No.

IN THE

Supreme Court of the United States

APPLIED UNDERWRITERS, INC.;
APPLIED RISK SERVICES, INC.,
Petitioners,

v.

RICARDO LARA, COMMISSIONER, CALIFORNIA DEPARTMENT OF INSURANCE, ET AL.,
Respondents.

&

CALIFORNIA INSURANCE COMPANY,
Petitioner,

v.

RICARDO LARA, COMMISSIONER, CALIFORNIA DEPARTMENT OF INSURANCE, 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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QUESTIONS PRESENTED

"[W]hen one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*." *Marshall v. Marshall*, 547 U.S. 293, 311 (2006). This judge-made jurisdictional limitation, often called the prior exclusive jurisdiction doctrine, reflects a practical concern that two "courts cannot possess or control the same thing at the same time." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 235 (1922). The doctrine "precludes federal courts from endeavoring to dispose of property" in the custody of a state court. *Marshall*, 547 U.S. at 312.

The Ninth Circuit applied the prior exclusive jurisdiction doctrine to bar *in personam* constitutional claims against state executive officials under 42 U.S.C. § 1983 based on its conclusion that the "gravamen" of the claims was "inherently *in rem*," without any determination that any, much less all, of the requested relief would require the district court to possess or control any property in the custody of the state court.

Further, in holding that the doctrine barred Petitioners' section 1983 claims, the Ninth Circuit grafted the exception for "bad faith" applicable to cases of abstention under *Younger v. Harris*, 401 U.S. 37 (1971), onto the prior exclusive jurisdiction doctrine. In so doing, the court applied a standard for evaluating that exception's applicability that conflicts with the standard applied by multiple circuits. The questions presented are:

1. Does the prior exclusive jurisdiction doctrine

require a federal court to abstain in an action against state executive officers under 42 U.S.C. § 1983 for constitutional violations that would not require the federal court to possess or control property in a state court's custody?

2. May civil rights litigants establish the "bad-faith" exception to abstention by showing that a civil proceeding was initiated in retaliation for constitutionally protected activity, as held by the Second, Fifth, Seventh, and Eighth Circuits, or, as held by the Ninth Circuit in this case, does the exception require a showing that a proceeding was brought with no expectation of success and with the bad-faith cooperation of a state court?

PARTIES TO THE PROCEEDING

This application arises from two cases consolidated by the U.S. Court of Appeals for the Ninth Circuit.

In the first of the two consolidated cases, the Petitioners are Applied Underwriters, Inc., a Nebraska corporation, and Applied Risk Services, Inc., a Nebraska corporation. Petitioners were the plaintiffs in the U.S. District Court for the Eastern District of California and appellants in the U.S. Court of Appeals for the Ninth Circuit.

Respondents are Ricardo Lara, Insurance Commissioner for the State of California, in his official capacity; Kenneth Schnoll, California Department of Insurance Deputy Commissioner, in his official capacity; and Bryant Henley, California Department of Insurance Deputy Commissioner, in his official capacity. Respondents were defendants in the U.S. District Court for the Eastern District of California and appellees in the U.S. Court of Appeals for the Ninth Circuit.

In the second of the two consolidated cases, the Petitioner is California Insurance Company, a New Mexico corporation. Petitioner was the plaintiff in the U.S. District Court for the Eastern District of California and appellant in the U.S. Court of Appeals for the Ninth Circuit.

Respondents are Ricardo Lara, Insurance Commissioner for the State of California, in his official capacity; Kenneth Schnoll, California Department of

Insurance Deputy Commissioner, in his official capacity; and Bryant Henley, California Department of Insurance Deputy Commissioner, in his official capacity. Respondents were defendants in the U.S. District Court for the Eastern District of California and appellees in the U.S. Court of Appeals for the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Applied Underwriters, Inc. is wholly owned by Bernard Acquisition Company, LLC, which is wholly owned by United Insurance Company. Petitioner Applied Risk Services, Inc. is wholly owned by Applied Underwriters, Inc. No publicly held company owns 10% or more of Bernard Acquisition Company, LLC or its parent.

Petitioner California Insurance Company, a New Mexico corporation, is owned by North American Casualty Co. through an indirect parent relationship. North American Casualty Co. is owned by AU Holding Company, Inc. No publicly held company owns 10% or more of North American Casualty Co., AU Holding Company, Inc., or their parents.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Eastern District of California:

- *Applied Underwriters, Inc. v. Lara*, No. 20-cv-02096 (E.D. Cal.), judgment entered March 31, 2021

- *California Insurance Company v. Lara*, No. 21-cv-00030 (E.D. Cal), judgment entered July 7, 2021
- *California Insurance Company v. Lara*, No. 21-16159 (9th Cir.), consolidated with No. 21-15679 (9th Cir.), and judgment entered June 10, 2022
- *Applied Underwriters, Inc. v. Lara*, No. 21-15679 (9th Cir.), judgment entered June 10, 2022

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

This petition seeks review of a decision of the Ninth Circuit Court of Appeals that conflicts with longstanding precedent of this Court and various circuit courts as to the scope of two judge-made rules governing when federal courts must abstain from adjudicating constitutional claims against state officials under 42 U.S.C. § 1983.

First, under the common law doctrine of prior exclusive jurisdiction, courts may not exercise *in rem* or *quasi in rem* jurisdiction over the same property, but they may consider *in personam* actions that relate to or establish rights to property in the custody of an *in rem* court. This Court has hewed consistently to this clear rule in applying the doctrine, and it further relied on it recently in *Marshall v. Marshall*, 547 U.S. 293 (2006), to clear up considerable confusion in the circuits as to the scope of the "probate exception" bar to federal jurisdiction. *Marshall* explained that a federal judgment does not "interfere with" state probate proceedings (requiring abstention under the probate exception) unless it also violates the prior exclusive jurisdiction doctrine by "endeavoring to dispose of property that is in the custody of a state probate court." *Id.* at 311-12.

The Ninth Circuit decision eliminates this clear line. Petitioners seek *in personam* declaratory and injunctive relief against officials of the California Department of Insurance ("CDI" or the "Commissioner"), an independent state agency, related to actions taken by those officials in connection with an insurance conservation proceeding they initiated in 2019 to take over California Insurance

Company ("CIC"), a fully solvent private company. State officials have operated CIC since that time. Through that control, they have sought—and continue to seek—state court approval of a "rehabilitation plan" that, among other things, would strip CIC of its California business (the vast majority of its business) and force CIC and Petitioners to abandon their rights in numerous lawsuits with private parties on terms far more disadvantageous than the private litigants could achieve even if successful.

