No. 20-1149

In the Supreme Court of the United States

BRISTOL-MYERS SQUIBB CO., ET AL., PETITIONERS,

v.

CLARE E. CONNORS, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF HAWAII.

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

BRIEF OF THE CATO INSTITUTE AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether, under *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013), a federal court must consider the specific characteristics of an underlying state-court civil proceeding to determine whether it is sufficiently "akin to a criminal prosecution" to warrant abstention under *Younger v. Harris*, 401 U.S. 37 (1971), as eight courts of appeals have held, or whether abstention is warranted whenever "the state proceeding falls within the general class" of state enforcement actions, as the Ninth Circuit held here.

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INTEREST OF *AMICI CURIAE* *

Amicus Cato Institute is a non-partisan, public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. In furtherance of these objectives, Cato regularly conducts conferences; publishes books, studies, and the annual *Cato Supreme Court Review*; and files *amicus* briefs.

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* Under Rule 37.6, *amici* affirm that no counsel for a party authored this brief, in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to fund its preparation or submission. Under Rule 37.2, all parties received timely notice of the intent to file this brief and have consented in writing to its filing.

This case implicates *amici*'s core interests in civil liberties and the Constitution's structural protections. In the parallel state proceeding at issue here, Respondent seeks to compel Petitioners' speech on a matter of scientific debate, thus infringing the First Amendment rights that Petitioners enjoy as businesses pursuing legitimate commercial objectives. The Ninth Circuit's decision to abstain from adjudicating Petitioners' claim—despite Respondent's use of contingent-fee counsel in that state-court action—immunizes Respondent's First Amendment violation from federal review as of right. That abstention undermines a key role of the federal courts in our constitutional order: guarding against the states' abuses of individual liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit decided that, for purposes of the *Younger v. Harris*, 401 U.S. 37 (1971), akin-to-a-criminal-prosecution abstention inquiry, it was irrelevant that the state used contingency-fee counsel to litigate a case on its behalf in a parallel state proceeding. In the lower court's view, there is "no reason why the application of *Younger* should turn on the State's choice of lawyers," even if the state pays those lawyers on a contingency-fee basis. *See* App.5a. While *amici* agree with Petitioners that this case presents a clear circuit split on the proper application of *Younger*, as further developed in *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013),

amici submit this brief to explain that this issue is also worthy of review because the Ninth Circuit decided an "important question of federal law" in a manner inconsistent with this Court's precedent, Rule 10(c).

The Ninth Circuit's holding that a state's decision to use contingency-fee counsel to litigate a case on the state's behalf is not relevant to whether a case is "akin to [a] criminal prosecution[ ]," *Sprint*, 571 U.S. at 72, is contrary to both *Sprint*—as Petitioners discuss in more detail, Pet.14–22, 30–32—and also to this Court's decisions in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), and *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). In *Marshall*, this Court held that a prosecutor's personal financial interest in the outcome of a case may violate the Due Process Clause. And in *Young*, this Court reinforced those due-process concerns, explaining that the presence of an interested prosecutor in a case is a pervasive error, calling into question the entire prosecution. These holdings mandate the conclusion that a state retaining contingent-fee counsel for a case means that the case is likely not "akin to [a] criminal prosecution[ ]." *Sprint*, 571 U.S. at 72. To hold otherwise—as the Ninth Circuit did—would be to imply that the state sought to violate, or push the boundaries of, the Due Process Clause. That is a deeply unfair assumption to make about any sovereign state, and this should be an important—indeed, often dispositive—factor in rejecting the

application of the narrow *Younger* abstention doctrine in a given case.

The Ninth Circuit's incorrect interpretation of *Younger* and *Sprint*—and its conflict with *Marshall* and *Young*—are on an issue of great and growing importance. Public-private agreements between States and law firms operating on a contingency fee are becoming more common in recent years. Private attorneys, incentivized by the prospect of massive contingency-fee awards, now regularly come up with their own novel theories of liability and then present them to the state. As the present case shows, these cases are routinely high-stakes, big-money disputes that can generate important federal constitutional and statutory issues—such as the First Amendment issues here—which issues Congress designed the federal courts to address.

