No. 21-997

In the Supreme Court of the United States

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF ARIZONA, ET AL.,
Petitioners,

vs.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS BRIEF OF THE STATES OF LOUISIANA, KANSAS, KENTUCKY, MISSISSIPPI, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA IN SUPPORT OF CERTIORARI

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INTEREST OF AMICI CURIAE[1]

Amici are the States of Louisiana, Kansas, Kentucky, Mississippi, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia. As sovereign States, *Amici* have powerful interests in the independence and efficiency of their judicial systems. These interests are at their zenith when States seek to enforce their own criminal laws in their own courts.

Younger abstention plays a critical role in "Our federalism" because it reinforces the independence of state courts. *Younger v. Harris*, 401 U.S. 37, 44 (1971). It is calibrated to enhance comity between the federal and state systems by providing state courts with the breathing room necessary to address federal claims in the context of criminal proceedings. The Ninth Circuit's decision takes a bite out of *Younger* by allowing federal courts to intervene even if interference with state criminal proceedings is likely—so long as the interference is not "inevitable." By abstaining less, the Ninth Circuit interferes more with States' autonomy.

Amici respectfully ask the Court to grant the petition for certiorari and reject the Ninth Circuit's enfeebled *Younger* abstention test.

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[1] Consistent with Supreme Court Rule 37.2(a), *amici* provided notice to the parties' attorneys ten days in advance of filing.

SUMMARY OF THE ARGUMENT

States are sovereigns with their own independent judicial systems. Preserving the proper balance of power between state and federal courts, and ensuring that the latter do not unduly interfere with the proceedings of the former, is a key component of our federalism.

Younger abstention, as articulated in *Younger v. Harris*, helps to define the proper relationship between state and federal courts by preventing federal courts from interfering in State criminal cases, even if a plausible Constitutional claim has been raised against a State law. At least five Circuits have adopted a relatively broad reading of *Younger*, confirming that federal courts should abstain when a federal plaintiff raises claims that are "derivative" of the claims at issue in a State criminal proceeding, if interference with that State proceeding is likely. The Ninth Circuit, however, employs an unusually strict test for *Younger* abstention, with the result that federal courts within that Circuit abstain less—and interfere with State proceedings more. This Court should grant certiorari to resolve that Circuit split and to ensure that federal courts respect the independent power of State courts to decide Constitutional challenges to a State's own laws.

ARGUMENT

I. *YOUNGER* ABSTENTION IS KEY TO PRESERVING THE JUDICIAL INDEPENDENCE STATES REQUIRE TO ENFORCE THEIR CRIMINAL LAWS.

"It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government." *Patterson v. New York*, 432 U.S. 197, 201 (1977). And this business is, of course, essential to the maintenance of order and prosperity of the Nation. For this reason, the Court has expressed the "highest regard for a State's right to make and enforce its own criminal laws." *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981) (citing *Colorado v. Symes*, 286 U.S. 510, 517–18 (1932)). And it has cautioned federal courts against "infring[ing] on [States'] sovereignty over criminal matters." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see Juidice v. Vail*, 430 U.S. 327, 335 (1977).

In light of the Court's respect for States' sovereignty in the criminal context, there is "a strong judicial policy against federal interference with state criminal proceedings." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 600 (1975). "[T]he restraining of an ongoing prosecution would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the constitution of the United States . . . .'" *Steffel v. Thompson*, 415 U.S. 452, 460–61 (1974) (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)).

Indeed, federal intervention in state criminal justice proceedings should "be interpreted as reflecting negatively upon the state courts' ability to enforce constitutional principles." *Huffman*, 420 at 603 (internal quotation marks omitted).

Even before issuing its decision in *Younger v. Harris*, this Court recognized that "[f]ederal injunctions against state criminal statutes, either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if such statutes are unconstitutional." *Watson v. Buck*, 313 U.S. 387, 400 (1941). From the very beginning, Congress has "manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger*, 401 U.S. at 43. Indeed, "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*

Nobody doubts that federal courts are usually in the business of deciding federal claims. But in light of States' need to operate independently in the criminal context, this Court held in *Younger* "that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." *Id.* at 54. A few years later, in light of the importance of respecting State power over a State's own criminal proceedings, the Court extended the principles of *Younger*, holding that even "where state criminal proceedings are begun against the federal plaintiffs *after* the federal

complaint is filed but before any proceedings of substance on the merits have taken place in the federal court," abstention should apply. *Hicks v. Miranda*, 422 U.S. 332, 349 (1975).

II. The Vast Majority of Circuits Give State Criminal Courts Breathing Room to Address Constitutional Claims.

According to at least five Circuit courts, *Younger* abstention generally applies when the claims asserted by a party in federal court are merely "derivative" of claims in an ongoing state court proceeding. *See Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1253 (8th Cir. 2012) ("*TACM*"); *Citizens for a Strong Ohio v. Marsh*, 123 Fed. App'x 630, 635 (6th Cir. 2005); *D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1230 (10th Cir. 2004); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 83 (2d Cir. 2003); *Cinema Blue of Charlotte, Inc. v. Gilchrist*, 887 F.2d 49, 53 (4th Cir. 1989). Even when a federal court's consideration of the claims would not "inevitably" interfere with the state court proceedings, the majority of circuits have abstained when such interference is at least likely.