The Ninth Circuit acknowledged that the relief Petitioners seek is *in personam* "in form." App.24. It further acknowledged that its unprecedented application of the doctrine of prior exclusive jurisdiction to bar constitutional claims brought under section 1983 against state officials was a "unique and important feature" of the case. App.26. Nonetheless, it concluded that the "gravamen" of the relief was *in rem* because Petitioners in part challenge the constitutionality of the state officials' actions in initiating and maintaining the conservatorship of CIC. App.24-25.

That decision is wrong under this Court's precedent, as well as precedent of the various circuits that have faithfully applied it. Under that precedent, what matters is whether the federal court is asked to seize or control property in an *in rem* court's possession or control. Where, as here, there is no such request and a federal judgment could only impact property in the state court's control through the res judicata effect of an *in personam* judgment, the prior exclusive jurisdiction rule does not apply. The Court therefore should grant review to prevent the Ninth

Circuit's vague new "gravamen" test from upsetting long-settled precedent, risking the confusion that this Court sought to redress in *Marshall* and violating this Court's guidance that federal courts should not expand judge-made rules beyond their established contours.

Second, to mitigate the potential impact of applying its overinclusive "gravamen" test to constitutional claims brought against state officials under 42 U.S.C. § 1983, the Ninth Circuit stitched onto that test exceptions that this Court has described in its *Younger* abstention cases. At the same time, the Ninth Circuit adopted a highly restrictive understanding of these exceptions that conflicts with and is more restrictive than decisions of at least six other circuits.

Under the Ninth Circuit's outlier standard, it is not "bad faith" for state officials to bring a proceeding in retaliation for the exercise of constitutionally protected rights. Instead, the litigant must show both that the proceeding was commenced with no expectation of success and with *judicial* bad faith. And such a showing must be maintained even where the state officials have the power to inflict vast deprivations of property rights based on minimal or nonexistent burdens of proof, and where targets of such deprivations have only minimal procedural protections. The Court therefore also should grant review to resolve this circuit split and correct the Ninth Circuit's unduly restrictive understanding of the "bad faith" exception.

OPINIONS BELOW

The Ninth Circuit opinion is reported at 37 F.4th 579 and reproduced at App.1-49. The opinions of the district court are reported at 530 F. Supp. 3d 914 and 547 F. Supp. 3d 908, and reproduced at App.50-92 and App.95-117.

JURISDICTION

The court of appeals entered judgment on June 10, 2022. On August 1, 2022, the court of appeals denied a timely petition for rehearing or rehearing en banc. App.120-121. On October 28, 2022, Justice Kagan granted an extension of time to file this petition until November 30, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Factual Background

This case arises from the Commissioner's unprecedented takeover of CIC, a fully solvent property and casualty insurance company with over $600 million in capital and surplus, through a conservatorship. App.6-13, 124, 192. That conservatorship has dragged on for more than three years. *See* App.153. Respondents have exploited vast powers afforded to state insurance officials and limited procedural safeguards for conserved companies under state law to take over CIC, attempt to extort its consent to a "rehabilitation plan," and when that effort failed, attempt to impose an even more oppressive plan. App.127-132, 155-157. That proposed plan would, among other things, force CIC to divest all of its California workers' compensation

business to an unrelated third party. App.158. Additionally, it would force the disadvantageous settlement of dozens of private lawsuits and arbitrations involving CIC and two of the Petitioners—Applied Underwriters, Inc. ("AUI") and Applied Risk Services ("ARS," together, "Applied"), which provide claim-processing, payroll, and agency services to CIC clients, App.135, 139-141, 158—for which valid defenses and valuable counterclaims exist and which are unrelated to the Commissioner's purported reasons for initiating the conservatorship. App.159-165.

While the stated basis for the conservatorship in the Commissioner's ex parte application was to stop an unapproved merger between CIC and a New Mexico corporation, Petitioner California Insurance Company ("CIC II"), its actual purpose was to use the powers of conservatorship to force CIC and Applied to settle ongoing private litigation with policyholders. App.164-165. That litigation relates to a workers' compensation insurance program called EquityComp® that allowed participant employers to share in underwriting profits if their claims loss experience was favorable. App.138. Having long been aware of the program's details and without raising any issue in five successive CDI regular examinations that included the program, CDI abruptly asserted in 2016 that part of EquityComp® was unapproved. App.138-139. The parties reached a settlement that (i) CIC would make minor changes to its offerings going forward, (ii) there was a "good faith dispute" as to the legality of the structure of EquityComp®, and (iii) disputes over its legality would be left to the courts. App.126, 139.

In subsequent litigation over EquityComp® propelled by plaintiffs' lawyers aligned with CDI, CIC and Applied successfully defended the program against attempts by certain policyholders to shirk their premium obligations. App.126-127, 139-140, 161-163. Dozens of these cases remain outstanding, and Petitioner AUI holds valuable claims and counterclaims in them. App.161, 274-275.

In January 2019, Steven Menzies, a minority shareholder in CIC's indirect parent company, sought to acquire the remaining shares from the majority shareholder, Berkshire Hathaway, Inc., in a deal that had to close by September 30, 2019 to avoid a $50 million break-up fee. App.141. Just under six months in advance of the scheduled closing date for the transaction, Menzies filed the requisite forms with the CDI. App.141. CDI is required to "approve or disapprove" transactions within 60 days. Cal. Ins. Code. § 1215.2(d). Dissatisfied with their past settlement and with CIC's and Applied's success in private litigation over the EquityComp® product but unable to show harm to any policyholders from the acquisition, CDI dragged its feet, refusing to approve or disapprove the transaction for over five months despite two comprehensive amended filings requested by CDI. App.125-127, 141-143. As a deadline approached that CDI knew would cost Menzies a $50 million break-up fee if the deal was not consummated, CDI stopped communicating with Menzies. App.143.

Unable to secure a decision from CDI, Menzies paid Berkshire Hathaway $10 million more to extend the closing for 10 more days in hope that CDI finally would respond. Despite numerous calls, they did not.

App.143-144. The acquisition had already obtained necessary approvals from regulators in Iowa, Texas, and Hawaii. App.143. Because CDI, by contrast, refused to act or communicate, CIC sought instead to merge with a New Mexico corporation, Petitioner CIC II, to obtain regulatory approval. App.144-145.

