No. 12-815

In The
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,

Petitioner,

v.

ELIZABETH S. JACOBS, et al.,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Eighth Circuit properly concluded, based on the specific facts of this case, that *Younger* abstention is warranted where there is an ongoing state proceeding that implicates the important state interest of regulating intrastate utilities and that allows the federal plaintiff to litigate the federal claims that were included in both its federal and state actions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES AND OTHER LEGISLATIVE AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTRODUCTION

The petition for writ of certiorari should be denied. There is no compelling reason to review the Eighth Circuit's decision in a case involving a straightforward application of the principles of abstention under *Younger v. Harris*, 401 U.S. 37 (1971) ("*Younger*"). Further review of the Eighth Circuit's decision would be unwarranted for at least three reasons. First, Petitioner's federal complaint has been stayed, not dismissed. Petitioner is not precluded from returning to federal court upon completion of the state proceeding presently underway, if appropriate at that time. Second, to the extent there is a split in the circuits regarding the coercive-remedial distinction for abstention purposes, the degree of that split is not yet clear. Nor is it clear that such a split, if it has developed with sufficient clarity, is an important matter worthy of this Court's review. And third, the decision below is correct.

The Eighth Circuit's decision is true to the principles of *Younger* as they have evolved in cases decided by this Court. Following the principles of comity and federalism discussed in *Younger* and the test developed by this Court in *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n,* 437 U.S. 423 (1982), the Eighth Circuit properly found that abstention was warranted to avoid interfering with an ongoing state proceeding that implicates the state's important interest of regulating intrastate utility services in the public interest. The state proceeding in this case involves more than a private interest.

The Eighth Circuit gave appropriate consideration to whether the state proceeding could be labeled as "coercive" or "remedial." The Eighth Circuit did not reject use of the coercive-remedial distinction or decide whether the state proceeding in this case is in fact coercive or remedial, stating only that the distinction is not "outcome determinative." Pet. App. 7a. Instead, the Eighth Circuit focused on the sufficiency of the state's interest, concluding that "Iowa has an important state interest in regulating and enforcing its intrastate utility rates." Pet. App. 8a. The Eighth Circuit's analysis of the state interest is consistent with abstention cases decided by this Court. This Court has not elevated consideration of whether a state proceeding can be labeled as coercive or remedial to the status of a determinative factor. Where the Eighth Circuit's decision is consistent with *Younger*, review by this Court is not necessary.

COUNTER-STATEMENT OF THE CASE

The Iowa Utilities Board ("Board") offers this statement to clarify and correct certain statements in the Petition regarding the dispute between Sprint and Iowa Telecom, the Board's administrative proceeding, the state of the law at the time the Board considered the dispute, and the posture of the case. This Petition arises from a dispute between Sprint and Iowa Telecom, two companies providing telecommunications service in Iowa subject to the regulatory authority of the Board pursuant to state law.

Iowa Code chapter 476. Congress has explicitly reserved authority to the states to govern intrastate telecommunications service. 47 U.S.C. § 152(b).

As the state agency charged with regulating intrastate telecommunications service in Iowa, the Board has broad general authority to give effect to the purposes of Iowa Code chapter 476, which authorizes the Board to regulate public utilities (Iowa Code § 476.1); to resolve complaints filed by anyone or brought on the Board's own motion to determine the reasonableness of anything done by a public utility (§ 476.3); to require and enforce tariffs governing the provision of intrastate service (§§ 476.4 and 476.5); and to oversee disconnection of utility service. (§ 476.20). The Board is authorized to resolve disputes between telecommunications companies, including disputes over unpaid intrastate access charges, in order to protect the public interest in a fully-interconnected telecommunications network. (§ 476.11).

This dispute arose after Sprint stopped paying intrastate access charges to Iowa Telecom for calls made using a type of Voice over Internet Protocol (VoIP) technology after having paid the charges for years without dispute. The charges were required by Iowa Telecom's intrastate access tariff that had been filed with and approved by the Board pursuant to state law. (§ 476.5). Sprint decided to stop paying intrastate access charges on VoIP traffic without any prior approval by the Board or decision by the Federal Communications Commission (FCC) that would have permitted the cessation of payment. Sprint's

refusal to pay the tariffed charges prompted Iowa Telecom to threaten to discontinue providing services to Sprint, disrupting the ability of certain end-user customers to make or receive calls.

