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

REPLY BRIEF FOR PETITIONERS

MARK BRNOVICH
Attorney General of Arizona

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

BRUNN W. ROYSDEN III
Solicitor General
MICHAEL S. CATLETT
Deputy Solicitor General
Counsel of Record
KATE B. SAWYER
Assistant Solicitor General
KATHERINE JESSEN
Assistant Attorney General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-3333
michael.catlett@azag.gov

Counsel for Petitioner Mark Brnovich

Additional counsel listed in signature block

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INTRODUCTION

Through *Younger* abstention, the Court has pursued "a strong federal policy against federal court interference with pending state judicial proceedings." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). The Court has held that federal courts should not interfere in such proceedings "absent extraordinary circumstances." *See id.* In fact, *Younger* requires abstention whenever a state has an important interest in adjudicating an ongoing proceeding in its own courts. *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72-73 (2013). And state-court criminal proceedings are at the core of *Younger*, which "generally precludes federal courts from intervening in ongoing state criminal prosecutions." *Trump v. Vance*, 140 S. Ct. 2412, 2420-21 (2020).

Yet, in contravention of *Younger* and its progeny, the Ninth Circuit refused to abstain here, despite that the discovery limitation at issue—a restriction on direct-victim contact—implicates hundreds (maybe thousands) of ongoing Arizona criminal proceedings. Not only does that refusal strike the core of *Younger* and risk considerable harm to Arizona's sovereign interest in adjudicating victims'-discovery issues in its state court, the tactic the Ninth Circuit took—holding that abstention does not apply unless the relief requested is akin to a full injunction—guts *Younger* and risks flooding federal courts with all manner of challenges to state-court criminal rules and limitations.

Respondents' arguments in opposition to certiorari are unavailing. While attempting to minimize the division of authority in the lower courts, Respondents admit that the standards used are

"slightly different," but, truth be told, there is a split on the amount of interference required to justify abstention. Respondents downplay the importance of the interests at stake, but Arizona's sovereign interest in adjudicating victim-discovery issues through ongoing criminal proceedings in its own courts hangs in the balance. Finally, the purported vehicle issues Respondents raise are insubstantial—the only way to fully vindicate Arizona's sovereign interests is through granting certiorari now.

ARGUMENT

I. The Court Should Clarify The Diverging Standards Between The Circuits.

Lower courts are split on what it means for there to be an "ongoing state judicial proceeding" for *Younger* abstention. Respondents do not contest that the Court has provided limited guidance on abstention under *Younger* when a federal plaintiff is not a party in a related state-court action. In fact, Respondents admit (at 10) that "courts have articulated this standard in slightly different ways[.]" That is a significant understatement, meant only to acknowledge that Petitioners are correct without outright admitting that certiorari is justified.

The Court has explained only that *Younger* applies if a federal claimant's interests are "intertwined" with the parties in ongoing state proceedings. *See Hicks v. Miranda*, 422 U.S. 332, 348-49 (1975). While multiple circuits, consistent with *Hicks*, look to whether a federal plaintiff's claims are *derivative* of a state-court party's claims—and if so, they abstain—the Ninth Circuit applies a heightened test. The Ninth Circuit considers, as it did here, whether a plaintiff's interests are "'so intertwined'

with those of [the parties] in state court proceedings that 'interference with the state court proceeding is inevitable.'" App.6 (quoting *Green v. City of Tucson*, 255 F.3d 1086, 1100 (9th Cir. 2001) (en banc)). In this way, the Ninth Circuit only abstains where the federal relief requested is akin to enjoining state-court proceedings, even if the federal-court plaintiff's claim is derivative of a state-court plaintiff's claim. This test is inconsistent with *Hicks* and every other circuit to speak on the issue.

1. The Ninth Circuit's discussion of *Green* in *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004) (en banc), did not resolve the existing circuit split.