On October 9, 2019, three CDI officials, including counsel, attended a duly noticed hearing convened by New Mexico insurance regulators and advised that the merger between CIC and CIC II "presented no risks to California policyholders" and did not object to it. App.145. New Mexico then approved the merger and ordered CIC II to assume CIC's liabilities and maintain a deposit with CDI (at the time, $248 million) for its California policyholders. App.146.

Shortly thereafter CDI took the position that the merger would extinguish CIC's California Certificate of Authority because CIC did not receive CDI's *written* approval for the merger—notwithstanding CDI representatives' failure to object. App.147. CIC thus voluntarily agreed not to consummate the merger so it could resolve any concerns CDI now had with the merger. App.148, 150. In the weeks that followed, CIC repeatedly attempted to contact CDI to resolve those purported concerns, and again, despite promises to discuss them, CDI did not respond. App.147-149.

The reason why soon became apparent. On November 4, 2019, Commissioner applied ex parte in the Superior Court of California, County of San Mateo for an order to place CIC into conservatorship for non-

financial reasons, to appoint him as conservator, and to vest him with title to CIC's assets. App.149.

In his application, the Commissioner falsely represented to the Superior Court that a conservatorship was necessary to prevent CIC from "fleeing" California and leaving its California policyholders without a licensed insurer. App.149-151, 200. The application failed to inform the Court, among other things, that CIC was a top-performing insurer with a best-in-class claims-processing record in the state or that CIC had voluntarily refrained from completing the merger after CDI said it needed written approval and that CIC would lose its certificate of authority to transact business if it proceeded without it. App.149-151, 276.

The Superior Court signed the Commissioner's proposed Conservation Order that same day without modification, and without giving CIC notice or an opportunity be heard. App.149, 153-163, 169, 253-263. Even if there had been a hearing, CDI would not have been required to prove its case because the state law the Commissioner invoked requires courts to grant the application based on the Commissioner's mere representation that he made certain findings. *See Fin. Indem. Co. v. Superior Court*, 45 Cal. 2d 395, 401 (1955) ("In obtaining his original ex parte order, *the commissioner is not required to show* to the court *that the company was in fact in a hazardous condition*, but only that he, as a state officer, invested by legislative authority with the power, has so determined and found.") (emphasis in original) (internal quotation marks omitted); Cal. Ins. Code § 1011.

Nor does California law require state officials to ever *prove* a conservatorship was warranted. Instead, once a conservatorship is imposed, the burden of proof shifts to the insurance company to end it. Specifically, to vacate the conservatorship, the conserved company must show that "the ground" for the conservation order "does not exist or has been removed." Cal. Ins. Code § 1012. When CIC moved to vacate the conservatorship in August 2020, the Superior Court concluded without elaboration that CIC "failed to demonstrate that the conditions necessitating conservation no longer exist." App.267.

The Commissioner also did not have to prove anything to justify the drastic remedy of conservatorship. CIC pointed out that a conservatorship was unnecessary to stop the merger, App.150, and the CDI had never pursued a conservatorship where, as in this case, there was no threat to the solvency of the company but only a regulatory dispute. Again, however, the state court found that it was required by law to defer to the Commissioner, stating that "the choice of enforcement tool is the Commissioner's to make." App.268.

As a result, for the past three years, the Commissioner has controlled CIC, harming its and Petitioners' business relationships, goodwill, and profitability. App.154, 165-168, 234-238, 277. CDI has conditioned ending the conservatorship on implementation of a "rehabilitation plan" aimed not at the merger approval, which was the sole basis of the conservatorship, but rather at forcing resolution of the private litigation over the EquityComp® program on

unfavorable terms to Petitioners. App.125-127, 156-165.

CDI first threatened CIC and Applied with an "even worse" plan if they did not agree voluntarily to one that would bar AUI from pursuing its defenses or counterclaims in the private litigation. App.156-157, 180, 274. That second "even worse" plan was filed in October 2020 and was supported in part by a declaration from the lead plaintiffs' attorney in the private litigation. App.157, 223-224, 246. CDI's plan will force CIC and Applied to settle every claim over the EquityComp® program—not only in pending litigation but also for "claimants" who have not even filed suit—on more favorable terms to claimants than they could obtain even if successful. App.159-165, 197, 226, 273.

Moreover, the rehabilitation plan will force CIC to transfer and reinsure its entire "book of California business" for workers' compensation insurance to "another California-admitted insurer." App.158, 195. The loss of that business pursuant to the plan would cause Applied to incur approximately $100 million in lost profits through 2024. App.158, 277. Meanwhile, CIC II has remained unable to consummate the merger duly approved by New Mexico regulators and as the successor-in-interest to CIC, confronts both the harms from the conservatorship and the anticipated harms from the proposed plan. App.224-238.

B. Procedural Background

Following the October 20, 2020 filing of the rehabilitation plan, Petitioners AUI and ARS sued Respondents in the U.S. District Court for the Eastern

District of California. The complaint, as amended, alleged claims against Respondents under 42 U.S.C. § 1983 for violations of the Fourteenth Amendment Due Process Clause and Equal Protection Clause, Dormant Commerce Clause, Takings Clause, and First Amendment. App.169-184.

The amended complaint sought various forms of declaratory relief including declarations that Respondents' action violated various constitutional provisions. App.184-185. It also sought various forms of injunctive relief, including an order directing the Commissioner to withdraw the proposed rehabilitation plan and an order "directing the Commissioner to take all necessary steps to end CIC's conservatorship pursuant to California Insurance Code § 1012, and enjoining the Commissioner from continuing the conservation." App.184-185. On March 31, 2021, the district court dismissed the complaint based on the prior exclusive jurisdiction doctrine and abstention under *Younger v. Harris*, 401 U.S. 37 (1971). App.66, 92-93.

On January 6, 2021, Petitioner CIC II sued Respondents in the same court. That complaint, as amended, alleged claims against Respondents under 42 U.S.C. § 1983 for violations of the Dormant Commerce Clause, Fourteenth Amendment Due Process Clause, Takings Clause, and First Amendment. App.238-250. It likewise sought various forms of declaratory and injunctive relief against Respondents. App.250-251. On July 7, 2021, the district court dismissed this complaint on the same grounds. App.99, 116-117.

Petitioners timely appealed both decisions to the Ninth Circuit Court of Appeals, which consolidated the actions for argument and disposition. *See* App. 1-2.

