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

REPLY BRIEF

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Younger abstention is reserved for exceptional circumstances where there is a parallel, pending state proceeding that is criminal or "akin to a criminal prosecution." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78-79 (2013). The Question Presented asks what should courts consider in determining whether a civil action is "akin to a criminal prosecution." *Certiorari* should be granted because the Panel extended *Younger* abstention beyond the confines of *Sprint* to a state administrative action initiated under a statute New Jersey courts deem purely civil; that is not "akin to a criminal prosecution"; and that does not have a criminal analog. Respondent asks the Court to reject the Petition because the Panel correctly recited *Sprint*'s standard, thus implicitly urging the Court to ignore the Panel's misapplication of *Sprint*; and because the case allegedly presents an imperfect vehicle to address the issue. Respondent's arguments diminish the impact of the Panel's precedential decision, its extension of *Sprint* to a parallel state administrative proceeding that is not akin to a criminal prosecution, and its rejection of controlling New Jersey courts' decisions holding the relevant statute to be purely civil, not quasi-criminal. *Certiorari* is appropriate because due to its errors, the Panel declined jurisdiction, shutting the courthouse doors to Petitioner's claims, thus allowing future courts to do the same. The Panel's precedent should not stand.

ARGUMENT

I. The Decision Below is Wrong.

1. The Panel's decision conflicts with *Sprint* because it improperly extended *Younger* to a civil

proceeding, holding that the state proceeding under N.J.S.A. 43:21-14 was akin to a criminal prosecution, in conflict with New Jersey state courts' interpretation of the same provision. New Jersey courts explain that N.J.S.A. 43:21-14 provides only civil remedies under New Jersey's Unemployment Compensation Laws ("UCL's") for an employer's failure to pay the appropriate contributions. *See State v. Witrak*, 194 N.J. Super. 526, 531 (App. Div. 1984); *State v. Drake*, 79 N.J. Super. 458, 461 (App. Div. 1963). Nothing Respondent raises refutes this error. Indeed, the word "penalty" in N.J.S.A. 43:21-14 does not authorize "sanctions for wrongful conduct," especially as here, when the state courts have examined the issue and concluded that N.J.S.A. 43:21-14 authorizes only civil remedies. *See Witrak*, 194 N.J. Super. at 531 (explaining that N.J.S.A. 43:21-16 is "not for mere nonpayment or failure to file but for 'offenses' of various descriptions").

Respondent urges denial of the Petition, maintaining that it inappropriately seeks review of state law and is mired with case-confining facts. (Resp. Br. 26). However, no predictive state law analysis is necessary. Nor are there any facts to which the Question Presented is confined. This case is the perfect vehicle to decide whether, under *Younger*, federal courts should consider and defer to state courts' interpretation of their own statutes when deciding whether the actually pending, not hypothetical, state proceeding is "quasi-criminal" or "akin to a criminal prosecution." *See New York v. Ferber*, 458 U.S. 747, 767 (1982) ("the construction that a state court gives a state

statute is not a matter subject to [federal court] review").

Here, New Jersey courts hold that N.J.S.A. 43:21-14 is purely civil and is not quasi-criminal. *See Witrak*, 194 N.J. Super. at 530-31; *Drake*, 79 N.J. Super. at 461. The statute's plain language similarly states that it provides civil remedies and describes a filed assessment as a civil judgment. *See* N.J.S.A. 43:21-14. In concluding that the parties' N.J.S.A. 43:21-14 administrative proceeding is a civil enforcement proceeding quasi-criminal in nature, the Panel rejected the plain language of the statute and its construction by New Jersey courts, conflated the civil remedies afforded under N.J.S.A. 43:21-14 with those afforded under N.J.S.A. 43:21-16(e) involving fraud or intentional misconduct, and improperly expanded *Sprint*'s reach.

2. The Panel's decision also contradicts this Court's command in *Sprint* that *Younger* only applies to a civil enforcement proceeding "'akin to a criminal prosecution' in 'important respects.'" 571 U.S. at 79 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)). Respondent's argument focuses on buzzwords from *Sprint* – investigation, complaint, violation – but closer analysis of the proceedings belies the conclusion that a civil enforcement proceeding, quasi-criminal in nature, exists. The Panel did not closely consider these "important" aspects of a criminal prosecution. (App. 17). Had it, the Panel would have found that the "investigation" is not a targeted investigation, but a

