No. 20-1327

In the Supreme Court of the United States

PDX NORTH, INC.,

Petitioner,

v.

ROBERT ASARO-ANGELO, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT OF THE STATE OF NEW JERSEY,

Respondent.

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

BRIEF IN OPPOSITION

Gurbir S. Grewal
Attorney General of New Jersey
Jeremy M. Feigenbaum*
State Solicitor
Melissa H. Raksa
Assistant Attorney General
Emily M. Bisnauth
Christopher Weber
Ryan J. Silver
Deputy Attorneys General
Office of the Attorney
General of New Jersey
25 Market Street
Trenton, New Jersey 08625
(609) 292-4925
jeremy.feigenbaum@njoag.gov

* *Counsel of Record*

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INTRODUCTION

In the decision below, the Third Circuit evaluated whether or not to abstain from resolving a particular federal suit. The unanimous panel recited the multi-factor test for abstention laid out in *Younger v. Harris*, 401 U.S. 37 (1971), and more recently in *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013), and it held that abstention was warranted. The panel found that the State of New Jersey had already initiated an ongoing state civil enforcement proceeding against Petitioner for its failure to pay unemployment taxes; that New Jersey was seeking to sanction Petitioner for its misconduct by demanding penalties in the proceeding; that the State's decision to proceed against Petitioner and seek sanctions followed a long investigation; and that Petitioner could raise its argument that New Jersey law was preempted by the Federal Aviation Administration Authorization Act of 1994 in state court instead. The Third Circuit explained that there was nothing unfair about this: before Petitioner chose to violate New Jersey law, and even as the State was investigating Petitioner's potential violations, the company could have pursued these claims in federal court. But because it decided to wait until after the State had taken enforcement action, the principles of comity underlying *Younger* abstention demanded that Petitioner raise its preemption defense in the ongoing state enforcement action instead.

No basis for certiorari exists as to that conclusion, which does nothing more than apply this Court's own multi-factor abstention test to the facts of this particular lawsuit. For one, there is no circuit split on either the outcome or the reasoning of the decision below. In reality, every circuit relies on the same considerations

announced in *Sprint* when considering whether to abstain in favor of an ongoing state civil enforcement action, and they apply those considerations to the record before them. There is no basis to say that this case would have been resolved differently by any other circuit. For another, this case does not warrant a splitless grant: the case involves nothing more than a challenge to how a common body of law applies to one record; the panel ruling will not impact other cases; and there are a number of vehicle problems, including an antecedent question on the standard of review and Petitioner's focus on challenging the interpretation of New Jersey law. Finally, the decision below was right: this case demands the federal courts abstain. There is no basis for this Court to grant review.

STATEMENT OF THE CASE

1. The New Jersey Department of Labor and Workforce Development enforces and administers New Jersey's various labor and workers' compensation laws on behalf of the State. N.J. Stat. Ann. §§ 34:1-1 to 34:21-15. The Department also oversees and enforces New Jersey's Unemployment Compensation Law ("UCL"), N.J. Stat. Ann. §§ 43:21-1 to -24.30, and administers the State's unemployment compensation fund. N.J. Stat. Ann. §§ 43:21-11 and -9.

The UCL was established in 1936, following the enactment of the Social Security Act in 1935, 49 Stat. 620, ch. 531 (1935), as part of a national response to widespread unemployment that had accompanied the Great Depression. See *Carpet Remnant Warehouse, Inc. v. New Jersey Dep't of Labor*, 593 A.2d 1177, 1183-85 (N.J. 1991). The "primary objective of the UCL is to provide a cushion for the workers of New Jersey

'against the shocks and rigors of unemployment.'" *Id.*, at 1184 (quoting *Provident Inst. for Sav. in Jersey City v. Div. of Emp't Sec.*, 161 A.2d 497, 500 (N.J. 1960)); see also N.J. Stat. Ann. § 43:21-2.

The UCL requires employers to pay into the State's unemployment compensation fund an amount in proportion to the wages each employer pays to its employees. See N.J. Stat. Ann. § 43:21-7. The UCL exempts workers from being classified as employees (allowing employers to avoid making unemployment tax contributions on their remuneration) if they satisfy a three-pronged test. See N.J. Stat. Ann. § 43:21-19(i)(6). Under that test, all "[s]ervices performed by an individual for remuneration shall be deemed to be employment" such that taxes are owed unless their employer proves "(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business." *Id.*; see also Pet. App. 5 (summarizing New Jersey law).

In other words, employers must pay UCL tax contributions to the State on payments made to employees, but not on payments to independent contractors. Pet. App. 5-6. There are other exemptions as well, in addition to the one for independent contractors. One such exemption, known as the "Truck Drivers Exemp-

tion," exempts from coverage under the UCL any services performed by certain operators of motor vehicles who meet several weight, licensing, and compensation-related factors—meaning the employer need not pay unemployment taxes for the work these persons perform. N.J. Stat. Ann. § 43:21-19(i)(7)(X).

