24-586

IN THE

Supreme Court of the United States

PEYMAN ROSHAN,
Petitioner,

v.

MELANIE LAWRENCE, in her official capacity as Chief Trial Counsel, and in her personal capacity; OFFICE OF CHIEF TRIAL COUNSEL,
Respondents,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Peyman Roshan presents in this petition the following questions:

1. At what point or points in time should federal courts analyze the factors for application of *Younger* abstention? There are at least six views expressed in the case law, five of which are present in Ninth Circuit case law:

   a. Federal courts only look at the time the complaint is filed, a view set out in the Ninth Circuit's en banc authority and many other cases.
   b. Federal courts look at the time the complaint is filed and perform a second check, as accepted in some Ninth Circuit case law, the panel in this appeal, and this Court. *Polykoff v. Collins,* 816 F.2d 1326, 1332 (9th Cir. 187); quoting *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 238 (1984).
   c. Federal courts look at the state proceedings at the time of the district court hearing and separately upon federal appellate review, as the majority held in *Duke v. Gastelo,* 64 F.4th 1088, 1096 (9th Cir. 2023).
   d. Federal courts look at matters as the case progresses, in the same way constitutional standing and mootness are evaluated, which is the position of the Appellants, the Eighth Circuit, the Tenth Circuit, and arguably this Court in *Middlesex, supra*;
   e. Federal courts look at the time the complaint is filed and matters before, as advocated by

Judge Bumatay in his dissent in *Duke*, *supra*, and held by the Fourth Circuit;

f. Federal court looks at the situation upon remand from the Court of Appeal, as the Ninth Circuit panel decided in the unpublished decision *Big Sky Scientific LLC, v. Bennetts,* Case No. 19-35138 (9th Cir. Sept. 4, 2019).

2. Given that *Younger* abstention's application to civil cases was premised on the availability of Supreme Court review of allegedly unconstitutional statutes which has since been eliminated and a view that 42 U.S.C. §1983 does not guarantee a federal forum for constitutional claims against state action that is now rejected, should *Younger* abstention's application to civil cases be eliminated on grounds that it violates equal protection and access to the Courts?

Roshan also joins in a request for this Court to address the following issues argued in the accompanying petition for certiorari from the same decision by Cyrus Sanai:

1. Does the endorsement by some Courts of Appeals of raising *Younger* abstention sua sponte at the District Court or Court of Appeals violate the party presentation principle and is thus improper?

2. Did the Court of Appeals err when it found that *Younger* abstention applied without addressing the additional requirement of determining whether the California attorney discipline proceedings fall into one of the *NOPSI* categories, given that after the

Ninth Circuit Court of Appeals found that California State Bar attorney discipline proceedings meet the *Middlesex* factors in *Hirsh v. Justices of Supreme Ct. of Cal.*, 67 F.3d 708, 712 (9th Cir. 1995) (per curiam) (citing *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)), and so are protected by *Younger* abstention, the California Supreme Court held in *In re Rose*, 22 Cal.4th 430, 440 (2000) that such proceedings are not civil enforcement proceedings nor criminal proceedings, thus avoiding the California Constitution's requirement that the Court hear oral argument on all civil and criminal cases before it? *See* .

3. Did the Court of Appeal err in holding that the *Younger* abstention requirement of a fair opportunity to raise federal claims is ignored if the federal court does not think the federal constitutional argument is meritorious on a pre-emptive basis?

PARTIES TO THE CASE

This petition is in respect of four federal actions with two different plaintiffs and two different sets of Defendants. The four actions were consolidated for hearing and decision, though they were litigated and briefed separately.

The plaintiff appellant and petitioner is Peyman Roshan, an individual.

The Defendants in this action are California State Bar Chief Trial Counsel Melanie Lawrence and the State Bar's Office of Chief Trial Counsel, who are *Ex Parte Young* defendants on behalf of the California

State Bar and in Lawrence's case the individual defendant. She has been succeeded in her official capacity by George Cardona.

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The lead question presented is a long-established and intractable conflict between the Circuit Courts of Appeal and within the Ninth Circuit regarding the point or points in time at which a federal court is required to determine when the requirements of *Younger* abstention are, or are not, met.

There are three positions on this question which have won a substantial amount of appellate support. The first position is endorsed by the Ninth Circuit in its en banc decision of *Gilbertson v. Albright*, 381 F.3d 965, 969 n.4 (9th Cir. 2004)(e banc); *see also Potrero Hills Landfill, Inc. v. Cty. of Solano*, 657 F.3d 876, 881 n.6 (9th Cir. 2011); *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014). The First and Eleventh Circuits agree. *Maymó-Meléndez v. Álvarez-Ramírez*, 364 F.3d 27, 32 (1st Cir. 2004)(noting that "the time at which the *Younger* test is applied" is the filing of the federal complaint); *Bettencourt v. Bd. of Registration in Medicine of Comm. of Mass.*, 904 F.2d 772, 777 (1st Cir. 1990)("In determining whether federal proceedings would interfere with ongoing state proceedings, the proper point of reference is the date plaintiff filed his federal complaint.").

The second position is derived from this Court's holding in *Doran v. Salem Inn, Inc.*, 422 U. S. 922, 929-931 (1975), which looks at when the federal proceeding is filed and then, if the state proceeding is filed later, when the state proceeding is filed. The circuits which adhere to this position are the Ninth Circuit, in this case, and the Sixth Circuit in *Zalman v. Armstrong*, 802 F.2d 199, 203-5 (6th Cir. 1986).

The third most endorsed position arises from this Court's opinion in *Middlesex County Ethics Comm. v.*

Garden State Bar Assn, 457 U.S. 423, 436-7 (1982)(when evaluating the opportunity-to-litigate *Younger* prong, there is "no reason to ignore this subsequent development" of a change in rules that allowed constitutional arguments to be made.) This is the position of the Fifth Circuit as articulated in . *Despain v. Johnston,* 731 F.2d 1171, 1177-8 (Fifth Cir. 1984).

The Eighth Circuit applied this rule in *Yamaha Motor Corp., USA v. Riney,* 21 F.3d 793 (8th Cir. 1993)(addressing state proceedings as they developed); *see also Fuller v. Ulland,* 76 F. 3d 957, 961 (8th Cir. 1996)(staying action on *Younger* grounds because state court's potential action in proceeding may eliminate possibility of interference); *Aaron v. Target Corp.,* 357 F.3d 768 (8th Cir.2004)("district court erred by concentrating on filing dates rather than by examining all the facts and context of the two actions").

The Tenth Circuit also adhered to the dynamic position. "Events in the state court proceeding occurring after the motions panel made its decision require us to find that *Younger* abstention is not applicable in this case." *Crown Point I v. Intermountain Rural Elec,* 319 F.3d 1211, 1215 (10th Cir. 2003) (reversing District Court's dismissal under *Younger* because the subsequent bar created by "[t]he [state] court in declin[ing] to consider Crown Point's due process defense prior to granting immediate possession on the grounds that Crown Point was collaterally estopped from raising the argument due to the District Court's decision on the merits in the federal action." *Id.* fn.2).

In this case and two consolidated Sanai appeals, both appellants win if the dynamic approach is used because the California Supreme Court attorney discipline proceedings ended before the Ninth Circuit heard the appeals, and unlike every other civil or criminal proceeding, California attorney discipline proceedings are not subject to reconsideration after the deadline for filing a petition for rehearing has passed and the case in closed. *See* App. E. Accordingly it was impossible for two of the four *Middlesex* factors to be deemed satisfied at the time the Ninth Circuit heard the appeal.

The Ninth Circuit panel in this case did not address the conflict in timing within Ninth Circuit case law or as between other circuits. Instead, it rejected the specific constitutional argument that Roshan wanted to raise after his attorney discipline proceedings ended, which was to argue that the later-discovered corruption of the State Bar's disciplinary personnel by disgraced California legal kingmaker Thomas Girardi raised constitutional issues under *Bracy v. Gramley,* 520 U.S. 899 (1994) and *Gacho v. Wills,* 986 F.3d 1067 (7th Cir. 2021). The panel concluded appellants had not "plausibly explained the relationship between Girardi and their State Bar proceedings." Appendix A at A-8. However, there is no requirement in any case, anywhere, that a party must show the merits of a constitutional argument that he shows he lacks an adequate opportunity to make in a State court in order to to defeat *Younger* abstention. All that has ever been required is that the federal plaintiff show he lacks an adequate opportunity to make the constitutional argument in State court.

ORDERS BELOW

The orders of the Ninth Circuit Court of Appeals affirming the District Court, denying the petitions for rehearing and rehearing en banc are set forth in Appendices, and denying the request to recall the mandate ("App.") A, C, D. The relevant order of the District Court is in App. B. The California Supreme Court's letter to Roshan confirming that there is no post-judgment proceedings to reopen or challenge an attorney disciplinary order is in App. E.

BASIS FOR JURISDICTION

The Ninth Circuit Court of Appeals issued its decisions affirming the orders of dismissal of the District Court and denying post judgment motions on January 20, 2024 App. A. Timely Petitions for Rehearing and Rehearing en Banc were denied on April 17, 2024. App. C. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1) and the jurisdiction of the federal courts under 28 U.S.C. §1331.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The relevant statutory and constitutional provisions and judicial rules are set forth in App. F. and include the Fourteenth Amendments to the United States Constitution U.S. Const., amend. XIV, and 42 U.S.C. §1983.

STATEMENT OF THE CASE

A. Procedural Background

1. The Complaint

On July 16, 2020, Plaintiff and Appellant Peyman Roshan ("Plaintiff", "Appellant" and "Petitioner") filed a class action complaint against Respondent Lawrence in her official capacity as Chief Trial Counsel of the California State Bar and personal capacity, and against the Office of Chief Trial Counsel ("OCTC""). ER 24. The complaint alleges the following facial constitutional inadequacies of the California State Bar's attorney disciplinary rules and practices:

(i) notice and opportunity to be heard were eliminated from its rules with a purpose to railroad innocent attorneys, ER 26-35;
(ii) no right to discovery, ER 35;
(iii) uncharged discipline is imposed, ER 35;
(iv) permission to add new charges up to date of trial, ER 32, 35;
(v) rejection of right to counsel, ER 32, 35;
(vi) arbitrary standards for granting continuances, ER 35;
(vii) deciding issues within the exclusive jurisdiction of federal courts, ER 32, 35;
(viii) not enforcing respondents' subpoenas of prosecution witnesses, ER 33; and,
(ix) not providing respondents power to subpoena witnesses and documents, ER 35.

On the July 16, 2020 date the federal complaint was filed, attorney discipline proceedings against Roshan were ongoing. Roshan filed a petition for review of the State Bar Court's recommended discipline on December 8, 2020. The petition for review reserved all federal and state constitutional claims. A suspension was imposed by the California Supreme Court on February 17, 2021. The reports of the press investigations into Thomas Girardi's corruption of the State Bar, discussed below, had not yet been made public, so no allegations regarding it were put in the Complaint.