Sprint filed a complaint with the Board over Iowa Telecom's threatened discontinuance of service. Sprint describes its dispute with Iowa Telecom over unpaid intrastate access charges as a "garden-variety commercial" dispute, as if the Board had no interest in doing anything other than ordering Iowa Telecom not to discontinue service to Sprint. Pet. 19. However, the Board recognized and Sprint acknowledged that the dispute was likely to recur, prompting new threats to the public interest in completing consumers' telephone calls. Pet. App. 66a. Thus, the dispute implicated the Board's interests in enforcing the terms of approved tariffs for intrastate telecommunications service and in protecting consumers who would be affected by any disruption in service resulting from discontinuance of service due to this "commercial dispute."

In response to the complaint, Iowa Telecom filed an answer with the Board saying Iowa Telecom would not discontinue service to Sprint so long as Sprint remained current on newly-billed charges. In response, Sprint filed a motion to withdraw its complaint, saying the only relief Sprint sought (a Board order prohibiting Iowa Telecom from discontinuing service) was no longer necessary. The Board granted Sprint's motion to withdraw its complaint but did

not close the docket; instead, the Board recast the proceeding to consider the question of whether Sprint properly withheld payment of access charges for intrastate VoIP calls. Pet. App. 65a-68a.

Sprint argued below that the VoIP calls were not subject to access charges because they are exempt from state regulation as an "information service." Pet. App. 88a-93a. In the Petition, Sprint refers to "general guidelines" from the FCC addressing the question of what constitutes an "information service." Pet. 8. Sprint says it decided the VoIP calls were not subject to access charges because the FCC had not imposed access charges on such calls. Pet. 8-10. However, at the time Sprint disputed the application of access charges to VoIP traffic, it was clear that the FCC had not classified VoIP as an information service[1] and that the FCC expected state regulatory commissions to make decisions regarding disputes over intercarrier compensation for intrastate VoIP traffic.[2] Pet. App. 97a, 109a, 117a-118a.

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[1] In its order issued on February 4, 2011, the Board referred to the Federal Communications Commission's National Broadband Plan that had been released March 16, 2010, observing that "In the National Broadband Plan, the FCC recognizes that it has not completed its work on VoIP compensation, stating . . . that it should address the treatment of VoIP for purposes of intercarrier compensation." *See* Pet. App. 107a, citing Federal Communications Commission, *Connecting America: The National Broadband Plan* (released March 16, 2010).

[2] *Petition of UTEX Commun's Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of*

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The Board concluded that the FCC had not classified VoIP as an information service and that the decisions addressing the regulatory status of VoIP did not constrain the Board's consideration of the dispute.[3] The Board issued an order (which applies exclusively to intrastate traffic) concluding that Iowa Telecom's access tariff applied to the VoIP calls and requiring Sprint to pay unpaid amounts. Pet. App. 60a. Subsequent FCC orders make it clear the Board's conclusions were correct. Any alterations of the division of regulatory responsibilities between the federal and state governments the FCC made in 2011 with respect to VoIP traffic (and other matters) had not been made at the time the Board reached its decision and those alterations are prospective only.[4]

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the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas, DA 09-2205, 24 FCC Rcd. 12573, 2009 WL 3266623 (Wir. Comp. Bur. 2009), *renewed pet. denied*, 25 FCC Rcd. 14168 (Wir. Comp. Bur. 2010).

[3] The Board recognized that where the FCC or a court has determined that a VoIP service was not subject to state regulation, the case involved "nomadic" VoIP, where the geographical endpoints of a call cannot be determined. *See* Pet. App. 110a-111a, citing *Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007) and *In re Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket 03-211, 199 FCC Rcd. 22404, rel. Nov. 12, 2004.

[4] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up;*

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Sprint filed a complaint in federal district court challenging the Board's order and seeking declaratory and injunctive relief. Sprint asked the court to declare that the Board's order is contrary to federal law and to enjoin the Board from enforcing the order. On the same day Sprint filed the federal complaint, it filed a petition for judicial review of the Board's order in Iowa district court, pursuant to state law. Iowa Code § 17A.19. Sprint raises the same federal claims in both the federal complaint and state petition. The sole issue for review in Sprint's federal case was identical to one of several in the state petition. Sprint sought a stay of the state court proceeding to allow the federal action to proceed; the state court proceeding was not stayed.

