No. 12-815

In The
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, INC.,

Petitioner,

v.

ELIZABETH S. JACOBS, NICK WAGNER, AND SHEILA K. TIPTON, in their official capacities as Members of the Iowa Utilities Board,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Should the *Younger* abstention doctrine be narrowed to allow federal courts to enjoin state judicial proceedings that can be characterized as "remedial" but involve important state interests?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

A. Agency Proceedings 1

B. Federal and State Court Proceedings 5

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. These State Proceedings Are Appropriate For *Younger* Abstention 10

A. Abstention is a well-recognized exception to the exercise of federal court jurisdiction 10

B. *Younger* abstention applies to this case 11

C. Sprint's reliance on *Verizon Maryland* is misplaced 18

D. The *Younger* abstention doctrine contains well-established limits that keep it within its proper bounds 20

II. Sprint's Proposed Coercive/Remedial Test is Supported by Neither Principle Nor Precedent 21

A. The coercive/remedial test sometimes produces the wrong result 23

B. Distinguishing between coercive and remedial proceedings can be difficult ... 26

TABLE OF CONTENTS – Continued

Page

C. Sprint's proposed test is, at best, a factor to be considered 29

III. In Any Event, The IUB Proceedings Were Coercive 29

IV. *Burford* Abstention Is Irrelevant To This Case 34

CONCLUSION..... 36

TABLE OF AUTHORITIES

Page

CASES

Addiction Specialists, Inc. v. Township of Hampton, 411 F.3d 399 (3d Cir. 2005) 25

Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375 (1983) 15

Brown v. Day, 555 F.3d 882 (10th Cir. 2009) 26, 27, 31, 32, 33

Burford v. Sun Oil Co., 319 U.S. 315 (1943) ...9, 34, 35

Fisher v. Iowa Bd. of Opt. Exam'rs, 478 N.W.2d 609 (Iowa 1991) 3, 16

Gentlemen's Retreat, Inc. v. City of Philadelphia, 109 F.Supp.2d 374 (E.D.Pa. 2000).....28

Gibson v. Berryhill, 411 U.S. 564 (1973).....21

Hudson v. Campbell, 663 F.3d 985 (8th Cir. 2011) 22

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 11, 12, 13, 14, 23

Juidice v. Vail, 430 U.S. 327 (1977) 24

Kercado-Melendez v. Aponte-Roque, 829 F.2d 255 (1st Cir. 1987) 27, 28

Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986).....19

Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982).....*passim*

Moore v. Sims, 442 U.S. 415 (1979) 26

TABLE OF AUTHORITIES – Continued

Page

Morrow v. Winslow, 94 F.3d 1386 (10th Cir. 1996) 25, 26

Munn v. Illinois, 94 U.S. 113 (1877) 15

Nat'l Parks Cons. Ass'n v. Lower Prov. Tp., 608 F.Supp.2d 637 (E.D.Pa. 2009).....28

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989)....10, 13, 14, 17

Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) 13, 22, 23

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982).....22, 23

Pennzoil Co. v. Texaco, 481 U.S.1 (1987) 23, 24

Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).....21

ReMed Recovery Care Centers v. Township of Worcester, 1998 WL 437272 (E.D.Pa. July 30, 1998) 28

Steffel v. Thompson, 415 U.S. 452 (1974) 21

Verizon Maryland, Inc. v. Public Service Comm'n of Maryland, 535 U.S. 635 (2002).....18, 19

Younger v. Harris, 401 U.S. 37 (1971).....*passim*

STATUTES

28 U.S.C. § 2283 10

47 U.S.C. § 152(b).....19

47 U.S.C. § 153(24) 3

TABLE OF AUTHORITIES – Continued

Page

47 U.S.C. § 153(53) 3

47 U.S.C. § 251 18

47 U.S.C. § 252 19

47 U.S.C. § 252(e)(6) 19, 21

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 18

Iowa Code § 17A.12 to 17A.17 14

Iowa Code § 17A.18A 1

Iowa Code § 17A.19 .....5, 14, 17

Iowa Code § 17A.20 14

Iowa Code § 476.3 1

Iowa Code § 476.5 .....2, 15, 33

Iowa Code § 476.51 .....15, 33

Iowa Code § 476.100 1

Iowa Code § 476.101 1

ADMINISTRATIVE RULES

199 Iowa Admin. Code 7.21 2

199 Iowa Admin. Code 22.14 .....2, 15

199 Iowa Admin. Code 22.14(1)(a) 33

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Connect America Fund, etc., WC Docket Nos. 10-90, *et al*., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 F.C.C.R. 4554 (Feb. 9, 2011) 4

Connect America Fund, etc., WC Docket Nos. 10-90, *et al.,* Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 F.C.C.R. 17663 (Nov. 18, 2011), *appeal docketed, In re: FCC-11-161*, No. 11-9900 (10th Cir.) 4, 5

Exchange of Transit Traffic, "Order Affirming Proposed Decision And Order," 2002 WL 535299 (Iowa U.B. 2002).....3

Petition of UTEX Commun's Corporation, etc., 24 F.C.C.R. 12573, 2009 WL 3266623 (Wir. Comp. Bur. 2009), *renewed pet. denied*, 25 F.C.C.R. 14168 (Wir. Comp. Bur. 2010).....4

Qwest Corp. and U.S. Cellular Corp. v. East Buchanan Tel. Coop., 2004 WL 3369799 (Iowa U.B. 2004) 16

STATEMENT

A. Agency Proceedings

This case arises from a dispute before the Iowa Utilities Board ("IUB" or "Board") that threatened disruption of intrastate telephone service. Windstream (formerly known as Iowa Telecommunications Services, Inc.) is a local exchange carrier that delivers to its customers long distance calls made by Sprint's customers. After paying tariffed intrastate access charges to Windstream for some time without objection, Sprint stopped paying the charges based on its unilateral decision that VoIP calls were not subject to access charges. (Pet. App. 61a.) In response, Windstream notified Sprint that it intended to discontinue service to Sprint, disrupting service to Sprint's customers.