2. Every year, the Department conducts audits of employers operating in the State to ensure compliance with the UCL, including to ensure that employers do not misclassify their employees to avoid their unemployment tax obligations. In May 2012, after completing audits for the period of 2006 through 2009, the Department determined that Petitioner—a shipper operating in the State—had misclassified a number of its truck drivers as independent contractors rather than as employees. Pet. App. 5. The Department made similar findings after completing subsequent audits for the period of 2010 through 2015. *Id.* Based on these findings, the Department found that Petitioner failed to pay the required contributions under the UCL, N.J. Stat. Ann. §§ 43:21-14 and -16, assessed Petitioner for the amount owed—including the principal, interest, and penalties—and filed administrative judgments for those assessments in 2015 and 2018. Pet. App. 6. On February 19, 2015, Petitioner sought review of the assessments at the New Jersey Office of Administrative Law ("NJOAL").[1] *Id.*

Seven months later, on September 22, 2015, Petitioner filed a complaint against the Commissioner in

[1] The NJOAL is a centralized state agency tasked with conducting administrative hearings for the State's executive departments. See N.J. Stat. Ann. §§ 52:14F-1 to -23.

the District of New Jersey, seeking declaratory and injunctive relief. Pet. App. 6-7. In this federal action, Petitioner argued the ongoing application of New Jersey labor laws to its business was preempted by a particular provision of the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501(c)(1). See Pet. App. 7. Petitioner sought an order that it should not have to pay contributions and penalties in the ongoing state enforcement action. *Id.*

On October 7, 2018, the Commissioner moved for judgment on the pleadings on the basis (*inter alia*) of the *Younger* abstention doctrine. Pet. App. 8. The District Court granted the Commissioner's motion and abstained under *Younger*. Pet. App. 8-9.

3. The Third Circuit affirmed in a unanimous decision. See Pet. App. 3-27. The panel first began by noting a split as to whether review of a decision to abstain is de novo or for abuse of discretion, Pet. App. 14 n.11 (collecting cases), and—based on its precedent—sided with Petitioner that review was de novo. *Id.* The panel then applied a straightforward analysis of this Court's *Younger* abstention decisions, and found the Department's ongoing action against Petitioner is the kind of action in which Petitioner can raise the same preemption arguments and to which abstention is ultimately warranted. Pet. App. 16-20.

The panel initially explained that while "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging,'" Pet App. 15 (quoting *Sprint*, 571 U.S., at 77), *Younger* nevertheless requires a court to abstain when three "types of state proceedings are ongoing at the time a federal case is commenced," *id.* (citing *Sprint*, 571 U.S., at 77). As the panel noted, these

categories are: (1) criminal proceedings, (2) select civil enforcement proceedings, and (3) proceedings involving orders in furtherance of state courts' judicial function. Pet. App. 16 (citing *Sprint*, 571 U.S., at 78).

As to the second category under *Younger*, the panel recognized that abstention in light of a civil enforcement proceeding would only be proper if that enforcement proceeding was structurally "akin" to state criminal proceedings in "important respects," *Sprint*, 571 U.S., at 79-80, which the panel denoted as "quasi-criminal," Pet. App. 16. To determine whether a civil enforcement proceeding qualified, the panel walked through the multi-factor test this Court set forth: that "(1) the action was commenced by the State in its sovereign capacity, (2) the proceeding was initiated to sanction the federal plaintiff for some wrongful act, and (3) there are other similarities to criminal actions." Pet. App. 16 (quoting *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 138 (CA3 2014), and citing *Sprint*, 571 U.S., at 79-80)). As to that final factor, the Third Circuit—relying on *Sprint*—noted that it would consider whether the action involved "a preliminary investigation that culminated with the filing of formal charges," as well as "whether the State could have alternatively sought to enforce a parallel criminal statute." *Id.* (quoting *ACRA Turf Club*, 748 F.3d, at 138, and citing *Sprint*, 571 U.S., at 79-80).

"Considering these factors together," the panel determined that the facts supported abstention in favor of the ongoing New Jersey proceeding. Pet. App. 20. First, the panel found that the "state administrative action was commenced by New Jersey in its sovereign capacity as to [Petitioner]." Pet. App. 17. Specifically,

the panel explained that unlike cases where no state actor investigated or filed a complaint, the State—via the Department—performed audits of Petitioner and issued multiple formal assessments after culmination of those audits. *Id.* Although Petitioner is the party that sought review of the assessments in the NJOAL, the panel identified that this was merely a function of New Jersey's administrative procedures, and that under state law, this still qualified as an enforcement action by the state actor. See Pet. App. 18.[2]

Next, the panel found this state enforcement proceeding sanctioned wrongful conduct. *Id.* The panel rejected Petitioner's sweeping claim that the civil remedies sought could never qualify as "sanctions." *Id.* Instead, the court determined, "[s]anctions are retributive in nature and are typically imposed to punish the sanctioned party 'for some wrongful act,'" *id.* (citation omitted), a category that could include certain civil consequences. The panel identified record evidence that this was just such an action to sanction Petitioner: the Department assessed Petitioner over $30,000 in penalties for failing to pay its taxes, which "are by their very nature, retributive: a sanction for wrongful conduct." Pet. App. 19. It found that this factor cut in favor of abstention as well. *Id.*

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[2] Indeed, under New Jersey law, the way a number of executive departments initiate civil enforcement actions is by providing assessments or other notices of violations, sometimes including penalties. The recipient can challenge that determination in the NJOAL. The ALJ's decision will be reviewed by the Commissioner who oversees the relevant department, and then by state appellate courts. If the assessment is not challenged, under state law the money assessed (including penalties) must be paid.

Finally, the panel examined whether there existed a criminal analog. *Id.* The panel, of course, recognized that "the question is not whether the current action is criminal or whether criminal charges are warranted" (as Petitioner contended); such a rule "would erase the quasi-criminal category of abstention," contrary to *Sprint*'s teachings. *Id.* Instead, the issue was whether there was a state criminal "analog" to this sort of action, further demonstrating the State's powerful interest in its enforcement action. Pet. App. 20. The panel found there was such an analog in this case because the State could have vindicated similar interests by holding Petitioner criminally liable under N.J. Stat. Ann. § 43:21-16(e), which criminalizes certain failures to pay unemployment taxes if the requisite intent requirement has been satisfied. Pet. App. 19-20. The panel then noted Petitioner itself alleged in its complaint a concern about facing criminal charges in state court for its misconduct. Pet. App. 20.

