Cir. 1989). Those cases stand for the proposition for which the Petitioners contend—to use the language of their "Question Presented," the first requirement of *Younger* should be deemed met "when a federal claim is derivative of a claim that could be brought in ongoing state court proceedings." (Petition, at page i.) These Circuits "find[] the interests of the parties to be 'intertwined' in such circumstances." (Petition, at page 4.)

"The Ninth Circuit is therefore an outlier," as the Petitioners conclude,

> . . . 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.

(Petition, at page 20.)[6]

---

[6] AVCV adopts as well the arguments of the Petitioners in the remainder of their Petition, at pages 21-26.

And the federal claim that the Respondents seek to assert in federal court, namely, that A.R.S. § 13-4433(B) infringes on their First Amendment Rights, is a claim that could be brought in ongoing state court proceedings. In the District Court's Order filed February 27, 2020, the District Court itself noted "the fact that Plaintiffs are currently representing some criminal defendants in pending state court proceedings." (Petitioners' Appendix, at App. 45.) That should have been enough for the District Court to have concluded that *Younger*'s first requirement was met.

Similarly, as the Petition points out, the 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 the 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. As the Petitioners put it, "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." (Petition, at page 26.) Let us be completely realistic about this, as the Ninth Circuit was not. The Respondents have no interest in contacting crime victims unless and until they are retained by a defendant who is formally charged with a criminal offense and who agrees to pay them for their

services. Further, there are currently, as at all times, hundreds of ongoing criminal proceedings in the courts of Arizona. It is therefore simply naïve to suppose that *Younger* concerns are not implicated here.

The Respondents' proposed challenge in federal court seeking injunctive and declaratory relief relative to A.R.S. § 13-4433(B) would affect not just a particular state court case, but all criminal cases then pending in Arizona in which the statute might otherwise be operative. That is one reason for *Younger* abstention in the first place, to prevent the kind of wholesale interference with a state law and state court proceedings necessarily entailed by a *federal* action.

Furthermore, if these Respondents are allowed to challenge A.R.S. § 13-4433(B), just one of the hundreds of crime victims' rights under the laws of the State of Arizona, in a federal court action seeking injunctive and declaratory relief, what would stop them from seeking the same relief in federal court actions challenging other Arizona crime victims' rights, on whatever particular bases they could come up with?

AVCV therefore supports the arguments made by the Petitioners in support of the proposition that *Younger* should apply when, as in the instant case, the federal claim brought by the Respondents is derivative of a claim that could be brought in ongoing state court proceedings. This Court should grant the Petition to resolve a split in the Circuits on what it means for there to be an ongoing state court proceeding, the first *Younger* requirement; to resolve it on the basis of the

approach taken by the Second, Fourth, Sixth, Eighth, and Tenth Circuits, rather than the Ninth Circuit; and to therefore ultimately reverse the Ninth Circuit in this case, thus leaving in place the dismissal of the underlying lawsuit by the District Court. That would leave in place A.R.S. § 13-4433(B), subject to it being challenged on constitutional or other grounds by a defendant in an actual state court case.

AVCV does not want the Court to lose sight of the underlying existential situation addressed by the statute the Respondents wish to challenge. The rights enshrined in A.R.S. § 13-4433(B) are of special importance to crime victims, as can be demonstrated by a thought experiment. Imagine being the "victim" under Arizona law in a case in which the status of "victim" is attained as the result of the murder of the victim's son or daughter. The victim now finds himself or herself not only undergoing the deepest mourning imaginable, but caught up in the criminal justice system, a system he or she does not understand and which must often seem hostile to him or her, given his or her unfamiliarly with it, and his or her concerns about its ability to render justice in the case in light of what he or she understands (correctly) to be the system's decided bent toward defendants' rights. Imagine then that the victim, during this time, could be legally contacted for an interview *directly* by the defendant, the defendant's attorney, or an agent of the defendant? That is the existential situation the statute addresses, and, especially

given all of the collateral legal arguments involving *Younger*, it must not be forgotten.[7]

While it is obvious that a victim in such a situation would not want to hear from the defendant, it may seem to those of us who work within the criminal justice system that it would be less of a burden to have the victim hear from the defendant's attorney or an agent of the defendant. But the burden is the same—a victim, most of whom will be laypersons unfamiliar with the criminal justice system, will not see much difference between the defendant himself or herself and someone with what the victim will take to be the audacity to act on the defendant's behalf.

A victim confronted directly by any of the three persons referenced in the statute, without the interposition of the prosecutor, would experience only additional shock, dread, revulsion, disgust, confusion, fear, and, ultimately, a terrible anger.

The crime victims' rights movement, which has resulted in law at the federal and state levels, was motivated not only by the fundamental unfairness of the law predating the creation of crime victims' rights, which treated those most directly affected by crime as mere appendages to the criminal justice system, to be used or ignored as the system demanded, but also by a recognition of the trauma inflicted on crime victims

---

[7] Part of federal crime victims' rights law recognizes the same situation as A.R.S. § 13-4433(B), and provides for victims as the very first right listed "[t]he right to be reasonably protected from the accused." 18 U.S.C. § 3771(a)(1).

forced to undergo the ordeal not only of the crime, but of the resulting criminal case.

Social science research demonstrates that the initial trauma victims suffer after a crime, especially a violent crime, is compounded by their experience with the criminal justice system. "Secondary victimization" often causes more harm than the initial criminal act. Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Soc. Just. Res. 313, 321 (2002). A victim's experience with the justice system often "means the difference between a healing experience and one that exacerbates the initial trauma." Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. Traum. Stress 182, 182 (2010). If a victim had to deal directly with the defendant, the defendant's attorney, or an agent of the defendant, without the assistance the prosecutor might provide, victim trauma would be multiplied exponentially.

CONCLUSION

Given its restrictive minority reading of the first *Younger* requirement, the Ninth Circuit in effect passed over the actual close relationship between the Respondents and ongoing Arizona state criminal court cases. The Ninth Circuit thus ignored the practicalities of the matter, which they would not have done had they followed the approach taken by the five other Circuits which have considered the nature of the first *Younger*

requirement and applied to it the broader test discussed more thoroughly in the Petition. Allowing Respondents to proceed with their claims in a federal court would violate the principles of federalism, comity, and equity on which *Younger* itself and "Our Federalism" is based.

AVCV urges the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

COLLEEN CLASE
Counsel of Record
THOMAS E. LORDAN
ARIZONA VOICE FOR CRIME VICTIMS INC.
111 East Taylor Street
Phoenix, AZ 85004
480-600-2661
cclase@voiceforvictims.org
Counsel for Amicus Curiae