Sprint filed a complaint with the IUB alleging violations of Iowa Code §§ 17A.18A, 476.3, 476.100, and 476.101, and seeking emergency relief to prevent the disconnection. (Pet. App. 64a.) Sprint claimed that if Windstream blocked all calls placed by Sprint's customers to Windstream's customers, the action would be contrary to law and policy, as it would present an immediate danger to the public health, safety, or welfare by blocking emergency calls.

Windstream responded by declaring that it would not discontinue service to Sprint so long as Sprint remained current on newly-billed charges. Sprint then filed a motion to withdraw its complaint on the ground that the only relief it sought (an IUB order

prohibiting Windstream from discontinuing service) was no longer necessary. The IUB allowed Sprint to withdraw its complaint[1] but did not close the docket. Instead, recognizing the likelihood the dispute would recur, the IUB on its own motion "continue[d] the proceeding in order to give full consideration to the underlying dispute that resulted in the threatened disconnection." (Pet. App. 68a.)

The case before the IUB was about the application of state law to intrastate telecommunications calls, a matter within the jurisdiction of the IUB. The IUB's rules require that local exchange carriers, like Windstream, file tariffs for providing exchange access services to long distance carriers. 199 Iowa Admin. Code 22.14. Iowa law requires that public utilities and their customers abide by the terms of the tariffs filed with the IUB, without granting any customer any unreasonable preference, advantage, prejudice, or disadvantage. Iowa Code § 476.5. Windstream's intrastate access service tariff specifies the charges to be paid by long distance carriers to Windstream for carrying long distance calls over the local network to Windstream's customers. There was no dispute that Sprint was delivering intrastate long distance calls to Windstream for completion. In the absence of any other factors, state law required Sprint to pay

[1] 199 Iowa Admin. Code 7.21 requires that complainants obtain IUB approval before a complaint may be withdrawn because of the possibility that the public interest will be implicated in any utility dispute.

Windstream for those access services, pursuant to the terms of the tariff.

Sprint raised a federal defense, however, claiming that the FCC had determined that the VoIP technology used to transmit the calls at issue converted the calls from a "telecommunications service" as defined in 47 U.S.C. § 153(53) to an "information service" as defined in § 153(24), to which intrastate access charges would not apply. The IUB necessarily considered that defense within the context of its state-mandated action.[2]

The Board concluded that the FCC had not declared that non-nomadic VoIP calls are an information service. The Board determined that these intrastate long-distance calls were subject to intrastate access charges because they were delivered to Windstream by a telecommunications carrier. Accordingly, the IUB found that Sprint's VoIP traffic was subject to Windstream's intrastate access tariff and Sprint had to pay the disputed charges pursuant to the state law provisions described above. (Pet. App. 144a-45a.)

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[2] State agencies in Iowa have the authority to consider federal preemption claims and to construe state law in light of federal constitutional issues. *Fisher v. Iowa Bd. of Opt. Exam'rs*, 478 N.W.2d 609, 612 (Iowa 1991). For example, the IUB has previously ruled that federal law removed certain mobile phone calls from the intrastate access charge regime. *See Exchange of Transit Traffic,* "Order Affirming Proposed Decision And Order," 2002 WL 535299 (Iowa U.B. 2002).

As Sprint acknowledges (J.A. 8a), the FCC had not classified VoIP as an information service at the time the IUB made its decision (and still has not done so). In fact, the FCC invited states to decide questions about the application of intercarrier compensation to calls made using VoIP technology.[3] Along with the IUB, other state public utility commissions were making decisions about the application of intrastate access charges to VoIP calling. (Pet. App. 118a-125a.)

Shortly after the IUB decision, the FCC confirmed it has not made any decisions about the regulatory classification of many types of VoIP calls, explicitly stating "the Commission thus far has not addressed the classification of interconnected VoIP services."[4] The reforms the FCC adopted in November 2011 apply prospectively only.[5] The FCC has not been persuaded "that all VoIP-PSTN traffic must be subject exclusively to federal regulation"[6] and still has

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[3] *Petition of UTEX Commun's Corporation, etc.*, 24 F.C.C.R. 12573, 2009 WL 3266623 (Wir. Comp. Bur. 2009), *renewed pet. denied*, 25 F.C.C.R. 14168 (Wir. Comp. Bur. 2010).

[4] *Connect America Fund, etc.,* WC Docket Nos. 10-90, *et al*., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 F.C.C.R. 4554 (Feb. 9, 2011), ¶ 618, n. 935.

[5] *Connect America Fund, etc.,* WC Docket Nos. 10-90, *et al.,* Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 F.C.C.R. 17663 (Nov. 18, 2011), ¶40, *appeal docketed, In re: FCC-11-161*, No. 11-9900 (10th Cir.) ("*USF/ICC Transformation Report and Order*").

[6] *USF/ICC Transformation Report and Order,* ¶934.

not classified interconnected VoIP as an information service.[7]

B. Federal and State Court Proceedings

After the IUB issued its decision, Sprint filed a complaint for declaratory and injunctive relief in federal district court asking the court to declare that the IUB decision is contrary to federal law and to enjoin the IUB members from enforcing the IUB orders. (J.A. 1a-9a.) Sprint asserted that state regulation of the VoIP service at issue is preempted, although Sprint admitted that the FCC had not ruled on whether VoIP is an information service. (J.A. 8a.) On the same day, Sprint also filed a petition in state district court seeking judicial review of the IUB's orders pursuant to Iowa Code § 17A.19. Sprint's state court petition includes its federal claim.