The panel also recognized that, in order to abstain, it would need to consider the so-called *Middlesex* factors, named for the case where they were announced, *Middlesex County Ethics Commission v. Garden State Bar Association*, 457 U.S. 423 (1982). Pet. App. 16-17. Abstention would only be warranted if "there are 'ongoing judicial proceeding[s]'"; the "'proceedings implicate important state interests'"; and "there is 'an adequate opportunity in the state proceeding to raise constitutional challenges.'" *Id.* (quoting *Middlesex*, 457 U.S., at 432). Those considerations were easily satisfied: a state action was proceeding at the time the federal suit was filed; the action implicated important interests both in the collection of unemployment taxes

and the enforcement of state law through proper channels; and Petitioner could raise its preemption defenses in the state appellate courts. See Pet. App. 21-22. Weighing all the factors together, the panel found that the state action against Petitioner was the kind that requires abstention under *Younger*. Pet. App. 20.

In the same opinion, the Third Circuit addressed a claim by another company. In the District Court, another company that had been audited by the Department, SLS Delivery Services, Inc. ("SLS"), intervened and raised the same causes of action and sought identical relief as Petitioner. Pet. App. 33-34. The District Court dismissed SLS's complaint, finding *Younger* abstention appropriate as to SLS's claims too. Pet. App. 47-48. On appeal, the panel reversed and remanded as to SLS, noting that while SLS was subject to an investigatory audit, SLS was not subject to any ongoing state proceedings and did not have an adequate opportunity to present constitutional claims in state court. Pet. App. 25-26. Therefore, the panel found *Younger* abstention was inappropriate as to SLS. Pet. App. 26. (The Third Circuit thus formally affirmed the District Court in part and reversed and remanded in part, but as to Petitioner, the panel affirmed the judgment entirely.) Respondent did not file a petition for certiorari from the ruling as to SLS.

REASONS FOR DENYING THE PETITION

None of the traditional criteria support certiorari. As a threshold matter, the Third Circuit's decision to abstain on the facts of this case did not generate a split requiring resolution by this Court. Nor is this the rare case that involves a split-less error in need of correction: there is no dispute over the governing abstention

test, only its application; the decision below will have no sweeping impact; and the Petition introduces vehicle problems. In any event, the panel decision was also rightly decided under this Court's precedents.

I. The Alleged Circuit Split Is Illusory.

The decision below does not conflict with—or even create tension with—the decision of any other circuit. Petitioner's asserted splits with the Seventh, Eighth, and Ninth Circuits rely upon fundamental misunderstandings of those circuits' decisions, and of the decision below. Each circuit has instead applied *Sprint*'s multi-factor analysis for abstention to the facts before them, and they have done so in a consistent way.

1. No split exists with the Seventh Circuit. In support of its position, Petitioner relies upon *Mulholland v. Marion County Election Board*, 746 F.3d 811 (CA7 2014), but that matter could not differ more from the instant case. In *Mulholland*, the federal plaintiff was an Indiana state legislative candidate who allegedly violated Indiana's election law. *Id.*, at 813. The Marion County Election Board scheduled a meeting to hear from interested persons about the candidate's alleged misconduct and to determine what steps it would take in response. *Id.*, at 814-15. The candidate then challenged the election law in federal court on First Amendment grounds, and the Election Board postponed the scheduled meeting and moved to dismiss the federal action under *Younger*. *Id.* The Seventh Circuit concluded on those facts that abstention was not warranted.

The Seventh Circuit offered three reasons why abstention was inappropriate, none of which apply here. First, the Seventh Circuit held "the Election Board's

investigation is too preliminary a proceeding to warrant *Younger* abstention," *id.*, at 813, since "a federal court need not decline to hear a constitutional case within its jurisdiction merely because a state investigation has begun," *id.*, at 817. That is consistent with the decision below, which likewise asked whether the State's "preliminary investigation" was still ongoing or whether it had already produced a "formal charge," and abstained in this case only because there was in fact a charge by the State. Pet. App. 16 (citing *Sprint*, 571 U.S., at 79-80); see also Pet. App. 26 (declining to abstain as to the claims of second company that was being audited but had not yet been assessed). In short, while the Marion County Election Board merely announced a future hearing to consider its options, the Department here had completed an audit and issued a formal assessment (including for penalties) that was the subject of an ongoing state proceeding.

Second, the Seventh Circuit held that the Election Board had no authority itself to sanction the plaintiff for any wrongdoing through the hearing, and that the Board could only *recommend* prosecution in a distinct proceeding by a prosecutor, who would have "complete discretion" over whether to accept that recommendation. *Mulholland*, 746 F.3d, at 817. It made sense that the Seventh Circuit would reject the notion of abstention in that case, given this Court's focus on whether the ongoing state action was initiated to "sanction" the federal plaintiff. *Sprint*, 571 U.S., at 79-80. But it is, of course, another critical difference from the decision below: here, the Commissioner can do more than recommend a punishment, and is instead seeking penalties—a classic sanction not addressed in *Mulholland*.

See Pet. App. 19 (noting "Commissioner has imposed over $30,000 in penalties on PDX").[3]

The Seventh Circuit provided a third "independent reason for not abstaining": the Board was "attempting to enforce a statute that ha[d] already been held unconstitutional in a final judgment against the Board" by a federal court in 2003. *Mulholland*, 746 F.3d, at 818. That defiance qualified as an "extraordinary circumstance" undermining abstention. *Id.*, at 813, 818. But no one alleges that any similar judgment has ever been issued against the Commissioner, meaning that this factor similarly distinguishes *Mulholland* from the decision below, and justifies refusing to abstain in the former alone. Simply put, these meaningfully distinct cases called for distinct outcomes under the same black letter abstention analysis.