field audit, one of thousands performed every year.[1] *See N.J. Dep't of Lab. and Workforce Dev., Emp. Handbook, Audit Process*, available at https://www.nj.gov/labor/handbook/chap1/chap1sec7AuditProcess.html. *See also* N.J.S.A. 43:21-14(d). The "complaint" is a bill called a "contribution report" in which Respondent declares that the amount of unemployment compensation contributions paid by the company is incorrect, that more are owed, and that penalties and interest for the now late payment are due, and if unchallenged by the employer, Respondent may docket and institute collection efforts like any other civil judgment. *See* N.J.S.A. 43:21-14(e). *But see* (App. 17-18) (noting that *Sprint* does not require the state to commence an action by formal complaint). Nor was a minimum of due process protection afforded to Petitioner in the state court proceeding, which would have been required if the proceeding was quasi-criminal. *See State v. Paladino*, 203 N.J. Super. 537, 547 (App. Div. 1985); N.J.S.A. 43:21-16(e) and (f).

Respondent repeatedly asserts that Petitioner "chose to violate the law," lending to its conclusion that the administrative proceeding is a quasi-criminal action instituted to sanction wrongful conduct. Respondent's argument, like the conclusion it invites, is unsupported. There is no *mens rea* element in N.J.S.A. 43:21-14, the statutory section under which the state action has proceeded. Respondent only commenced field audits of the Petitioner and calculated contributions, interest, and penalties pursuant to

[1] Respondent incorrectly states that PDX never argued that an investigation did not occur. (Resp. Br. 29); (Pet. 15-16).

N.J.S.A. 43:21-14 that the auditor thinks PDX owes, based on its review of a minimum of records. PDX appealed as permitted to challenge the NJDOL's determination and accounting and assert that the amounts calculated by the NJDOL are not due. *See* N.J.S.A. 43:21-14(h). This procedural history of the proceeding reflects a simple civil dispute, not one commenced by the state to punish the Petitioner for intentional misconduct.

3. The Panel also erroneously expanded *Sprint* when it applied a "criminal analog" analysis, addressing whether "the State could have alternatively sought to enforce a parallel criminal statute." (App. 16). The Panel concluded that N.J.S.A. 43:21-16(e) is a criminal statute that Respondent could have enforced, but this conclusion is wrong because N.J.S.A. 43:21-16(e) is not a criminal statute, and Respondent could not have brought an action under it. Indeed, N.J.S.A. 43:21-16(e) is a civil statute, albeit one that authorizes Respondent to commence actions in Superior or municipal court in cases involving fraud. *Id. See also Matter of Corbo*, 117 B.R. 109, 111 (Bankr. D.N.J. 1990); *Witrak*, 194 N.J. Super. at 529-32.

Although the Panel cites *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 138 (3d Cir. 2014), and *Sprint*, 571 U.S. at 79-80, to invoke the criminal analog test as determinative, in part, of its *Younger* analysis (App. 16), the criminal analog test has not been explicitly embraced by this Court either in *Sprint* or post-*Sprint*, a distinction that Respondent fails to address. Decades before *Sprint*, the "criminal analog" test was advanced in *Trainor v. Hernandez*, 431 U.S.

434, 444 (1977) and *Huffman*, 420 U.S. at 604. Pre-*Sprint*, courts considered whether there is a criminal statute parallel to the civil statute at issue in the state proceeding under which the state could have vindicated its interests, and if so, then *Younger* applied. The Panel employed this analysis without addressing whether the test satisfies *Sprint*.

Assuming that *Trainor* and *Huffman* allow courts to employ the criminal analog test to invoke *Younger* abstention and deny jurisdiction, the decisions of both the Panel and the District Court are flawed because there is no criminal statute analogous to N.J.S.A. 43:21-14, *accord ACRA Turf*, 748 F.3d at 138-39, and therefore, both the Panel and the District Court erred in so holding. *See* (App. 19-20); (App. 41). Because N.J.S.A. 43:21-14 is a civil statute that does not require allegations of fraud or willful misconduct; because fraud or willful misconduct was never alleged in the state proceeding; and because N.J.S.A. 43:21-16(e) is not a criminal statute, N.J.S.A. 43:21-16(e) cannot be N.J.S.A. 43:21-14's criminal analog.