2. The Rule 12(b) Dismissal Proceedings

On August 19, 2020, Defendants moved to dismiss based solely on *Younger* abstention, Dkt. No. 9, pp. 4-5. Defendants asserted "this Court must abstain from exercising its jurisdiction where four requirements are met: (1) a state-initiated proceeding is ongoing; (2) the proceeding implicates important state interests; (3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) the federal court action would enjoin the proceeding or have the practical effect of doing so." Dkt. No. 9, p. 9.

On October 14, 2020, Plaintiff opposed the motion to dismiss on the following grounds:

(i) "Defendants fail to properly characterize the doctrine. *Younger* abstention applies to a suit under 42 U.S.C. §1983 when the "*Middlesex*" factors are met: "Absent 'extraordinary circumstances' (including but not limited to bad faith and

harassment), abstention in favor of state judicial proceedings is required if the state proceedings (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims"." Dkt. No. 17, pp. 7-8 (citations omitted).

(ii) "Defendants...fail to acknowledge that the issue of whether adequate opportunity exists is a question of FACT." Dkt. No. 17, p. 8.

(iii) [I]ntervening California Supreme Court case law after *Hirsh*...demonstrates that the California Supreme Court does not recognize federal or state constitutional arguments as grounds for granting review and reversing State Bar Court Review Department Decisions." *Id.*

(iv) "[I]n the 29 years since the California Supreme Court established its current standards for granting review State Bar Court decisions, it has never granted review to consider a single federal constitutional issue; the one time it considered a state constitutional issue, it explicitly held that constitutional issues do not meet the standard for granting review under Cal. R. Ct. 954(a), now Cal.R.Ct. 9.16(a)." *Id.*

(v) "[T]he extraordinary circumstances doctrine applies, because the California Supreme Court rejects binding United States Supreme Court authority

> regarding attorney disciplinary matters." *Id.*

The District Court granted the motion to dismiss. App. B. A timely appeal was filed.

On January 17, 2022, while this appeal was pending, Roshan moved for relief from order or judgment under Fed. R. Civ. P. 60(b) based on both newly discovered evidence; and fraud, misrepresentation, or misconduct by opposing party. Dkt. No. 46. The motion cited to the *Los Angeles Times*' ("*Times*") post-judgment reporting of broad-based corruption of the State Bar by Thomas Girardi ("Girardi"); that since the California Supreme Court, contrary to United States Supreme Court and Federal Circuit authority, refused to overturn its opinion that a party cannot enter a trial court's rulings or in-court statements as evidence to prove bias under either state or federal law, there is a procedural barrier to raising issues of bias in the State Bar Court based on the State Bar court's rulings on disqualifications; and that State Bar Court Rules of Procedures do not allow raising constitutional claims regarding a State Bar court judge's bias or impartiality. Dkt. No. 46, p. 5. The motion cites two factual examples. Dkt. No. 46, p. 6.

For two decades the State Bar of California was corrupted by a group of lawyers, investigators and others centered around Girardi. Once a prince of the legal profession, a friend and lover of judges, and a political and legal power-broker, Girardi was recently convicted for a portion of this crimes stealing money from his clients and faces more charges.

The *Times* conducted series of exposés which demonstrated that the Office of Chief Trial Counsel

("OCTC"), State Bar Board of Trustees, and the State Bar Court had been corrupted by Girardi. As set out in the articles and additional filings made in the California Supreme Court, Girardi over two decades had successfully placed operatives and allies in the State Bar Board of Trustees (including at least one past President of the State Bar), the State Bar's management (including a State Bar Executive Director who was fired by the State Bar for misconduct and subjected to State Bar discipline), all of the prior Chief Trial Counsels with one partial exception, numerous State Bar investigators and lawyers (many who worked for Girardi while at the State Bar), and past and currently serving State Bar Court judges. *See* M. Hamilton, H. Ryan, "'Real Housewives' attorney Tom Girardi used cash and clout to forge powerful political connections", *Los Angeles Times,* March 9, 2021 ("Girardi pushed for other state court judges who did make it onto the federal bench, according to congressional records."); H. Ryan, M. Hamilton, "His job was to police bad lawyers. He became Tom Girardi's broker to L.A.'s rich, powerful", *Los Angeles Times*, July 13, 2021; H. Ryan, M. Hamilton, "State Bar probes whether insiders helped 'Real Housewives' star Tom Girardi avoid scrutiny", *Los Angeles Times,* January 24, 2022; H. Ryan, M. Hamilton, "Tom Girardi's epic corruption exposes the secretive world of private judges", *Los Angeles Times,* August 4, 2022; H. Ryan, M. Hamilton, "Tom Girardi gave millions to Democratic politicians. Was the money stolen from clients?", *Los Angeles Times,* August 4, 2022 (discussing how Girardi "poured millions into local, state and national races personally and lined up

additional donations from his wife, "Real Housewives of Beverly Hills" star Erika; the employees of his law firm; and the multitude of California trial lawyers who did business with him — or hoped to"); *see also* H. Keene, "Gavin Newsom has Longstanding Ties to Dem Power Player Facing Lawsuits, Investigations", *Fox News,* June 22, 2021 at www.foxnews.com/politics/gavin-newsom-ties-tom-girardi-lawsuit.

Girardi had close personal relationships with certain judges; so, for example and without limitation, in the case of former District Judge Tevrizian, he was a life-long friend; in the case of California Court of Appeal Justice Tricia Bigelow, he was her lover; and in the case of former L.A. Superior Court Judge Daniel J. Buckley, he was Buckley's legal idol. *See* K. Reich, "Judges' Role in Cruise Sponsored by Lawyer's Group Raises Questions", *Los Angeles Times*, October 6, 1997 at www.latimes.com/archives/la-xpm-1997-oct-06-me-39832-story.html; H. Ryan, M. Hamilton, "Erika Jayne Under Fire After Alleging Judge's Involvement with Tom Girardi" *Los Angeles Times,* December 22, 2020; J. Kloczko, "Dating Tom: My Lunch dates with Famous Lawyer Guy Tom Girardi," The Debaser, May 9, 2021 at debaser.substack.com/p/lunch-with-tom?s=r ("Tom looked across the room and saw Daniel Buckley, who was the assistant presiding judge of Los Angeles County Superior Court. What happened next was amazing. He pointed at the judge, wagged his finger "come here," and the judge ran up to Girardi like a groupie. I was introduced to him, and a few weeks later we had lunch. Tom hooked it up."); H. Ryan, M. Hamilton, "Erika Jayne Under

Fire After Alleging Judge's Involvement with Tom Girardi" *Los Angeles Times,* December 22, 2020; H. Ryan, M. Hamilton, "A Judge's Affair with Tom Girardi and a $300000 Wire", *Los Angeles Times,* August 31, 2022 (discussing Second Appellate District Judge Tricia Bigelow's adulterous affair with Girardi and the gifts and apparent bribes paid to her with stolen money from his clients).

In 2009, Girardi cemented his control over the State Bar when his "partner" Howard Miller became State Bar President by default when all other eligible candidates mysteriously refused to run. *See* K. Ofgang, "Howard Miller Poised to Became State Bar President", *Metropolitan News-Enterprise* at 1, May 4, 2009. Under Girardi's control, the State Bar sought to eliminate the ability of the persons it was permitted or encouraged to prosecute by Girardi and his allies (who included a large network of lawyers and corrupted California state court judges) by making defense of their cases nearly impossible. Thus if you were Girardi, a colleague of Girardi's, or a friend of one of Girardi's judicial allies, you virtually had a free pass for misconduct. However, if you were outside this magic circle, the State Bar would prosecute you with all important due process protections removed; and if one was before a Girardi-allied State Bar Court judge, all discretionary procedural and discovery rulings would go against that respondent.

The State Bar does not deny that its prosecutorial and adjudicative policies resulted in forgoing disciplinary actions against Girardi and his cabal. Indeed, one of its internal reviewers, engaged by the State Bar to advise on its policies, found that there

are *fifty* Girardis which the State Bar has refused to prosecute.

Girardi obtained this power through money stolen from his clients, which he liberally contributed to Democratic politicians such as former Governor Jerry Brown ("Brown") and current Governor Gavin Newsom ("Newsom") as well as all of the rising stars at the state and local levels. As a result, Brown and Newsom regularly appointed Girardi's hand-picked candidates, who were often informed of their appointments at dinners at Girardi's home attended by the governors. Current California Supreme Court Justices Joshua Groban ("Groban") and Meryl Jenkins ("Jenkins") were charged with accepting and evaluating Girardi's favored candidates, and were instrumental in Girardi's retention of power within California's legal system due to their genuflecting towards Girardi's candidate choices. Even those appointees to state judicial positions who were not selected by Girardi had to obtain his approval to advance.

On January 31, 2022, Defendants opposed the plaintiff's motion for relief stating "Plaintiff is simply attempting to dispute the Court's ruling on *Younger* abstention as to the issue of the adequacy of state court constitutional review...This is simply an attack on the basis for the judgment itself, and must be raised on appeal, not by FRCP 60 motion." Dkt. No. 47, p. 4.

On September 9, 2022, the District Court denied Roshan's Rule 60(b) motion.

Last year in the related Sanai discipline matters it was demonstrated for the first time that there exists an absolute procedural bar to raising

constitutional issues after the Supreme Court has issued its discipline order. *Sanai v. Lawrence*, Case No. 22-56215, Dkt. No 13-8 at 265. To demonstrate its applicability in his case, Roshan filed a petition and motion for relief that was rejected for filing. Ninth Circuit Case No. 21-15771. Dkt No. 118, App. E. This motion sought to present to the California Supreme Court the arguments regarding Girardi's corruption that Roshan had not been able to make because they had not been disclosed to him as exculpatory evidence by the State Bar.

B. Procedural Background

Roshan filed an appeal that was consolidated with three different pending appeals field by Cyrus Sanai. The Ninth Circuit affirmed the dismissals based on *Younger* abstention. App. A. On April 17, 2024, four petitions for rehearing which cross-referenced the others were denied. App. C.

WHY THE PETITION SHOULD BE GRANTED

A. *Younger* abstention.

In this Court's most recent discussion of *Younger* abstention, it explained that:

> In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction. Abstention is not in order simply because a pending state-court proceeding involves the same subject matter. *New Orleans Public Service, Inc. v. Council of City of New Orleans,* 491 U.S. 350, 373, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989) (*NOPSI*) ("[T]here is no doctrine that ... pendency of state judicial proceedings excludes the federal courts."). This Court has recognized, however, certain instances in which the prospect of undue interference with state proceedings counsels against federal relief. *See id.*, at 368, 109 S.Ct. 2506.
>
> *Younger* exemplifies one class of cases in which federal-court abstention is required. When there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution. This Court has extended *Younger* abstention to particular state civil proceedings that are akin to criminal prosecutions, *see Huffman v. Pursue, Ltd.,* 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), or that implicate a

> State's interest in enforcing the orders and judgments of its courts, *see Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987). We have cautioned, however, that federal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant, and should not "refus[e] to decide a case in deference to the States." *NOPSI*, 491 U.S., at 368, 109 S.Ct. 2506.
>
> Circumstances fitting within the *Younger* doctrine, we have stressed, are "exceptional"; they include, as catalogued in *NOPSI*, "state criminal prosecutions," "civil enforcement proceedings," and "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." 491 U.S., at 367-368, 109 S.Ct. 2506.