The Ninth Circuit rejected the district court's application of *Younger* abstention on the grounds that an insurance conservatorship is not a civil enforcement proceeding "akin to a criminal prosecution." App.15-20. But the court affirmed dismissal under the prior exclusive jurisdiction doctrine, finding that both the state and federal proceedings were *in rem* or *quasi in rem* proceedings. App.26. In reaching this conclusion, the court did not conclude that the federal court would have to seize or control assets. It also recognized that the claims were *in personam* "in form" and that the fact that they were claims brought under 42 U.S.C. § 1983 was a "unique and important feature" of the case. App.26. Nonetheless, it found that the "gravamen of the complaint" was "ending the conservatorship's control over CIC I's assets," that this purported "gravamen" imparted "an inherently *in rem* nature to the federal actions," and that the federal actions thus could not proceed. App.24-26.

The Ninth Circuit recognized that its holding that "abstention under the prior exclusive jurisdiction rule can be proper even though the federal action asserts a 42 U.S.C. § 1983 claim," would permit abstention in cases where federal courts ought to intervene to protect important constitutional rights. App.29. The court therefore imported the "bad faith" exception applied in the context of cases where *Younger* abstention otherwise would apply. Then, in

conflict with nearly every other circuit to address the scope of that exception, it found that to constitute "bad faith" under *Younger* (and now the prior exclusive jurisdiction doctrine), the proceeding must be brought with no reasonable expectation of success—no matter how limited the showing state officials must make to be "successful," and even if it could be established that the proceeding itself was brought in retaliation for constitutionally protected activity. App.33. The court further held that where there is purported "judicial authorization," bad-faith cooperation of the state court, not just executive officials, must be shown. App.35.

Petitioners filed a petition for rehearing or rehearing en banc, which was denied. App.120-121. This timely appeal followed.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's "gravamen" test for deciding the applicability of the prior exclusive jurisdiction doctrine conflicts with this Court's precedent and would replace easily applied jurisdictional rules with confusion and uncertainty.

The Ninth Circuit's application of the prior exclusive jurisdiction doctrine in this case conflicts with (i) this Court's longstanding test for determining the doctrine's applicability, (ii) its closely related decision to cabin the scope of the "probate exception" to federal jurisdiction in *Marshall*, (iii) its recognition that 42 U.S.C. § 1983 is meant to guarantee a forum for federal civil rights violations; and (iv) its repeated admonition that judge-made abstention doctrines

should not be extended beyond established contours without congressional authorization.

A. The prior exclusive jurisdiction doctrine rests on a simple premise: two "courts cannot possess or control the same thing at the same time." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 235 (1922). Where "two suits are *in rem* or quasi *in rem*, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other." *Penn Gen. Cas. Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935). Where both actions are *in rem* or *quasi in rem*, the second court to obtain jurisdiction is the one that must yield. *Id.* at 196. It follows that a "federal court may not 'seize and control the property which is in the possession of the state court' nor interfere with the state court or its functions." *Fischer v. Am. United Ins. Co.*, 314 U.S. 549, 554 (1942) (quoting *Waterman v. Canal-Louisiana Bank & Tr. Co.*, 215 U.S. 33, 44 (1909)). "Short of that, however, the federal court may go." *Id.* at 554-55.

By contrast, "the prior exclusive jurisdiction doctrine does not generally apply to situations where one action is in rem and the other in personam" because the "adjudication of rights in personam simply does not impede the possession or control of the property required for maintenance of an in rem action." *Leopard Marine & Trading, Ltd. v. Easy St. Ltd.*, 896 F.3d 174, 192 (2d Cir. 2018). When a court renders an *in personam* judgment, "the effect of that judgment is to be determined by the application of the

principles of *res* []*judicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case." *Kline*, 260 U.S. at 230. For purposes of applying these principles, it does not matter whether the *in personam* proceeding is in federal court and the *in rem* proceeding in state court, *see, e.g.*, *Fischer*, 314 U.S. at 554-55; *Riehle v. Margolies*, 279 U.S. 218, 224 (1929), or vice versa, *see, e.g.*, *United States v. Klein*, 303 U.S. 276, 281 (1938).

This Court's test for applying the doctrine is thus simple and limited: it applies where the relief sought in a later-filed action required the court to seize or control property in the custody of another court. By contrast, where the judgment of the later-filed court could be *in personam* and would only impact a pending *in rem* action through res judicata, the doctrine does not apply.

In *Commonwealth Trust Co. v. Bradford*, 297 U.S. 613 (1936), for example, the Court held that the rule did not bar a district court from deciding a plaintiff's right to property controlled by a state court-appointed trustee. "Such proceedings are not in rem" because they "produced no interference with the trustee's possession, nor with the power of the [state] court to order distribution of assets." *Id.* at 619-20. Likewise, this Court held in *Riehle v. Margolies*, that where a court "directs distribution, and fixes the time and manner of distribution, it deals directly with the property," but a proceeding that "determines, or recognizes a prior determination of" rights in the property "does not deal directly with any of the

property" and "is strictly a proceeding *in personam*." 279 U.S. at 224.

These limitations on the doctrine's scope were critical to this Court's cabining of the scope of the "probate exception" in *Marshall*. *See* 547 U.S. at 310-12. Prior to *Marshall*, there was uncertainty in the circuits as to the scope of that exception, and in particular the meaning of language in prior decisions permitting federal courts to

> entertain suits 'in favor of creditors, legatees, and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not *interfere with the probate proceedings* or assume general jurisdiction of the probate or control of property in the custody of the state court.

Id. at 310 (emphasis added) (quoting *Markham v. Allen*, 326 U.S. 490, 494 (1946)).

Addressing the view of some courts that the words blocked federal jurisdiction "over a range of matters well beyond probate of a will or administration of a decedent's estate," this Court explained that the interference language was merely "a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*." *Id.* at 311. Thus, the language "precludes federal courts from endeavoring *to dispose of property* that is in the custody of a state probate court" but "does not bar federal courts from adjudicating matters outside those confines and

otherwise within federal jurisdiction." *Id.* at 312 (emphasis added). This Court therefore incorporated the same bright-line understanding of the prior exclusive jurisdiction doctrine that the Court had long applied.

