No. 21-5031

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CARLY GRAFF, ET AL.,

Plaintiffs-Appellants,

v.

ABERDEEN ENTERPRIZES, II, INC., ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Oklahoma, No. 4:17-CV-00606-TCK-JFJ
Hon. Terence C. Kern

BRIEF OF AMICI CURIAE INSTITUTE FOR JUSTICE AND THE CATO INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF AMICI CURIAE[1]

The Institute for Justice (IJ) is a nonprofit, public interest law center committed to defending the essential foundations of a free society by securing greater protection for individual liberty and restoring constitutional limits on the power of governing, including holding individual public officials liable for their constitutional wrongdoing. IJ represents plaintiffs nationwide in cases challenging unconstitutional systems of fines and fees that are brought pursuant to 42 U.S.C. § 1983.

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

[1] Pursuant to Fed. R. App. P. 29, no party or party's counsel for either side authored this brief in whole or in part. No person or entity other than amici curiae and their members made a monetary contribution to its preparation or submission.

ARGUMENT

This case presents the following question: is federal court abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), appropriate with regard to a proceeding collateral to an already-completed criminal or quasi-criminal prosecution? The district court here answered that question "yes." *Graff v. Aberdeen Enterprizes, II, Inc*., No. 17-CV-606-TCK-JFJ, 2021 WL 951017, at *10 (N.D. Okla. Mar. 12, 2021); Opening Br., Attach. A, at 19–21. That answer was wrong for two reasons.

First, *Younger* abstention only applies when there is an ongoing state criminal or quasi-criminal proceeding. It does not apply to a state judicial proceeding in which the federal litigant has exhausted all state appellate remedies or permitted the time to seek such remedies to lapse. Here, the time for review of all of the plaintiffs' convictions has passed. As such, there was no ongoing state proceeding with which the district court could have interfered. Because there was no ongoing proceeding, any relief sought by plaintiffs could not prejudice the conduct of the plaintiffs' trial on the merits.

Second, there was no adequate opportunity for plaintiffs to raise the constitutionality of the federal defendants' debt collection policies in defense of their prosecutions. At the time the state prosecuted them, whether and to what extent plaintiffs would incur judicial debt, be unable to pay it, and the steps the government would take to collect it were entirely speculative. In addition, even if this Court were

to consider Oklahoma's Rule 8 proceedings to be part of the plaintiffs' underlying prosecution, such proceedings are expressly limited and do not permit state defendants to raise constitutional claims and certainly not federal and state claims for damages against private individuals.

For these reasons, this Court should reverse the district court.

1. The Standard for *Younger* Abstention

In determining whether *Younger* abstention is appropriate, federal courts examine the following considerations. First, the court must determine whether a particular state proceeding falls within one of three categories: (i) criminal proceedings, (ii) certain civil enforcement proceedings, and (iii) pending civil proceedings involving certain orders "uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Commc'ns v. Jacobs*, 571 U.S. 69, 78 (2013) (cleaned up). If the proceeding falls within one of these categories, then the court must consider the three factors set out in *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). These three factors are (i) the existence of an ongoing state judicial proceeding, which (ii) implicates important state interests, and (iii) provides an adequate opportunity to raise the federal plaintiffs' constitutional claims. *Id.* If the case meets these criteria, then the court must consider whether any exception to *Younger* applies. *Id.* at 435. This Court

reviews the district court's decision to abstain de novo. *Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999).

This brief specifically examines two factors in this test: (i) whether the state proceeding here is "ongoing," and (ii) whether the federal plaintiffs have an adequate opportunity to raise their constitutional claims in the state proceeding. Abstention here is inappropriate because this case meets neither of these factors.