The IUB moved the federal court to abstain pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). The court granted the IUB's motion and dismissed Sprint's federal complaint, concluding that the requirements for *Younger* abstention were satisfied. (Pet. App. 11a.) Specifically, the district court found that the requested federal relief would unduly interfere with a state proceeding by enjoining the IUB from defending its order in the state proceedings. As such, "the requested injunctive relief against the IUB

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[7] *USF/ICC Transformation Report and Order,* ¶946, n. 1906.

is tantamount to an injunction against the state court proceeding." (Pet. App. 20a.) Further, the district court found that the state proceeding implicated important state interests because the IUB was engaged in judicial activity to regulate utilities in Iowa. The court also found an important state interest in the integrity of Iowa's procedure for judicial review of IUB orders. (Pet. App. 26a.) Finally, the court noted Sprint's agreement that the state proceedings afford Sprint an adequate opportunity to raise its federal questions. (Pet. App. 16a.)

Sprint appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the district court's decision to abstain, but vacated the decision to dismiss Sprint's federal complaint, remanding the case to the federal district court with instructions to enter a stay of the federal action. (Pet. App. 9a.)[8] The Eighth Circuit concluded that a federal court's declaration of how the IUB should interpret Iowa laws and regulations would interfere with pending state proceedings reviewing the same IUB interpretation. (Pet. App. 6a.) The Eighth Circuit found an important state interest in regulating and enforcing its intrastate utility rates. (Pet. App. 8a.) And again, Sprint's ability to raise its federal issues in the state proceeding was not

[8] Sprint's brief incorrectly states that the Eighth Circuit concluded that Sprint's complaint should be dismissed. (Br. 16-17.) Sprint cites language from the district court's order and erroneously attributes it to the Eighth Circuit. (*Id.*)

contested. (Pet. App. 5a.) The court acknowledged Sprint's argument regarding the coercive or remedial nature of the state proceedings but concluded the distinction was not outcome-determinative. (Pet. App. 6a-7a.)

The state judicial review proceeding continues; briefing is complete and the case was argued before the state district court on April 19, 2013. The district court's ruling on the merits has not been issued as of the date this brief went to print.

SUMMARY OF ARGUMENT

This case involves an ongoing state proceeding involving two important state interests: Enforcement of Iowa law relating to public utility tariffs and protecting Iowans from harm resulting from a dispute between telecommunications carriers. The state proceeding offers a full opportunity for Sprint to present its federal law issues. When a state undertakes a judicial proceeding to serve important interests, the federal courts properly allow the state process to play out without interference. In those circumstances, *Younger* abstention is appropriate.

The authority to regulate the telecommunications industry is split between federal and state regulators and that split will inevitably result in cases that are on or near the line. Those few cases near the line do not mean that the states forfeit their legitimate interest in enforcing their laws and

protecting the public from injury. Instead, it is sometimes necessary for a regulator to investigate and determine how the jurisdictional divide applies to specific facts, as the IUB did.

Principles of comity and federalism require federal court deference to pending proceedings in which the state has a strong interest. Here, the IUB acted in its sovereign capacity on the state side of the federal-state divide, not as a deputized federal regulator. The agency conducted a state-law proceeding, coercive in nature, to address a potential harm to telephone customers in Iowa resulting from a potential violation of state law. Sprint raised a federal-law defense, requiring the IUB to determine whether the FCC had ruled that use of VoIP technology changes the jurisdictional nature of certain long distance calls, but this was still a proceeding involving important state interests. Under the *Younger* abstention doctrine, the case must be permitted to work its way through the state's process, where Sprint's federal claims can be given full consideration in the context of the state interests.

When considering *Younger* abstention in this matter, the Eighth Circuit correctly determined that the coercive or remedial nature of the related state proceeding does not, by itself, determine whether abstention is required. While the coercive/remedial distinction is an appropriate consideration in some cases, it does not reliably serve as a theory of definitive resolution and can produce inconsistent results,

making it a poor substitute for a complete *Middlesex County* analysis.

Furthermore, even if the coercive/remedial test were determinative, the proceedings before the IUB were coercive, not remedial, and therefore abstention was appropriate.

Finally, the Eighth Circuit's decision does not confuse or combine the *Burford* and *Younger* abstention doctrines. Sprint and the Law Professors argue that the IUB should have moved for abstention under *Burford*, then argue that *Burford* abstention does not apply. The IUB agrees that *Burford* abstention does not apply, albeit for a different reason. That is why the IUB did not rely upon, or even mention, *Burford* when it filed its motion for abstention. Instead, the IUB properly relied upon *Younger* abstention, and the Eighth Circuit did not confuse *Younger* and *Burford*.

ARGUMENT

The doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), requires that the federal courts abstain from enjoining the members of the IUB from defending and enforcing the IUB's decision. The doctrine's underlying principles, and a straightforward reading of this Court's decisions, confirms that it applies here. The Court should reject Sprint's effort to narrow the doctrine by allowing federal courts to enjoin ongoing state judicial proceedings that are deemed "remedial" in nature but involve important state interests.

I. These State Proceedings Are Appropriate For *Younger* Abstention.

A. Abstention is a well-recognized exception to the exercise of federal court jurisdiction.

Although the federal courts have a general obligation to decide cases properly brought before them, the abstention doctrines are a well-recognized exception to that obligation. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans ("NOPSI")*, 491 U.S. 350, 359 (1989). The history of the abstention exception is long and is based on foundational considerations of equity, comity, and federalism.

Under the common law, courts had discretion to withhold equitable forms of relief. That discretion predates the enactment of the statutes defining federal jurisdiction and those statutes preserve this traditional discretion. *Id.*; *see also* 28 U.S.C. § 2283 (the Anti-Injunction Act). Consistent with that common-law tradition, the Court has developed various abstention doctrines, the entire point of which is to identify the situations in which federal courts should decline to exercise their jurisdiction in favor of a state proceeding. The *Younger* doctrine, at issue here, is a cornerstone of that effort.

In *Younger,* the Court determined that longstanding judicial policy requires that federal courts refrain from interfering with pending state criminal proceedings, identifying equity, comity, and federalism as the sources of this policy. As *Younger* explains,

equitable principles prevent duplication of legal proceedings when a single suit is adequate to protect the rights asserted. 401 U.S. at 44. Principles of comity, in contrast, preserve respect for state functions, recognizing that the country is made up of a union of separate state governments and their institutions. The exercise of comity eases the potential friction or tension between the federal and state courts. When comparing comity to the equitable principles described above, the Court declared that comity is the "even more vital consideration." *Id*.