2. If anything, the claimed split between the decision below and the Eighth Circuit is even weaker. Petitioner relies on *Minnesota Living Assistance v. Peterson*, 899 F.3d 548 (CA8 2018), *cert. denied*, 139 S. Ct. 1195 (Feb. 19, 2019), but that case involved a circuit's decision to abstain and supports the decision below.

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[3] Seeking to establish a conflict, Petitioner claims the Seventh Circuit's analysis focused on whether "the applicable election statute presented any 'possibility of [a] criminal penalty.'" Pet. 19 (quoting *Mulholland*, 746 F.3d, at 816-17). Petitioner severely misconstrues that decision. The Seventh Circuit did not consider whether the Indiana election law at issue contained any sort of criminal analog. See *Mulholland*, 746 F.3d, at 816-18. Instead, the court looked to the Election Board's general "authority to sanction" the plaintiff and concluded that the specific hearing at issue could not lead to any such sanctions and could only lead to recommendations. *Id.*, at 817. That is inapposite.

In *Peterson*, an employee of Minnesota Living Assistance, Inc. (referred to in that case as "Baywood"), filed a 2014 complaint alleging that Baywood violated the Minnesota Fair Labor Standards Act ("MFLSA") by failing to pay overtime compensation from March 2012 to March 2014. *Id.*, at 551. The Minnesota Department of Labor and Industry ("DLI") investigated and determined Baywood had not paid employees the wages required. *Id.* In May 2016, DLI issued an order assessing a penalty of $1,000 for the failure to keep records and requiring Baywood to pay back wages and liquidated damages. *Id.* In August 2016, after Baywood contested the compliance order, DLI initiated a contested case proceeding before an administrative law judge at the Minnesota Office of Administrative Hearing. *Id.* Baywood then filed a suit in federal district court seeking a declaration that the federal Fair Labor Standards Act preempted the MFLSA. *Id.* The Eighth Circuit found abstention appropriate, just as the panel did here. *Id.*, at 553.

The Eighth Circuit asked the same question that the panel below did—namely, whether there is "a civil enforcement proceeding resembling a criminal prosecution," meaning one in which "(1) the action was initiated by the State in its sovereign capacity; (2) the action involves sanctions against the federal plaintiff for some wrongful act; and (3) the action includes an investigation, often culminating in formal charges." *Id.*, at 552 (citing *Sprint*, 571 U.S., at 79-80). The Eighth Circuit, in language reminiscent of the decision below, explained that the first and third factors supported abstention "because the action was initiated by the State, via the DLI, following an investigation into Baywood's failure to pay overtime wages to

companionship-services employees." *Id.*; see Pet. App. 17-20 (making same points as to initiation by State after a departmental investigation).

Although Petitioner focuses on the Eighth Circuit's analysis of the second prong—whether there is a sanction for a wrongful act—Petitioner misapprehends the Eighth Circuit's opinion. Petitioner suggests that the Eighth Circuit only abstained in favor of the Minnesota action because the MFLSA provides for criminal penalties, even if DLI did not seek them. Pet. 18 (citing *Peterson*, 899 F.3d, at 553). That is not what the Eighth Circuit said. Instead, the court explicitly emphasized DLI was seeking to sanction the company's wrongful conduct because it was imposing liquidated damages and because it was seeking to restrain Baywood's future conduct. See *Peterson*, 899 F.3d, at 553. The Eighth Circuit could not have been clearer on this point: "*Though not themselves criminal penalties*, the sanctions sought support *Younger* abstention." *Id.* (emphasis added). In short, while the Minnesota labor laws providing for criminal penalties certainly bolster a decision to abstain, the Eighth Circuit nowhere said that such a provision was necessary, and the court instead treated civil remedies as qualifying sanctions. There is no split between these decisions, which both affirmed abstention orders.

3. Finally, Petitioner gets no further by referencing two Ninth Circuit cases, *Rynearson v. Ferguson*, 903 F.3d 920 (CA9 2018), and *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732 (CA9 2020), *cert. denied*, __ S. Ct. __ (June 21, 2021).

Begin with *Rynearson*, which (just like the Seventh Circuit decision discussed above) has next-to-nothing

in common with the decision below. That case involved a state court action between two *private parties* where one individual was seeking a stalking protection order against the other. *Rynearson*, 903 F.3d, at 922. In response to the state proceeding, the defendant brought suit in federal district court challenging the constitutionality of Washington's cyberstalking statute, which formed the basis for the state protection order pursued against him. *Id.*, at 924. The question was whether abstention was warranted as to the private protective order proceedings in Washington state court.

Although the Ninth Circuit held abstention was inappropriate, it relied upon considerations that are not present here. *Id.*, at 925-26. For one, the Ninth Circuit explained that the party who initiated the state court action "is a private party, not the state or local government," and that state "law does not require state authorities to conduct any investigation or file charges or a complaint in connection with an application for a protection order, and state actors are not party to the protection proceedings." *Id.*, at 925; see also *id.*, at 923 (noting prosecutor indicated no plans on filing charges against the state court defendant). That is hugely different from this case, which involved a state-initiated enforcement action after a government-run investigation. Pet. App. 17-20 (citing *Sprint*, 571 U.S., at 79-80). For another, closely reviewing the relevant Washington law, the Ninth Circuit found that protective orders in Washington were designed only to protect the applicant, not to sanction misconduct. *Rynearson*, 903 F.3d, at 922. But that case did not involve any request for penalties, and thus did not address (or dispute) the Third Circuit's conclusion that such remedies can still qualify as sanctions for wrongful conduct.