The Board filed a motion asking the federal district court to abstain pursuant to *Younger*; the court granted the motion and dismissed the federal complaint. Pet. App. 11a. The district court concluded that the requirements for *Younger* abstention were met: the requested federal relief would unduly interfere with the state proceeding; the ongoing state proceeding implicates important state interests, including Iowa's interest in regulating intrastate

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Universal Service Reform – Mobility Fund; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 F.C.C.R. 17663, ¶¶¶40, 935, 946 n.1906 (Rel. Nov. 18, 2011), *appeal docketed, In re: FCC-11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

utility services; and the state proceeding allows Sprint an adequate opportunity to raise its federal claims. Sprint appealed that decision to the Eighth Circuit Court of Appeals, which upheld the district court's decision to abstain but vacated the decision to dismiss the federal complaint, instructing the district court to enter a stay instead. Pet. App. 1a. The state judicial review proceeding continues; briefing is complete and an oral argument before the district court is scheduled for March 8, 2013.

REASONS FOR DENYING THE PETITION

I. Further Review by this Court Would be Premature.

Sprint asserts that the Eighth Circuit denied Sprint's right to federal court review of its federal law claims. Pet. 5. That assertion is not correct. The Eighth Circuit upheld the district court's decision to abstain in deference to the ongoing state proceeding but vacated the district court's dismissal of Sprint's federal complaint. Sprint has not been denied access to the federal court. The Eighth Circuit indicated that in this case there is a possibility that the parties will return to federal court. Pet. App. 9a. Further review by this Court would be premature where it is not at all clear what the outcome of the state proceeding will be and what, if any, federal issues may remain.

Further, as discussed below, this case would make a poor vehicle for this Court's consideration of

the question presented by Sprint's Petition because the Eighth Circuit did not make the conclusions Sprint attributes to it.

II. Petitioner Overstates the Existence of and the Urgency to Resolve a Circuit Split.

Sprint bases its petition on a distinction between coercive and remedial state proceedings, insisting that distinction should determine the outcome of a court's abstention analysis. The Eighth Circuit acknowledges the distinction but did not apply it in this case to determine whether *Younger* required abstention. The distinction that was discussed more fully in this case and applied by the Eighth Circuit to guide its analysis is the distinction between judicial and legislative proceedings. This Court has recognized the distinction between judicial and legislative state proceedings and made it a part of the *Younger* abstention analysis. *New Orleans Pub. Serv., Inc. v. City of New Orleans*, 491 U.S. 350, 368 (1989) ("*NOPSI*"). In contrast, the coercive-remedial distinction has been mentioned by this Court only once, in a footnote included in a case where the federal claim at issue was brought under 42 U.S.C. § 1983. *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 627 n.2 (1986).

It is not yet clear whether the Eighth Circuit's statement that the coercive-remedial distinction is not outcome determinative places it on one side or the

other of a split that needs this Court's attention. Nor is it clear, as Sprint contends, that the outcome of this case would have been different if decided by a court in another circuit. (Sprint assumes, but cannot prove, that courts in other circuits would conclude that the state proceeding here is not coercive.) Contrary to Sprint's assertion that a majority of circuits are either "clearly" or "apparently" applying the coercive-remedial distinction as a determinative factor in abstention cases (Pet. 16 nn.8, 9), the circuits are not uniformly applying the distinction in their abstention decisions. *Donohue v. Mangano*, 886 F. Supp. 2d 126, 145 (E.D.N.Y. 2012).

For example, a district court in the Third Circuit (a circuit which Sprint contends has "apparently" adopted the coercive-remedial distinction as controlling) noted that *Younger* abstention "is only appropriate if the underlying state proceeding is judicial in nature and not merely legislative." *National Parks Conservation Association v. Lower Providence Township, Pennsylvania,* 608 F. Supp. 2d 637, 647 (E.D. Pa. 2009), citing *NOPSI*, 491 U.S. at 368. The district court in *National Parks* discussed the coercive-remedial distinction, observing that

> [u]nfortunately, in deciding whether or not to abstain under *Younger*, some courts have undermined the clear directive of the Supreme Court by introducing a theory of definitive resolution – a "remedial/coercive" analysis of the state court action. To do so prevents a court from conducting an analysis

> of the three *Younger* abstention factors articulated by the Supreme Court.

Id. at 652. The court also discussed the malleability of the distinction and how its use in the Third Circuit has resulted in inconsistent decisions. *Id*. at 654.

Further consideration by the lower courts of the meaning and utility of the coercive-remedial labels is necessary before it can be determined whether and to what extent the Eighth Circuit may be out of line with other circuits. Further review is not necessary at this time in this case given the fact that Sprint's federal action has been stayed, not dismissed. Sprint alleges, but fails to demonstrate, how it has been harmed or how the Eighth Circuit's decision will allow further "mischief" or contribute to confusion.

III. This Case Involves a Straightforward Application of *Younger* Abstention Principles and Was Correctly Decided by the Eighth Circuit.

