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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

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The central argument that Sprint presented in its petition is that this case exacerbates a stark split in the circuits regarding whether a state administrative action must be "coercive" (as opposed to "remedial") for *Younger* abstention to apply. *See Younger v. Harris*, 401 U.S. 37 (1971). The Iowa Utilities Board's ("IUB's") opposition not only confirms the existence of that split, but underscores that it is fundamental, far-reaching, and deeply perplexing to the lower courts.

To begin, however, it is worth emphasizing what the IUB's brief does *not* do. It does not deny the

existence of the split, nor does it attempt to reconcile the circuit cases cited by Sprint so as to minimize the split. To the contrary, the IUB's opposition fails even to mention *any* of the dozen or so circuit court cases that Sprint advanced to illustrate the split.

Instead of addressing the relevant circuit court precedents, the IUB's legal arguments consist almost entirely of discussions of two district court decisions that strongly *support* Sprint's arguments for review. The first case, *Donohue v. Mangano*, 886 F. Supp. 2d 126, 145-46 (E.D.N.Y. 2012), confirms that at least eight circuits appear to incorporate the coercive/remedial distinction into their tests for *Younger* abstention—but also notes that "not *every* Circuit is in line with this thinking," citing the lone example of the Eighth Circuit on the other side of the split. *Id.* at 147 (emphasis added). The second case, *National Parks Conservation Ass'n v. Lower Providence Township, Pennsylvania*, 608 F. Supp. 2d 637 (E.D. Pa. 2009), also highlights the need for review. There, a district court in the Eastern District of Pennsylvania criticized its *own* court of appeals, the Third Circuit, for adopting the coercive/remedial distinction. *National Parks* argued that a different line—whether state administrative proceedings are "judicial" or "legislative" in nature—would be preferable. *Id.* at 654. Plainly, however, the fact that the law in this area is so confused that there are not two but three or more competing standards—and that district courts feel free to criticize controlling circuit precedent as "blurry" and "malleab[le]"—is an argument *for* certiorari, not against.

Sprint's petition also argued that the Eighth Circuit's application of *Younger* abstention is

fundamentally inconsistent both with this Court's precedents establishing the "primacy of the federal judiciary in deciding questions of federal law," *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411, 415-16 (1964), and with this Court's nuanced abstention jurisprudence. Once again, the IUB's opposition fails seriously to contest these points. The IUB does not even mention *England* or this Court's cases imposing on district courts the "virtually unflagging obligation" to decide cases within their jurisdiction, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Nor does the IUB acknowledge that this Court has—consistent with *England* and *Colorado River*—specifically permitted federal courts to review the decisions of state telecommunications regulators. *See Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 639 (2002); *see also* Pet. 23-26.

The IUB also provides no cogent response to Sprint's argument that the Eighth Circuit's approach collapses and conflates *Younger* and *Burford* abstention into a single, unrecognizably broad rule. In this appeal, Sprint has consistently argued that removing the requirement of *coercive* state administrative action from the *Younger* analysis leaves essentially *all* appeals of state agency proceedings to the federal courts subject to abstention. But that position cannot be squared with this Court's decisions. It is supposed to be *Burford* abstention—originating in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)—rather than *Younger* abstention that prevents federal court "intru[sion] into state proceedings where there exists a complex state regulatory system." *New Orleans Pub. Serv.*

Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989) ("*NOPSI*"). The IUB failed even to invoke *Burford* below because, under *NOPSI*, abstention plainly is not warranted. Pet. 33-35. This Court should not permit *Burford* and *Younger* to be conflated into a broad rule providing that all review of state agency proceedings—even on important questions of *federal* law, as here—must take place in the state courts.

I. There is Nothing "Premature" About Review of this Case by the Court.

The IUB first suggests that this Court should deny certiorari on the ground that review could be mooted if Sprint *prevails* before the state court—*i.e.*, "it is not at all clear what the outcome of the state proceeding will be"—and that any "federal issues [that] remain" after the state case concludes could yet return to federal court. Opp. 8-9. But it is *always* the case that a plaintiff who is unlawfully denied a federal forum due to the misapplication of abstention law *could* prevail on the merits in state court. Sprint's point here is not about the merits at all—it is that the misapplication of abstention law below to deny Sprint the federal forum to which it is entitled exacerbated a split in the circuits that requires this Court's review. That split requires review now.