This Court should grant the Petition.

ARGUMENT

I. The Ninth Circuit Wrongly Held That A State's Use Of Contingency Fee Counsel To Bring A Case Is Irrelevant To Whether *Younger* Abstention Applies

A. *Younger* Abstention's Quasi-Criminal Prong Is A Narrow Exception To The General Rule That Federal Courts Should Adjudicate Federal Claims

The federal courts generally have the "'virtually unflagging'" obligation to hear and decide cases within their jurisdiction. *Sprint*, 571 U.S. at 77 (quoting *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976)). As this Court "early and famously said," federal courts "have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Id.* (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)). "Parallel state-court proceedings do not detract from that obligation"; instead, contemporaneous federal and state litigation over the same subject matter is the norm. *Id.* The availability of the federal courts to adjudicate federal claims is essential to protecting federal rights—including, as relevant here, the First Amendment right to speak about matters of scientific debate, unhindered by state efforts to compel contrary speech. Pet.29–30.

Within this context, the *Younger* abstention doctrine is a narrow, carefully confined "exception to this general rule" that federal courts must adjudicate all federal constitutional and statutory claims within their jurisdiction. *Sprint*, 571 U.S. at 77. Under *Younger*, federal courts will only abstain in deference to a parallel state proceeding when that proceeding satisfies one of three "exceptional circumstances": (1) it is a "pending state criminal proceeding," (2) it is "akin to [a] criminal prosecution[ ]," or (3) it "implicate[s] a State's interest in enforcing the orders and judgments of its courts." *Id.* at 72–73, 78. As this Court explained in *Sprint*, such abstention "extends to the[se] three exceptional circumstances . . . , but no further." *Id.* at 82 (citations omitted).

Most relevant here is *Younger*'s second category—parallel state proceedings that are "quasi-criminal" in character—which applies only when those proceedings are "akin to a criminal prosecution in important respects." *Id.* at 79, 81 (citations omitted). To fall within this category, the parallel state action at issue must "bear a close relationship to proceedings criminal in nature." *Id.* at 79 (citations omitted). And determining whether a state proceeding triggers *Younger* requires courts to scrutinize closely the specific state proceeding itself, asking whether that proceeding in particular is "civil" or "criminal in character." *See id.* at 79–81; *accord* Pet.14–18.

This Court in *Sprint* established a two-step process to "guide other federal courts" in determining

whether a parallel state proceeding is "quasi-criminal." 571 U.S. at 81–82. First, *Sprint* identified three essential factors that the parallel civil proceeding must satisfy to be "akin to a criminal prosecution" under *Younger*: the action sanctions the federal plaintiff, the State is typically a party and initiator of the action, and an investigation and formal complaint are present. *Id.* at 79–81. Then, if these three factors are satisfied, federal courts may "appropriately consider[ ]" any "*additional* factors . . . before invoking *Younger*" abstention. *Id.* at 81 (discussing the factors in *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982)). Importantly, the additional factors that a federal court may consider at this second step can, when appropriate, counsel only *against* abstention; they cannot themselves "dispositive[ly]" trigger abstention in the absence of a sufficient showing on the three essential factors. *Id.* at 81.

B. A State's Reliance On Contingent-Fee Counsel Is An Important—And Often Dispositive—Factor Weighing Against *Younger* Abstention, Because The Use Of Such Financially Interested Counsel In A Quasi-Criminal Case Would Raise Grave Due-Process Questions