2. *Younger* Abstention is Not Warranted Here

A. The State Proceeding Has Terminated Because State Appellate Process Has Been Exhausted or the Time for Appeals Has Passed

The district court here concluded that the first prong of the *Middlesex* test was met because the federal plaintiffs' state cases were still ongoing. Specifically, the district court reasoned: "Plaintiffs have pled guilty to the underlying infractions and, as part of their sentence, have agreed to pay, or have been sentenced to pay, certain fines and costs associated with their violations. Finally, they have admittedly failed to satisfy their plea agreements." *Graff*, 2021 WL 951017, at *10; Opening Br., Attach. A, at 20.[2]

That is not the standard for determining whether a proceeding is still "ongoing." The key consideration when a court determines whether a proceeding is

[2] The district court's conclusion that the federal plaintiffs' cases are ongoing contradicts the court's conclusion earlier in its opinion that "Plaintiffs filed this lawsuit after their state-court proceedings had ended." *Graff*, 2021 WL 951017, at *7; Opening Br., Attach. A, at 14.

ongoing or ended is whether the federal plaintiff has exhausted his or her state appellate remedies. In 1975, the Supreme Court stated: "We . . . hold that *Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609 (1975). This Court has come to the same conclusion. *Morrow v. Winslow*, 94 F.3d 1386, 1392 (10th Cir. 1996) ("[A] party must exhaust his state appellate remedies before seeking a federal injunction unless he can bring himself within one of the exceptions in *Younger*.") (citing *Huffman*). *See also DeSpain v. Johnson*, 731 F.2d 1171, 1178 (5th Cir. 1984) ("In the most basic sense, a state proceeding is *pending* when it is begun before the federal proceeding is initiated and the state court appeals are not exhausted at the time of the federal filing."). As the Fifth Circuit stated, "Once invoked, the state court's jurisdiction is held to the exclusion of a court of the United States *until its duty is fully performed and the jurisdiction invoked is exhausted*." *Id.* at 1179 (cleaned up) (emphasis added). That is, under *Younger*, abstention is required up to the time the plaintiff exhausts his or her state remedies. Once these state remedies can no longer affect the outcome of the case, however, abstention is no longer proper.[3]

[3] The Sixth Circuit has held that a state criminal proceeding remains pending "if state habeas corpus relief is available." *Tesmer v. Granholm*, 333 F.3d 683, 689 (6th Cir. 2003). That is, in the Sixth Circuit, the fact that prisoners may avail themselves to state habeas proceedings at some point in during their incarceration keeps their state proceeding "pending" even if a prisoner has exhausted all direct state appeals. Oklahoma has a state habeas remedy. *See* Okla. Const. art.

Consistent with this holding, this Court has twice vacated district court orders abstaining where the federal plaintiff filed his or her federal case after the state proceeding had begun but where the state proceeding terminated during the course of the federal case. In *Columbian Financial Corp. v. Stork*, 811 F.3d 390 (10th Cir. 2016), the prosecution of the federal plaintiff terminated while the plaintiffs' federal appeal was pending. This Court vacated the district court's dismissal of the federal plaintiffs' case and remanded the plaintiff's claims to the district court "so that it can reconsider them without the need to abstain now that the state proceedings have ended." *Id*. at 395. Similarly, in *Ziankovich v. Large*, 745 F. App'x 800 (10th Cir. 2018) (mem.), the state disciplinary proceeding against the federal plaintiff terminated during the pendency of his appeal of the dismissal of his federal case pursuant to *Younger*. Following *Columbian*, this Court vacated the district court's dismissal, concluding "Plaintiff's disciplinary proceedings have ended, and the district court thus no longer has a need to abstain under *Younger*." *Id.* at 802.

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2 § 10; 12 Okla. Stat. §§ 1331 *et seq.* Oklahoma's statutory provision provides in part: "Every person restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered therefrom when illegal." 12 Okla. Stat. § 1331. Nonetheless, this Court should not follow the Sixth Circuit's approach here for two reasons. First, the federal plaintiffs here are not in custody. The state habeas remedy is, by its terms, limited to petitioners in custody. In addition, habeas has always been a remedy limited to those in custody. "It is clear, not only from the language of [federal habeas statutes], but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). Second, as discussed in Section 2.B below, habeas proceedings do not "interfere" with ongoing state proceedings because such proceedings have concluded.

"Timing is crucial to the applicability of *Younger*." *DeSpain*, 731 F.2d at 1177. Here, as Appellants point out, "there are no ongoing state proceedings in any of Plaintiffs' cases. Their criminal cases concluded prior to this lawsuit, and when they brought this suit, they had no pending actions relating to the enforcement of any term of their sentences." Opening Br. 33. Consistent with *Huffman, Morrow,* and *Columbian*, there is no need for the federal courts to abstain under *Younger*. This Court should therefore reverse and remand the case to the district court for consideration of the plaintiffs' claims.