Petitioner details a single sentence from the Ninth Circuit opinion to allege a split, but it comes up short. Petitioner notes that, as the Ninth Circuit found, "the *mere fact* that the protection order law refers to criminal statutes does not mean that protection order proceedings are quasi-criminal." *Id.*, at 926 (emphasis added). But no one disagrees with that point—least of all the Third Circuit. Rather, there is significant other evidence in this case that abstention is warranted: the State's own preliminary investigation; the initiation of a state proceeding by a public entity; and the effort by the State to sanction state lawbreaking, in particular by seeking penalties. See Pet. App. 20 (explaining its decision to abstain was based on all the *Sprint* "factors together," not solely based on a reference to a criminal statute). None of that was present in *Rynearson*.

Finally, Petitioner also relies upon *Connors*. There, in 2014, Hawai'i filed a suit in state court against several pharmaceutical companies that produced a medication to help prevent heart attacks and strokes. *Connors*, 979 F.3d, at 735. Hawai'i alleged that the companies had intentionally concealed health information in violation of state law prohibiting unfair or deceptive acts. *Id.* These companies responded in January 2020 with a federal suit seeking an injunction against the state proceedings, arguing the Hawai'i law at issue violated their First Amendment rights. *Id.*

It is genuinely unclear why Petitioner believes the Ninth Circuit's decision in *Connors* helps it, because *Connors* agreed that abstention was warranted. *Id.*, at 734. The panel held (contrary to Petitioner's claims) that the factors for abstention laid out in *Sprint* are the sort that should be "typically present," but are *not*

"criteria that are always required." *Id.*, at 737; see also *id.* (explaining that *Sprint*'s multi-factor test should not be treated like a "checklist"). And then turning to that test, *Connors* found abstention justified in favor of a proceeding in which the State sought exclusively *civil* penalties and punitive damages to sanction companies for their deceptive conduct—as those could still qualify as sanctions for wrongful conduct. *Id.*, at 738. The Ninth Circuit added that even as important federal interests were at stake, namely First Amendment rights, "the existence of a chilling effect ... has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Id.* (quoting *Younger*, 401 U.S., at 51) (quotation marks omitted). The Ninth Circuit did not announce any rule or outcome which conflicts with the Third Circuit's approach here.

All Petitioner can muster in support of its conflict is that *Connors* allegedly properly asked whether the specific state case was a qualifying civil enforcement action, while the decision below allegedly improperly looked at a "hypothetical" criminal charge that could have been brought but was not. Pet. 21. That fails on a number of levels. For one, Petitioner's reading of the Ninth Circuit is simply wrong: *Connors* confirms that an abstention analysis looks to the "general class" of cases, *id.,* at 738, and notes explicitly that "[a]ccepting the companies' invitation to scrutinize the particular facts of a state civil enforcement action would offend the principles of comity at the heart of the *Younger* doctrine." *Id.*, at 737. For another, Petitioner misconstrues what the Third Circuit did: the panel painstakingly reviewed the actual, ongoing state civil enforcement proceeding to determine if it met the *Sprint* fac-

tors, and mentioned the potential for criminal enforcement solely in assessing the presence of a criminal analog. Pet. App. 17-18. And finally, there is a tension in the Petition on this point: in drawing a contrast with the Eighth Circuit, Petitioner details the hypothetical criminal proceeding the DLI could have pursued, but in discussing *Connors*, Petitioner suggests that hypothetical action is irrelevant. Petitioner cannot have it both ways, and its claims of a split are lacking.[4]

II. This Case Does Not Otherwise Warrant Certiorari.

Petitioner claims that certiorari is warranted even absent a split, but that is incorrect for three independent reasons: this is a dispute not over legal principles but over their application to the facts; the decision will have limited practical impact on any other cases; and vehicle problems complicate review.

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[4] Finally, Petitioner asserts without proof that no other court has abstained under *Younger* in favor of what Petitioner terms a "purely civil" proceeding. Pet. 17. That is wrong. As noted above, *Connors* involved a decision to abstain in favor of a civil proceeding that sought penalties and damages, 979 F.3d, at 739, and *Peterson* involved abstention given an ongoing state administrative enforcement in which the agency declined to seek criminal penalties for violations of labor law. 899 F.3d, at 552-53. Nor are they alone. See, e.g., *Middlesex*, 457 U.S., at 433-34 (state-initiated disciplinary proceedings against lawyer for violation of ethics rules); *Mir v. Shah*, 596 F. App'x 48, 51 (CA2 2014) (state proceeding against physician to revoke license); *Marcus & Millichap Real Estate Inv. Servs. of Nev. v. Chandra*, 822 F. App'x 597, 598 (CA9 2020) (disciplinary proceeding against real estate brokers); *Hunter v. Hirsig*, 660 F. App'x 711 (CA10 2016) (disciplinary proceedings to revoke insurance agents' licenses).

1. As an initial matter, certiorari is not warranted because the Third Circuit correctly stated the governing test for abstention, and the parties simply debate its fact-bound application to this case. As explained above, the Third Circuit correctly recognized that federal jurisdiction is the rule, and that *Younger* abstention is only appropriate for three categories of ongoing state proceedings: (1) criminal prosecutions, (2) select civil enforcement proceedings, and (3) proceedings involving orders in furtherance of the state courts' judicial function. Pet. App. 16 (quoting *ACRA Turf Club,* 748 F.3d, at 138, and citing *Sprint*, 571 U.S., at 78). Petitioner does not, and cannot, deny that this Court has said precisely the same.

The panel also correctly stated the test for whether an ongoing civil enforcement proceeding—the only applicable category—required abstention. Far from concluding that all civil enforcement proceedings sufficed, this Court has instructed to ask whether the underlying state proceeding is like a criminal action in "important respects": if so, abstention is proper; if not, it is not. *Sprint*, 571 U.S., at 79-80. Relying directly on *Sprint*'s test, the panel followed the same step-by-step analysis this Court has used, asking whether the action "was commenced by the State in its sovereign capacity"; whether the suit "was initiated to sanction the federal plaintiff for some wrongful act"; and whether "there are other similarities to criminal actions," such as "a preliminary investigation that culminated with the filing of formal charges" or the existence of a state law criminal analog. Pet. App. 16 (citing *Sprint*, 571 U.S., at 79-80)). If this Court compares the multi-factor test in *Sprint* with the test the panel relied on below, it will find a perfect overlap.