Sprint Communications Inc. v. Jacobs, 571 US 69 (2014).

B. The Courts of Appeal are Hopelessly Divided on the Question of When *Younger* Abstention is Evaluated And Only this Court can Establish a Uniform Rule.

1. Time in Evaluating *Younger* is Crucial.

"Timing is crucial to the applicability of *Younger*." *DeSpain*, *supra*. Within the Ninth Circuit and outside of it, the case law is completely inconsistent as to when and how often during the progress of federal litigation a court evaluates the factors for

applying *Younger* abstention. In this case the significance is that a complete temporal procedural bar to making constitutional arguments was proven during the appeal. *See* App. E.

2. The First View: Look at Time of Filing Only.

The first view is to look only at when the complaint was filed. This is the official position of the Ninth Circuit under the en banc decision of *Gilbertson, supra*; *see also Potrero Hills, supra*; *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund,* 754 F.3d 754, 759 (9th Cir. 2014); *Duke v. Gastelo,* 64 F.4th 1088, 1105 (9th Cir. 2023)(""the "critical date for purposes of deciding whether abstention principles apply is the date the federal action is filed." *Gilbertson v. Albright,* 381 F.3d 965, 969 n.4 (9th Cir. 2004).")(Bumatay, J, diss.).

The First and Eleventh Circuits agree. *Maymó-Meléndez v. Álvarez-Ramírez*, 364 F.3d 27, 32 (1st Cir. 2004)(noting that "the time at which the *Younger* test is applied" is the filing of the federal complaint); *Bettencourt v. Bd. of Registration in Medicine of Comm. of Mass.*, 904 F.2d 772, 777 (1st Cir. 1990)("In determining whether federal proceedings would interfere with ongoing state proceedings, the proper point of reference is the date plaintiff filed his federal complaint.") Interestingly enough, Judge Siler, who was on the panel in the underlying appeal, was also on a subsequent First Circuit panel that found there was tension between *Bettencourt* and this Court's precedent. *Guillemard-Ginorio v. Contreras-Gomez,* 585 F.3d 508, 521 (1st Cir. 2009).

The Eleventh Circuit agrees with *Gilbertson*. *Liedel v. Juvenile Court of Madison County*, 891 F.2d 1542, 1546 n. 6 (11th Cir. 1990) ("The date of filing of the federal complaint is the relevant date for purposes of determining *Younger's* applicability."); *Tokyo Gwinnett, LLC v. Gwinnett Cnty., Ga,* 940 F.3d 1254, 1268 (11th Cir. 2019) (holding, over objection of dissent, that subsequent events after filing may not be considered.)

3. The Second View: Take a Second Look When State Proceeding is Filed.

The second view is, if at the time of filing no state action pends, whether, when the state court action was later filed, the federal case has progressed beyond the embryonic stage. That was the standard employed in *Sanai v. Cardona*, the related case. *See* App. A at A-7 fn. 2. *Polykoff v. Collins,* 816 F.2d 1326, 1332 (9th Cir. 187); quoting *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 238 (1984). This position was established in *Doran v. Salem Inn, Inc.,* 422 U. S. 922, 929-931 (1975), and is not inconsistent with the third or fourth view if it is viewed as an application of the dynamic approach; however, it is inconsistent if these are treated as the only two times that the applicability of *Younger* is analyzed.

The Sixth Circuit also takes the approach of an initial look at the time of filing with a revisit when a state proceeding is subsequently initiated that qualifies for *Younger* protection. *Zalman v. Armstrong*, 802 F.2d 199, 203-5 (6th Cir. 1986).

4. The Third View: Look at the Situation When the District Court Reviews the Case and Then Look Again When the Appellate

Courts Review.

The third view is to look at matters at the time the District Court and Court of Appeals each independently review the case. "Properly framed, the third requirement for *Younger* abstention asks whether there remains an opportunity to litigate the federal claim in a state-court proceeding at the time the federal court is considering whether to abstain." *Duke, supra* at 1096. The third view, like the first, second, and fourth are all present in published Ninth Circuit case law.

5. The Fourth View: Evaluate Timing of *Younger's* Applicability Dynamically

The fourth view is the timing of *Younger's* applicability is evaluated dynamically at every point in the litigation, in the same manner as constitutional case and controversy for standing/mootness. This is the approach of the Fifth, Eighth and Ten Circuits.

The Fifth Circuit looks at the situation when the federal action is filed and then the state action is filed, but removes *Younger* protection once "the state appellate procedure has...been exhausted." This analysis arose from the Fifth Circuit's view that the purpose of *Younger* abstention is to give the state appeals courts first shot at deciding the case. Of course, if the plaintiff loses he is potentially subject to the preclusion trap if he litigated his constitutional issues; but if he wins on a state-law issue and receives a remand without the constitutional issues being decided, *Younger* terminates. *Despain, supra.*

The Eighth Circuit evaluates *Younger* dynamically as the litigations proceed. *Yamaha, supra,* (addressing state proceedings as they developed); *see also Fuller v. Ulland,* 76 F. 3d 957, 961 (8th Cir. 1996)(staying action on *Younger* grounds because state court's potential action in proceeding may eliminate possibility of interference); *Aaron v. Target Corp.,* 357 F.3d 768 (8th Cir.2004)("district court erred by concentrating on filing dates rather than by examining all the facts and context of the two actions"). *Aaron* is the strongest expression of the dynamic analysis in published case law.

The Tenth Circuit has also adhered to the dynamic position. "Events in the state court proceeding occurring after the motions panel made its decision require us to find that *Younger* abstention is not applicable in this case." *Crown Point I v. Intermountain Rural Elec,* 319 F.3d 1211, 1215 (10th Cir. 2003) (reversing District Court's dismissal under *Younger* because the subsequent bar created by "[t]he [state] court in declin[ing] to consider Crown Point's due process defense prior to granting immediate possession on the grounds that Crown Point was collaterally estopped from raising the argument due to the District Court's decision on the merits in the federal action." *Id.* fn.2). *Crown Point* is most similar to the situation in this case, as it involves a temporal procedural bar arising from prior proceedings.

This Court in one case has concurred that issues are evaluated dynamically as the action progresses. *Middlesex, supra,* 436-7 (1982) (when evaluating opportunity to litigate *Younger* prong, there is "no

reason to ignore this subsequent development" of a change in rules that allowed constitutional arguments to be made.). This appears to be the position of the Second Circuit as well, though the Second Circuit might also adhere to the third view. *Spargo v. N.Y. State Com'n, Judicial Conduct,* 351 F.3d 65, 77 (2d Cir. 2003)(*citing Middlesex*).

The third and fourth views are necessarily very similar. For purposes of Roshan's appeal or Sanai's appeals in *Sanai v. Lawrence* and *Sanai v. Kruger* consolidated to Roshan's, it makes no difference whether the third or fourth view is correct, but, as discussed below, treating *Younger* abstention like mootness avoids very strange results.

6. The Fifth View: *Younger* is Analyzed at the Time of Filing and Before.

The fifth view was articulated by Judge Bumatay in *Duke*, *supra.* He took the position that the time for evaluating *Younger* abstention is, at least for the opportunity to litigate federal claims, tested from the time of filing of the federal lawsuit and before. *Duke*, *supra*, at 1103-1106 (Bumatay, diss.). The Fourth Circuit agrees with Judge Bumatay. *See Laurel Sand & Gravel, Inc. v. Wilson,* 519 F. 3d 156 (4th Cir. 2008). Notably the Fourth Circuit's holding is explicitly premised on the Supreme Court's prior expressed view that:

> In *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 608, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), the Supreme Court stated that "a necessary concomitant of *Younger* is that a party must exhaust his state appellate remedies before seeking relief in the District Court." Thus, "a

> party may not procure federal intervention by terminating the state judicial process prematurely — forgoing the state appeal to attack the trial court's judgment in federal court." *New Orleans Pub. Serv.*, 491 U.S. at 369, 109 S.Ct. 2506; *see also Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986)(applying *Younger* to state administrative proceedings).

Laurel Sand & Gravel, supra at 166.

The Fourth Circuit's analysis is directly contrary to this Court's current view on exhaustion, as set out in *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019).

7. The Sixth View: *Younger* is Analyzed at the Time of Remanding or Some Future Event.

As discussed above, the Ninth Circuit's published precedent covers nearly every position. The Ninth's Circuit's unpublished anti-precedent sets out an additional position.

As discussed in the accompanying petition by Cyrus Sanai, the Ninth Circuit engages in the practice of creating anti-precedent: unpublished case law that conflicts with prior decisions of this Court or the Ninth Circuit but which constitute a body of shadow precedent that the Ninth Circuit adopts when its judges do not like the result that binding precedent dictates.

Ninth Circuit en banc law holds that *Younger* abstention is determined at the time of filing of the federal complaint. *Gilbertson*, *supra* at 69, holds that *Younger* abstention is determined at the time of

filing. Circuit Judge Hawkins, affirmed the *Gilbertson* approach in his opinion *Potrero Hills Landfill, supra*, at 881 n.6. Circuit Judge McKeown affirmed that *Gilbertson* sets the rule in her opinion in *Logan v. U.S. Bank N.A.,* 722 F.2d 1163, 1167 (2013)("the relevant date for evaluating abstention is the date the federal action is filed. *Gilbertson v. Albright,* 381 F.3d 965, 969 n. 4 (9th Cir.2004) (en banc)").

However, Judges Hawkins and McKeown, along with Judge Bybee (who signed *Gilbertson*) picked a different timing rule when they did not like the result in *Big Sky Scientific LLC, v. Bennetts,* Case No. 19-35138 (9th Cir. Sept. 4, 2019). Oral argument is available at www.ca9.uscourts.gov/media/video/?20190828/19-35138/. The case involved hemp owned by Big Sky that was being trucked in interstate commerce through Idaho that was confiscated for violating Idaho state anti-marijuana laws. The trucker was criminally charged. The forfeiture case was stayed pending the criminal case (as to which Big Sky was not a defendant) so Big Sky sued in federal court based on Commerce Clause and Farm Act pre-emption. The District Court held *Younger* abstention did not apply but denied a preliminary injunction, an order that Big Sky appealed to the Ninth Circuit.

The case is remarkable for several reasons. First, Judges McKeown and Hawkins state, in the year 2019, that they view *Younger* abstention as a matter for judicial discretion, whatever the facts may be, a position contrary to the controlling Ninth Circuit law. Oral Argument at 32:30. Second, this was a case where, at the time of filing, there was no way for

plaintiff Big Sky to make its constitutional arguments at that time in state court, as the district court correctly held that the adequate opportunity to make constitutional arguments did not apply where the state proceedings were stayed at the insistence of the state due to the pending criminal prosecution of the truck driver.