Moreover, as a practical matter, there is no chance of the state court proceeding actually mooting Sprint's petition. Although the state court failed to stay the state case pending resolution of the federal proceeding, the state case is ongoing and will be for some time. Oral argument in that case was recently scheduled for April 19, 2013, which is *after* the date of the conference for which Sprint's petition will be

distributed, and a written decision is thus presumably still months off. Order Continuing Hearing at 1, Sprint Comm. Co. v. Iowa Utils. Bd. (Iowa Dist. Ct. for Polk County No. CVCV0086368). Moreover, there can be no serious question that the state court *would* be amenable to a stay if this Court were to grant Sprint's petition.

II. This Case Exacerbates a Deep Split in the Circuits Warranting this Court's Review.

In its petition, Sprint argued that this Court should grant certiorari to resolve a deep split between the Eighth Circuit and the other circuits over the scope of *Younger* abstention. Pet. 15-23. More specifically, Sprint pointed out that *nine* circuits appear to apply *Younger* only if the ongoing state proceeding is "coercive"—*i.e.*, if it was initiated by the state to punish the federal plaintiff for wrongdoing. *Id.* at 16-17, nn. 8&9. Sprint further explained that this difference between the Eighth Circuit, which unquestionably does not view the coercive/remedial line as "outcome determinative," *see* Opp. 9, and other circuits, which do, is "unlikely to be resolved without the intervention of this Court." Pet. 20. The difference is rooted in longstanding and fundamentally different views of this Court's controlling precedents. Pet. 20-23.

As noted above, the IUB does not deny the existence of a split nor attempt to reconcile the cases cited by Sprint. Instead, it seeks to minimize the importance of the circuit split by arguing that the "circuits are not *uniformly* applying the [coercive/remedial] distinction [that Sprint invokes] in their abstention decisions." Opp. 10. This argument is fundamentally misguided; a lack of

uniformity among the circuits is a reason to *grant* review, not deny it.

The IUB does not cite or discuss *any* circuit court precedents to support its argument that the circuit split claimed by Sprint is "[o]verstate[d]." And the two *district* court decisions it advances only underscore the existence of a deep split and widespread uncertainty among the lower courts concerning the coercive/remedial distinction. If anything, these cases suggest that Sprint's characterization of the split in its petition was *understated*.

The first case, *Donohue v. Mangano*, 886 F. Supp. 2d 126 (E.D.N.Y. 2012), confirms that "many circuits" have "found the distinction [between coercive and remedial actions] to be a crucial one":

> [T]he Third Circuit and its district courts have consistently held that federal courts should abstain under *Younger* only when the state proceedings are "coercive", rather than "remedial." … Precedent from the Seventh Circuit also appears to advise against application of *Younger* [absent coercive state action]. ... [And] [t]he Third and Seventh Circuits are not alone in adhering to this legal application. *See, e.g., Devlin v. Kalm,* 594 F.3d 893, 895 (6th Cir.2010); *Dukes v. Maryland,* No. 11 Civ. 876, 2011 WL 4500885, at *4 (D.Md. Sept. 27, 2011) ("The Fourth Circuit has twice reiterated that the distinction between remedial and coercive administrative proceedings is relevant to determining whether abstention is appropriate.") Most recently, the Tenth Circuit fully explored the

> remedial/coercive distinction and developed a structured approach for lower courts to incorporate the distinction into the traditional three-part *Younger* inquiry. … Also, the First and Ninth Circuits expressly require a state-initiated action to show the existence of a coercive proceeding. … The Second Circuit has not expressly ruled on this issue, but any inferences drawn from its opinions appear to indicate that the distinction is one that is valid.