The *Younger* Court also recognized the related notion of federalism, which allows the states to pursue their own policies to the benefit of the nation as a whole, which also supports abstention in appropriate cases. *Id*. Thus, even when federal rights and interests are at issue, if the state proceedings are capable of protecting those federal rights and interests, it is "perfectly natural" and "normal" for the national government not to interfere in the legitimate activities of the states. 401 U.S. at 45.

B. *Younger* abstention applies to this case.

Younger principles of comity and federalism apply to state civil proceedings involving important state interests. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). They also apply to pending state administrative proceedings that are judicial in nature, so long as the federal plaintiff has a full and fair opportunity to present any constitutional claims. *Middlesex County*

Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982). Together, these cases establish that *Younger* abstention is fully applicable to civil administrative proceedings such as the case before the IUB.

1. The *Huffman* Court concluded that federal restraint is appropriate in civil proceedings because the comity and federal interests underlying the *Younger* doctrine fully apply to civil proceedings where important state interests are involved; federal interference would prevent the state from pursuing its own policies and would deny the state the ability to first consider any constitutional objections. 420 U.S. at 604. As sovereign entities, states should be permitted the initial opportunity to consider those objections, giving the opportunity to take such action as may be necessary in order to obviate the objections and make further constitutional analysis unnecessary.

The *Huffman* Court also recognized that federal interference in ongoing state cases could result in duplicative legal proceedings, which (a) could be seen to impugn the Iowa courts' ability to protect constitutional rights by presenting the appearance of a lack of confidence in the state courts and (b) to be an inefficient use of legal resources. 420 U.S. at 604. Sprint's approach to this case reflects an apparent lack of confidence in the state system and has already resulted in unnecessary legal proceedings, as Sprint seeks to present its claims in a repetitive manner; first its federal claim in federal court and then its state claims in state court, all while the state court

system is capable of hearing and deciding all of the issues in a single appellate process.

2. While *Huffman* involved state civil court proceedings, *Middlesex County* applied *Younger* abstention to state administrative proceedings, more specifically to a state proceeding that was initially conducted by a local District Ethics Committee, subject to judicial review. The Court concluded that the state bar disciplinary proceedings warranted federal court deference because they were "judicial in nature." 457 U.S. at 433-34. And in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), the Court reaffirmed that *Younger* applies to state administrative proceedings that are judicial in nature.

The *Middlesex County* Court set out a three-part test for determining when *Younger* abstention is required: (1) Is there an ongoing state judicial proceeding? (2) Do the proceedings implicate important state interests? (3) Is there an adequate opportunity in the state proceedings to raise constitutional challenges? 457 U.S. at 432. If all three questions are answered in the affirmative, then a federal court should abstain, absent "bad faith, harassment, or some extraordinary circumstance that would make abstention inappropriate." *Id.* at 435. Here, all three of these questions are answered affirmatively.

First, there is an ongoing state judicial proceeding. In *NOPSI*, this Court left open the question of whether there is an ongoing state proceeding where a

state agency issues a ruling that is, or could be, appealed to a state court. 491 U.S. at 369. Sprint did not seek certiorari on that issue, however, so it is not properly before the Court. The Court should therefore assume, as it did in *NOPSI*, that the availability of state court review provides an ongoing state proceeding.

In all events, the Eighth Circuit was on solid ground in concluding there is an ongoing state proceeding here. Just as *Younger* applies when state trial court proceedings are ended (*Huffman*, 420 U.S. at 608-09), *Younger* applies after a state administrative proceeding of a judicial nature is ended, based upon the same *Huffman* considerations of judicial efficiency, comity, and federalism.

Federal intervention after the agency proceedings are concluded would be duplicative because the IUB has already offered Sprint an opportunity for a hearing with the full panoply of procedural rights available in a trial court. Iowa Code §§ 17A.12 to 17A.17. Further, the Iowa appellate courts are charged by statute with the duty to review state agency decisions, including those that involve constitutional questions, to ensure those decisions conform to certain standards. Iowa Code §§ 17A.19 to 17A.20. That function would be annulled if exhaustion of state appellate remedies is not required once there has been significant progress at the agency level.

But, again, that issue is not properly before the Court.

Second, the IUB proceedings involve an important state interest. Regulation of utilities has long been recognized as "one of the most important functions traditionally associated with the police power of the State." *Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 377 (1983), citing *Munn v. Illinois*, 94 U.S. 113 (1877). The IUB was engaged in reviewing the conduct of two telecommunications carriers with the specific goals of (a) enforcing state law and (b) protecting the public from the injuries that would result if important telephone calls were interrupted due to a commercial dispute between the carriers. Specifically, 199 Iowa Admin. Code 22.14 requires Windstream to charge carriers like Sprint for providing access services, pursuant to tariff, and Iowa Code § 476.5 prohibits public utilities from charging more or less than the tariffed rate for utility services. A violation of the statute or an IUB rule or order may subject the utility to civil penalties pursuant to Iowa Code § 476.51, after notice and opportunity for hearing. The state has an important interest in preserving this regulatory scheme.

The state also has an important interest in protecting its citizens from disruption of important telephone calls due to a dispute between telecommunications carriers. In fact, in its complaint filed with the IUB, Sprint alleged that "blocking telephone calls on a carrier basis will almost always present an immediate danger to the public health, safety, or

welfare."[9] Thus, Sprint acknowledges that the public interest in completing telephone calls is an important matter of law and policy, *i.e.*, that it is an important state interest. While that interest was temporarily addressed when Windstream agreed not to disconnect Sprint under certain conditions, the parties acknowledged the call blocking dispute was likely to recur (Pet. App. 66a), so the state's interest was still at issue.