The Ninth Circuit below held that it is irrelevant under *Younger*'s quasi-criminal category whether "the state proceeding is being litigated by private counsel," as long as it "is still an action brought by the State." App.5a. The court believed that there is "no

reason why the application of *Younger* should turn on the State's choice of lawyers," even if the state pays those lawyers on a contingency-fee basis. App.5a. That conclusion is wrong. The state's use of contingent-fee lawyers in its parallel action is plainly an important factor that federal courts should consider when determining whether that proceeding is "quasi-criminal" for purposes of *Younger* abstention. *Sprint*, 571 U.S. at 81–82. As explained immediately below, because a state's use of contingent-fee counsel in a quasi-criminal case would "raise serious constitutional questions," *Marshall*, 446 U.S. at 249, *infra* Part I.B.1, the use of such counsel to "prosecut[e]" a case for the state would undermine any possible claim that this proceeding is "akin to a criminal prosecution in important respects," *Sprint*, 571 U.S. at 79 (citations omitted); *infra* Part I.B.2.

1. A prosecution being guided by the requirements of the law, not the personal financial interests of the state's attorney, is an essential component to the Due Process Clause's "safeguarding [of] the liberty of the citizen against deprivation through the action of the state." *See Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (per curiam); *Marshall*, 446 U.S. at 249; *Berger v. United States*, 295 U.S. 78, 88 (1935). A prosecutor must be "the servant of the law" whose "interest" is "not . . . [to] win a case," but to ensure "that justice shall be done." *Berger*, 295 U.S. at 88. So, while the prosecutor is "necessarily permitted to be zealous in [his] enforcement of the law," the Due Process Clause

sets important "limits" to ensure that the prosecutor is not "motivated by improper factors." *Marshall*, 446 U.S. at 248–49; *see Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978). Those limits "preserve[ ] both the appearance and reality of fairness." *Marshall*, 446 U.S. at 242.

The Due Process Clause imposes "constraints" on "the financial or personal interest" that a prosecutor may have in a particular case. *Marshall*, 446 U.S. at 251–52. The Constitution prohibits states from adopting a prosecutorial "scheme" that "inject[s] a personal interest, financial or otherwise, into the enforcement process," if that scheme risks "bring[ing] irrelevant or impermissible factors into . . . prosecutorial decision[s]." *Id.* at 249–50. While a state may "stimulate prosecutions for crime by offering [prosecutors] . . . rewards for thus acting in the interest of the state and the people," those "rewards" violate due process if they risk causing a "biasing influence" on "prosecutorial functions." *Id.* at 243–44, 249 (citation omitted); *accord Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805 (1987) ("A [court-appointed] prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial . . . rewards for [his] private client.").

This Court in *Marshall* identified several factors for when a financial interest in a prosecutorial scheme creates an unconstitutional risk of bias in a prosecutor. There, this Court considered the

administrative-prosecution scheme of the Fair Labor Standards Act ("FLSA"), which apportioned penalties for certain FLSA violations to the agency tasked with prosecuting those violations. *See* 446 U.S. at 239–40. This Court upheld the scheme, concluding that any risk of exerting an unconstitutional "biasing influence" on the agency's prosecutors was "exceptionally remote." *Id.* at 243, 250. The prosecutors did not stand to "profit" directly from the penalties, since their salaries were "fixed by law." *Id.* at 250. The penalties that the agency collected "represent[ed] substantially less than 1% of [its] budget," and the prosecutors had "no assurance" that their own regional offices would receive any portion of the penalties collected. *Id.* at 250–51. Finally, the agency's "administration" of the law "minimized any potential for bias," since it reimbursed those offices according to "expenses incurred," rather than "amounts of penalties collected," when it reimbursed the offices at all. *Id.* at 251.

This Court in *Young* then underscored and sharpened *Marshall*'s due-process concerns, definitively holding that the presence of a "prosecutor subject to influences," including from financial interests, "undermine[s] confidence that [the] prosecution can be conducted in disinterested fashion." 481 U.S. at 811. Indeed, "[a]ppointment of [such] an interested prosecutor is [ ] an error whose effects are pervasive," calling "into question" the "entire prosecution." *Id.* at 812.

2. Because the Due Process Clause imposes limits on the financial interests that a prosecutor may hold, a state's use of contingent-fee counsel to litigate an action, on the state's behalf, is a highly relevant factor in determining whether that proceeding satisfies *Younger*'s quasi-criminal prong.