For example, in *TACM*, a church sought to bring various First and Fourth Amendment claims on behalf of its members, after the children of those members were removed from the custody of their parents and from the church's compound on suspicion of abuse. *TACM*, 664 F.3d at 1247. The parents were facing state court proceedings in which they could raise their constitutional claims. The panel held that

Younger abstention should apply to the church's attempted federal suit because "not only are [the church's] interests generally aligned with those of its members, [but also] the church shares a close relationship with its members," and because the church "allege[d] standing based on injuries that are either directly or indirectly derivative of those of the individual Plaintiffs." *Id.* at 1253. In other words, resolving the church's claims would interfere with the ongoing state case in which the parents were already litigants, and such interference was not permissible.

In *Citizens for a Strong Ohio v. Marsh*, the Sixth Circuit explained that if a federal plaintiff's interests are "intertwined" with the interests of a party in State court, such that the rights they assert are "merely derivative of the rights" of the State-court party, *Younger* abstention should apply. *Marsh*, 123 Fed. App'x at 636. The court declined to decide a constitutional claim brought by two corporations in support of a political action committee, when that committee was itself in the midst of hearings before the State Elections Commission. *Id.* at 634, 636. The corporations alleged that they were asserting their own First Amendment rights, but their interests were clearly intertwined with those of the PAC—and the effect of their lawsuit would have been the disruption of State court proceedings. *Id.* at 636.

In *D.L. v. Unified School District No. 497*, the Tenth Circuit decided to abstain from deciding Fourteenth Amendment and statutory claims brought by children against a school district, asserting a right to special education. The children's parents drove

them across school district lines to receive special education, and the district sued the parents in State court to recover the costs of educating them. *D.L.*, 392 F.3d at 1226. The parents countered by suing in federal court, adding their children as plaintiffs, and "each claim" that they brought "assert[ed] the entitlement of the children to the education they received from the District. The court could not grant any relief—injunctive, declaratory, or monetary—without concluding that the children were so entitled." *Id.* at 1229. The Tenth Circuit abstained from deciding the federal suit, holding that, "in essence, only one claim [was] at stake" in the federal and state cases. *Id.* at 1230. Any ruling would impermissibly interfere with the state court's power to apply to the Constitution to its own school system.

In *Spargo v. New York State Commission on Judicial Conduct*, 351 F.3d 65 (2nd Cir. 2003), an elected state judge and two of his political supporters brought First and Fourteenth Amendment challenges against various state rules of judicial conduct after the judge had been charged with breaking those rules. *Spargo*, 351 F.3d at 67. The panel recognized that "few interests can be considered more central than a state's interest in regulating its own judicial system." *Id.* at 75. It concluded that it must abstain from deciding the judge's own claims, which would interfere directly in a pending state misconduct proceeding. Even though there was some chance that the proceeding might end without a ruling on the merits of the judge's constitutional claims—for example, the matter might be dropped for lack of sufficient evidence—"[t]he relevant question under *Younger*" is "whether the

state's procedural remedies *could* provide the relief sought, not whether the state *will* provide' the constitutional ruling which the plaintiff seeks." *Id.* at 79 (quoting *Kirschner v. Klemons*, 225 F.3d 227, 234–35 (2nd Cir. 2000)). As there was no question that a ruling on the merits would interfere with the State disciplinary proceeding, the federal court abstained. The claims of the other plaintiffs were also not entertained, as they were "derivative of Spargo's [the judge's] right to engage in protected speech," *id.* at 85, and any decision on their claims would likewise have interfered with the state proceeding.

Finally, in *Cinema Blue of Charlotte v. Gilchrist*, 887 F.2d 49 (4th Cir. 1989), the Fourth Circuit used a similar formulation of the *Younger* test: "[F]ederal courts should abstain from the decision of constitutional challenges to state action, however meritorious the complaint may be, 'whenever [the] federal claims have been *or could be* presented in ongoing state judicial proceedings that concern important state interests.'" *Cinema Blue*, 887 F.2d at 52 (emphasis added) (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237–38 (1984)). That case concerned the prosecution of a cinema for disseminating obscene materials. *Id.* at 50. The defendants planned to hire an expert witness who would develop his testimony by presenting some of the allegedly obscene materials to "focus groups" from the community, in the hope that the focus groups would not find them offensive or obscene. *Id.* The prosecutor warned that such an exhibition of materials might itself violate the statute against disseminating obscene material. *Id.* The cinema then sought an

injunction in federal court blocking any (as yet hypothetical) prosecution against the expert.