B. The Ninth Circuit decision conflicts with this precedent and undermines the clear rule it establishes. In this case, Petitioners seek only *in personam* declaratory and injunctive relief against state executive officials for violating Petitioners' constitutional rights by (i) initiating and maintaining the conservatorship and (ii) seeking to impose various conditions of "rehabilitation" such as forcing the settlement of lawsuits. None of the requested relief would require the district court to seize or control CIC's property. Nor do Petitioners request that the district court adjudicate ownership of CIC's assets against the world, let alone deliver them to Petitioners. App.184-185, 250-251.

Instead, a favorable declaratory judgment that, for example, the conservatorship or particular forms of rehabilitation sought were unconstitutionally retaliatory would impact the state court proceeding only by the state court's determination to give it res judicata effect. It therefore would not have required "that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and grant the relief sought," *Penn Gen.*, 294 U.S. at 195. Even an injunction ordering the Commissioner to cease his conduct and "take all necessary steps" to end the conservatorship—the most sweeping form of relief sought—would not have required the district court to control any CIC

property or attach any asset in the custody of the state court.

In applying its "gravamen" test to hold that the prior exclusive jurisdiction doctrine nonetheless barred federal jurisdiction, the Ninth Circuit ignored settled law and the doctrine's animating principle that two "courts cannot possess or control the same thing at the same time." *Kline*, 260 U.S. at 235. The court did not analyze how—or indeed, whether—the district court would need to "have possession or control of" CIC's assets "in order to proceed with the cause and to grant the relief sought." *Penn Gen.*, 294 U.S. at 195.

Further, the court acknowledged that, "[i]n form, the federal actions" brought by Petitioners "are *in personam* actions asserting claims under 42 U.S.C. § 1983 directed against certain state officials." App.24. It nonetheless held that the prior exclusive jurisdiction doctrine barred jurisdiction based on its assertion that the "gravamen" of the federal actions was "ending the conservatorship's control over CIC I's assets," which purportedly "impart[ed] an inherently *in rem* nature to the federal actions" that required dismissal. App.24-25; *see* App.26 (concluding the federal actions are "either *in rem* or *quasi in rem*").[1]

The lone support the Ninth Circuit cited for this "gravamen" test was its own earlier decision in *State Engineer of Nevada v. South Fork Band of Te-Moak Tribe of the Western Shoshone Indians of Nevada*, 339

[1] While not a ground for granting the petition, the Ninth Circuit also erred in treating the executive-driven state court conservation proceeding as *in rem*.

F.3d 804 (2003). *State Engineer* held that the prior exclusive jurisdiction doctrine barred a federal court from hearing a removed contempt action against a tribe for purportedly violating a state court decree allocating water rights. *Id.* at 811. Whereas the district court had abstained based on the *Colorado River* doctrine, the Ninth Circuit decided the proper analysis was instead to "look behind 'the form of the action' to 'the gravamen of the complaint and the nature of the right sued on.'" *Id.* at 810-811 (quoting *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1520 (9th Cir. 1985)). The court reasoned that because "the contempt action was brought to enforce a decree over a res," *id.* at 811, "it is the [parties'] interest[s] in the property that serve[] as the basis of the jurisdiction," *id.* (alteration in original) (quoting Black's Law Dictionary 1245 (6th ed. 1990)), and the action thus was *quasi in rem* and the prior exclusive jurisdiction doctrine applied.

Whatever the merits of its earlier decision in *State Engineer*, the Ninth Circuit's "gravamen" test as applied here conflicts with this Court's longstanding precedent by declining jurisdiction even without any showing that the federal court would need to exercise control over property in an earlier-filed state *in rem* proceeding. Such a test would be equally if not more "enigmatic" to apply as the "interference with proceedings" test that this Court explained in *Marshall* encompassed only the traditional prohibition on exercising jurisdiction over property in a state court's custody. *See Marshall*, 547 U.S. at 311-12. All manner of *in personam* lawsuits can have as their goal obtaining rights to property in another court's control or ultimate possession of that property.

But that goal does not matter for purposes of the prior exclusive jurisdiction doctrine so long as the federal court would not have to control or dispose of property in another court's custody.

The Ninth Circuit pointed to nothing in this Court's precedent to support its amorphous "gravamen" restriction on federal jurisdiction. The one decision it cited barred federal lawsuits by the United States that asked the court to order depositaries appointed by a state court to "pay over" to the United States, "as 'the sole and exclusive owner,' the entire funds in their hands." *United States v. Bank of New York & Tr. Co.*, 296 U.S. 463, 478 (1936). The case thus involved a type of relief that is not at issue here—an order transferring custody or control of property within the custody or control of another court. The absence of that kind of relief here meant that the Ninth Circuit should not have applied the prior exclusive jurisdiction doctrine.

Accordingly, the Court should grant certiorari to restore its clear, limited, and easily applied rule of prior exclusive jurisdiction. If the Ninth Circuit decision is not corrected, it will introduce a new and "enigmatic" judge-made test for denying federal jurisdiction and thereby reopen the door that this Court shut in *Marshall* when it rejected the expansive "interference" test for assessing applicability of the probate exception.

C. Review of the Ninth Circuit decision is additionally warranted because it involves the unprecedented application of the prior exclusive jurisdiction doctrine to bar a federal forum for the enforcement of constitutional rights under 42 U.S.C.

§ 1983. This Court has repeatedly emphasized that section 1983 "guarantees a federal forum for claims of unconstitutional treatment at the hands of state officials." *Pakdel v. City of San Francisco*, 141 S. Ct. 2226, 2230 (2021) (cleaned up) (quoting *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019)). Consistent with this guarantee, no appellate court until now has ever relied on the prior exclusive jurisdiction doctrine to bar a federal forum for federal constitutional claims against a state official.[2]

Even assuming that the narrow limitations on the guarantee that this Court has recognized include the judge-made rule against seizing property in state court custody, the Ninth Circuit's "gravamen" test would sweep far more broadly and invite state and local officials to seek to frustrate federal jurisdiction over all manner of constitutional claims that merely touch on such property.

The Ninth Circuit recognized the relationship between section 1983 and the prior exclusive jurisdiction doctrine as a "unique and important" feature of this case. App.26. It even acknowledged the perils of extending the doctrine by preemptively importing exceptions from *Younger* jurisprudence to mitigate its impact. *See* App.26-40. This type of doctrinal experimentation, however, runs directly counter to this Court's "dominant instruction" that

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[2] Courts have dismissed frivolous section 1983 claims brought against private parties in cases that otherwise involved paradigmatic applications of the prior exclusive jurisdiction doctrine. *See, e.g.*, *Dyno v. Dyno*, No. 20-3302, 2021 WL 3508252, at *2-3 (3d Cir. Aug. 10, 2021) (unpublished).