That conclusion follows from the Due Process Clause principles discussed immediately above. *See supra* Part I.B.1. While a state generally has the sovereign right to choose to retain contingent-fee counsel to litigate on its behalf in at least some civil cases—so long as state law allows, *see, e.g.*, Haw. Rev. Stat. § 28-8(b)—the Due Process Clause more severely limits such an arrangement in quasi-criminal cases. Accordingly, if a federal court considers a state proceeding brought by contingency-fee counsel, it should usually conclude that the state did not intend to violate or push the boundaries of the Due Process Clause, but should instead typically conclude that the proceeding does *not* "bear a close relationship to proceedings criminal in nature," under *Younger*. *Sprint*, 571 U.S. at 79 (citations omitted).

Put another way, regardless of a parallel state proceeding's showing on the three essential factors identified in *Sprint*'s first step, the participation of counsel with a personal financial interest, such as through a contingency-fee arrangement, is an important and often potentially dispositive factor that should counsel a federal court against *Younger* abstention. *Id.* at 81 (emphasis omitted).

II. The Ninth Circuit's Erroneous Decision Is Of Great Importance Because Of The Particular Features Of The Growing Number Of State Cases Filed By Private Counsel

The decision below is not only wrong, but wrong in a matter that will have grave impacts within the nation's largest circuit. Without this Court's review, citizens and companies in the Ninth Circuit will face state-court lawsuits brought on the state's behalf by contingency-fee counsel without the ability to seek federal review of federal issues that arise in these often high-stakes, novel cases. And those high stakes and novelty are more likely in such cases, because of the financial incentives of contingent-fee contracts.

1. The practice of states' hiring private attorneys to litigate cases is a relatively recent innovation. The practice "can be traced back to a case in the 1980s when the state of Massachusetts decided to hire private lawyers to pursue claims over asbestos removal," and then it spread throughout the Nation. Walter Olson, *Tort Travesty*, Wall St. J. (May 18, 2007), https://tinyurl.com/torttravesty2 (all websites last accessed on March 23, 2021). Perhaps most famously, in the 1990s, private trial attorneys on behalf of a coalition of states litigated a $246 billion settlement against various tobacco companies, netting themselves a $14 billion fee award in the process. Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 Colum. J.L. & Soc. Probs.

587, 588 (2009); *see also* Richard A. Samp, *Growing Concern Over Contingency Fee Agreements Between Attorneys General and Private Attorneys*, Bloomberg Law (October 16, 2012), https://tinyurl.com/yf5akc35. This success spawned additional instances of public-private agreements between state attorneys general and private plaintiffs' lawyers. Godesky, *supra*, at 588–89.

States have relied on contingency-fee counsel even more in recent years. *See* Douglas F. McMeyer, *et al.*, *Contingency Fee Plaintiffs' Counsel and the Public Good?*, at 1–3, 16, In-House Defense Quarterly (Winter 2011), https://tinyurl.com/xa9zpx9s. One state entered into a contingency agreement with three law firms related to civil litigation seeking damages against opioid manufacturers, providing up to $50 million in possible contingency fees, with the state not required to provide private counsel with any "compensation for any services rendered unless a recovery or settlement . . . is awarded and collected." Ohio Attorney General, *First Renewal of Retention Agreement for Opioid Wholesale Distributors Investigation and Proposed Litigation* 7, app.A (effective July 1, 2019), https://tinyurl.com/phtfuk6b.[†] Another state entered into a contingent-fee

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[†] Indeed, such contingency agreements are so relatively commonplace in Ohio that the Attorney General maintains a website where you can review active agreements. *See* Ohio Attorney General, *Contingency Fee Agreements*, OhioAttorney General.gov, https://tinyurl.com/yutruu5c.