4. Respondent's argument that this case is an imperfect vehicle to address the issue at hand is not dispositive. As advanced by the parties and invoked by the Panel, a plenary standard of review applies to the Question Presented, namely, whether a parallel state proceeding is "akin to a criminal prosecution in important respects." *Compare Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 408 (3d Cir. 2005) ("We exercise plenary review over the legal determination of whether the requirements for abstention have been met."), *with Hamilton v. Bromley*,

862 F.3d 329, 333 (3d Cir. 2017) ("We exercise plenary review over a trial court's . . . determination of whether *Younger* abstention is proper."). *See also* (App. 14 n.11). Before the Panel, neither party disputed what standard of review applied, both only citing *Addiction Specialists*, 411 F.3d at 408. Thus, this Court need not depart from its normal practice to address the issue. *See Byrd v. United States*, 138 S.Ct. 1518, 1530 (2018); *EEOC v. FLRA*, 476 U.S. 19, 24 (1986). Respondent's statement that the Panel "sided with Petitioner" (Resp. Br. 5) on this point is baseless. To the extent the Court departs from its normal practice, it may easily resolve this issue of federal law. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278-79 (1989).

II. The Circuits Are Split On the Question Presented.

In other Circuit cases cited by Petitioner, *Minnesota Living Assistance, Inc. v. Peterson*, 899 F.3d 548, 553 (8th Cir. 2018), *Mulholland v. Marion County Election Board*, 746 F.3d 811, 816 (7th Cir. 2014), *Rynearson v. Ferguson*, 903 F.3d 920, 926 (9th Cir. 2018), and *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732, 738 (9th Cir. 2020), *Sprint* is followed closely, limiting *Younger* abstention to circumstances involving parallel civil proceedings akin to criminal prosecutions. In stark contrast, the Panel expanded *Sprint* to a civil proceeding commenced pursuant to N.J.S.A. 43:21-14. It did so without deferring to New Jersey courts' construction of the statute, without examining the plain language or purpose of the statute or the specific administrative proceeding, and without properly identifying an analogous criminal statute as permitted

pre-*Sprint*, in *Trainor* and *Huffman*. This disparate application of *Sprint* created a split between the Third Circuit and all other circuits because no other court applies *Younger* abstention to a purely civil proceeding that is not like a criminal prosecution.

Nothing Respondent raises diminishes the split or its consequences. Instead, Respondent raises irrelevant facts or broad argument about each court's similar recitation of *Sprint* rather than addressing Petitioner's argument: that the Panel erroneously expanded *Younger* abstention by holding that N.J.S.A. 43:21-14 is quasi-criminal, contradicting New Jersey state court rulings that N.J.S.A. 43:21-14 is a civil provision without any quasi-criminal purpose.

Peterson. The Panel's analysis conflicts with the Eighth Circuit's *Peterson* decision in which that court looked carefully at a state statute to determine if it imposed quasi-criminal penalties. In *Peterson*, the Eighth Circuit addressed *Younger* abstention in the context of an administrative proceeding for failure to pay overtime compensation. 899 F.3d at 550. The statute at issue in *Peterson* explicitly provides for the imposition of criminal penalties. *Id.* at 553. Here, in the proceeding commenced under N.J.S.A. 43:21-14, there is no criminal sanction or imprisonment option. Rather, to sanction Petitioner, the Commissioner would have to establish that PDX intended to evade or defraud the NJDOL under a different civil statute, N.J.S.A. 43:21-16(e), and initiate a complaint in municipal or Superior Court. Unlike Petitioner's actual state administrative proceeding, the administrative proceeding in *Peterson* permitted the state to seek

"criminal penalties," which Respondent concedes "certainly bolster[ed] a decision to abstain" in *Peterson*. (Resp. Br. 14). Even if the state in *Peterson* chose not to seek criminal penalties, they were available to the state on the same facts and in the same proceeding at issue. Not so in Petitioner's case.

Mulholland. The Panel's analysis conflicts with *Mulholland* because the Seventh Circuit grounded its analysis of whether the civil proceeding was akin to a criminal prosecution in the remedies available under the precise statute at issue. There, the local Election Board initiated proceedings to sanction a candidate accused of violating election campaigning laws. 746 F.3d at 816-17. Like in *Peterson*, and unlike the Panel, the Seventh Circuit closely examined the state statutory section underlying the state civil proceeding and explained that "the Board's authority to sanction offenders is extremely limited–far less than the state proceedings that have warranted *Younger* abstention in other cases. The Board's hearing could lead only to a recommendation of prosecution to a county prosecuting attorney or the state attorney general." *Id.* at 817 (citation omitted). The court also noted that "[t]he possibility that a state proceeding may lead to a future prosecution of the federal plaintiff is not enough to trigger *Younger* abstention; a federal court need not decline to hear a constitutional case within its jurisdiction merely because a state investigation has begun." *Id.* Unlike the Panel that did not examine either the state court decisions or the plain language or impact of N.J.S.A. 43:21-14, the Seventh Circuit looked at whether the proceeding "presented [any] possibility of [a] criminal penalty." *Id.* at 816-17.