Judge Hawkins acknowledges this, then proceeds to bargain with the Idaho state lawyers starting at 33:30 to agree to lift the stay on the forfeiture proceedings and hold them before the criminal trial so that the panel could impose *Younger* abstention. All of this is done without the participation of Big Sky's attorney. After Judge Hawkins extracted the promises he sought sua sponte, Judge McKeown commented that

> I appreciate the representations. Let me just say this is highly unusual because when the district court made its decision not to abstain of course it was dealing with the record it had before it. And we understand that fast-forward record, not before this court other than your good-faith representations is not one the district court had. So I appreciate it, thank you.

Oral Argument at 36:00.

In the memorandum disposition of September 4, 2019, six days after oral argument, the panel wrote:

> We reverse the district court's decision not to apply *Younger* abstention. Our decision is based in part on (1) Defendants' counsels' representation at

> oral argument that Idaho will immediately move to lift the stay in the in rem forfeiture action, and (2) the assumption that, apart from any criminal proceedings, the Idaho District Court will proceed expeditiously with the in rem action, including Big Sky's challenge to Idaho's interpretation of the federal Agricultural Improvement Act of 2018 (known as the 2018 Farm Bill), and Big Sky's Commerce Clause claims. The panel will retain jurisdiction over further proceedings in this matter.

Big Sky Scientific LL, v. Bennett, supra.

Big Sky is anti-precedent in action. It shows in video that notwithstanding the published decisions as to when the applicability of *Younger* abstention is determined, a panel which knows of and has validated the en banc rule that "the relevant date for evaluating abstention is the date the federal action is filed" will, in a later unpublished disposition, reverse the district court's decision on the "fast-forward" record it caused to occur by directly bargaining with the state.

6. <u>This Court's Intervention is Necessary to Establish a Uniform Rule on this Recurring Issue.</u>

This Court's opinions have taken different positions on at which time the applicability of *Younger* abstention should be evaluated.

At the time *Younger* was decided another case, *Perez v. Ledesma*, 401 US 82 (1971) presented the question, at least to one Justice, of when the timing for the applicability of *Younger* abstention should be evaluated. In a concurring and dissenting opinion, Justice Brennan discussed the fact that the trial court had correctly treated the post-federal filing dismissal of the state action as terminating the grounds for application of *Younger* abstention in a declaratory and injunctive relief action against the state prosecution (which was affirmed by the Supreme Court majority):

> The third threshold question is whether the state prosecution under the ordinance was "pending" so as to make federal intervention inappropriate. The fact is, as I have already noted, that informations against appellee Ledesma for violation of the ordinance were outstanding when this federal suit was filed. However, the *nolle prosequi* of those informations was entered before the three-judge court convened and heard the case. That court therefore treated the case as one in which no prosecution under the ordinance was pending. This was not error. The availability of declaratory relief was correctly regarded to depend upon the situation at the time of the hearing and not upon the situation when the federal suit was initiated. *See Golden v. Zwickler,* 394 U. S., at 108. The principles of comity as they apply to federal court intervention, treated by the Court today in Nos. 2, 4, 7,

> 9, 41, and 83, *see supra*, at 93, present this issue. The key predicate to answering the question whether a federal court should stay its hand, is whether there is a pending state prosecution where the federal court plaintiff may have his constitutional defenses heard and determined. Ordinarily, that question may be answered merely by examining the dates upon which the federal and state actions were filed. If the state prosecution was first filed and if it provides an adequate forum for the adjudication of constitutional rights, the federal court should not ordinarily intervene. When, however, as here, at the time of the federal hearing there is no state prosecution to which the federal court plaintiff may be relegated for the assertion of his constitutional defenses, the primary reason for refusing intervention is absent. Here, there was no other forum for the adjudication of appellees' constitutional objections to the ordinance.

Perez v. Ledesma, 401 U.S. 82, 103-4 (1971)(Brennan, J., concurring).

The majority in *Perez* did not accept or reject Justice Brennan's analysis of timing because it held that it did not have jurisdiction to review the decisions that had been *nolle prosequied*, but nothing the Supreme Court has subsequently held refutes it either. Justice Brennan's opinion in *Perez* is cited more often than the majority opinion by the United States Supreme Court. *See, e.g. Steffel v. Thompson,* 415 US 452, 469-70 (1974),

The first clear cut expression of setting the time for evaluating *Younger* abstention by the Court was *Doran, supra,* and was the position utilized by the panel in this case.

This Court's next address of this issue suggested that the dynamic approach is proper. *Middlesex County Ethics Comm. v. Garden State Bar Assn,* 457 U. S. 423, 439 (1982). In that case this Court held that the applicability of *Younger* abstention could be evaluated based on the state of play at the time this Court made its decision:

> Whatever doubt, if any, that may have existed about respondent Hinds' ability to have constitutional challenges heard in the bar disciplinary hearings was laid to rest by the subsequent actions of the New Jersey Supreme Court. Prior to the filing of the petition for certiorari in this Court the New Jersey Supreme Court sua sponte entertained the constitutional issues raised by respondent Hinds. Respondent Hinds therefore has had abundant opportunity to present his constitutional challenges in the state disciplinary proceedings.
>
> There is no reason for the federal courts to ignore this subsequent development. In *Hicks v. Miranda,* 422 U. S. 332 (1975), we held that "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in federal court, the

> principles of *Younger v. Harris* should apply in full force." *Id.*, at 349. An analogous situation is presented here; the principles of comity and federalism which call for abstention remain in full 437*437 force. Thus far in the federal-court litigation the sole issue has been whether abstention is appropriate. No proceedings have occurred on the merits and therefore no federal proceedings on the merits will be terminated by application of *Younger* principles. It would trivialize the principles of comity and federalism if federal courts failed to take into account that an adequate state forum for all relevant issues has clearly been demonstrated to be available prior to any proceedings on the merits in *federal court. 422 U. S., at 350.[16]*

Middlesex, *supra* (footnotes omitted).

This Court's most recent discussion of timing explains why some Courts of Appeals panels believe that this Court's ultimate position is that the time of filing is the only time to evaluate *Younger*:

> In this opinion, we have addressed the situation that existed on the morning of December 10, 1985, when this case was filed in the United States District Court for the Southern District of New York. We recognize that much has transpired in the Texas courts since then.

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 17 (1987).

Reviewing this Court's discussions of the issue of timing, one can identify an analysis which supports

every one of the six different views identified above. This is therefore a matter which has to be resolved by this Court. The question of timing is an important one as it necessarily arises every time *Younger* abstention is raised.

C. The Court Should Reconsider Whether *Younger* abstention Should be Applied Outside of Criminal Proceedings Given the Negation of the Reasons for its Expansion discussed in *Huffman*.

In addressing various actual and hypothetical applications of *Younger* with the six different views of evaluation of timing, the Court will soon realize that every approach can lead to absurd results. The original vision of *Younger* was based on underlying state court criminal proceedings, which due to double jeopardy considerations generally occur once.

Civil cases are different. They can be brought and dismissed multiple times, and civil disputes will often not resolve all issues in one proceeding.

There is no question that the federal scheme of habeas review requires *Younger* abstention for criminal cases; *Younger* was an 8-1 decision, and the dissent did not contend that *Younger* abstention existed, merely its application to the accused. *Younger v. Harris,* 401 U.S. 37 (1971). The expansion to civil cases was with a divided Court built on facts and assumptions that no longer hold true. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

In *Huffman*, Justice Rehnquist, writing for a 6-3 majority, justified the expansion based on the following assertions:

1. Interference with state statutes and juridical proceedings should only be

permitted "in a case reasonably free from doubt and when necessary to prevent great and irreparable injury"; *Id.* at 603.

2. "The component of *Younger*, which rests upon the threat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding"; *Id.* at 592-3.

3. "A civil litigant may, of course, seek review in this Court of any federal claim properly asserted in and rejected by state courts. Moreover, where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to this Court lies as a matter of right. 28 U. S. C. § 1257 (2). Thus, appellee in this case was assured of eventual consideration of its claim by this Court." *Id.* at 605.

4. "Appellee's argument, that because there may be no civil counterpart to federal habeas it should have contemporaneous access to a federal forum for its federal claim, apparently depends on the unarticulated major premise that every litigant who asserts a federal claim is entitled to have it decided on the merits by a federal, rather than a state, court. We need not consider the validity of this premise in order to reject the result which appellee seeks. Even assuming, *arguendo,* that litigants are entitled to a federal forum

> for the resolution of all federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to relitigate a federal issue adversely determined in *completed* state court proceedings." *Id.* at 606 (italics in original).

Each of these five key considerations cited by Justice Rehnquist in support of expansion of *Younger* abstention to civil cases has been reversed or rejected. As to item 1, injunctive relief against unconstitutional state statutes or actions is available under a much more lenient standard than characterized by Justice Rehnquist. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

As to consideration 2, this Court in *Sprint, supra*, decided that the interference consideration is not generally applicable in civil litigation, and only specific kinds of proceedings that fall into one of the *NOPSI* categories is protected.

As to consideration 3, review by this Court as a matter of right by civil litigants was eliminated by the Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

As to considerations 4-5, "[t]he Civil Rights Act of 1871, after all, guarantees "a federal forum for claims of unconstitutional treatment at the hands of state officials," and the settled rule is that "exhaustion of state remedies `is not a prerequisite to an action under [42 U.S.C.] § 1983.'" " *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019) (*quoting Heck v. Humphrey*, 512 U.S. 477, 480 (1994)); *see also Knick* at 2172– 73 (explaining that "[t]he general rule is that plaintiffs may bring constitutional claims under

§1983 without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available").

Since *Huffman* was decided, the statutory rights of civil litigants to review constitutional challenges to state statutes and the doctrinal assumptions employed by Justice Rehnquist in *Huffman* and later *Younger* abstention cases he authored have disappeared or been reversed. Roshan submits that this Court should consider whether the disappearance of the grounds for *Younger* abstention, combined with the dramatic cabining of *Younger's* scope outside criminal proceedings means that the applicability of *Younger* abstention to civil proceedings should be eliminated. Indeed, the now arbitrary lines between civil cases where *Younger* is applied as compared to where it is not applied create issues of equal protection under the First Amendment's petitioning right that did not exist when it was applied indiscriminately.

CONCLUSION

This petition, and the accompanying petitions of Cyrus Sanai, present recurring issues that have long divided the Courts of Appeal that merit review by this Court. However, rather than granting review and addressing these issues, this Court also has the option of summarily reversing on the one matter which was simply an obvious and uncontroversial violation of the law and remand the case for consideration of all other issues: the creation of a merits standard for constitutional claims that cannot be brought before the state courts. This question is discussed in the accompanying petition.