The Eighth Circuit's decision to affirm the district court's decision to abstain is fully supported by and consistent with *Younger* and subsequent abstention cases decided by this Court. The Eighth Circuit did not expand the application of the *Younger* abstention doctrine but rather applied the doctrine as was intended by this Court – to promote interests of comity and federalism, thereby affording the "proper respect for state functions." *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S.

at 431 (1982). The *Younger* abstention doctrine has evolved from one that originally applied only to prevent federal court interference with state criminal proceedings to one that applies in the context of state administrative proceedings. *Cedar Rapids Cellular Telephone, L.P. v. Miller*, 280 F.3d 874, 879 (8th Cir. 2002), citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *OCMC v. Norris, et al.*, 428 F. Supp. 2d 930 (S.D. Iowa 2006). This Court recognizes that because the federal courts have "discretion in determining whether to grant certain types of relief . . . there are some classes of cases in which the withholding of authorized equitable relief because of undue interference with state proceedings is 'the normal thing to do.'" *NOPSI*, 491 U.S. at 359, citing *Younger,* 401 U.S. at 45.[5]

[5] Sprint claims that counsel for the Board advocated for application of *Younger* to every Board proceeding and is likely to assert that position now. Pet. 13. The Board did not take that position in its brief submitted to the Eighth Circuit and does not take that position now. In its brief below, the Board acknowledged Sprint's assertion that federal courts routinely hear appeals challenging decisions of state public utility commissions in the telecommunications context, but observed that those appeals often are made to federal court pursuant to an explicit statutory requirement. 47 U.S.C. § 252(b). The Board argued only that it did not follow from Sprint's assertion about the frequency of federal review in the telecommunications context that every appeal of a Board decision must go to federal court. This case involved an important state interest in enforcing the terms of a Board-approved tariff. The Board's decision applied only to intrastate service. This case presented an important state interest that warranted abstention under *Younger*. Others may

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Sprint argues the Eighth Circuit has conflated the abstention doctrine under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) ("*Burford*"), with the *Younger* abstention doctrine, claiming the Board was trying to avoid invoking *Burford* in order to evade this Court's decision in *NOPSI*. Pet. 33-35. This argument draws distinctions that are not as strong as Sprint infers. First, the various abstention doctrines formulated by this Court are not "'rigid pigeonholes into which federal courts must try to fit cases.'" *Night Clubs v. City of Fort Smith, Arkansas*, 163 F.3d 475, 479 (8th Cir. 1998), quoting *NOPSI*, 491 U.S. at 359. Second, Sprint characterizes *NOPSI* too broadly. *NOPSI* did not involve a state-law claim. *NOPSI*, 491 U.S. at 361. The case involved a Federal Energy Regulatory Commission order that directed state regulators to allocate the costs of a specific set of nuclear power plants in a particular manner and therefore was subject to a claim that any contrary state action was "facially preempted," reflecting a strong federal interest in the matter. *NOPSI*, 491 U.S. at 363. In contrast, the case before the Board was about whether Sprint violated state law by not paying intrastate access charges, and there was no FCC order that facially preempted the Board's authority with respect

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not. Further, the Board recognizes that while this Court has expanded the application of *Younger* to state administrative proceedings, it "has stopped short . . . of stating that *Younger* applies in every civil case." *Ebiza, Inc. v. City of Davenport*, 434 F. Supp. 2d 710, 719 (S.D. Iowa 2006), citing *Trainor v. Hernandez*, 431 U.S. 434, 444 n.8 (1977).

to intrastate utility services, expressly reserved to the states pursuant to 47 U.S.C. § 152(b). Pet. App. 159a-160a. Further, the Board's action was adjudicatory, not legislative (as in *NOPSI*). Thus, there was no attempt to avoid *NOPSI*.

The Eighth Circuit properly observed that whether *Younger* abstention is appropriate is determined by the factors outlined in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). Under those factors, *Younger* directs federal courts to abstain when (1) there is an ongoing state judicial proceeding, which (2) implicates important state interests, and when (3) that proceeding affords an adequate opportunity to raise the federal questions presented. Pet. App. 5a.

Sprint identifies the question presented in its Petition as whether the Eighth Circuit "erred by concluding . . . that *Younger* abstention is warranted not only when there is a related state proceeding that is 'coercive' but also when there is a related state proceeding that is, instead, 'remedial.'" Pet. i. That question is predicated on the assumption that the Eighth Circuit actually decided that the state proceeding in this case was remedial, not coercive. That assumption is not supported by the Eighth Circuit's opinion. Sprint complains of a ruling that was not made.