Id. at 145-46 (internal citations and quotations omitted). In short, according to this case on which the *IUB* relies, at least *eight* circuits appear to apply precisely the distinction that Sprint says the Eighth Circuit should have applied here.[1]

The second district court case cited by the IUB is no more helpful to its cause. The IUB's goal appears to be to show that there are courts other than the Eighth Circuit—at least at the district court level—that question whether the coercive/remedial distinction that most circuits apply under *Younger* is a good one. Specifically, the *National Parks* court wrote:

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[1] Perhaps the IUB seeks solace in *Donohue*'s observation—citing two student Notes—that the coercive/remedial distinction "has been criticized." 886 F. Supp. 2d at 147. But if the IUB's point is that the coercive/remedial test adopted by numerous circuits is the *wrong* one, and the Eighth Circuit's standard is the *right* one, that is an argument better saved for this Court's review on the merits.

> The line between "coercive" and "remedial" cases is often blurry and has yet to be defined by the ... the Supreme Court. As previously stated, some courts have decided whether or not to abstain based only on the remedial/coercive distinction without considering the *Younger* abstention factors. If the issue is remedial, these courts have held that abstention is *per se* inappropriate. This has led to inconsistent decisions because of the malleability of the remedial/coercive distinction.

Nat'l Parks Conservation Ass'n v. Lower Providence T'ship, Pennsylvania, 608 F. Supp. 2d 637, 654 (E.D. Pa. 2009). *National Parks* thus appears to criticize its *own* circuit court for "adher[ing]" to the coercive/remedial distinction because it is purportedly "blurry" and "malleab[le]." But the suggestion that the rule is not only the subject of a circuit split but *also* a source of great uncertainty for the lower courts indicates that review is *more* necessary, not less.

The IUB further responds to Sprint's claim of a deep, abiding split by arguing that Sprint "cannot prove, that courts in other circuits would conclude that the state proceeding here is not coercive." Opp. 10. This argument is also misguided. First, the split here is not dependent on factbound analysis of whether particular proceedings are or are not "coercive." The split here arises because other circuits—unlike the Eighth Circuit—think it matters whether a proceeding is coercive or not. Indeed, the Eighth Circuit has squarely acknowledged that other circuits find this distinction "outcome determinative"

under *Younger*, s*ee Hudson v. Campbell*, 663 F.3d 985, 987 (8th Cir. 2011)—no coercive state action means no *Younger* abstention. In contrast, the Eighth Circuit in this case *reaffirmed* that it does not care whether a proceeding is "coercive" or not in deciding whether to apply *Younger*. Pet. App. 6a-7a. *That* is the heart of the split here, and the IUB does not even attempt to explain it away.

Second, even if it were to matter, we *do* know that "courts in other circuits would conclude that the state proceeding here is not coercive." Opp. 10. We know that because other circuits have described the category of proceedings that they would find "coercive," and this case does not fit. For example, the Tenth Circuit has explained that a "common thread" in coercive administrative proceedings is that "the federal plaintiff had engaged in misconduct," and the state administrative proceeding "would ultimately impose punishment for that misconduct." *Brown ex. rel. Brown v. Day*, 555 F.3d 882, 892 (10th Cir. 2009). But this case does not involve a state enforcement action to punish Sprint for bad acts. This case involves a garden-variety commercial dispute between Sprint and Windstream about how (if at all) the "intercarrier compensation" regime applies to certain "Voice over Internet Protocol" communications. Pet. 7-10. And—contrary to the IUB's claims, Opp. 15—*neither* the fact that the IUB proceeding went forward over Sprint's objection that the Board lacked authority to resolve the underlying issues of federal law, Pet. 10, *nor* the fact that the IUB ultimately ruled that Sprint owed Windstream intercarrier compensation, *id.*, transformed this commercial dispute into a state enforcement action.

III. The Eighth Circuit's Approach is Wrong, and Cannot be Reconciled with Multiple Lines of this Court's Precedents.

The fact that the Eighth Circuit is alone on its side of the circuit split here—with *most* of the other circuits arrayed against it—casts considerable doubt on its position. But there is a far more important reason to reject the Eighth Circuit's removal of the coercive requirement from *Younger* analysis. It simply cannot be reconciled with multiple lines of this Court's precedent.