Given that members of the Court of Appeal are advocating that this Court more aggressively police unpublished decisions by the Ninth Circuit, satisfying this demand immediately may well force the Ninth Circuit to give more serious attention of its anti-precedent problem. *Malone v. Williams,* Docket No. 22-16671, Order Denying Petition for En Banc Review (9th Cir. August 15, 2024). Bybee, J, diss. (requesting Supreme Court to summarily reverse unpublished memorandum opinion and instructing other appellate courts not to follow it; noting that refusal to grant en banc review "reflects a quixotic assessment that litigants and courts will readily observe that the panel's unpublished decision is so far afield of clearly established law that it cannot possibly be read to cast doubt on our precedential AEDPA decisions."). Though Circuit Judge Bybee expresses dismay at the alleged deviation from binding precedent in *Malone,* he had no problem breaking free in *Big Sky, supra*, and applying a dynamic approach to evaluating *Younger* that, if applied to Roshan's and Sanai's cases, would have resulted in an appellate victory.

It's clear from *Big Sky* that the position advocated by Roshan and joined by Sanai is even-handed. Sometimes it helps the state, as in Big Sky, and sometimes it helps the private parties. It's also the only position that is consistent with this Court's approach in *Middlesex*, and it would be applied in the same manner as mootness analysis.

Dated this September 16, 2024.

Respectfully submitted,

/s/ Peyman Roshan

Peyman Roshan
1757 Burgundy Place
Santa Rosa, CA 95403

TABLE OF APPENDICES

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JAN 30 2024
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PEYMAN ROSHAN, an individual on behalf of himself and others similarly situated, Plaintiff-Appellant, v. MELANIE J LAWRENCE, in her official capacity as Chief Trial Counsel, and in her personal	No. 21-15771 D.C. No. 3:20-cv-04770-AGT **MEMORANDUM***

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

capacity; OFFICE OF CHIEF TRIAL COUNSEL,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Alex G. Tse, Magistrate Judge, Presiding

CYRUS MARK SANAI,
Plaintiff-Appellant,

Plaintiff-Appellant,

v.

MELANIE J LAWRENCE, sued in her individual and official capacities; CYNTHIA VALENZUELA, sued in her individual and official capacities; GEORGE CARDONA, sued in his individual and official capacities; RICHARD A. HONN, sued in his official capacity; W. KEARSE MCGILL, an individual sued in his official capacity;

No. 22-56215

D.C. No. 2:21-cv-07745-JFW-KES

DOES, 1 through 10, inclusive,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

CYRUS MARK SANAI, Plaintiff-Appellant,

Plaintiff-Appellant,

v.

GEORGE CARDONA; LEAH WILSON,

Defendants-Appellees.

No. 23-15618

D.C. No. 4:22-cv-01818-JST

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

CYRUS MARK SANAI, Plaintiff-Appellant, Plaintiff-Appellant, v. LEONDRA KRUGER, Judge; JOSHUA P. GROBAN; MARTIN J. JENKINS; KELLI M. EVANS; CAROL A. CORRIGAN; GOODWIN H. LIU; PATRICIA GUERRERO, Defendants-Appellees.	No. 23-16104 D.C. No. 3:23-cv-01057-AMO

Appeal from the United States District Court
for the Northern District of California
Araceli Martinez-Olguin, District Judge, Presiding

Argued and Submitted January 8, 2024
San Francisco, California

Before: SILER,** TASHIMA, and BRESS, Circuit Judges.

Appellants Cyrus Sanai and Peyman Roshan are California attorneys who, at relevant times, were subject to California State Bar disciplinary proceedings.[1] They filed these four lawsuits under 42 U.S.C. § 1983 against officials of the California State Bar and the Justices of the California Supreme Court, alleging that the California State Bar disciplinary process is constitutionally defective. In each case, appellants asked the district court to enjoin State Bar proceedings. The district courts concluded that *Younger* abstention applied. *See Younger v. Harris*, 401 U.S. 37 (1971). We review dismissals on the basis of *Younger* abstention de novo. *Canatella v. California*, 304 F.3d 843, 850 (9th Cir. 2002). We have jurisdiction under 28 U.S.C. §§ 1291 and 1292, and we affirm.

1. *Younger* and its progeny direct that "[a]bsent 'extraordinary circumstances,' abstention in favor of state judicial proceedings is required if the state proceedings (1) are ongoing, (2) implicate

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** The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

[1] The four above-captioned cases (three filed by the same plaintiff) present nearly identical questions about the applicability of *Younger* abstention to California State Bar proceedings. Having previously consolidated these matters for oral argument, we now consolidate them for all purposes.

important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims." *Hirsh v. Justices of Supreme Ct. of Cal.*, 67 F.3d 708, 712 (9th Cir. 1995) (per curiam) (citing *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)); *see generally Gilbertson v. Albright*, 381 F.3d 965, 969 (9th Cir. 2004) (noting that the "*Middlesex* factors . . . guide consideration of whether *Younger* extends to noncriminal proceedings"). In addition, "[t]he requested relief must seek to enjoin or have the practical effect of enjoining—ongoing state proceedings." *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 758 (9th Cir. 2014) (citing *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir. 2007)). If each of these conditions is met, *Younger* abstention is appropriate unless "there is a 'showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate.'" *Arevalo v. Hennessy*, 882 F.3d 763, 765–66 (9th Cir. 2018) (quoting *Middlesex*, 457 U.S. at 435).

As an initial matter, we reject appellants' contention that our prior decision in *Hirsh* should not apply to these cases. "[W]e are bound by circuit precedent except 'where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority.'" *Lambert v. Saul*, 980 F.3d 1266, 1274 (9th Cir. 2020) (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc)). Appellants have not identified intervening authority that is "clearly

irreconcilable" with *Hirsh*, and so *Hirsh* still governs here.

Applying *Hirsh*, we conclude that the district courts properly abstained under *Younger* in each of the four cases. Under *Hirsh*, for purposes of *Younger* abstention, California State Bar proceedings are judicial in nature and implicate important state interests. *Hirsh*, 67 F.3d at 712, 713. In addition, like the plaintiffs in *Hirsh*, Appellants asked federal courts to enjoin their ongoing State Bar disciplinary proceedings.[2] *Id.* at 712.

On the third *Middlesex* factor, our precedents indicate that attorneys subject to California State Bar disciplinary matters have an adequate opportunity to raise their federal constitutional claims in the State Bar proceedings. *Id.* at 713; *see also Rosenthal v. Justices of the Supreme Ct. of Cal.*, 910 F.2d 561 (9th Cir. 1990). Appellants raise several

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[2] In *Sanai v. Cardona*, No. 23-15618, Sanai filed his lawsuit before the State Bar initiated the relevant disciplinary proceedings. Nevertheless, the district court properly concluded that *Younger* abstention applied because the state proceedings were "initiated 'before any proceedings of substance on the merits ha[d] taken place in federal court.'" *Polykoff v. Collins*, 816 F.2d 1326, 1332 (9th Cir. 1987) (quoting *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 238 (1984)); *cf. Credit One Bank, N.A. v. Hestrin*, 60 F.4th 1220, 1226 (9th Cir. 2023) (concluding that state proceedings were ongoing for *Younger* purposes when "the only significant proceeding that had occurred in the federal action" at the time the state action was filed "was the denial of [a] motion to dismiss for lack of jurisdiction").

arguments about the alleged insufficiency of the State Bar process, each of which fails. Contrary to appellants' arguments, the California Supreme Court follows *In re Ruffalo*, 390 U.S. 544 (1968). *See, e.g.*, *Van Sloten v. State Bar*, 771 P.2d 1323, 1326 (Cal. 1989). And even assuming that appellants are correct that the State Bar owed some duty to provide attorneys in disciplinary proceedings with exculpatory material, appellants have not identified any plausible violation of that obligation.

Appellants relatedly argue that the State Bar proceedings provide an inadequate opportunity to litigate because appellants are precluded from raising claims of judicial bias or obtaining discovery related to suspected bias, as allegedly allowed under *Bracy v. Gramley*, 520 U.S. 899 (1994) and *Gacho v. Wills*, 986 F.3d 1067 (7th Cir. 2021). But in alleging bias by State Bar officials and state judges in favor of Thomas Girardi, appellants have not plausibly explained the relationship between Girardi and their State Bar proceedings. Appellants' wholly conjectural bias claims fail to "overcome [the] presumption of honesty and integrity in those serving as adjudicators." *Hirsh*, 67 F.3d at 713 (quoting *Kenneally v. Lungren,* 967 F.2d 329, 333 (9th Cir. 1992)).

Nor have appellants demonstrated that the "extraordinary circumstances" exception for *Younger* abstention should apply. *See Arevalo*, 882 F.3d at 765–66. Appellants have not demonstrated judicial bias in the State Bar proceedings. *See Hirsch*, 67

F.3d at 713–14. Nor have they demonstrated any other "extraordinary circumstances" justifying an exception to *Younger*.

2. In three of these cases, appellants argue that the district courts erred by denying their post-judgment motions under Federal Rules of Civil Procedure 59 and 60(b). We review the district courts' denial of these motions for abuse of discretion. *See Kaufmann v. Kijakazi*, 32 F.4th 843, 847 (9th Cir. 2022) (Rule 59 motion standard of review); *Flores v. Rosen*, 984 F.3d 720, 731 (9th Cir. 2020) (Rule 60(b) motion standard of review).

Appellants' arguments are based on their mistaken view that the Supreme Court's decisions in *Banister v. Davis*, 140 S. Ct. 1698 (2020) and *Kemp v. United States*, 142 S. Ct. 1856 (2022) abrogated our precedent governing post-judgment motions under Rules 59 and 60(b). That is not correct. The district court applied the proper legal standards in denying these motions, and appellants do not identify any other basis for concluding that the district courts abused their discretion in denying the motions.