The Eighth Circuit acknowledged Sprint's contention that the state proceedings here are remedial, not coercive, but the court did not state whether it

agreed with Sprint's characterization. Instead, the Eighth Circuit simply noted that it "recognized the existence of the coercive-remedial distinction" but "we have not considered the distinction to be outcome determinative." Pet. App. 6a-7a. Sprint argued that because it filed the initial complaint with the Board, the proceeding was remedial. The Board contended that the state proceedings were coercive, rather than remedial, because while it is true that Sprint filed the initial complaint with the Board, Sprint then withdrew its complaint. However, the Board did not close the docket; instead, on its own motion, the Board recast the proceeding to determine whether Sprint improperly withheld payment of the disputed charges, i.e., committed misconduct, making this a coercive proceeding to enforce Iowa's laws regarding public utility regulation.[6] On these facts, the remedial nature of the state proceeding here was not apparent and the Eighth Circuit wisely concluded it was unnecessary to determine whether the state proceeding could be labeled as coercive or remedial, focusing instead on the second *Middlesex* factor.

[6] In the recast proceeding, the Board sought to enforce, among other provisions of state law, the Board's administrative rule at 199 Iowa Administrative Code 22.14(1) "a," which provides that intrastate access charges apply to all intrastate access services rendered to interexchange utilities and contemplates that utilities such as Sprint must pay access charges to local exchange utilities such as Iowa Telecom for the origination and termination of intrastate toll traffic. Pet. App. 71a.

The Eighth Circuit also addressed Sprint's related argument that the state proceedings at issue do not involve an important state interest because, according to Sprint's overly-broad assertion, the telecommunications context presents a pervasive federal regulatory scheme. On this issue, the Eighth Circuit did not state that this case involves a pervasive federal regulatory scheme. The court acknowledged its prior statements in *Alleghany Corp. v. McCartney*, 896 F.2d 1138 (8th Cir. 1990),[7] but immediately countered that reference with a discussion of *NOPSI*, in which this Court recognized that states have "a substantial, legitimate interest in regulating

[7] In *Alleghany v. McCartney*, 896 F.2d at 1145 (*cites omitted*), the Eighth Circuit discussed cases in the public utility context where a strong federal interest was present, but rejected a party's argument that those decisions supported the assertion that a federal preemption claim precludes *Younger* preemption. The court observed that the cases "involved a pervasive federal regulatory scheme which indicated a strong federal interest," which distinguished them from the insurance case before the court, "an area of regulation delegated to the states by Congress." *Id*. As an example of the type of strong federal interest recognized by the Eighth Circuit in *Alleghany v. McCartney*, *see Arkansas Power & Light Co v. Missouri Pub. Serv. Comm'n*, 829 F.2d 1444 (8th Cir. 1987), where the court upheld the district court's decision not to abstain given the strong federal interest in regulation of wholesale electric rates, where "Congress has established a federal agency to resolve competing local interests, and not just one state, but several, all with interests adverse to each other, are involved." *Id*. at 1450. In contrast, in this case, where regulation of intrastate telecommunications is expressly reserved to the states by federal law, the state's interest is not overwhelmed by the federal interest. 47 U.S.C. § 152(b).

intrastate retail rates, one of the most important of the functions traditionally associated with the police power of the states." Pet. App. 7a, quoting *NOPSI*, 491 U.S. at 365. Finally, the Eighth Circuit recognized that Sprint's argument "impermissibly narrows the focus to the outcome of the case, rather than the importance of the generic proceedings to the state." Pet. App. 8a. The conclusion that Sprint attributes to the Eighth Circuit – that "it makes no difference that this case involves a 'pervasive regulatory scheme'" – is not found in the court's decision. Pet. 14.

Thus, instead of deciding whether *Younger* abstention was warranted based on whether the state proceeding could be labeled as coercive or remedial, the Eighth Circuit focused on the distinction that has been recognized by this Court as having a role in the *Younger* abstention analysis, i.e., whether a proceeding is judicial as opposed to legislative, observing that this Court noted in *NOPSI* that "only judicial proceedings are entitled to *Younger* abstention." Pet. App. 8a, citing *NOPSI*, 491 U.S. at 367. Agreeing with the district court, the Eighth Circuit concluded that the state proceeding was judicial because the Board "is seeking to enforce the status quo that existed before Sprint ceased paying the intrastate access charges. The Board's order attempts to enforce liabilities based on present facts and existing laws, and thus it constitutes a judicial proceeding that is entitled to *Younger* abstention." Pet. App. 9a. Because the Eighth Circuit correctly applied the requirements

for *Younger* abstention, no further review of the decision is necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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