Rynearson. In *Rynearson*, the Ninth Circuit faithfully applied *Younger* to the actual state proceeding brought under the Washington stalking statute. There, a permanent protective order was sought to enjoin Rynearson from posting harassing social media comments. 903 F.3d at 923. Although *Rynearson* involved private parties and a state proceeding, that does not undermine the circuit split. Like the Eighth and Seventh Circuits, the *Rynearson* Court closely reviewed the state statute and the specific proceeding at issue. The court reasoned that the under the statute, "a court may issue a protection order if it 'finds by a preponderance of the evidence that the petitioner has been a victim of stalking conduct by the respondent.'" *Id.* at 925 (citation omitted). Importantly, the Ninth Circuit explained that "[m]ore broadly, the mere fact that the protection order law refers to criminal statutes does not mean that the protection order proceedings are quasi-criminal." *Id.* at 926. Like the Washington stalking statute, N.J.S.A. 43:21-14 references exceptions to the general rule in instances of fraud, but in stark contrast to the Ninth Circuit, the Panel did not address the state statute's parameters or the specific state administrative proceeding to determine whether the administrative action is akin to a criminal prosecution. Nor did the Panel consider New Jersey courts' long-standing published decisions that proceedings commenced under N.J.S.A. 43:21-14 are civil in nature, notwithstanding its use of the word "penalty." The Panel instead erroneously equated the use of the word "penalty" in the statute with a conclusion that Petitioner was "sanctioned for wrongful conduct" in reliance on unrelated, irrelevant provisions. Unlike the Ninth

Circuit, the Panel also invoked the criminal analog analysis set forth in *Trainor* and *Huffman* to incorrectly conclude that a civil statute, N.J.S.A. 43:21-16(e), can be a criminal statute analogous to the civil statute at issue, N.J.S.A. 43:21-14.

Connors. The Ninth Circuit's analysis in *Connors* further exacerbated the circuit split. In *Connors*, the State of Hawaii sued several pharmaceutical companies in state court alleging false and deceptive drug marketing practices. 979 F.3d at 734. Examining the actual state proceeding, the Ninth Circuit affirmed abstention because the "[s]tate's action has been brought under a statute that punishes those who engage in deceptive acts in commerce." *Id*. at 738. Here, the Panel did not focus on the actual statute pursuant to which Respondent initiated the field audits, served the contribution reports, and filed the civil judgment, and under which the Petitioner contested the determination by filing a notice for a hearing. Had it, the Panel would have concluded that there was no allegation of knowing or intentional *mens rea* or any accusation of fraud or evasion. (App. 16) (citing *ACRA Turf Club*, 748 F.3d at 138). Thus, the state could not have alternatively sought to enforce N.J.S.A. 43:21-16(e) to vindicate its interests.

In sum, the Panel's decision improperly expands *Younger* to a civil proceeding that lacks the hallmarks of a criminal prosecution. The Panel also misapplied the pre-*Sprint* criminal analog analysis to conclude that the administrative proceeding was a civil enforcement proceeding quasi-criminal in nature. Its conclusion directly conflicts with New Jersey state

courts' interpretation of N.J.S.A. 43:21-14, holding that it is civil and not a civil enforcement proceeding that is quasi-criminal in nature. The Panel's failures thus created a circuit split between the Third Circuit and the Seventh, Eighth and Ninth Circuits warranting this Court's review.

III. The Question Presented is Exceptionally Important.

The stakes here are extraordinary, both for the parties in this case and litigants nationwide. This Court should grant *certiorari* to reaffirm its consistent command that *Younger* abstention remains the exception, not the rule, and that federal courts have a "virtually unflagging" obligation to hear and decide cases within their jurisdiction. *Sprint*, 571 U.S. at 77. If left intact, the Panel's opinion and analysis will require future courts to improperly decline jurisdiction as did the Panel below, without regard to a state court's construction of its own state statutes and by allowing federal courts to use civil statutes as the requisite analog when employing a criminal analog analysis. In all, the Panel's precedential opinion will prevent litigants from vindicating their constitutional rights in a federal forum. The abstention issues presented will not benefit from further percolation in the circuit courts, and this case presents an ideal vehicle to decide the legal issues raised by Petitioner without wading into disputed facts or interpretation of state law. All this strongly supports review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: July 27, 2021

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