The district court granted the injunction, but the Fourth Circuit reversed. The panel held that such an injunction "works the sort of practical interference with an ongoing state criminal proceeding that *Younger* counsels against." *Id.* at 53. The fact that the injunction on its face prevented a future prosecution, rather than the prosecution of the cinema which was actually ongoing, did not make a difference. "At the very least, [the federal case's] practical effect was to raise the specter of a federal pre-judgment that the evidence enjoyed some measure of federal constitutional protection that must be taken into account by any state court ruling on its admissibility. . . ." *Id.*

Although the interference was not inevitable, it was very likely to occur. And the plaintiffs could raise not only their First Amendment rights to free speech, but also their Sixth Amendment rights to gather evidence and present a defense, perfectly well in state court. *Id.* at 54. Presumably, the expert could have come up with a different strategy for establishing whether the material shown by the cinema offended prevailing community standards. But, according to the Fourth Circuit, *inevitable* interference was not required for abstention; a likelihood of interference was enough.

The Fourth Circuit has explained that *Younger* abstention "does not extend merely to *direct* relief against the state prosecution; it denies any relief that

depends on resolution of the constitutional issue raised in the state case." *Simopoulos v. Virginia State Bd. of Med.*, 644 F.2d 321, 324 (4th Cir. 1981) (internal quotes omitted) (emphasis added). Likewise, both the Second and Eighth circuits have recognized that abstention can be proper when a federal plaintiff "seeks to interfere" with pending state proceedings, even if such an attempt might not succeed or if the court sees another way to resolve the case without causing such interference. *See Spargo*, 351 F.3d at 82 (quoting *Cedar Rapids Cellular Tel., L.P., v. Miller*, 280 F.3d 874, 882 (8th Cir. 2002)).

In all of these cases, a federal court recognized the potential for interference with a state proceeding and wisely declined to rule on the claims presented. Despite this broad consensus among the federal circuit courts, the Third Circuit has observed that *this* Court has "has declined to draw a direct interference/collateral intrusion line in *Younger* cases." *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Bd. of Higher Educ.*, 654 F.2d 868, 880 (3d Cir. 1981). *Amici* States have an interest in seeing this issue clarified.

III. The Ninth Circuit's Test Takes a Bite out of *Younger* by Requiring "Inevitable" Interference.

In contrast to the vast majority of circuit courts, the Ninth Circuit is unusually strict in its application of *Younger*, and as a result abstains less and interferes more with state court criminal proceedings. The Ninth Circuit abstains under *Younger* only when the federal

case features "a party whose interest is so intertwined with those of the state court party that *direct* interference with the state court proceeding is *inevitable*." *Green v. City of Tucson*, 255 F.3d 1086, 1100 (9th Cir. 2001) (en banc) (emphasis added), *overruled in part on other grounds by Gilbertson v. Albright*, 381 F.3d 965, 976–78 (9th Cir. 2004) (en banc). Under this precedent, a strong likelihood of interference with a state court proceeding is not enough. Neither "[c]ongruence of interests" nor "identity of counsel" is sufficient to justify abstention under this test. *Id.* The Ninth Circuit therefore will consider challenges to state criminal laws, even when those laws are actively being enforced in other cases, unless the State can meet the very high burden of showing inevitable, direct interference with a state proceeding.

This framework is insufficiently protective of the independence of state courts, and it inhibits States from deciding critical questions within their own justice systems. The Ninth Circuit has allowed federal courts to interfere on many questions where other Circuits would have directed abstention.

Many of the cases highlighted above, from other circuits, might plausibly have come out the other way had the Ninth Circuit's test been applied. For example, in *TACM*, although the interests of the church were clearly aligned with those of its members, there was no guarantee that a ruling for the church would have *inevitably* resulted in direct interference with a state proceeding. A federal court could have concluded that the church could not assert parental

rights over those children—even if it acted for the benefit of the parents—and declined to directly consider the parents' constitutional claims. Thus, the federal proceedings at least had a chance of not interfering with state proceedings. This would render *Younger* abstention improper under the Ninth Circuit's test, in spite of the existence of actual ongoing state proceedings in which the parents were involved.

In *Cinema Blue*, any federal ruling on the expert's proposed plan would have undoubtedly "be taken into account by any state court ruling on its admissibility"—a ruling which the parties expected would be needed before trial. *See Cinema Blue*, 887 F.2d at 53. The Fourth Circuit abstained, but if it had followed the Ninth Circuit's test, it may have found that "direct interference" with the state court proceeding was not "inevitable." *See Green*, 255 F.3d at 1100. However, such "tangential" or "indirect" interference would nevertheless prevent state courts from efficiently and accurately applying the State's own laws in a criminal proceeding.

This case is an optimal vehicle to establish that *Younger* abstention applies even if entertaining federal claims in federal court would not "inevitably" interfere with state court proceedings. The Court should adopt the majority position and reject the Ninth Circuit's test—which fails to adequately respect the comity between state and federal courts inherent in "Our federalism."

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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