The panel further recognized that even assuming a civil proceeding is quasi-criminal in nature, a federal court must still consider whether the *Middlesex* factors weigh in favor of abstention. Pet. App. 16-17. Before deciding to abstain, the panel therefore appropriately asked whether "there are 'ongoing judicial proceeding[s]'"; whether the "'proceedings implicate important state interests'"; and whether "there is 'an adequate opportunity in the state proceeding to raise constitutional challenges.'" *Id.* (quoting *Middlesex*, 457 U.S., at 432). Petitioner does not contest these considerations, nor could it: all of them have been established explicitly by this Court. As before, a side-by-side review of this Court's precedents and the decision below will provide a seamless match.

This Court in *Sprint* recited in extensive detail the multi-factor test that governs questions of abstention. There is no dispute the Third Circuit used that test, and there is no request in this case to actually change any of the governing factors. Instead, Petitioner is just unhappy with how a unanimous panel applied those factors here. That is hardly the sort of question that—absent a split—justifies certiorari.

2. Although Petitioner claims that the mere impact of the panel's application of *Younger* justifies certiorari, that is wrong. Petitioner's sweeping claims about the reach of the panel decision are contrary to both the Third Circuit's decision and the record.

First, Petitioner baldly claims that the decision below will "extend *Younger* to virtually all parallel state and federal proceedings where a party can identify a plausible important state interest." Pet. 14; see also *id.* (complaining that that the Third Circuit's decision

"all but ensures that a State will prevail on abstention grounds"). That is simply incorrect. Instead, the Third Circuit specifically evaluated not only whether there was an ongoing state proceeding affecting important state interests, but also whether the State itself initiated the proceeding; whether the proceeding was initiated to sanction wrongful conduct (in part by reviewing the remedies the State sought); whether the proceeding followed a preliminary investigation; whether state law established a criminal analog to the enforcement proceeding; and whether the federal preemption defense could be raised in the state proceedings. Pet. App. 16-19 (analyzing multi-factor test); see also Pet. App. 20 (only agreeing to abstain after "[c]onsidering these factors together").[5]

Put simply, rather than breaking doctrinal ground, the panel conducted a careful, reasoned examination of the specific facts and circumstances of the state enforcement action and held that—on balance—the proceeding satisfied *Sprint*'s multi-factor test for abstention. See Pet. App. 17-22. Petitioner is of course dissatisfied with how some of the factors were analyzed, but they were still central to the ruling, and the decision below hardly stands for the proposition that all

[5] Indeed, by the nature of its multi-factor test, *Younger* cases consistently require the courts to examine such facts on a "case-by-case basis and not as a matter of the application of a general rule." *Ahrensfeld v. Stephens*, 528 F.2d 193, 197 (CA7 1975); see also *JMM Corp. v. Dist. of Colum.*, 378 F.3d 1117, n.10 (CADC 2004) (explaining that because *Younger* abstention is determined on a case-by-case basis, the holding is limited to the specific proceeding before the court); *Tokyo Gwinnett, LLC v. Gwinnett Cty.*, 940 F.3d 1254, 1272 (CA11 2019) (same).

enforcement actions qualify for abstention. Said another way, future parties can (and undoubtedly will) debate whether abstention is warranted in any case in which the State did not initiate the proceeding, there was no criminal analog, the State sought no penalties, or a preemption defense could not be raised in state court, and the panel did not foreclose them from doing so. Absent this perfect confluence of factors, the decision below will not necessarily control.

Petitioner's second consequentialist argument focuses more concretely on the context of labor audits in New Jersey, but it fares no better. Petitioner says that because the Department regularly initiates audits of employers operating in New Jersey, the panel's decision effectively means the Department is "initiating a quasi-criminal proceeding against thousands of employers per year, all of which are now barred from any challenge to the [Department] in federal court." Pet. 15. But that claim is baseless, and finds no support in the decision below. Far from stating that every single audit triggers *Younger* abstention and precludes federal courts from hearing a preemption defense, a party could (1) challenge New Jersey law as preempted before it decides to unlawfully refuse to pay taxes, or (2) challenge state law while an audit is ongoing but prior to the initiation of the state enforcement proceedings. The *only* thing the panel held a company cannot do is what Petitioner did—violate New Jersey law, wait until the State completes its preliminary investigation and initiates formal state proceedings to sanction that misconduct (including by seeking penalties), and *then* sue the State directly in federal court to raise an issue that could instead easily be raised in the now-ongoing state judicial action. That is a narrower holding than

Petitioner lets on, and one driven by important principles of comity and equity.

There can be no doubt that Petitioner is wrong as to the reach of the Third Circuit's opinion: in the same opinion affirming abstention as to Petitioner's claims, the panel *reversed* abstention as to a second company audited by the Department—SLS. Pet. App. 4. Unlike for Petitioner's case, the Department's audit of SLS had not yet concluded at the time the federal action was filed. Pet. App. 33. It followed, the panel reasoned, that because SLS was still in that audit phase, there was no "ongoing judicial proceeding for *Younger* abstention purposes." Pet. App. 25. In reaching this decision, the panel rejected an argument by the State that "once the Department initiates a formal audit, an 'ongoing judicial proceeding' exists for *Younger* purposes." Pet. App. 24-25. The panel's clear holding as to SLS belies Petitioner's breathless claim that the decision below will lead to "thousands of employers per year" being barred from suing New Jersey in federal court when an audit begins.[6]