To the contrary, *Gilbertson* doubles down on the Ninth Circuit's requirement that a claim be so intertwined that the relief requested in federal court will effectively enjoin state-court proceedings. *Green* concluded that *Younger* is appropriate only when a federal plaintiff seeks to "directly interfere" with ongoing state proceedings by seeking "'to enjoin, declare invalid, or otherwise involve the federal courts in terminating or truncating the state court proceedings.'" *Gilbertson*, 381 F.3d at 976-78. *Gilbertson* holds only that *Younger* also applies when the relief sought would "have the same practical effect on the state proceeding as a formal injunction." *See id.* Put differently, the Ninth Circuit in *Gilbertson*, understanding that it needed to come to grips with *Samuels v. Mackell*, 401 U.S. 66, 69 (1971), held that while requested relief other than an injunction justifies abstention, it only does so when such relief has the same practical effect as an injunction on state-court proceedings. 381 F.3d at 977-78; *see also San Jose Silicon Valley Chamber of Com. Pol. Action Comm. v. City of San Jose*, 546 F.3d 1087, 1096 n.4

(9th Cir. 2008) ("*Gilbertson* expanded the interference requirement to cases in which the relief sought … 'would have the same practical effect on the state proceeding as a formal injunction.'").

Gilbertson thus leaves in place *Green*'s holding that interference with a state-court proceeding akin to a formal injunction must be present. And the Ninth Circuit looks to *Green*—as it did in this case—to determine whether a federal claim is "so intertwined" such that "interference with the state court proceeding is inevitable." App.6 (quoting *Green*). *Gilbertson*'s minor clarification of *Green* to include relief having the same effect as a formal injunction does not eliminate the circuit split.

2. Despite admitting (at 10) that "courts have articulated [the pertinent] standard in slightly different ways," Respondents assert that all circuits require federal-court relief akin to a formal injunction of state-court proceedings. Respondents are wrong. In reality, other circuits vary in their approaches to non-parties to a state-court action, and none *requires* interference akin to an injunction of state proceedings. This is an important distinction that can lead to a different result, including in this case. *See* Pet.17-20.

For example, in *Tony Alamo Christian Ministries ("TACM") v. Selig*, the Eighth Circuit held that *Younger* is required when a federal plaintiff's injuries are "directly or indirectly derivative of" those of state-court plaintiffs. 664 F.3d 1245, 1253 (8th Cir. 2012). Once the court determined that the federal plaintiff's injuries were derivative of the state-court plaintiff's injuries, the court held that abstention was required. This was true despite that "the state court proceedings [were at the time] apparently complete,"

and thus there were no state-court proceedings to be interfered with, let alone in the same manner as an injunction. *See id.* at 1251. And this was true despite that the federal claimant—like Respondents here—"assert[ed] its own rights and allege[d] various injuries directly to itself[.]" *See id.* at 1253. Respondents' statement that the Eighth Circuit standard is only "slightly different" from the Ninth Circuit's standard is incorrect.

Similarly, the Tenth Circuit asks only whether a federal-court claim "is derivative of" a state-court claim. *See D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1231 (10th Cir. 2004) (holding that *Younger* abstention applied). But, unlike the Ninth Circuit, the Tenth Circuit does not analyze whether the relief requested in federal court is akin to a formal injunction of state-court proceedings. Quite the contrary. The Tenth Circuit applies *Younger* abstention "regardless of the relief initially sought in the federal-court suit," including "to federal claims for monetary relief," which lack any resemblance to an injunction of state-court proceedings. *See id.* at 1228.

The unpublished Fourth Circuit decision Respondents cite also does not help them. That opinion merely explains that abstention does not require that the parties to state-court proceedings be identical to the parties to federal-court proceedings, "given the fact that all of the claims are intertwined." *See Clowdis v. Silverman*, 666 F. App'x 267, 270 (4th Cir. 2016). The court applied *Younger* abstention despite the federal-court plaintiff's argument that "there is no functional state proceeding, rendering *Younger* abstention inappropriate." *See id.* at 269.

Finally, the Second Circuit applies *Younger* abstention where the federal "plaintiffs' claims are

essentially derivative" of issues pending in state proceedings. *See Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 84 (2d Cir. 2003). While the Second Circuit held that *Younger* abstention applies where a federal-court plaintiff seeks to permanently enjoin state-court proceedings, the Second Circuit has not decided whether other relief is sufficient to trigger such abstention. *See id.* at 85. It is clear, therefore, that the Second Circuit does not currently apply a standard similar to the Ninth Circuit, which rejects *Younger* abstention *unless* the requested relief is akin to a formal injunction of state-court proceedings.