"even in the presence of state parallel proceedings, abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 81-82 (2013) (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1982)). "Jurisdiction existing, this Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Id.* at 77 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). For that reason, this Court has held repeatedly that courts should not extend judge-made abstention doctrines or exceptions to federal jurisdiction.[3] Where jurisdiction is not prohibited, the proper approach is not to create a new jurisdictional bar, stitched together from the spare parts of others. The proper approach is to exercise jurisdiction.

Review also is merited because the confusion created by the Ninth Circuit is not limited to one type of *in rem* proceeding or one type of constitutional abuse. Rather, it places a new, confusing, and unnecessary hurdle in front of litigants challenging the myriad ways states can abuse constitutional property rights. For example, this Court recently

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[3] *Sprint*, 571 U.S. at 79, 82 (limiting *Younger* abstention to three narrow categories of proceedings and cabining the category of "civil enforcement proceedings"); *Marshall*, 547 U.S. at 299-300 (rejecting the Ninth Circuit's extension of the "probate exception" to federal jurisdiction to "any 'probate related matter'"); *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (limiting the "domestic relations exception" to "the issuance of a divorce, alimony, or child custody decree,"); *Markham*, 326 U.S. at 495 (rejecting application of the probate exception when federal judgment concerned only distribution of estate assets).

recognized very serious concerns about abuses in some of the most common *in rem* proceedings in this country—state civil asset forfeitures. *See Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) ("Indiana argues that the Excessive Fines Clause cannot be incorporated if it applies to civil *in rem* forfeitures. We disagree."). Challenges to the constitutionality of state forfeiture procedures are ongoing, including in cases with parallel state proceedings. *See, e.g.*, *Sparger-Withers v. Taylor*, No. 21-cv-02824 (D. Ind.) (class action under section 1983 challenging Indiana's civil forfeiture practices). Whatever the substantive merits of those challenges and the applicability of other doctrines, layering of an overinclusive "gravamen" test on top of section 1983 claims seeking *in personam* relief would sow confusion and potentially prevent federal courts from considering meritorious challenges to state forfeiture abuses.

II. The Court should grant certiorari to resolve a circuit split within the Ninth Circuit and between the Ninth and the Second, Third, Fourth, Sixth, and Seventh Circuits on the scope of the prior exclusive jurisdiction doctrine.

Unsurprisingly—given its inconsistency with this Court's precedent—the Ninth Circuit decision conflicts with the precedent of other courts of appeals, including an earlier Ninth Circuit decision that the court in this case ignored despite Petitioners' reliance on it. Whereas other courts look to the traditionally applied indicia for determining whether a proceeding is *in rem*, the Ninth Circuit is the only court of appeals to make jurisdiction turn on an amorphous

characterization of a lawsuit's "gravamen" rather than examination of the specific relief the court would have to order.

A. The Ninth Circuit decision in this case first conflicts with its earlier decision in *Goncalves ex rel. Goncalves v. Rady Children's Hospital San Diego*, 865 F.3d 1237 (9th Cir. 2017). In that case, the court properly determined that a subrogation action by insurers seeking a lien on a medical malpractice settlement in a state court's control was not *in rem* and thus did not implicate the prior exclusive jurisdiction doctrine. *Id.* at 1254-55. Despite the fact that the requested lien in the case likely would have affected the ultimate disposition of the property, and the fact that the insurers' goal was to secure rights to property that was part of a settlement administered by the state court, the Ninth Circuit recognized that the insurers were "not asking the district court to take any of the settlement funds from the state court's control . . . , [n]or would the district court's determination necessarily involve a disturbance of possession or control of the settlement." *Id.* at 1254. The court thus concluded that the action sought "only a determination of [] rights" and thus was "an *in personam* action, not an action *in rem* or *quasi in rem*." *Id.* at 1255.

That decision conflicts with the Ninth Circuit decision in this case, which held that the prior exclusive jurisdiction doctrine barred jurisdiction because the panel concluded that one of the Petitioners' goals was the end of the state court conservation proceedings. App.24-25. As reflected in *Goncalves* and as further explained above, that

approach was incorrect. The application of the prior exclusive jurisdiction doctrine turns on the relief the federal court would be required to order and whether it would require conflicting possession or control over property. Where it would not and where instead any impact would occur only via the state court's decision to give the federal *in personam* judgment res judicata effect, the doctrine does not apply.

B. The Ninth Circuit's "gravamen" test also conflicts with its sister circuits' application of the prior exclusive jurisdiction doctrine. Other circuits conclude that the relevant question for applying the prior exclusive jurisdiction doctrine is whether the requested relief requires the federal court to seize or control the property at issue, or to adjudicate its ownership against the world. Thus, in *Leopard Marine & Trading, Ltd. v. Easy Street Ltd.*, the Second Circuit declined to apply the prior exclusive jurisdiction doctrine to the plaintiff's request for a declaration that laches had extinguished a lien on property in the custody of a foreign court. 896 F.3d at 193. As the court explained, "Despite its similarity to an *in rem* proceeding," the action "did not require" the court "to keep custody over any property, either in actuality or constructively," and "thus posed no challenge to the foreign court's possession of the res." *Id.* "[A]n action *in personam*" that "merely adjudicates *rights* in the res" does "not impair the [foreign] court's possession of the res or its authority over it" and "thus does not create an exceptional circumstance that would permit abstention" under the prior exclusive jurisdiction doctrine. *Id.*

Similarly, while affirming dismissal of claims for disgorgement of property in state court custody, the Second Circuit in *Lefkowitz v. Bank of New York*, 528 F.3d 102 (2d Cir. 2007), held that the probate exception did not bar *in personam* claims for breach of fiduciary duty against the executor of an estate. *Id.* at 107-08. Relying simultaneously on *Marshall* and this Court's decision applying the prior exclusive jurisdiction doctrine in *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939), the court explained that "where exercise of federal jurisdiction will result in a judgment that does not dispose of property in the custody of a state probate court, *even though the judgment may be intertwined with and binding on those state proceedings, the federal courts retain their jurisdiction*." *Lefkowitz*, 528 F.3d at 108 (emphasis added). The court thus appropriately separated claims based on their associated relief, dismissing only those that necessarily would dispose of property while remanding those that would not. *See id.* at 107-08; *see also Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Old Sec. Life Ins. Co.*, 600 F.2d 671, 675 n.7 (7th Cir. 1979) ("The district court is fully capable of preventing inappropriate conversion of the suit to a proceeding truly *in rem*.").