Third, the IUB proceedings offer an opportunity to consider Sprint's constitutional challenges. Sprint has not challenged the third of the *Middlesex County* factors, but it is worth noting that the proceedings before the IUB offered an opportunity for the agency to consider Sprint's federal law defense and the ongoing judicial review proceedings provide a full and fair opportunity to present those claims in state court. Under Iowa law, constitutional claims involving state administrative proceedings must be raised before the state agency in order to be preserved for judicial review. *Fisher*, 478 N.W.2d at 612. This requirement provides the agency an opportunity to construe its enabling legislation in light of the constitutional allegations.

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[9] Sprint was quoting from the IUB's decision in *Qwest Corp. and U.S. Cellular Corp. v. East Buchanan Tel. Coop.*, 2004 WL 3369799 (Iowa U.B. 2004). Sprint's complaint in the IUB proceedings can be found at: https://efs.iowa.gov/cs/groups/external/documents/docket/mdaw/mdu0/~edisp/030034.pdf.

Even if the state agency lacked authority to consider such arguments on its own (which it does not), it is sufficient under *Middlesex County* that Sprint's constitutional claims can be presented in state court appellate review. 457 U.S. at 436. Iowa Code § 17A.19 provides that opportunity.

Finally, *NOPSI* added a fourth step to the *Middlesex County* analysis, requiring consideration of whether the agency proceeding was "the type of proceeding to which *Younger* applies," distinguishing between state judicial inquiries and state action of a legislative nature. 491 U.S. at 367. Only proceedings of a judicial nature are entitled to *Younger* abstention. *Id*. Unlike *NOPSI*, where the agency was engaged in setting utility rates prospectively, the IUB sought to enforce the status quo that existed before Sprint ceased paying intrastate access charges to Windstream. The IUB's order enforced liabilities based on present facts and existing laws, and thus the agency proceeding constituted a judicial proceeding that is entitled to *Younger* abstention.

Sprint and the *amici curiae* Law Professors ignore this fundamental difference between *NOPSI* and this case: In *NOPSI*, the state was engaged in ratemaking for the future, a legislative act, while the IUB was engaged in ***enforcing rates that had already been set***, a judicial act. In abstaining here, the lower courts faithfully applied *NOPSI* and this Court's other *Younger* precedents.

C. Sprint's reliance on *Verizon Maryland* is misplaced.

In an attempt to avoid the application of *Middlesex County* to these proceedings, Sprint relies on *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635 (2002), as authority for the ability of federal courts to review state utility commission orders that are issued pursuant to the Telecommunications Act of 1996 ("1996 Act"). (Br. 14-16.) The CTIA does likewise. (CTIA Br. 13-16.) *Verizon Maryland* is irrelevant to this case, however, because *Verizon Maryland* is not an abstention case and because the IUB's orders were not issued pursuant to the 1996 Act.

Neither *Younger* nor any other abstention doctrine is mentioned even once in *Verizon Maryland*. Instead, the central question in *Verizon Maryland* was whether the federal court had jurisdiction to review a state commission decision involving the interpretation of an interconnection agreement entered into pursuant to federal law. The IUB has not challenged the federal court's jurisdiction in this matter; rather, the question the IUB presented was whether the federal court should decline to exercise that jurisdiction based upon *Younger,* a question not present in *Verizon Maryland*.

Furthermore, *Verizon Maryland* involved a state commission acting pursuant to a delegation of federal authority. Specifically, 47 U.S.C. § 251 requires that incumbent local exchange carriers interconnect with

and share their networks with competitors pursuant to interconnection agreements. 47 U.S.C. § 252 then requires that state commissions review and approve negotiated agreements and, when necessary, arbitrate agreements when negotiations are unsuccessful. Because the state commissions are operating under delegated federal authority, their actions are subject to review in federal district court under 47 U.S.C. § 252(e)(6).

Here, in contrast, federal law explicitly reserves the subject matter of the IUB proceedings to the states. States have primary authority over intrastate services. 47 U.S.C. § 152(b). In the absence of a specific Congressional directive, there is no intrastate FCC authority. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 370 (1986). There is no such directive here.

The case before the IUB involved the question of whether intrastate exchange access charges applied to long distance calls made using VoIP technology. The IUB was acting pursuant to state law and state authority; it was not acting "in the voluntarily assumed capacity of a federal regulator" (CTIA Br. 33) or as a "deputized federal regulator" (Pet. Br. 13), as the Maryland commission was. *Verizon Maryland* is irrelevant to this case.

D. The *Younger* abstention doctrine contains well-established limits that keep it within its proper bounds.

In the end, Sprint's position comes down to the assertion that a straightforward application of the *Middlesex County* standard is overbroad and "would presumably be satisfied with respect to *every* state-agency proceeding." (Br. 27, emph. in original.) Other *amici* make the same claim of overbreadth. (Chamber Br. 12, CTIA Br. 33-35.) However, there are well-established limits on the application of *Younger* abstention that prevent the overbroad application of abstention described by Sprint and the others.[10]

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[10] Sprint asserts that at oral argument before the Eighth Circuit the IUB "boldly proclaimed that *Younger* abstention applies to *all* of its proceedings regardless of the legal regime involved – *i.e.*, that review of IUB decisions is available only through the state court system." (Br. 10, emphasis in original, footnote omitted.) Sprint's only support for this incorrect statement is that the IUB did not explicitly deny it at the certiorari stage of this matter. (*Id.*, n. 5.)

Because the Eighth Circuit's recording equipment malfunctioned during argument, there is no direct record of what was said. At the certiorari stage, Sprint relied on this absence of evidence to attribute certain statements to the IUB. (Pet. 13.) In the absence of a recording, the IUB chose not to engage in fruitless "he said, she said" argument and instead focused on the evidence in the record, that is, the written statements in the IUB's brief. (BIO 12.) Sprint continues to ignore this written record. The IUB does not now and never has asserted that *Younger* abstention applies to all IUB proceedings. The limits of *Younger* abstention are well-defined and apply to the IUB.