We have reviewed appellants' other assignments of error and find them without merit. Costs are taxed to appellants. The judgments of the district courts are

AFFIRMED in Case Nos. 21-15771, 23-15619, and 23-16104, and AFFIRMED IN PART AND DISMISED IN PART in Case No. 22-56215.[3]

[3] In *Sanai v. Lawrence*, No. 22-56215, Sanai did not timely appeal the district court's dismissal of the case because he filed his notice of appeal more than 30 days after the district court entered judgment on that order. *See* Fed. R. App. P. 4(a)(1)(A). The timely filing of a notice of appeal is jurisdictional. Sanai's motion for reconsideration under Federal Rule of Civil Procedure 60(b) did not extend the time for appeal of that order, Fed. R. App. P. 4(a)(1)(A)(vi), because it was a successive motion for reconsideration and the district court did not alter its judgment in response. *See Wages v. IRS*, 915 F.2d 1230, 1233 n.3 (9th Cir. 1990). In Case No. 22-56215, we therefore dismiss for lack of jurisdiction Sanai's appeal of the district court's orders entered more than 30 days before Sanai filed his notice of appeal on December 21, 2022. *See Evans v. Synopsys, Inc.*, 34 F.4th 762, 768 (9th Cir. 2022) (noting that the deadline for filing an appeal is jurisdictional). This partial dismissal of the appeal did not affect our ability to reach the underlying issues because the *Younger* issues are also presented in Sanai's timely appeal of the district court's denial of an injunction pending appeal. As to the district court orders that Sanai has timely appealed—those entered on November 28, 2022; December 20, 2022; June 20, 2023; and August 21, 2023—we affirm.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PEYMAN ROSHAN , Plaintiff, v. MELANIE J. LAWRENCE, et al., Defendants.	Case No. 20-cv-04770-AGT **ORDER (1) GRANTING MOTION TO DISMISS, (2) DENYING MOTION FOR LEAVE TO AMEND, (3) DENYING MOTION TO DEFER CONSIDERATION OF MOTION TO DISMISS** Re: ECF Nos. 9, 28, 30

In this action for declaratory and injunctive relief, Peyman Roshan, a California lawyer facing discipline by the State Bar of California ("State Bar") for numerous counts of professional misconduct, seeks to enjoin his ongoing disciplinary proceedings and an order declaring the State Bar's disciplinary rules and procedures unconstitutional. The State Bar's Office of Chief Trial Counsel ("OCTC") and the head of OCTC, Melanie J. Lawrence ("Defendants"), have moved to dismiss, without leave to amend, on

abstention grounds under *Younger v. Harris*, 401 U.S. 37 (1971). ECF No. 9. After that motion was fully briefed, Roshan filed a motion for leave to amend (ECF No. 28), followed by a motion to defer consideration of the pending motion to dismiss until February 2021, when he believes his pending State Bar disciplinary proceedings will have concluded (ECF No. 30).[1] For the reasons that follow, the Court finds that *Younger* abstention applies and requires dismissal of this case, right now, without leave to amend and without prejudice. Defendants' motion to dismiss is therefore granted; Roshan's motions are denied.

I. BACKGROUND

A. California's Attorney Disciplinary System

Under California law, attorney disciplinary matters are handled by the State Bar, a state constitutional entity that serves as an administrative arm of the California Supreme Court. *See In re Rose*, 22 Cal. 4th 430, 438 (2000). Defendant OCTC is the department of the State Bar responsible for prosecuting attorney discipline cases in the State Bar Court, and the head of OCTC is the Chief Trial Counsel, defendant Melanie J. Lawrence.

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[1] Pursuant to Civil Local Rule 7-1(b), the Court previously found Defendants' pending motion to dismiss suitable for decision without oral argument, *see* ECF No. 21, and likewise finds Roshan's pending motions appropriate for resolution on the papers.

The State Bar Court "exercises no judicial power, but rather makes recommendations to [the California Supreme Court], which then undertakes an independent determination of the law and the facts, exercises its inherent jurisdiction over attorney discipline, and enters the first and only disciplinary order." *Id.* at 436. The California Supreme Court has described the structure and process of California's attorney discipline system as follows:

> The State Bar Court Hearing Department (Hearing Department) conducts evidentiary hearings on the merits in disciplinary matters. An attorney charged with misconduct is entitled to receive reasonable notice, to conduct discovery, to have a reasonable opportunity to defend against the charge by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses. The Hearing Department renders a written decision recommending whether the attorney should be disciplined.
>
> Any disciplinary decision of the Hearing Department is reviewable by the State Bar Court Review Department (Review Department) at the request of the

> attorney or the State Bar. In such a review proceeding, the matter is fully briefed, and the parties are given an opportunity for oral argument. The Review Department independently reviews the record, files a written opinion, and may adopt findings, conclusions, and a decision or recommendation at variance with those of the Hearing Department.
>
> A recommendation of suspension or disbarment, and the accompanying record, is transmitted to this court after the State Bar Court's decision becomes final.

Id. at 439 (internal citations omitted and paragraph breaks added). The attorney may then file a petition for review with the California Supreme Court within 60 days after the State Bar Court files a certified copy of the decision recommending suspension or disbarment. *See id.* at 440 (citing Cal. Bus. & Prof. Code §§ 6082, 6083; Cal. R. Ct. 952(a), subsequently renumbered to Cal. R. Ct. 9.13(a)). The California Supreme Court either grants review and issues a final order or denies review, in which case the State Bar Court's disciplinary recommendation is filed as an order of the California Supreme Court. *Id.* at 440–41 (citing Cal. R. Ct. 954, subsequently renumbered to Cal. R. Ct. 9.16). Throughout this process, the California Supreme Court retains inherent judicial

authority over all attorney discipline matters. *Id.* at 442.

B. Roshan's Ongoing State Bar Disciplinary Proceedings[2]

Plaintiff and California attorney Peyman Roshan is the subject of ongoing disciplinary proceedings in State Bar Court Case Nos. 17-O-01202; 17-O-05799 (consolidated). Compl. ¶ 28.

OCTC issued a notice of disciplinary charges ("NDC") against Roshan in December 2018, charging him with 19 counts of misconduct based on his representation of a client with whom he developed a business relationship. *See* Defs.' RJN, Exs. 1 & 2. On April 9, 2019, OCTC filed an amended NDC, adding two additional counts relating to that same matter.

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[2] Defendants request judicial notice of the following documents relating to Roshan's disciplinary proceedings in State Bar Court Case Nos. 17-O-01202, 17-O-05799 (consolidated): (1) OCTC's Amended Notice of Disciplinary Charges, filed April 9, 2019; (2) State Bar Court Hearing Department Decision, dated August 7, 2019; (3) Roshan's Request for Review by the State Bar Court Review Department, filed October 18, 2019; and (4) a copy of the State Bar Court docket, printed August 19, 2020. *See* ECF No. 10 ("Defs.' RJN"), Exs. 1–4. Defendants' request is granted. *See* Fed. R. Evid. 201; *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (courts "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue"). The Court also takes judicial notice of the updated docket in State Bar Court Case Nos. 17-O-01202, 17-O-05799 (available via https://apps.statebarcourt.ca.gov/dockets.aspx) and the docket in California Supreme Court Case No. S265119 (available via https://appellatecases.courtinfo.ca.gov).

See id.; Compl. ¶¶ 28, 38. The misconduct alleged in the amended NDC included, among other things, that Roshan practiced law without authorization prior to receiving his license, failed to perform legal services with competence, engaged in improper business transactions with his client, and engaged in moral turpitude and misrepresentation. *See* ECF No. 9 at 7–8; Defs.' RJN, Ex. 1. A five-day trial began on April 18, 2019, and four months later, the State Bar Court Hearing Department issued a 46- page decision finding Roshan culpable of 12 counts of misconduct and recommending a two-year actual suspension. *See* ECF No. 9 at 8; Defs.' RJN, Ex. 2. Roshan sought review of the decision with the State Bar Court Review Department in October 2019. Defs.' RJN, Ex. 4.

On July 16, 2020—the same day Roshan filed this federal action—the Review Department held oral argument in his disciplinary case. *Id.* In August 2020, the Review Department issued a decision finding Roshan culpable of seven counts of misconduct, including breach of fiduciary duty and moral turpitude by misrepresentation, and recommending that Roshan be suspended for two years. *See id*; ECF No. 30 at 3–4. The respective online dockets

reflect that the State Bar Court's disciplinary recommendation and accompanying record in Case Nos. 17-O-01202, 17-O- 05799 were transmitted to the California Supreme Court on October 7, 2020, and that Roshan filed a petition for review with the California Supreme Court in Case No. S265119 on

December 7, 2020, which currently remains pending and has not been decided.

C. This Action

Roshan filed the instant action on July 16, 2020, while his disciplinary proceedings were pending before the State Bar Court Review Department. He alleges that the State Bar disciplinary system is unconstitutional and deprives him and other attorney-defendants of federal due process rights. Roshan does not seek monetary damages; he asserts two claims, seeking only injunctive and declaratory relief:

1. Injunctive relief for violation of constitutional rights: "The ongoing proceedings against ROSHAN should be enjoined, and all other State Bar attorney discipline proceedings should be enjoined, until such time as the OCTC has drafted amended Rules of Procedure that grant attorney respondents the due process rights to which they are entitled, including, without limitation, the right to a preliminary hearing that is the equivalent to a criminal preliminary hearing." Compl. ¶ 38.
2. Declaratory Judgement: "ROSHAN is entitled to a declaratory judgment that the State Bar Rules of Procedure and Rules of Practice are facially unconstitutional, and that all attorney discipline proceedings that occurred in whole or in part after 2010 are unconstitutional and violated the due process rights of the attorney defendants. A declaratory judgment should be

> entered that all attorney discipline orders and judgments entered from and after 2010 other than exonerations are unconstitutional, and that all attorney discipline proceedings that are ongoing are unconstitutional." *Id.* ¶ 41.

He also requests attorney's fees and costs. *See id.*, Prayer for Relief.

Following full briefing on Defendants' pending motion to dismiss, Roshan filed a motion for leave to "amend the complaint on or after February 4, 2021 to change the pleadings to allege that the state court proceedings are ended." ECF No. 28 at 4. The accompanying proposed amended complaint (ECF No. 28-1) is largely identical to the operative complaint except it (speculatively) alleges that Roshan's ongoing disciplinary proceedings have ended (*id.* ¶ 37); that his pending, yet undecided petition for review "was denied on _____, 2021" (*id.* ¶ 30); and that "[t]he order suspending ROSHAN should be enjoined" (*id.* ¶ 38). Roshan then filed an administrative motion requesting the Court to "defer consideration of the pending motion to dismiss to February 4, 2021." ECF No. 30. Defendants oppose both motions.

II. DISCUSSION

Defendants contend that Roshan's claims are barred and must be dismissed, without leave to amend, on abstention grounds under *Younger v. Harris*, 401 U.S. 37 (1971). The Court agrees, and

finds that because *Younger* abstention is appropriate, amendment would be futile.

A. *Younger* Abstention

"*Younger* abstention is a jurisprudential doctrine rooted in overlapping principles of equity, comity, and federalism." *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1091 (9th Cir. 2008). "*Younger* and its progeny generally direct federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending state judicial proceedings," including "disciplinary proceedings" initiated by the California State Bar. *Hirsh v. Justices of Supreme Court of State of Cal.*, 67 F.3d 708, 712 (9th Cir. 1995); *see also Canatella v. California*, 404 F.3d 1106, 1110 (9th Cir. 2005) ("California's attorney discipline proceedings are 'judicial in character' for purposes of *Younger* abstention.") (citation omitted).

Under *Younger*, federal courts must abstain from exercising jurisdiction where: "(1) a state-initiated proceeding is ongoing; (2) the proceeding implicates important state interests; (3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) the federal court action would enjoin the proceeding or have the practical effect of doing so." *City of San Jose*, 546 F.3d at 1092. An exception to *Younger* abstention exists if there is a "showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention

inappropriate." *Id.* (quoting *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982)). In this case, all four requirements for *Younger* abstention are met, and no extraordinary circumstances exist.