In similarly relying on *Marshall*, the Fourth Circuit concluded in *Lee Graham Shopping Center, LLC v. Estate of Kirsch*, 777 F.3d 678 (4th Cir. 2015), that the probate exception did not "not preclude federal jurisdiction" over a request for declaratory judgment even though it could affect future distributions of property because it would "not order a distribution of property out of the assets of" the estate. *Id.* at 681. It is insufficient, the court explained, that

a federal judgment "merely impacts a state court's" probating or annulling of a will, administration of an estate, or disposition of property in its custody where the federal court is not called upon to perform one of those tasks. *Id.*

Applications of the prior exclusive jurisdiction doctrine in other circuits likewise are not based on an amorphous "gravamen" test, but the presence of the traditionally applied criteria—*i.e.*, whether the action would require the federal court to seize or control property or adjudicate its ownership against the world. In *Cartwright v. Garner*, 751 F.3d 752 (6th Cir. 2014), for example, the court applied the doctrine to bar a federal action to recover trust assets in a state court's custody because if the action were successful "the [district] court would be required to exercise some control over the defendant partnerships and the trusts in order to effectuate that remedy." *Id.* at 762; *see also Three Keys Ltd. v. SR Util. Holding Co.*, 540 F.3d 220, 229 (3d Cir. 2008) (barring federal action because relief would "dispose of Estate property under the jurisdiction of the Orphans' Court").

Likewise, the Seventh Circuit explained that both "*[q]uasi in rem* as well as *in rem* actions are subject to the rule," because "in each 'the court or its officer [must] have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought.'" *United States v. $79,123.49 in U.S. Cash & Currency*, 830 F.2d 94, 97 (7th Cir. 1987) (quoting *Penn Gen.,* 294 U.S. at 195). It further explained, as this Court has consistently, that the "logical and practical difficulty of two courts *simultaneously vying for possession or*

control of the same property is the key." *Id.* (emphasis added).

III. The Ninth Circuit decision conflicts with multiple other circuits on the standard for establishing the requirements of the "bad faith" exception to *Younger* abstention.

In concluding that the prior exclusive jurisdiction doctrine could bar section 1983 claims, the Ninth Circuit evaluated the applicability of the "'bad faith' and 'irreparable harm' exceptions" that are applied in cases involving *Younger* abstention. App.33. Because the standard the court applied is incorrect and conflicts with the standard of multiple other circuits, the Court should grant certiorari to resolve the conflict.

Petitioners argued that the "bad faith" exception applied because the proceeding was brought in retaliation for exercising their constitutional rights. Specifically, Petitioners' amended complaints include detailed allegations that Respondents sought to deny Petitioners their First Amendment right of access to the courts by taking over CIC I to force Petitioners and CIC I to settle unrelated private litigation on disadvantageous terms that were far more favorable than the individual litigants (whose lawyers are working with CDI officials) otherwise could have secured. The conservatorship both offered the only available vehicle to do so and was ideally suited for the purpose because of (i) the vast powers it conferred on the Commissioner to take over CIC and (ii) the limited procedural protections and vast judicial deference owed to the Commissioner's decisions under the state conservatorship statute.

The Ninth Circuit applied a far more demanding standard in this case. Under that standard it is not enough to show that a proceeding was initiated to retaliate for the exercise of constitutional rights. Instead, under the Ninth Circuit's new test, litigants must meet two requirements: First, they must show that a proceeding is brought with no objectively reasonable expectation of success. App.33. Second, where there is "judicial authorization" of the proceeding (regardless of the level of deference owed by the state court), the bad-faith cooperation of the state court must be shown. App.35. (stating that where there has been "repeated judicial authorization," Appellants "must allege that the *state court itself* is part of the Commissioner's bad faith scheme") (emphasis in original). As discussed below, this standard conflicts with decisions of at least six other circuits. The Court therefore should grant certiorari to clarify the scope of *Younger*'s "bad faith" exception and to resolve the conflict in the circuits as to its scope.

A. The exceptions the Ninth Circuit grafted onto the prior exclusive jurisdiction doctrine were first articulated in the context of *Younger* abstention. The Ninth Circuit did not suggest that the rule applies differently in the prior exclusive jurisdiction context and instead made clear that it understood itself to be construing the exceptions as they apply in *Younger* cases.

Younger abstention rests on the principle that "courts of equity should not act" to "restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparabl[e] injury

if denied equitable relief." *Sprint*, 571 U.S. at 77 (quoting *Younger*, 401 U.S. at 43–44). Courts subsequently expanded *Younger* and subsequent cases to bar interference with a wider variety of state civil proceedings, but this Court halted that expansion in *Sprint*. *See id.* at 73, 78-80, 82 (holding that *Younger* extends "no further" than three narrow categories of proceedings: (1) "state criminal prosecutions," (2) "civil enforcement proceedings" that are "akin" to such prosecutions, and (3) "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions").

Even as the Court recognized federal courts ordinarily should not enjoin criminal proceedings "brought lawfully and in good faith" based on facial challenges to the underlying statutes, *Younger*, 401 U.S. at 49, it also recognized that intervention might be warranted in certain circumstances, including where a proceeding is brought in "bad faith" or for "harassment." *See id.* at 49-50, 53; *see also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975) (*Younger* does not require abstention when "the state proceeding is motivated by a desire to harass or is conducted in bad faith"). "In such circumstances the reasons of policy for deferring to state adjudication are outweighed by the injury flowing from the very bringing of the state proceedings, by the perversion of the very process that is supposed to provide vindication, and by the need for speedy and effective action to protect federal rights." *Younger*, 401 U.S. at 56 (Stewart, J. concurring).

B. The Ninth Circuit's test conflicts with the standards applied by multiple other circuits, which encompass three different approaches.