Petitioner's final argument as to the impacts of the decision below is weaker still. Petitioner worries "the panel's opinion and analysis will significantly hinder

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[6] That is why Petitioner's offensive claim that the State will "initiat[e] a frivolous state proceeding to bar a business from raising meritorious claims in its defense," Pet. 23, makes no sense on its face. Petitioner, like SLS, had ample time to raise a preemption argument in federal court, including before it chose to violate New Jersey's labor laws. It declined to do so—opting to simply break New Jersey law and then attempt to evade the very proceedings sanctioning that lawbreaking.

a business's ability to challenge unconstitutional regulations." Pet. 23. But it will do nothing of the sort. Even in those cases in which abstention is warranted in favor of an ongoing state proceeding, the employer is not precluded from raising its constitutional challenge; indeed, one of the *Middlesex* factors for abstention is that they be able to do so. See 457 U.S., at 432. That is certainly the case here. See *Zahl v. Harper*, 282 F.3d 204, 210-11 (CA3 2002) (explaining that a preemption challenge can be addressed in New Jersey's administrative and appellate proceedings) (citing N.J. Ct. R. 2:2-3(a)(2)); N.J. Admin. Code § 12:16-22.6(b); *Maisonet v. Dep't of Human Servs.*, 657 A.2d 1209, 1212 (N.J. 1995)). If Petitioner believes that federal law preempts New Jersey's laws, it can raise that claim in the state appellate court, the New Jersey Supreme Court, and then this Court.

Petitioner evidently believes that the New Jersey courts would not properly hear such defenses, but this Court has consistently rejected "any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex*, 457 U.S., at 431; see also *Moore v. Sims*, 442 U.S. 415, 430 (1979) ("emphatically reject[ing]" the contention that "state courts [are] not competent to adjudicate federal constitutional claims"); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975) ("Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do."). This case is about *where* Petitioner must raise its arguments, not whether it can do so.

Across the board, Petitioner misstates the results on the decision below. The Third Circuit's ruling does

not mean that every civil proceeding in state court will qualify for abstention. It does not mean every labor audit in New Jersey will qualify for abstention. And it does not mean that Petitioner is precluded from raising a preemption argument (or, for that matter, any other federal constitutional argument). All it means is that *Sprint*'s multi-factor test for *Younger* abstention continues to govern this case and every other.

3. Finally, three independent vehicle problems also stand in the way of review in this case. The first problem is that resolution of the fact-bound question Petitioner presents would be complicated by the existence of an antecedent question: the standard of review that should apply to the District Court's decision to abstain under *Younger*. The Third Circuit noted disagreement among the lower courts on this question, see Pet. App. 14 n.11 (collecting cases demonstrating a dispute over the applicable standard of review), but answered that question in favor of Petitioner here—reviewing the abstention question de novo, rather than for an abuse of discretion. Petitioner glosses over this issue, but because the District Court decided to abstain, this Court would need to evaluate what standard applies before it could grant Petitioner relief. Antecedent questions that were resolved by the lower court in favor of Petitioner are frequently reason enough to deny certiorari and await a better vehicle.

Second, Petitioner's own pleadings make this case a poor vehicle for reviewing Petitioner's arguments. A key premise of the instant Petition is that *Younger* abstention is inappropriate because "the Panel never references a parallel criminal statute or criminal code provision" that could have been enforced against the

company. Pet. 9. Leaving aside that Petitioner misunderstands how the *Younger* analysis is generally supposed to work, see Part III, *infra*, there is an obvious factual problem: Petitioner itself "acknowledge[d] the risk of New Jersey criminally charging them in their pleadings, stating they fear criminal consequences." Pet. App. 20. If this Court wishes to evaluate whether *Younger* abstention applies to a civil enforcement proceeding that has no criminal analog (as Petitioner incorrectly posits happened here), it should not do so in a case in which Petitioner's own pleadings allege concerns about state criminal consequences—and where the panel explicitly relied on those allegations.

Third, Petitioner's argument brings in questions of New Jersey state law, which are not appropriate uses of this Court's time and resources. As noted above, a premise (if not *the* premise) of this Petition is that the panel abstained in the face of a civil enforcement proceeding without identifying a parallel state criminal law. The problem for Petitioner is that the panel *did* identify such criminal analog, N.J. Stat. Ann. § 43:21-16(e), but Petitioner believes that was an "erroneous" reading of state law. See Pet. 9-10, 13-14 (arguing that as a matter of New Jersey law, N.J. Stat. Ann. § 43:21-16(e) itself is a civil statute with quasi-criminal consequences, rather than a criminal law). In other words, to side with Petitioner on Petitioner's own theory, this Court would have to evaluate whether a circuit court misconstrued a particular state statute as criminal or civil, and review state case law to make that call. That Petitioner's case demands this Court engage in a state law inquiry further counsels against review.

III. The Decision Below Is Correct.

Not only does Petitioner seek certiorari in a split-less, fact-bound case, but the panel's decision reflects the correct application of this Court's precedents. As noted above, the claim that a court misapplied a correctly stated rule of law is ordinarily not grounds for this Court's review. But in any event, the application of *Younger* and *Sprint* to this case was right.

In assessing whether this proceeding was a civil enforcement action that triggers *Younger*, the panel scrutinized the record. First, the panel correctly noted that the underlying state proceeding "was commenced by New Jersey in its sovereign capacity" as "the Commissioner performed multiple audits of [Petitioner] and issued multiple formal assessments after the culmination of those audits." Pet. App. 17. While Petitioner was technically the party seeking review of the audit in the NJOAL, the panel explained that this was merely a function of New Jersey's administrative procedures—and that the State was really the one to commence this state enforcement action under New Jersey law. Pet. App. 18. Not only that, but the Department also filed administrative judgments for those assessments in 2015 and 2018, which had the full force and effect of court orders. See Pet. App. 6. There is no doubt the State initiated the ongoing action to which the panel abstained, and the Petition does not appear to challenge this conclusion.