Younger abstention does not apply when the state administrative proceedings are legislative in nature, rather than judicial, NOPSI, 491 U.S. at 372, or in the absence of a prior pending state proceeding. *Steffel v. Thompson,* 415 U.S. 452, 474 (1974). Abstention is not available if the plaintiff is seeking something other than equitable or other discretionary relief. *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 719 (1996). Judicial bias is a recognized basis for denying *Younger* abstention. *Gibson v. Berryhill*, 411 U.S. 564, 577-79 (1973). *Younger* abstention does not apply when Congress has declared that state action in specific circumstances should be reviewed in federal court, such as in 47 U.S.C. § 252(e)(6). Finally, abstention is unavailable if any one of the three *Middlesex County* factors is not present.

These are substantial limitations on the *Younger* abstention doctrine. They serve to identify the state proceedings in which comity and federalism require a federal court to stay its hand by focusing on proceedings that are judicial in nature, involve important state interests, and offer adequate opportunity to address federal issues. The case before the IUB satisfies all three of those requirements.

II. Sprint's Proposed Coercive/Remedial Test Is Supported by Neither Principle Nor Precedent.

The coercive/remedial test proposed by Sprint, if adopted, would inevitably result in federal courts

failing to abstain in cases where the state proceedings can be characterized as remedial but nonetheless involve an important state interest. Such a result is not required by principle or by precedent. There may be some attractiveness to a simple "bright-line" test for determining whether to abstain; simple tests that can replace a complex analysis can aid in the efficient administration of justice. However, a good bright-line test must give the right result and be easy to apply. The coercive/remedial distinction can produce incorrect results and can be difficult to apply. For these reasons, the Eighth Circuit correctly concluded that the test should not be considered outcome-determinative in all cases. *Hudson v. Campbell*, 663 F.3d 985, 987 (8th Cir. 2011).

Hudson acknowledges that other circuits recognize a distinction between coercive and remedial actions. That distinction is based upon four words from a footnote in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.,* 477 U.S. 619, 627, n. 2 (1986). However, there is nothing in that footnote to indicate that the distinction was intended to become the final touchstone for determining whether *Younger* abstention is required; the *Dayton* Court merely distinguished an earlier decision by saying that "[u]nlike *Patsy*,[11] the administrative proceedings here are coercive rather than remedial, began before any substantial advancement in the federal action took

[11] *Patsy v. Florida Board of Regents,* 457 U.S. 496 (1982).

place, and involve an important state interest." *Id*., n. 2 (footnote added). The coercive/remedial distinction was only one of three different factors identified by the Court as distinguishing *Dayton* from *Patsy*, a slender thread by which to hang an outcome-determinative test, especially one that sometimes produces wrong results.

A. The coercive/remedial test sometimes produces the wrong result.

The coercive/remedial test cannot be reconciled with this Court's holding in *Pennzoil Co. v. Texaco*, 481 U.S. 1 (1987), "that *Younger* requires a district court to abstain from intervening in a state proceeding between two private parties." *Hudson*, 663 F.3d at 987-88. *Pennzoil* involved two private litigants in both the state and federal cases; the State of Texas was not a party litigant to either proceeding, so the state proceedings cannot be characterized as "coercive" under any of the tests currently in use. Nonetheless, the *Pennzoil* Court concluded that the federal district court "should have abstained under the principles of federalism enunciated in *Younger* . . . ," 481 U.S. at 10, because "proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand." *Id.* at 14. There is no way to reconcile a bright-line test based upon the coercive/remedial distinction with the result in *Pennzoil*.

Similarly, the proposed coercive/remedial test is inconsistent with the result in *Juidice v. Vail*, 430 U.S. 327 (1977), where the Court required *Younger* abstention in a civil lawsuit brought by judgment creditors in an attempt to collect judgment. 430 U.S. at 337. Again, the state was not a party litigant to the proceeding, so the case cannot be called coercive, yet abstention was still required.

Sprint tries to explain this inconsistency by describing *Pennzoil* and *Juidice* as being in a special class of civil proceedings that further the state courts' ability to perform their judicial functions. (Br. 22.) While that description of the cases is accurate, it ignores the ***rationale*** of the decisions, which is not limited to that special class. In *Juidice*, the Court emphasized that the most important reason for nonintervention is comity, "a proper respect for state functions." 430 U.S. at 334. *Pennzoil* also turns on the strong policy of comity, with an emphasis on the state's interest in a particular regulatory matter; if that interest is "so important that exercise of the federal judicial power would disregard the comity between the States and the National Government," abstention is required. 481 U.S. at 11. The key factor in both *Pennzoil* and *Juidice* is not as limited as Sprint asserts; both cases were decided on the basis of comity. The fact that *Pennzoil* and *Juidice* had similar types of state interest at stake does not mean abstention is limited to those particular types of state interest. If there is a sufficiently important state interest, comity requires abstention.

Using the coercive/remedial distinction as a binding test would also be inconsistent with the decision in *Middlesex County*, which recognized that abstention is required in criminal proceedings (clearly coercive) but also in "[p]roceedings necessary for the vindication of important state policies. . . ." 457 U.S. at 432. A state may be called upon to defend its policies in a proceeding regardless of who initiated it; thus, many remedial proceedings may involve important state policies that justify abstention under *Middlesex County*.

Nor, contrary to Sprint's contention, is the Eighth Circuit alone in requiring *Younger* abstention in situations where the state proceedings would be classified as remedial. For example, in *Addiction Specialists, Inc. v. Township of Hampton*, 411 F.3d 399 (3d Cir. 2005), the state proceedings would be characterized as remedial (because the plaintiff initiated the challenge to a zoning decision and there was no state enforcement proceeding), but the Third Circuit affirmed the district court's decision to abstain without discussing the coercive/remedial distinction. Instead, the court applied the standard *Middlesex County* three-part analysis and concluded *Younger* abstention was appropriate. 411 F.3d at 408-11.