Four have adopted the standard advocated by Petitioners—*i.e.*, that state officials have acted in "bad faith" where they bring a proceeding in retaliation for the exercise of constitutionally protected rights. *See, e.g.*, *Cullen v. Fliegner*, 18 F.3d 96, 103–04 (2d Cir. 1994) (abstention improper in cases of retaliatory motive "because a state cannot have a legitimate interest in discouraging the exercise of constitutional rights, or, equally, in continuing actions otherwise brought in bad faith"); *Bishop v. State Bar of Texas*, 736 F.2d 292, 294 (5th Cir. 1984) (abstention improper "when a state commences a prosecution or proceeding to retaliate for or to deter constitutionally protected conduct"); *Collins v. Cty. of Kendall*, 807 F.2d 95, 98 (7th Cir. 1986) (considering only whether state prosecution "was brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights" without any requirement for a lack of legitimate purpose or hope for success) (quotation marks omitted); *Lewellen v. Raff*, 843 F.2d 1103, 1109–10 (8th Cir. 1988) (holding that a proceeding that "was brought in retaliation for or to discourage the exercise of constitutional rights will justify an injunction regardless of whether valid convictions conceivably could be obtained") (cleaned up).

Consistent with the first element of the Ninth Circuit's test, a plaintiff in the Third Circuit must show there is no hope of success as a distinct element in addition to a retaliatory motive. *See Williams v.*

Red Bank Bd. of Educ., 662 F.2d 1008, 1022 n.14 (3d Cir. 1981) (holding that state prosecutions must be brought "with(out) any expectation of securing a valid conviction"). It is unclear whether the Third Circuit would also require a showing of judicial complicity.

Finally, the Tenth Circuit has taken a middle-ground approach, holding that a plaintiff need only show "retaliation was a major motivating factor and played a dominant role in the decision to prosecute." At that point, the burden passes to the defendant "to rebut the presumption of bad faith by offering 'legitimate, articulable, objective reasons'" to justify the prosecution. *Phelps v. Hamilton*, 59 F.3d 1058, 1065-66 (10th Cir. 1995).

Recent district court decisions applying the distinct standards of the circuits in which they are located confirm the importance of the Court resolving this circuit split. District courts in the Second, Fifth, Seventh, and Eighth Circuits have applied the rule that it is bad faith to institute a proceeding to retaliate for the exercise of constitutional rights regardless of any expectation of success. *See, e.g.*, *Frampton v. City of Baton Rouge/Par. of E. Baton Rouge*, No. 21-CV-362, 2022 WL 90238, at *25, *46 (M.D. La. Jan. 7, 2022) (applying the bad faith exception and rejecting contention that the exception "should apply only where the state official proceeds 'without hope of obtaining a valid conviction'"); *Marohn v. Minnesota Bd. of Architecture, Eng'g, Land Surveying, Landscape, Architecture, Geoscience, & Interior Design*, No. 21-CV-1241, 2021 WL 5868194, at *4 (D. Minn. Dec. 10, 2021) ("Where the action was brought in retaliation for the exercise of a constitutional right,

abstention is not appropriate even if a court could validly rule in the State's favor."); *Stagliano v. Herkimer Cent. Sch. Dist.*, 151 F. Supp. 3d 264, 270-72 (N.D.N.Y. 2015) (applying exception where proceeding was brought in retaliation for federally protected conduct, with no requirement that the proceeding be brought without expectation of success); *Torres v. Frias*, 68 F. Supp. 2d 935, 939 (N.D. Ill. 1999) (applying the exception where "state prosecution 'was brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights.'"); *see also Trump v. James*, No. 21-CV-1352, 2022 WL 1718951, at *12 (N.D.N.Y. May 27, 2022) (finding the exception not met while holding that it requires a showing that "'the party bringing the state action must have no reasonable expectation of obtaining a favorable outcome' [] *or* that the proceeding 'has been brought to retaliate for or to deter constitutionally protected conduct' or otherwise 'for the purpose to harass'" (emphasis added)).

At the same time, district courts in the Ninth Circuit already have applied the restrictive rule that the Ninth Circuit applied in this case. *See Floyd v. San Jose Police Dep't*, No. 22-CV-00751, 2022 WL 2915704, at *3 (N.D. Cal. July 25, 2022) (citing this case for the heightened requirement that "bad faith might be shown where [a] state proceeding [is] brought with 'no legitimate purpose,' based on evidence of 'repeated harassment by enforcement authorities with no intention of securing a conclusive resolution'").

C. As its outlier status reflects, the Ninth Circuit's test also is far too restrictive. Where a

plaintiff alleges facts plausibly establishing that a proceeding is retaliatory, federal courts should not be required to abstain, whether under *Younger* or under the Ninth Circuit's undue expansion of the prior exclusive jurisdiction test.[4]

This is true for two primary reasons. *First*, as explained in cases cited in the prior subsection, it is the definition of "bad faith" for state executive officials to bring proceedings against citizens for the exercise of their constitutional rights, and states have no legitimate interest in maintaining such proceedings even if they can manufacture a pretext to initiate them. Therefore, there is no reason why a proceeding that itself was brought for retaliatory reasons should be insulated from the review of the federal courts, whether under *Younger* or under the Ninth Circuit's misconceived "gravamen" test.

Second, where a proceeding is retaliatory, the standard does not provide sufficient protection, particularly in civil proceedings that, as here, allow state executive officials to take advantage of favorable burdens of proof, afford limited procedural protections to private litigants, and require state courts to afford deference to state officials both in initiating and maintaining such a conservatorship and in their choice of remedy. A state official's expectation of

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[4] For criminal prosecutions, the standard for establishing bad faith effectively would be the same as the first (but not the second) element of the Ninth Circuit test. *See Hartman v. Moore*, 547 U.S. 250 (2006) (requiring a showing of absence of probable cause). As various courts (including the Ninth Circuit) recognize, however, that standard does not apply to retaliatory civil proceedings. *See CarePartners, LLC v. Lashway*, 545 F.3d 867, 877 n.7 (9th Cir. 2008).

success means little when they need only clear a minimal bar of proof to inflict vast constitutional deprivations for retaliatory purposes. As discussed above at pages 8-9, the California conservation law that the Commissioner invoked in this case illustrates the point in various ways, including the absence of any need to prove the basis for the conservatorship, the absence of need for a heightened showing to obtain the conservatorship, the shifting of the burden of proof to CIC to justify vacating it, and the deference to the Commissioner as to his choice of "rehabilitation" remedy.

The result here is that state officials, insulated from federal court review, have taken over and run a thriving private insurance company for more than three years. Further, they have used that great power to seek draconian and unjustifiable remedies that, even if they are rejected by the state court (as they should be), will not end the conservatorship but rather will still leave the Commissioner in indefinite charge of the company and its assets.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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