CASE NO. 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

SUPPLEMENTAL BRIEF DISCUSSING EFFECT OF *SEATTLE PACIFIC UNIVERSITY V. FERGUSON*

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INTRODUCTION

This supplemental brief addresses a highly relevant published Ninth Circuit Court of Appeals decision issued just before Roshan initially filed his petition for certiorari: *Seattle Pacific University v. Ferguson,* 104 F.4th 50 (9th Cir. 2024) ("*SPU*"). Roshan was unaware of the decision until after he filed his petition, and it was not easily available to him. Because the clerk advised that neither this petition nor the related petition should be updated other than as required by the Court's rejection letter, Roshan was unable to address it in his revised petition. The lead question presented in this petition 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.

Roshan identified three positions that have gained substantial support, all three of which are adopted in different strands of Ninth Circuit authority. The first approach is that one looks solely at the time of filing of the federal complaint to the situation in state tribunals. The second is that one looks at the time of filing of the first complaint, then again if a state proceeding is initiated, to determine if proceedings of substance in federal court have occurred. The third approach is dynamic where one looks at the federal and stated proceedings as they evolve.

Roshan's petition identifies and discusses other variations of the three major categories.

SPU, authored by Circuit Judge McKeown, articulates another new rule, a variation of the first approach. This opinion is notable for multiple reasons. First it expressly acknowledges the brief window that now exists for mounting federal court challenges to potential state actions that may evolve into proceedings falling into one of the *NOPSI* categories. *SPU* at 64.[1] Second, it creates yet another subcategory of tests for evaluating whether certain kinds of state proceedings are protected by *Younger* abstention. Third, the opinion in an unexplained citation note holds that a frequently cited Ninth Circuit decision *San Jose Silicon Valley Chamber of Com. Pol. Action Comm. v. City of San Jose*, 546 F.3d 1087 (9th Cir. 2008), was "abrograted" by this Court's seminal decision of *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013), which cut back the application of *Younger* to cases falling into the "*NOPSI* categories." Fourth, the decision was authored by Circuit Judge McKeown, who can be observed choosing a completely different timing rule when she and the rest of the panel did not like the result in *Big Sky Scientific LLC, v. Bennetts,* Case No. 19-35138 (9th Cir. Sept. 4, 2019); o*ral argument is available at*

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[1] Recognizing that "if there were no daylight between the invocation of pre-enforcement standing and the start of *Younger* abstention, then litigants would have virtually no opportunity to seek federal review of state laws infringing on constitutional rights." *Id.*

www.ca9.uscourts.gov/media/video/?20190828/19-35138/.

In addition to the two questions presented in this petition, Roshan also endorses and joins in the petition filed by Mr. Sanai which raises three questions. The first is whether raising *Younger* abstention (or any other waivable defense) to dismiss an action where the defendants have defaulted violates the party presentation principle. The second is whether the Ninth Circuit could rely on its precedent finding that the rules and procedures in 1994, which have long since been replaced, requires imposition of *Younger* abstention even though the requirement that such procedures be judicial in nature and constitute civil enforcement proceedings was expressly rejected by subsequent California Supreme Court authority. The third issue is whether the *Younger* abstention requirement that the litigant have had opportunity to raise federal questions also requires convincing the federal court that the federal contentions would win.

RECAPITULATION OF THE QUESTIONS PRESENTED

The federal courts are hopelessly confused about the time or times at which *Younger* abstention is to be evaluated. The Ninth Circuit is the most confused of all, as its judges have issued published and unpublished decision that apply each of the three main tests.

The first test 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 the instant 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).

Finally, the Ninth Circuit has endorsed a future-looking dynamic position in the unpublished case of *Big Sky*..

The Ninth Circuit could not have applied *Younger* abstention to Roshan under either of the dynamic approaches.

The multiplication of tests and recondite distinctions between cases leads to Roshan's second question: whether the application of *Younger* outside of criminal proceedings should be entirely eliminated in favor of Congress' intent to give litigants a federal forum in conflicts with state officials.

IN *SPU*, THE NINTH CIRCUIT CREATED YET ANOTHER TEST, AN OFFSHOOT OF THE FIRST FEDERAL TIME OF FILING TEST.