agreement with three law firms to file an environmental lawsuit against manufacturers of polyfluoroalkyl substances, allowing for open-ended attorneys' fees of 10–20% of the recovery, depending on the amount recovered. *See* Mich. Attorney Gen., *Fee Agreement: PFAS Environmental Tort Litigation* (Sept. 2019), https://tinyurl.com/k2yunuh9. Similar examples are legion, as this practice has become commonplace across the country in "virtually every area of [civil] litigation against numerous industries." Christopher E. Appel, *Legislators Address the Growing Use of Contingent Fee Attorneys by State Officials*, Inside ALEC 20 (May/June 2013), https://tinyurl.com/h3dw7aau; *see also* Olson, *supra* ("matters as diverse as prescription drug pricing, natural gas royalties and the calculation of back tax bills"); Margaret A. Little, *Pirates at the Parchment Gates: How State Attorneys General Violate the Constitution and Shower Billions on Trial Lawyers*, at 3, Competitive Enterprise Inst. (Feb. 2017, Issue No. 3), https://tinyurl.com/3khsnu8t ("environment, public health, consumer safety, or some other public policy concern").

2. This growing number of lawsuits brought on behalf of states by contingency-fee counsel often involve high-stakes disputes that can spawn important federal constitutional and statutory issues.

The core reason that cases filed on states' behalf by contingency-fee counsel more commonly involve federal constitutional and statutory issues is precisely

because of the financial incentives of such arrangements. The structure of these contingent-fee cases gives private lawyers for the state a distinctly mercenary motive for maximizing monetary recovery. In many of these cases, it is the private attorneys who "develop the theories of liability [and] approach state AGs" with their idea for a lawsuit, which they then offer to litigate on the State's behalf "in exchange for a contingency fee." Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 Kan. L. Rev. 209, 217 (2016). In this regard, private firms are motivated to "dream[ ] up" new cases that they "shop[ ]" to the states, in exchange for a piece of the eventual recovery after the lawsuit. Craig R. McCoy & Angela Couloumbis, *As Pennsylvania Targets Nursing Homes, Law Firm Could Benefit*, The Morning Call (May 31, 2015), https://tinyurl.com/5yuvn2rc.

As the present case well shows, with these strong monetary incentives at play, private attorneys are often motivated to find new targets and claims, often developing novel liability theories that inevitably implicate important federal constitutional and statutory rights. Here, private counsel approached the Hawaii Attorney General with their own novel theory of liability under a state statute, based on a claimed shortfall in Plavix's efficacy that Hawaii's state officials had never felt even the need to investigate before. App.48a, 50a, 57a–58a. On this

proposition alone, Hawaii entered into a contingent-fee agreement with these lawyers, under which the private lawyers would receive "no compensation for any services rendered if the State does not settle or is not awarded civil penalties," but would recover 20% of all proceeds from the lawsuit if they prevail. App.49a (citations omitted). And Petitioners here have a powerful argument that the theory and remedy that these private attorneys sought and obtained violate their First Amendment rights by punishing them for failing to utter particular speech, on a question of scientific debate. Pet.29–30.

3. Allowing courts in the Ninth Circuit to shirk their "virtually unflagging" duty to decide the federal constitutional issues in these often high-stakes cases, *Sprint*, 571 U.S. at 77 (citations omitted), could place citizens or businesses in that Circuit at risk of "crushing liability," *Trans Union LLC v. Fed. Trade Comm'n*, 122 S. Ct. 2386, 2387 (2002) (Kennedy, J., joined by O'Connor, J., dissenting from denial of writ of certiorari), based on constitutionally dubious legal theories or in cases that otherwise raise novel federal issues. In the present case, Petitioners suffered an $834 million judgment, despite the state-court suit's raising grave First Amendment concerns of compelled speech. *See* Pet. 4, 29–30. Under the Ninth Circuit's approach to *Younger*'s quasi-criminal prong, no federal district court could review any such case litigated on a state's behalf by contingent-fee counsel, no matter the significant federal constitutional and

statutory rights implicated by the state's theory of liability. *See* App.4a–9a.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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