Second, the panel looked to whether the enforcement action sanctioned wrongful conduct. The panel, in holding that the action did sanction wrongful conduct, relied on the Commissioner's decision to impose over $30,000 in penalties, finding that these penalties

were assessed to sanction Petitioner for its failure to remit taxes. Pet. App. 18-19. Petitioner contests this point, claiming the Department's action was not initiated to "sanction" Petitioner because the remedy is ultimately civil. Pet. 15. But as the Third Circuit explained, even civil "[p]enalties are, by their very nature, retributive: a sanction for wrongful conduct." Pet. App. 19. This Court has said the same. See *United States v. Halper*, 490 U.S. 435, 448 (1989) ("[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."); *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 589 (2011) (agreeing there can be "both civil and criminal sanctions"); *Austin v. United States*, 509 U.S. 602, 610 (1993) ("The notion of punishment … cuts across the division between the civil and criminal law."). Given the Department's demand for penalties, it is clear that the State is seeking sanctions for the wrongful act of withholding unemployment taxes, notwithstanding Petitioner's protestations.

Finally, it is also the case that there are other similarities to criminal actions—the final part of *Sprint*'s multi-factor test. See Pet. App. 16. For one, there was "a preliminary investigation that culminated with the filing of formal charges." *Sprint*, 571 U.S., at 79-80. The record in this case is clear that, for years, the Department conducted a preliminary investigation (over multiple periods) to determine whether Petitioner was properly paying unemployment taxes. Pet. App. 5 (discussing the audits of Petitioner for the 2006-2009 period and 2010-2015 period). Those "preliminary investigations" culminated in a "formal charge," *Sprint*, 571

U.S., at 79-80: an assessment of Petitioner for taxes owed—including penalties—and administrative judgments for the assessments, all of which must be paid or litigated. Pet. App. 6. Petitioner never refutes the existence of an investigation.

Petitioner's gripe instead concerns the panel evaluation of the remaining consideration in the multi-factor test: the presence of a criminal analog under New Jersey law. See Pet. 9-10, 13-14. As noted above, the panel found that this consideration supported abstention because "[u]nder New Jersey law, employers who do not pay or withhold contributions as lawfully required may face a $1,000 fine and a sentence of imprisonment of up to ninety days." Pet. App. 19-20 (citing N.J. Stat. Ann. § 43:21-16(e)). Petitioner argues that this is not a criminal provision at all, but the text of the state law refers to an "offense upon conviction," and includes imprisonment on its list of punishments. N.J. Stat. Ann. § 43:21-16(e). Not only that, but Petitioner ignores that other provisions of state criminal law may well apply to this sort of misconduct, see N.J. Stat. Ann. §§ 2C:20-3 (theft by unlawful taking), -4 (theft by deception), and that the presence of a criminal analog is but one part of a multi-factor test.[7]

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[7] As to that last point, *Sprint* requires only that the state civil enforcement proceeding be "akin to a criminal prosecution" in "important respects." 571 U.S., at 79. The existence of a parallel criminal statute or criminal code is not dispositive of that issue. Instead, courts undertaking a *Younger* analysis must holistically review the factors presented by this Court to determine whether, on balance, abstention is appropriate under the specific facts. See *id.*, at 79-91; *Sirva Relocation, LLC v. Richie*, 794 F.3d 185, 193-94 (CA1 2015) ("[T]hough the availability of parallel criminal

Even as every factor in *Sprint*'s balancing test cuts toward abstention, Petitioner argues generally that abstention is simply not proper under a "purely civil" statute. Pet. 13; see also Pet. 11-13 (arguing in detail that N.J. Stat. Ann. § 43:21-14, the basis for the state enforcement against Petitioner, is a civil law that only allows the Department to seek civil remedies). But there is nothing wrong with the idea that, in the appropriate case, abstention in favor of a civil enforcement proceeding could be warranted. Indeed, this Court in *New Orleans Public Service v. Council of New Orleans*, 491 U.S. 350 (1989), specifically held that "comity and federalism" concerns required "expand[ing] the protection of *Younger* beyond state criminal prosecutions," *id.*, at 367-68, and *Sprint* was explicit that abstention can apply to civil enforcement proceedings that are structurally "akin to a criminal prosecution" in "important respects." 571 U.S., at 79.

Although Petitioner seems to think that a "quasi-criminal" proceeding means one where the offense is at least partially substantively criminal, this Court instead explained that it refers to a civil enforcement action that (1) follows an investigation, (2) is initiated by the State and remains ongoing, and (3) seeks to sanction misconduct by the defendant in that action. *Id.* Said another way, the point of extending *Younger* to civil enforcement proceedings was to provide federal courts the ability to abstain from those matters that are structurally similar to a criminal proceeding—i.e.,

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sanctions may be a relevant datum … it is not a necessary element when the state proceeding otherwise sufficiently resembles a criminal prosecution.").

cases where there is an investigation, and then an action in the state system to sanction misconduct—and not just criminal proceedings themselves. The panel, "[c]onsidering these factors together," found that this case that implicated abstention. Pet. App. 20. Review of that determination is not warranted.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

GURBIR S. GREWAL
Attorney General
State of New Jersey
JEREMY M. FEIGENBAUM*
State Solicitor
MELISSA H. RAKSA
Assistant Attorney General
EMILY M. BISNAUTH
CHRISTOPHER WEBER
RYAN J. SILVER
Deputy Attorneys General
25 Market Street
Trenton, New Jersey 08625
Jeremy.Feigenbaum@njoag.gov
**Counsel of Record*

Counsel for Respondent Robert Asaro-Angelo

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