First, the Eighth Circuit's rule that even run-of-the-mill, non-coercive state agency proceedings may trigger *Younger* abstention conflicts with this Court's precedents that district courts have a "virtually unflagging obligation" to decide cases brought before them, and "[t]his obligation does not evaporate simply because there is a pending state court action involving the same subject matter." *Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Coops, Inc.*, 48 F.3d 294, 297 (8th Cir. 1995) (citing *Colorado River*, 424 U.S. at 817). With few exceptions—including the specific, narrow carve-outs of the abstention doctrines—"a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims" in federal court." *See, e.g.*, *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411, 417 (1964). Accordingly, this Court has specifically allowed for federal courts to review the federal-law decisions of state telecommunications regulators. *See, e.g., Verizon Maryland*, 535 U.S. 635. The Eighth Circuit's decision is inconsistent with

these lines of cases—all of which the IUB fails even to mention.

Second, the decision below is inconsistent with the core principle underlying all of this Court's abstention cases, which is that *state* courts should be allowed to administer *state* statutory, regulatory, and enforcement regimes without undue interference from *federal* courts. Here, in contrast, Sprint's efforts to obtain review concern the *federal* courts' authority (and, indeed, responsibility) to decide *federal* law issues as to which *state* agencies have no authority whatsoever. The fundamental principle of non-interference in matters of the states' administration and enforcement of their own laws that underlies all of abstention law is inapposite here. *See* Pet. 27-30. And, again, the IUB makes no argument at all to the contrary.

Third, by ignoring the coercive/remedial distinction, the Eighth Circuit split not only with most other circuits, but also with this Court's own case announcing that distinction. Specifically, in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), the Court found that *Younger does* apply to administrative action brought by a state agency to vindicate the State's policy against sex discrimination. The Court distinguished its earlier holding in *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), on the ground that "[u]nlike *Patsy*, the administrative proceedings here are *coercive rather than remedial*, began before any substantial advancement in the federal action took place, and involve an important state interest." 477 U.S. at 627

n.2 (emphasis added and citations omitted). The IUB's opposition fails to mention *Dayton* or *Patsy*.

Finally, the Eighth Circuit's decision thoroughly confuses abstention law by conflating the *Burford* and *Younger* doctrines into a new, unrecognizably broad kind of abstention.[2] *Burford* abstention cases require the federal courts to permit the states to administer their regulatory regimes without undue interference from the federal courts, *see NOPSI*, 491 U.S. at 361, while *Younger* prevents federal court interference with state criminal and similar civil-enforcement regimes. In its petition, Sprint argued that the Eighth Circuit's application of abstention in this case blurred the lines between *Burford* and *Younger* in a way that makes no sense. Pet. 33-35.

The IUB responds that "the various abstention doctrines formulated by this Court are not 'rigid pigeonholes into which federal courts must try to fit cases.'" Opp. 13 (citing *Night Clubs v. City of Fort Smith, Arkansas*, 163 F.3d 475, 479 (8th Cir. 1998)). But even if the abstention doctrines are not "rigid pigeonholes," this Court has emphasized that they are "sufficiently distinct to justify independent analyses" under different legal standards. *NOPSI*, 491 U.S. at 359-60. And they *are* exceptions to the

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[2] As Sprint explained in its Petition, in oral argument before the Eighth Circuit the IUB's counsel *agreed*. Pet. 13 & n.7. The IUB does not deny that fact, but instead cagily points out that it "did not take that position" in writing either in its brief below or its opposition. But the IUB's continued coyness (at least in writing) concerning the *reductio ad absurdum* nature of the standard it advanced (and the Eighth Circuit adopted) below does not make the standard any less broad.

general rule—which, again, the IUB fails even to acknowledge—that district courts have a "virtually unflagging obligation" to decide cases over which they have jurisdiction. *Colorado River*, 424 U.S. at 817. A broad rule that district courts must always (or nearly always) defer to state court proceedings reviewing state administrative decisions on issues of *federal* law is inconsistent with that obligation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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