1. Ongoing State Proceedings

It is undisputed that Roshan's State Bar disciplinary proceedings were ongoing when he filed this action—he even adds an allegation in his proposed amended complaint alleging, "[a]t the time the complaint was filed, the state court proceedings were ongoing," ECF No. 28-1 ¶ 37. *See Beltran v. State of Cal.*, 871 F.2d 777, 782 (9th Cir. 1988) ("*Younger* abstention requires that the federal courts abstain when state court proceedings were ongoing at the time the federal action was filed."); *see also ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014) ("[T]he date for determining whether *Younger* applies 'is the date the federal action is filed.'") (citation omitted). Roshan also concedes that the proceedings are still ongoing, as the California Supreme Court has not yet ruled on his petition for review currently pending in California Supreme Court Case No. S265119.[3] *See*

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[3] As noted, the California Supreme Court will either grant review of Roshan's petition and issue an order of discipline, or it will deny review, in which case the State Bar Court's decision recommending suspension will be filed as an order of the California Supreme Court. *See In re Rose*, 22 Cal. 4th at 440–41; Cal. R. Ct. 9.16(b).

ECF No. 28 at 4–5; *see also Hirsh*, 67 F.3d at 712 (finding State Bar disciplinary proceedings "ongoing" for *Younger* purposes where the

California Supreme Court had not yet filed an order regarding the State Bar Court's disciplinary recommendation). Roshan's "prediction" that "the California Supreme Court will deny [his] petition, baring [sic] a virtual miracle," by February 2021 (*see* ECF No. 28 at 5; ECF No. 33 at 2– 3), is simply not relevant to this Court's *Younger* analysis, which is conducted "in light of the facts and circumstances existing at the time the federal action was filed." *Rynearson v. Ferguson*, 903 F.3d 920, 924 (9th Cir. 2018) (quoting *Potrero Hills Landfill, Inc. v. Cty. of Solano*, 657 F.3d 876, 881 n.6 (9th Cir. 2011)).

2. Important State Interests

It is also undisputed that Roshan's ongoing disciplinary proceedings involve important state interests. *See Hirsh*, 67 F.3d at 712 ("California's attorney disciplinary proceedings implicate important state interests."); *Middlesex*, 457 U.S. at 434 ("The State . . . has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses.").

3. Opportunity to Litigate Federal Claims

Third, "California's attorney disciplinary proceedings provide [attorneys] with an adequate

opportunity to litigate [their] federal constitutional claims." *Canatella*, 404 F.3d at 1111 (citing *Hirsh*, 67 F.3d at 713). Although the California Constitution precludes the State Bar Court from considering federal constitutional claims, "such claims may be raised in judicial review of the Bar Court's decision." *Hirsh*, 67 F.3d at 713; *see* Cal. R. Ct. 9.13 (providing process for petitioning the California Supreme Court for review of State Bar Court decisions). The Ninth Circuit has repeatedly held that this opportunity to seek review by the California Supreme Court "satisfies the third requirement of *Younger*." *Hirsh*, 67 F.3d at 713 (citing cases); *see Canatella*, 404 F.3d at 1111 ("Although judicial review is wholly discretionary, its mere availability provides the requisite opportunity to litigate."). The Supreme Court has also, on multiple occasions, affirmed decisions to abstain notwithstanding a state agency's inability to consider federal challenges in the initial administrative proceedings, where those challenges could be presented during state-court judicial review. *See, e.g.*, *Middlesex*, 457 U.S. at 435–36; *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986).

Roshan nevertheless contends that "California's current system of Supreme Court review fails the *Younger* test because the five articulated grounds for review [enumerated in California Rules of Court 9.16(a)] do not allow for raising federal facial arguments, overbreadth arguments, equal protection arguments, or any kind of procedural due process contention." ECF No. 17 at 23–24. The Ninth Circuit has already rejected that argument, *see Hirsh*, 67

F.3d at 713, and contrary to Roshan's contentions, *Hirsh* remains good law and is binding on this Court.[4] As the

Hirsh court emphasized, "[j]udicial review is inadequate only when state procedural law *bars*

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[4] Roshan discusses *Hirsh* at length in his opposition and then dubiously claims that "*Hirsh* might control the outcome in this case but for the fact that five years later, intervening authority by the California Supreme Court was issued, *In re Rose*, [22 Cal. 4th 430 (2000)]." ECF No. 17 at 9; *see also id.* at 24 (arguing that "*Hirsh* and the cases which cite to it are no longer binding precedent"). These contentions—unsupported by citation to any authority—are wrong: *In re Rose* did not overrule or otherwise undermine the Ninth Circuit's key decision in *Hirsh*, and the Ninth Circuit continues to hold, relying on *Hirsh*, that attorneys facing State Bar disciplinary proceedings have adequate opportunity to raise federal constitutional claims in the California Supreme Court. *See Canatella*, 404 F.3d at 1111 (citing *Hirsh*, 67 F.3d at 711–12, 713); *see also Kay v. State Bar of California*, No. 09-cv-1135 PJH, 2009 WL 1456433, at *3 (N.D. Cal. May 21, 2009) (citing *Hirsh* and *Canatella* and reiterating that "[t]he Ninth Circuit has repeatedly held that *Younger* abstention is required where a plaintiff seeks to challenge or enjoin a pending disciplinary or other proceeding by the State Bar of California"); *Robinson v. California State Bar*, No. 15-mc-80129- JD, 2015 WL 3486724, at *3 (N.D. Cal. May 28, 2015) (collecting cases holding same). Unfortunately for Roshan, *Hirsh* does control the outcome in this case and requires dismissal.

presentation of the federal claims." *Id.* (emphasis in original); *see also Commc'ns Telesystems Int'l v. California Pub. Util. Comm'n*, 196 F.3d 1011, 1020 (9th Cir. 1999) ("*Younger* requires only the absence of 'procedural bars' to raising a federal claim in the state proceedings."). As the party opposing abstention, Roshan has the burden of showing "that state procedural law barred presentation of [his federal] claims." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987) (citation omitted). He has not met that burden.

Nothing in California's procedural rules governing review of State Bar Court disciplinary decisions precludes Roshan from raising, or the California Supreme Court from considering, his federal constitutional claims. As noted, an attorney may petition for review of a State Bar Court decision recommending disbarment or suspension under California Rules of Court 9.13(a), as Roshan has done here. The California Supreme Court then "thoroughly review[s] the attorney's contentions [presented in the petition] and the entire record, and reach[es] an independent determination whether he or she should be disciplined as recommended." *In re Rose*, 22 Cal. 4th at 457. California Rules of Court 9.16(a)—the rule Roshan erroneously claims is a "procedural barrier" to raising his federal constitutional arguments—simply sets forth the five circumstances in which the California Supreme Court "will order review" of the State Bar Court's decision (*e.g.*, "when it appears . . . [n]ecessary to settle important questions of law" or that the "[p]etitioner did not receive a fair hearing" Cal. R. Ct. 9.16(a)). Moreover,

the California Supreme Court has made clear that it "retain[s] inherent authority to grant review in any disciplinary matter, *notwithstanding the criteria set forth in [that] rule*." *In re Rose*, 22 Cal. 4th at 459 (emphasis added); *see also id.* at 441 ("Under the present scheme, we expressly retain the authority both to grant review of any petition and to review any disciplinary recommendation on our own motion."). In short, "[t]he fact that review is discretionary does not bar presentation of [Roshan's] federal claims—[he] can raise the claims in a petition for review." *Hirsh*, 67 F.3d at 713.

Relatedly, the fact that Roshan "withdrew and reserved all constitutional arguments" in the State Bar Court proceedings and "only addresses non-constitutional issues" in his pending petition for review does not change the analysis.[5] ECF No. 30 at 4. His "failure to avail himself of the opportunity [to raise federal claims] does not mean that the state procedures are inadequate." *Gilbertson v. Albright*, 381 F.3d 965, 983 (9th Cir. 2004) (en banc) (citing *Juidice v. Vail*, 430 U.S. 327, 337 (1977)); *see also*

[5] The Ninth Circuit has rejected attempts by plaintiffs to evade *Younger* abstention by declining to pursue their federal claims in state court proceedings. *See, e.g.*, *Beltran*, 871 F.2d at 783 & n.8. (explaining that "when *Younger* abstention applies, federal plaintiffs cannot reserve their federal claim from state court adjudication for later decision by the federal court"; "*Younger* abstention requires dismissal of the federal complaint [and] [t]he federal plaintiff must submit all claims, including any federal claims, to the state court").

Pennzoil, 481 U.S. at 15 ("[W]hen a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy."). What matters is Roshan could have presented his constitutional claims to the California Supreme Court. "No more is required to invoke *Younger* abstention." *Juidice*, 430 U.S. at 337.

Roshan also argues that the absence of recent California Supreme Court decisions granting petitions for review raising federal constitutional issues in State Bar Court proceedings is proof "that no such review is available." ECF No. 17 at 16–17. This argument is unpersuasive. To start, "[t]he fact that state courts may reject (or have rejected) arguments on the merits [] does not mean those courts have deprived a plaintiff of the *opportunity* to make the argument." *Dubinka v. Judges of Superior Court of State of Cal. for Cty. of Los Angeles*, 23 F.3d 218, 224–25 (9th Cir. 1994) (emphasis in original; ellipsis and citation omitted) (applying *Younger* even though state courts are compelled to reject a federal constitutional claim under state precedent; relying on absence of procedural bar to raising the federal claim). And more importantly, refusing to abstain here "would require presuming that the California Supreme Court will not adequately safeguard federal constitutional rights, a presumption the U.S. Supreme Court squarely rejected in *Middlesex*, 457 U.S. at 431." *Hirsh*, 67 F.3d at 713; *see also Confederated Tribes of Colville Reservation v. Superior Court of Okanogan Cty.*, 945 F.2d 1138, 1141 (9th Cir. 1991) (noting "[t]he supremacy clause

of the Constitution requires state judges to discern and apply federal law where it is controlling"; rejecting argument based on presumption that state judges "will not do so unless a federal court tells them to"). This the Court declines to do.

4. Interference

The fourth and final *Younger* requirement—that the federal action "would 'interfere' with the ongoing state proceeding (i.e., enjoin or have the practical effect of enjoining the proceeding)"—is also satisfied here. *City of San Jose*, 546 F.3d at 1095–96 (citation omitted). Roshan seeks, among other equitable relief, an injunction stopping Defendants from advancing his and all other attorney disciplinary proceedings and an order declaring California's attorney discipline system unconstitutional.

5. Extraordinary Circumstances Exception

Even when the requirements for *Younger* abstention are satisfied, federal intervention may be appropriate if the "state proceedings are conducted in bad faith or to harass the litigant, or other extraordinary circumstances exist," *Baffert v. California Horse Racing Bd.*, 332 F.3d 613, 621 (9th Cir. 2003), like when a state statute "flagrantly and patently" violates "express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever" it is applied," *Younger*, 401 U.S. at 53–54 (citation omitted). Roshan argues that the "bad faith" and

"extraordinary circumstances" exceptions to *Younger* apply here because, according to him, the State Bar procedural rules are "plainly unconstitutional" and devoid of federal due process protections. *See* ECF No. 17 at 21–24. These unsupported contentions fall woefully short of establishing an exception for bad faith or any other extraordinary circumstance.