Though Respondents claim that all circuits apply the same *Younger* abstention standard, this case belies that assertion. Here, the Ninth Circuit recognized only that the federal plaintiffs (Respondents here) assert their own "rights in this proceeding, not their clients' rights," and therefore federal "plaintiffs' interests are not 'so intertwined' with those of" the state-court parties that interference would be inevitable. App.6 (quoting *Green*). Respondents are not seeking to enjoin state-court proceedings in their entirety, but interference from the relief they seek will be palpable. A ruling in favor of Respondents will enjoin victim-contact limitations in ongoing state-court criminal proceedings. Even a declaratory judgment in favor of Respondents will prevent prosecutors from being the contact point for initiation of contact by criminal defense counsel and investigators and crime victims. That interference would be sufficient in the Eighth, Tenth, Fourth, and likely Second Circuits, but it was not sufficient in the Ninth Circuit because of the heightened standard. The Court should grant certiorari to bring the Ninth

Circuit in line with this Court's decision in *Hicks* and those circuits recognizing that *Younger* does not require the equivalent of an injunction entirely stopping state-court proceedings.

II. The Ninth Circuit's Decision Conflicts With Long-Standing Principles Of Abstention.

By holding that *Younger* was not required here simply because "plaintiffs in this case assert their own First Amendment rights," and Respondents' relief would not entirely enjoin any state-court proceedings, App.6, the Ninth Circuit acted inconsistently with this Court's *Younger* precedent.

This Court has not declined to abstain merely because a federal plaintiff characterizes a derivative claim as being based on their own constitutional rights. For example, in *Hicks*, the federal plaintiffs asserted their own constitutional rights, but this Court nonetheless held that *Younger* abstention was required because the federal plaintiffs' interests were "intertwined" with those of state-court litigants. 422 U.S. at 348-49. Allowing a federal claimant to avoid abstention through crafty characterization of a claim is flatly inconsistent with this Court's repeated articulation of the interests underlying abstention. This kind of crafty pleading is exactly why the Court previously lamented "[t]he mischief that resulted from [the lower courts] allowing the attorneys to circumvent *Younger*[.]" *Kowalski v. Tesmer*, 543 U.S. 125, 133 n.4 (2004). And the Ninth Circuit did exactly that here, setting the stage for future mischief.

Nor has the Court applied *Younger* abstention only in cases where the relief requested in federal court is akin to an injunction stopping state-court proceedings. The Court has, instead, explained that

"the salient fact is whether federal-court interference would *unduly interfere with the legitimate activities of the state*." *Middlesex Cnty.*, 457 U.S. at 433 n.12 (emphasis added). And the Ninth Circuit's holding here, rejecting abstention for insufficient interference, is flatly inconsistent with the Court's admonition that "[i]f the federal equity power must refrain from staying State prosecutions outright ..., how much more reluctant must it be to intervene piecemeal to try collateral issues." *Kugler v. Helfant*, 421 U.S. 117, 130 (1975); *see also New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989) (*Younger* applies "even to civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions").

The Ninth Circuit has now gone in the opposite direction, opening the door for creative counsel to access federal court to challenge any number of state-court criminal rules or decisions. It is not just Arizona that is concerned about this development—ten other states have expressed similar concerns here. *See* Amicus Br. of Louisiana, *et. al.* at 12 ("… the Ninth Circuit's test … fails to adequately respect the comity between state and federal courts inherent in 'Our federalism.'"). And there are important implications for victims' rights, when state proceedings can be multiplied with satellite federal challenges. *See* Amicus Br. of Ariz. Voice For Crime Victims, Inc. at 21-22.

Respondents' arguments in opposition to certiorari fall flat. Respondents take up the Ninth Circuit's mantle by repeatedly asserting that *Younger* has no application because they "assert their own independent First Amendment rights [which] are in

no way derivative of their clients' rights." BIO.14. Not only can one not avoid *Younger* by simply declaring the case to be about one's own rights, and not those of others, but the record does not support Respondents' premise that their claims are not derivative.

Respondents continue to ignore that A.R.S. §13-4433(B) only applies after a "defendant" is charged with a crime and counsel has been retained. *See* Pet.24. Respondents' purported injury only arises *once there is a pending criminal proceeding* for which they have been retained. At least one Respondent admits that he does not seek to initiate contact with victims unrelated to his representation of criminal defense clients. *See, e.g.*, Dkt. 19-5 at ER797-98.