SPU is a lawsuit between a small Christian university, Seattle Pacific University ("SPU"), and the attorney general of Washington State, Defendant Ferguson. Ferguson announced an investigation of SPU's policies against faculty and most employees engaging in homosexual conduct as a potential violation of Washington State law. *SPU* at 56. SPU mounted a pre-emptive lawsuit, just as occurred in the related case of *Sanai v. Cardona*, Ninth Circuit Case No. 23-15618.

The district court judgment dismissed on the case on *Younger* abstention and lack of redressability. *SPU* at 57.

Judge McKeown first addressed the issue of redressability, which is not at issue in either Roshan or Sanai's petition. Next, she addressed *Younger* abstention. Prior to *SPU*, Judge McKeown had taken two different positions on the test for *Younger* abstention. First, 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, in the unpublished case of *Big Sky*, *supra*, the panel did not like the result that the date-of-filing-time rule dictated, because at the time that complaint was filed the state proceeding was stayed due to a related criminal case involving a third party. As discussed in the petition, Judge McKeown and the rest of the panel employed a new "fast-forward" approach where the test was based on evaluating the case at a future time based on a promise by the state at oral argument to lift the stay on the state proceeding. *See* www.ca9.uscourts.gov/media/video/?20190828/19-35138/.

In *SPU*, Judge McKeown took a third position: that *Younger* abstention may only be avoided in the time between pre-enforcement standing and the start of ongoing proceedings. *SPU* at 64 (*citing Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1229 (4th Cir. 1898) that the "period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time for a litigant to bring its First Amendment challenges in federal court. Indeed, if this time is never appropriate, any

opportunity for federal adjudication of federal rights will be lost.")

Prior to this Court's decision in *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013) any kind of governmental proceedings could be deemed subject to *Younger*. The *SPU* panel identified two cases where matters in the investigation stage had been held to be subject to *Younger*. The first was "*Partington v. Gedan,* 961 F.2d 852 (9th Cir. 1992), *as amended* (July 2, 1992)", *id.* at 65, a case involving multiple Hawaii Bar proceedings ordered by the Hawaii Supreme Court. The second was "*San Jose Silicon Valley Chamber of Com. Pol. Action Comm. v. City of San Jose,* 546 F.3d 1087, 1092 (9th Cir. 2008)... *abrogated on other grounds by Sprint Commc'ns,* 571 U.S. 69, 134 S.Ct. 584, 187 L.Ed.2d 505...." *Id.*

The note that *San Jose Silicon Valley* was abrogated by *Sprint* is a new, unexplained, determination. Every single citation of *San Jose Silicon Valley* prior to *SPU* treated it as good law. *See, e.g. Arevelo v. Hennessey,* 882 F.3d 763, 765 (9th Cir. 2018), the most recent published opinion to cite *San Jose Silicon Valley.*

The only grounds for finding that *Sprint* abrogated *San Jose Silicon Valley* would be a determination that case did not meet *Sprint's* requirement that the state proceedings fall into one of the *NOPSI* categories. All of these categories require that the proceedings be "judicial in nature." However, in California, administrative proceedings are not judicial in nature as a matter of constitutional edict. Cal. Const. art. VI, §1 ("The judicial power of this State is vested in the Supreme

Court, courts of appeal, superior courts, and municipal courts."); and *In re Rose*, 22 Cal.4th 430, 441-42 (Cal. 2000) ("[T]he State Bar Court is not an article VI court"). This led to a separate but related conflict in Circuit law discussed as follows:

> We pause to note an important legal issue that we need not and do not reach. Under California law, an aggrieved party may challenge a final administrative action in state court by petitioning for a writ of mandate. Cal.Civ.Proc.Code § 1094.5. If a state administrative proceeding is final, and state-court judicial review is available but has not been invoked, is the state proceeding nevertheless "ongoing" for purposes of *Younger* abstention? In other words, must federal courts view the administrative proceeding and the possibility for state-court review as one unitary proceeding? The Supreme Court has stated that this is an open question. *New Orleans Pub. Serv., Inc. v. Council of New Orleans* ("NOPSI"), 491 U.S. 350, 370 n. 4, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989); *see also id. at* 374, 109 S.Ct. 2506 (Rehnquist, C.J., concurring in the judgment) (stating that he would hold that the proceedings are unitary); *id.* at 374-75, 109 S.Ct. 2506 (Blackmun, J., concurring in the judgment) (stating that he is "not entirely persuaded" that the question is open).