Similarly, in *Morrow v. Winslow*, 94 F.3d 1386 (10th Cir. 1996), the circuit panel ordered abstention *sua sponte* in a case where the underlying proceedings must be characterized as remedial, not coercive. *Morrow* involved private litigation in the form of a

state adoption proceeding; neither the state nor any of its agencies was a party. 94 F.3d at 1396-97. The appellate court nonetheless found *Younger* abstention was required due to the importance of the state's interest in family relations, relying upon *Moore v. Sims*, 442 U.S. 415, 435 (1979). The *Morrow* court concluded there was no need for federal litigation of issues already under consideration in the ongoing state proceedings. 94 F.3d at 1397.

Each of these cases demonstrates that it is possible, even inevitable, to have "remedial" cases that nonetheless require *Younger* abstention due to the importance of the state interest involved. The simple test proposed by Sprint would produce incorrect results in many cases.

B. Distinguishing between coercive and remedial proceedings can be difficult.

The rule proposed by Sprint should also be rejected because the line between a coercive and a remedial proceeding is not at all precise. For example, the panel in *Brown v. Day*, 555 F.3d 882 (10th Cir. 2009), split over the apparently simple question of whether the Medicaid administrative proceeding involved in that case was coercive or remedial.

The *Brown* majority concluded the state agency proceedings were remedial, rather than coercive, because (a) Brown initiated the challenge to actions by the Kansas state agency and (b) Brown "committed no cognizable bad act." 555 F.3d at 893. In

contrast, the *Brown* dissent considered the same facts and concluded the proceedings were coercive because under Kansas law, "Brown was an unlawful recipient of Medicaid benefits, and the state was acting in its enforcement role during Brown's administrative proceedings." 555 F.3d at 897. Thus, the dissent considered the state's notice of termination of benefits to be the beginning of the state's judicial process, while the majority viewed the federal plaintiff's request for hearing as the initiating act, all based upon consideration of the same set of undisputed adjudicative facts.

The First Circuit experienced a similar split in *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255 (1st Cir. 1987), in which the federal plaintiff was fired from her position as school district superintendent for allegedly unconstitutional reasons. The Secretary of Public Instruction served the plaintiff with an order dismissing her from employment and notifying her of her right to file an administrative appeal. Instead, she filed an action in the federal court, which found the charges against her to be without merit and reinstated her. On appeal, the Secretary argued the district court should have abstained under *Younger*. The majority disagreed, concluding the administrative proceedings were remedial in nature, in part because in the majority view the issuance of the dismissal order, by itself, constituted a legal wrong. 829 F.2d at 261. Because the wrong was complete when the dismissal order was issued, and the plaintiff merely had the option of initiating further state

proceedings to try to remedy the wrong, there was no ongoing state proceeding and abstention was not required. *Id*.

The dissent took a different view, observing that when the plaintiff brought her federal suit, she was "very much in the midst of Commonwealth administrative proceedings." 829 F.2d at 267 (Breyer, J., dissenting). This was because the dismissal order, by its own terms, became final only if it was not appealed within the state system within ten days. *Id*. Thus, sending the notice was just one step within "an integrated, statutory administrative scheme" and, therefore, the state proceeding was still pending. *Id*. Again, this case demonstrates that the coercive/remedial distinction can be anything but easy to apply.

Other cases also demonstrate the malleability of this distinction. For example, in two cases before courts in the same district, just two years apart, one court found a cease and desist action in the zoning context to be "coercive" while the other court considered the same action to be "remedial." *See ReMed Recovery Care Centers v. Township of Worcester,* 1998 WL 437272 (E.D.Pa. July 30, 1998), and *Gentlemen's Retreat, Inc. v. City of Philadelphia*, 109 F.Supp.2d 374 (E.D.Pa. 2000). *See also Nat'l Parks Cons. Ass'n v. Lower Prov. Tp.,* 608 F.Supp.2d 637, 652-56 (E.D.Pa. 2009) (explaining the difficulties of applying the coercive/remedial test). A good bright-line test should not be so difficult to apply or produce such inconsistent results.

C. Sprint's proposed test is, at best, a factor to be considered.

The coercive/remedial distinction may be useful in some cases as a factor in making the decision whether to abstain, but as shown above it should not be considered a standalone, controlling test for determining whether abstention is required. The distinction can help in evaluating the state's interest in an administrative proceeding, as coercive cases are always likely to involve an important state interest, while some remedial cases may not. The distinction can also aid in the analysis of *Middlesex County's* third prong, as well; a coercive proceeding that is judicial in nature is likely to provide an adequate forum to consider the federal issues in connection with the important state interests. So, while the distinction is not appropriate for use as a bright-line test, it may still have value as a consideration.

III. In Any Event, The IUB Proceedings Were Coercive.

Sprint's argument is premised on the proposition that the IUB proceedings were remedial, not coercive. That is so, according to Sprint and its *amici,* because the proceedings were initiated by Sprint. (Sprint Br. 29, Chamber Br. 6 n. 2, and Law Professors Br. 27.) Upon closer inspection, however, Sprint's assumption is unfounded. If the coercive/remedial distinction were applied as a test in this case – and it should not be for all the reasons discussed above – the Eighth Circuit decision would still merit affirmance. And the

very difficulty of characterizing these proceedings highlights the difficulties in implementing Sprint's proposed test.

It is perhaps for that reason that the Eighth Circuit did not make a determination regarding the coercive or remedial nature of the IUB proceedings. The Eighth Circuit acknowledged Sprint's contention that the state proceedings are remedial but did not state whether it agreed with Sprint's characterization. Instead, the court simply noted that it recognized the distinction but has "not considered the distinction to be outcome determinative." (Pet. App. 6a-7a.)

To apply the test, it is first necessary to determine what the terms mean. After considering the definitions used by the other circuits, the Tenth Circuit adopted the following multi-factor analysis, which Sprint cited approvingly (Br. 30):

> First, we must query whether the federal plaintiff initiated the state proceeding of her own volition to right a wrong inflicted by the state (a remedial proceeding) or whether the state initiated the proceeding against her, making her participation mandatory (a coercive proceeding). Second, we must differentiate cases where the federal plaintiff contends that the state proceeding is unlawful (coercive) from cases where the federal plaintiff seeks a remedy for some other state-inflicted wrong (remedial). Even this test is not entirely determinative; below, we also discuss

> other factors that may distinguish remedial proceedings from coercive ones.