Respondents instead contend (at 3-4 & n.1) that they seek to contact victims "to pursue systemic policy objectives[.]" But Respondents remain free to do so as long as the victim contact does not occur on behalf of a client in connection with a pending criminal proceeding. Because a pending criminal proceeding is the *sine qua non* of the victim-contact restriction which Respondents here challenge, and the victim contact that would otherwise occur would be on behalf of Respondents' *charged* criminal clients, Respondents' claims in this action are intertwined with state-court parties and their requested relief will interfere with pending state-court criminal proceedings (but apparently not in a sufficient enough manner under *Green*).

Respondents attempt to downplay the interference their claims will cause and the resulting onslaught of new federal challenges regarding all manner of state-court criminal rules and limitations. They do so by claiming that the victim-contact

restriction—a limitation on how a criminal defendant may initiate communication with a victim—is different than discovery rules, evidentiary rulings, or page limitations, which also limit or regulate communication and speech. *See* BIO.19 n.9. Respondents admit, however, that "[t]here is no independent First Amendment right" involved with these examples and they all "appear to directly interfere, and thus would likely be barred by *Younger*." *See id.* Respondents make no attempt, however, to identify any principled difference between a regulation on obtaining discovery from a crime victim and any of the examples Respondents admit would result in abstention. That is because no principled distinction exists.

Respondents' admissions, therefore, demonstrate that the Ninth Circuit erred in refusing abstention based on a heightened standard. The Court should grant certiorari to ensure that federal courts do not become a forum for satellite litigation over state-court criminal rules and procedures, thereby preserving the principles of restraint and respect for state sovereignty underpinning *Younger* abstention.

III. The Court's Review Is Warranted Now.

Respondents place undue weight (at 15-17) on the "interlocutory" nature of this petition, arguing that granting certiorari now would be "premature."[1] But their arguments ignore both the practical and

[1] Respondents do not contest the jurisdiction of this Court or of the Court of Appeals. *See* BIO.15 (acknowledging that "there is no absolute bar to review" here). The district court issued a "final decision," which the Respondents appealed pursuant to 28 U.S.C. §1291. *See Ariz. Attorneys for Criminal Justice v. Brnovich*, No. 20-16293, Dkt. 18 at 3 (9th Cir. Sept. 30, 2020).

procedural considerations that make now the ideal time to grant certiorari.

Despite the now-interlocutory nature of this case, *Younger* abstention needs no further development. If the Court grants certiorari now, and holds *Younger* abstention is warranted, the entire case will remain dismissed, making an ideal vehicle for resolving this important question. *See* Stephen M. Shapiro et al., Supreme Court Practice §4.18 (11th ed. 2019) ("In some instances, the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation."). This Court has exercised its discretion to grant certiorari in cases similarly postured, especially when, like here, the issue presented is "'fundamental to the further conduct of the case.'" *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *see also Middlesex Cnty.*, 457 U.S. at 429-30 (certiorari granted after district court dismissed based on *Younger* and Third Circuit reversed).

Respondents' primary citation is to *Mazurek v. Armstrong*, 520 U.S. 968 (1997), which involved the Court's review of a preliminary injunction decision. But the denial of a preliminary injunction motion is entirely different than the denial of a motion based on abstention.[2] Unlike a lower court decision denying a motion for preliminary injunction, which in most cases will not terminate further proceedings even if reversed, reversal of the Ninth Circuit on abstention grounds, reinstating the district court's final

[2] Notably, the Court *granted* certiorari in *Mazurek* to review even the preliminary injunction decision.

judgment dismissing the case, will resolve this case. This petition, therefore, presents a far more compelling case for certiorari than cases where the lower courts have denied a preliminary injunction.

Denying certiorari along the lines Respondents suggest, thereby requiring Petitioners to litigate the merits of Respondents' claims (including any appeal), defeats the very purpose of abstention and the interests underlying it. By then, the damage is done.

CONCLUSION

The petition for writ of certiorari should be granted.

April 5, 2022

Respectfully submitted,

MARK BRNOVICH
Attorney General of Arizona

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

BRUNN W. ROYSDEN III
Solicitor General
MICHAEL S. CATLETT
Deputy Solicitor General
Counsel of Record
KATE B. SAWYER
Assistant Solicitor General
KATHERINE JESSEN
Assistant Attorney General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-3333
michael.catlett@azag.gov

Counsel for Petitioner Mark Brnovich

ERYN M. MCCARTHY
NANCY M. BONNELL
Assistant Attorneys General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-7902
nancy.bonnell@azag.gov

Counsel for Petitioner Heston Silbert