Seven circuits have addressed this question. Four have held that the administrative proceeding and the possibility for state court review are to be viewed as one unitary proceeding, and three have held the opposite. *Compare Maymo-Melendez v. Alvarez-Ramirez,* 364 F.3d 27, 35 (1st Cir.2004) ("*Younger* now has to be read as treating the state process[the administrative proceeding and the possibility for state-court review] ... as a continuum from start to finish."), *Majors v. Engelbrecht,* 149 F.3d 709, 713 (7th Cir.1998) (holding that the state proceeding is ongoing, even assuming that the administrative proceeding is final and state-court review had not begun), *O'Neill v. City of Philadelphia,* 32 F.3d 785, 790-91 (3d Cir.1994) (joining the majority rule and observing that "[w]e have been given no reason why a litigant in a state administrative proceeding should be permitted to forego state-court judicial review of the agency's decision in order to apply for relief in federal court"), and *Alleghany Corp. v. Pomeroy,* 898 F.2d 1314, 1316-17 (8th Cir.1990) (noting that the Supreme Court left the question open and deciding that the proceedings are unitary), with *Norfolk & W. Ry. Co. v. Pub. Utils. Comm'n,* 926 F.2d 567, 572

(6th Cir.1991) (agreeing that "a state administrative enforcement proceeding is no longer pending when the agency proceeding has been completed, notwithstanding the availability of state appellate review"), *CECOS Int'l, Inc. v. Jorling,* 895 F.2d 66, 72 (2d Cir.1990) (holding that an aggrieved party may choose between petitioning the state court for review and filing a federal § 1983 claim), and *Thomas v. Tex. State Bd. of Med. Exam'rs,* 807 F.2d 453, 456 (5th Cir.1987) ("The mere availability of state judicial review of state administrative proceedings does not amount to the pendency of state judicial proceedings within the meaning of *Huffman* [*v. Pursue, Ltd.,* 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975)].").

Although we briefly joined the majority rule in 1993, that opinion was withdrawn, and we have not addressed the question since then. *See Nev. Entm't Indus., Inc. v. City of Henderson,* 8 F.3d 1348 (9th Cir.1993) (per curiam) (joining majority rule), *withdrawn by* 21 F.3d 895 (9th Cir.), *on reh'g* 26 F.3d 131 (9th Cir.1994) (unpublished disposition) (holding that the *Younger* abstention question was moot); *see also Kleenwell*

> *Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 393-94 (9th Cir.1995) (noting that the question is open in this circuit, but declining to reach it). Because, here, the administrative proceeding itself is ongoing, we do not reach the issue.

San Jose Silicon Valley, *supra*, at 1093-4.

The embedded conflict on the question of whether administrative proceedings are part of the same or different proceedings in California has been determined as a matter of state law: they are separate. *Ogunaalu v. Sup. Ct. (Cal. Comm. on Teacher Credentialing)*, 12 Cal.App.5th 107,113 (2017)(administrative proceeding is separate from administrative mandamus proceedings). But the issue differs in every state. The dynamic approach largely eliminates this issue, however, as the limitations period on review will force the state and the federal plaintiff to proceed to true judicial proceeding or terminate state proceedings.

The new rule for timing announced by *SPU* is dicta; it was not necessary to determine the case, but Judge McKeown decided to create it anyway. When measured against her decision in *Big Sky*, it is apparent that the increasingly abstruse doctrines serve to make arbitrary departures from the published case law easier to achieve.

SPU's analysis underlines the virtue of eliminating *Younger* abstention outside of the criminal arena. Instead of the complex tests and *Middlesex* factors, eliminating *Younger* would simplify matters and all non-criminal cases would be

treated the same, eliminating the increasingly arbitrary distinctions between litigant who are subject to *Younger* abstention in non-criminal cases and those who are not.

CONCLUSION

This Court should grant the petition for certiorari as requested in petitions of Roshan, Mr. Sanai, and in this supplemental brief.

Dated this January 10, 2025.

Respectfully submitted,

/s/ Peyman Roshan

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