Brown, 555 F.3d at 889. The "other factors" mentioned in the quote include whether "the federal plaintiff has committed an alleged bad act" (555 F.3d at 891) and whether the proceeding "originated with the state's proactive enforcement of its laws" (555 F.3d at 892), each of which indicates a coercive proceeding.

Under the *Brown* test, the proceedings before the IUB were coercive. This is even true under the "who-filed-first" test. Sprint filed a "Complaint and Request for Emergency Relief" with the IUB on January 6, 2010, but that is not the end of the story. Sprint subsequently withdrew its complaint and attempted to terminate the proceeding, but the IUB issued an order recasting the proceeding and requiring Sprint to continue to participate, effectively re-initiating the proceeding as described in greater detail in the Statement, *supra* pp. 1-2. The IUB stepped in to enforce state law and to protect important state interests. Under the who-filed-first test, the IUB proceedings were coercive because the IUB initiated the enforcement proceedings.

Even though this simplest definition of "coercive" favors the IUB in this case, the who-filed-first test should not be considered determinative of whether a proceeding is coercive or remedial. If the distinction is intended to help identify cases involving an important state interest, then applying it as an

outcome-determinative test could have led to the wrong conclusion in this matter. While the case before the IUB may have appeared to be a private dispute prior to being recast, the fact is that ***this case involved an important state interest from the moment it was initiated by Sprint***. The IUB's initial concern was that telecommunications customers in Iowa should not be harmed by the blocking of their important telephone calls due to a dispute between two carriers, because some percentage of those calls will be emergency calls to doctors, parents, schools, and others; the public interest requires that such calls not be used as leverage in intercarrier disputes. That interest was present when Sprint filed its complaint; it was present when the IUB allowed Sprint to withdraw its complaint; and it was present when the IUB recast the proceedings and required that they continue. If Sprint had never moved to withdraw its complaint, that public interest factor in the IUB proceedings still would have been present. The procedural history of this case reveals the unreliable nature of the who-filed-first test, showing that an apparently remedial case can still be appropriate for *Younger* abstention.

An examination of the other tests from the Tenth Circuit's analysis is also illuminating. The first factor is whether the case is one "where the federal plaintiff contends that the state proceeding is unlawful (coercive) [or one] where the federal plaintiff seeks a remedy for some other state-inflicted wrong (remedial)." *Brown*, 555 F.3d at 889. Sprint originally sought

a remedy preventing disconnection by a non-state actor and did not claim any "state-inflicted wrong." In its various appeals of the IUB decision, Sprint contends the IUB's proceedings were unlawful under federal law. Sprint does not seek a ***remedy*** from the state for some alleged state-inflicted wrong like unlawful termination of Medicare benefits or employment. Under this test, the IUB proceedings were coercive.

The Tenth Circuit also considers whether it has been alleged that the federal plaintiff has committed a bad act. *Brown*, 555 F.3d at 891. In the proceedings before the IUB, Windstream alleged that Sprint had wrongfully withheld intrastate access charge payments, in violation of Iowa Code § 476.5 and 199 Iowa Admin. Code 22.14(1)(a). (Pet. App. 71a.) The IUB proceedings therefore involved an allegation that Sprint had violated state statutes and regulations, that is, Sprint had committed a bad act. Under this test as well, the IUB proceedings were coercive.

The final Tenth Circuit consideration is whether the state administrative proceedings "originated with the state's proactive enforcement of its laws." *Brown*, 555 F.3d at 892. Again, the circumstances of this case demonstrate that this test is satisfied. The IUB recast the proceeding to determine whether Sprint had violated Iowa law by failing to pay tariffed intrastate access charges, and if so, to order Sprint to pay those charges. Failure to comply with such an IUB order could have resulted in the imposition of civil penalties pursuant to Iowa Code § 476.51.

When the coercive or remedial nature of the case is properly considered in the abstention analysis as a factor indicative of the presence of a substantial state interest, it is clear that under any of the tests in use that the proceedings before the IUB were coercive, not remedial.

IV. *Burford* Abstention Is Irrelevant To This Case.

Sprint and the Law Professors set up a *Burford*[12] straw man only to knock it down, arguing that the IUB should have moved for abstention under that doctrine, and then arguing that *Burford* abstention does not apply to this case. The IUB agrees that the doctrine does not apply here; that is why the IUB did not move for abstention under *Burford.*

Burford involved a complex system of state regulation that required a state agency and the state courts to participate as partners in the formation of policy and determination of cases involving oil production rights. 319 U.S. at 333. Intervention by lower federal courts in that system had already resulted in confusion and conflict. *Id*. at 327. "Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand." *Id*. at 334.

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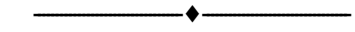
[12] *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943).

This case involves no such complex system. There is no partnership between the IUB and the Iowa courts to develop policy and decide cases. The issues before the IUB involved straightforward tariff interpretation, akin to contract interpretation, and a determination of whether the FCC has declared VoIP calls to be an information service. This case is not like *Burford*.

Younger is the proper abstention doctrine for this case, as described in the three-part test of *Middlesex County*. There can be no real dispute that there is an ongoing state proceeding; Sprint sought judicial review of the IUB decision in state court. The proceedings implicate important state interests in the regulation of public utilities in Iowa, the enforcement of Iowa laws, the protection of Iowa consumers, and the interest of state courts in reviewing the decisions of administrative agencies. Finally, there is no dispute that Sprint can present all of its argument, federal and state, in the state court proceedings. This is the type of case to which *Younger* abstention applies.

The Eighth Circuit did not confuse *Younger* and *Burford*. It did not even mention *Burford*. The Eighth Circuit ignored *Burford* because it is not relevant here.



CONCLUSION

The judgment of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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