Bad faith in the *Younger* context "means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction," and requires "evidence of bad faith, such as bias against Plaintiff, or of a harassing motive." *Baffert*, 332 F.3d at 621. There are no allegations (let alone evidence) to that effect here, and nothing in the record suggests that the State Bar pursued disciplinary charges against Roshan without reasonable expectation of success, or solely to harass him. *See Juidice*, 430 U.S. at 338 (holding that "unless it is *alleged and proved* that [state adjudicators] are enforcing the [state] procedures in bad faith or are motivated by a desire to harass," federal courts must abstain under *Younger*) (emphasis added). To the extent Roshan's rambling diatribes about the California Supreme Court's alleged refusal to protect federal constitutional rights (*see, e.g.*, ECF No. 17 at 8–25; Compl. ¶¶ 9–10, 19, 33, 35, 37) can be construed as an attempt to allege bias, Roshan likewise "fails to offer any 'actual evidence' to overcome the 'presumption of honesty and integrity in those serving as adjudicators.'" *Canatella*, 404 F.3d at 1112 (quoting *Hirsh*, 67 F.3d at 713–14).

Roshan's claim that State Bar rules are "plainly unconstitutional" also "does not, by itself, support an extraordinary circumstances exception to *Younger* abstention." *Id.*; *see also Baffert*, 332 F.3d at 621 (noting that the Supreme Court "has repeatedly rejected the argument that a constitutional attack on state procedures themselves automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases") (citation and internal quotation marks omitted). And Roshan has not come close to demonstrating that *Younger's* rare exception for "flagrantly and patently" unconstitutional statutes—i.e., statutes that are "violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever" they might be applied—is implicated here. *Younger*, 401 U.S. at 53–54. This exception is "very narrow" and may not be utilized "if the constitutionality of the state statute is unclear or if the statute may be applied constitutionally in some cases." *Dubinka*, 23 F.3d at 225. For instance, Roshan alleges "the applications of the [State Bar Court's] Rules of Procedure are unconstitutional *in a majority of the cases* brought by the OCTC since 2010." Compl. ¶ 36 (emphasis added); *see also id.* ¶¶ 22–27 (listing "instances" and "cases" in which the State Bar rules allegedly violate constitutional rights). Thus, by his own implicit admission, the State Bar rules are not patently unconstitutional in "*every* clause, sentence and paragraph" and in "*whatever* manner and against *whomever*" they are applied. *See Dubinka*, 23 F.3d at 225 (holding that, "even if appellants are correct that some applications of Proposition 115 are

unconstitutional, the [challenged] provisions are not so 'flagrantly and patently' unconstitutional as to invoke federal jurisdiction"). And in any event, the Ninth Circuit has previously found that California's State Bar rules do not fall within the patently unconstitutional exception contemplated by *Younger*. *See Hirsh*, 67 F.3d at 714; *see also Canatella*, 404 F.3d at 1112.

In sum, Roshan has not demonstrated that any extraordinary circumstances exist here that would warrant departure from the "longstanding public policy against federal court interference with state court proceedings." *Younger*, 401 U.S. at 43.

* * *

Having determined that *Younger* applies without exception, abstention in favor of the state proceedings is required. Because Roshan seeks injunctive and declaratory relief but not damages, the Court must abstain permanently and dismiss this action. *See Gilbertson*, 381 F.3d at 981 ("When an injunction is sought and *Younger* applies . . . dismissal (and only dismissal) is appropriate.").[6]

B. Motion for Leave to Amend

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[6] In contrast, when damages are sought and *Younger* applies, "an abstention-based stay order, rather than a dismissal, is appropriate." *Gilbertson*, 381 F.3d at 975.

Given that this action is barred by *Younger* abstention, Roshan's motion for leave to file an amended complaint is denied as futile.[7] *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."); *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (affirming denial of leave to amend "where the amendment would be futile or where the amended complaint would be subject to dismissal").

Roshan argues, incorrectly, that "[e]ven if this Court does decide that abstention is appropriate, it can simply elect to stay the action until the California Supreme Court has acted on Plaintiff's petition for review, then grant leave to amend, or defer its decision [on the motion to dismiss"] as requested in the pending motion to defer." ECF No. 33 at 9. Under binding precedent, neither course of

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[7] Because *Younger* abstention is appropriate, the Court finds it unnecessary to address Defendants' arguments against amendment. The Court does note, however, that Defendants are correct that Roshan's motion to amend is improper because the proposed amended complaint—which Roshan seeks to file "on or after February 4, 2021," when he prophesizes the California Supreme Court will have denied his pending petition for review—is incomplete, leaving a placeholder for a future date (*see* ECF No. 28-1 ¶ 30, "ROSHAN filed a petition for review with the California Supreme Court, which was denied on _____, 2021"), and impermissibly pleads speculative possible future events (*see, e.g.*, *id.* ¶ 37 "while this action was proceeding, the state court proceedings ended") as facts. ECF No. 29 at 2.

action is permissible: "Where *Younger* abstention is appropriate, a district court cannot refuse to abstain, retain jurisdiction over the action, and render a decision on the merits after the state proceedings have ended. To the contrary, *Younger* abstention requires *dismissal* of the federal action." *Beltran*, 871 F.2d at 782 (emphasis in original);[8] *see also Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) ("*Younger v. Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts.").

III. CONCLUSION

For the reasons set forth above, the Court declines to exercise jurisdiction in this case under the *Younger* abstention doctrine. Defendants' motion to dismiss (ECF No. 9) is granted; Roshan's motion for leave to file an amended complaint (ECF No. 28) is denied as futile; Roshan's motion to defer consideration of the motion to dismiss (ECF No. 30) is denied as moot; and all other pending motions are denied as moot. The Clerk of the Court is directed to enter judgment of dismissal without prejudice and close the case file.

IT IS SO ORDERED.

Dated: January 18, 2021

ALEX G. TSE
United States
Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED

APRIL 17 2024
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PEYMAN ROSHAN, an individual on behalf of himself and others similarly situated,

Plaintiff-Appellant,

v.

MELANIE J LAWRENCE, in her official capacity as Chief Trial Counsel, and in her personal capacity; OFFICE OF CHIEF TRIAL COUNSEL,

Defendants-Appellees.

No. 21-15771

D.C. No. 3:20-cv-04770-AGT

ORDER

CYRUS MARK SANAI, Plaintiff-Appellant, Plaintiff-Appellant, v. MELANIE J LAWRENCE, sued in her individual and official capacities; CYNTHIA VALENZUELA, sued in her individual and official capacities; GEORGE CARDONA, sued in his individual and official capacities; RICHARD A. HONN, sued in his official capacity; W. KEARSE MCGILL, an individual sued in his official capacity; DOES, 1 through 10, inclusive, Defendants-Appellees.	No. 22-56215 D.C. No. 2:21-cv-07745-JFW-KES
CYRUS MARK SANAI, Plaintiff-Appellant, Plaintiff-Appellant,	No. 23-15618 D.C. No. 4:22-cv-01818-JST

v.

GEORGE CARDONA; LEAH WILSON,

Defendants-Appellees.

CYRUS MARK SANAI,
Plaintiff-Appellant,

Plaintiff-Appellant,

v.

LEONDRA KRUGER, Judge; JOSHUA P. GROBAN; MARTIN J. JENKINS; KELLI M. EVANS; CAROL A. CORRIGAN; GOODWIN H. LIU; PATRICIA GUERRERO,

Defendants-Appellees.

No. 23-16104

D.C. No. 3:23-cv-01057-AMO

Before: SILER,* TASHIMA, and BRESS, Circuit Judges.

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

The panel unanimously voted to deny Appellants' petitions for panel rehearing.. No. 21-15771, Dkts. 145, 146, 147, 148. Judge Bress voted to deny the petitions for rehearing en banc and Judges Siler and Tashima so recommended. The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Appellants' petitions for panel rehearing and rehearing en banc are **DENIED.**

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED

APRIL 17 2024
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PEYMAN ROSHAN, an individual on behalf of himself and others similarly situated,

Plaintiff-Appellant,

v.

MELANIE J LAWRENCE, in her official capacity as Chief Trial Counsel, and in her personal capacity; OFFICE OF CHIEF TRIAL COUNSEL,

Defendants-Appellees.

No. 21-15771

D.C. No. 3:20-cv-04770-AGT

ORDER

CYRUS MARK SANAI, Plaintiff-Appellant, Plaintiff-Appellant, v. MELANIE J LAWRENCE, sued in her individual and official capacities; CYNTHIA VALENZUELA, sued in her individual and official capacities; GEORGE CARDONA, sued in his individual and official capacities; RICHARD A. HONN, sued in his official capacity; W. KEARSE MCGILL, an individual sued in his official capacity; DOES, 1 through 10, inclusive, Defendants-Appellees.	No. 22-56215 D.C. No. 2:21-cv-07745-JFW-KES
CYRUS MARK SANAI, Plaintiff-Appellant, Plaintiff-Appellant,	No. 23-15618 D.C. No. 4:22-cv-01818-JST

v.

GEORGE CARDONA; LEAH WILSON,

Defendants-Appellees.

CYRUS MARK SANAI,
Plaintiff-Appellant,

Plaintiff-Appellant,

v.

LEONDRA KRUGER, Judge; JOSHUA P. GROBAN; MARTIN J. JENKINS; KELLI M. EVANS; CAROL A. CORRIGAN; GOODWIN H. LIU; PATRICIA GUERRERO,

Defendants-Appellees.

No. 23-16104

D.C. No. 3:23-cv-01057-AMO

Before: SILER,* TASHIMA, and BRESS, Circuit Judges.

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Appellants' motion to recall the mandate, No. 21-15771, Dkt. 165, is denied.

APPENDIX E

SUPREME COURT OF CALIFORNIA
JORGE E. NAVARRETE
CLERK AND EXECUTIVE DIRECTOR
OF THE SUPREME COURT
EARL WARREN BUILDING
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
(415) 865-7000

January 19, 2024

SENT VIA USPS MAIL

Peyman Roshan
1757 Burgundy Place
Santa Rosa, CA 95403

Re: S265119 - ROSHAN ON DISCIPLINE

Dear Peyman Roshan:

We hereby return unfiled your documents received electronically via Truefiling January 16, 2024. The order of this court filed February 17, 2021, denying the above-referenced petition, was final forthwith and may not be reconsidered or reinstated. The case is now closed.

Very truly yours,

JORGE E. NAVARRETE
Clerk and
Executive Officer of the Supreme Court

By: L. Brooks, Deputy Clerk

cc: Rec.

APPENDIX F

Relevant Statutes and Constitutional Provisions

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1983.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1