B. There Is No Chance Plaintiffs' Remedies Could Prejudice their State Court Proceedings

It is tempting to state that a proceeding that is over is not ongoing and leave it at that. However, the fact that abstention would be improper here is not just a matter of the district court failing to follow the holdings of this Court and the U.S. Supreme Court. The application of abstention here would frustrate the purpose of abstention, which is to give state courts the opportunity to conduct criminal and quasi-criminal trials on the merits with no interference from a federal court. Simply put, because the federal plaintiffs' substantive state cases are finished, there is no interference that can occur and the reason for abstention dissolves.

This case is a mirror image of *Gerstein v. Pugh*, 420 U.S. 103 (1975). In that case, the Supreme Court refused to apply *Younger* because the federal plaintiffs' challenge to the state's pretrial detention policies could not affect the state's criminal

prosecution. The Court stated, "The [plaintiffs'] injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits." *Id*. at 108 n.9. Put another way, if there is no interference with the state court proceeding, there is no need for a federal court to abstain. *See 31 Foster Children v. Bush*, 329 F.3d 1255, 1276 (11th Cir. 2003) ("[W]e join our sister circuits in explicitly stating that an essential part of the first *Middlesex* factor in *Younger* abstention analysis is whether the federal proceeding will interfere with an ongoing state court proceeding. If there is no interference, then abstention is not required."). That reasoning applies (or should apply) to federal proceedings that occur both before and after the state proceeding.

To determine whether a federal plaintiff's claim would interfere with a state proceeding, the federal courts examine the relief requested and the effect it would have on the state proceedings. *Id*. The relief sought need not directly interfere with or terminate a state proceeding for *Younger* to apply. *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974). But it must have some effect on the underlying proceeding. *31 Foster Children*, 328 F.3d at 1266–67. Here, the plaintiffs seek damages, declaratory relief, and prospective injunctive relief (as well as attorneys' fees) for actions taken by the defendants here after the state plaintiffs' criminal prosecution. Second

Amend. Compl. ("SAC")[4] at pp. 100–02. The relief sought by defendants would not interfere with their criminal prosecution (because it is over), nor would it indirectly interfere with the conduct of the state's criminal or quasi-criminal processes. It would also not undo their fines—they would still need to pay them if they could. Instead, it seeks independent remedies for harms caused by defendants after the state proceedings have ended and the damages, declaratory relief, and prospective injunctive relief would do nothing to call into question the state's prosecution, trial, or sentencing of the defendants.

Nor could these claims have been raised in defense of the federal plaintiffs' prosecutions. *See Stewart v. Abraham*, 275 F.3d 220, 225 (3d Cir. 2001) (declining to abstain because the relief sought by the federal plaintiffs could not be raised in defense of their criminal prosecutions). When the state prosecuted the federal plaintiffs, and even in any state appellate proceedings, the fact that the defendants in this case would commit unconstitutional, illegal, and tortious acts against people who are too poor to pay their court debt was speculative at best. Any attempt to defend against such deprivations would have been treated by the state courts as little more than speculative fiction.

[4] The Second Amended Complaint is available in Volume 1 of the Joint Appendix (JA), pp. 86–204. *Amici* follow the Opening Brief's practice of referring to paragraph and page numbers of the Second Amended Complaint itself rather than the Joint Appendix. *See* Opening Br. at 4, n.2.

Like the plaintiffs' claims in *Gerstein*, plaintiffs' claims here are "not directed at the state prosecutions as such" and therefore cannot "prejudice the conduct of the trial on the merits." *Gerstein*, 420 U.S. at 108 n.9. In such circumstances, abstention would be improper. For this reason, this Court should reverse the district court's order and remand the case back to that court for consideration of the merits.

C. The Plaintiffs Here Did Not, and Do Not, Have an Opportunity to Meaningfully Pursue Their Constitutional Claims In the State Proceeding

"The operation of the *Younger* doctrine is dependent upon the ability of state courts to provide an adequate remedy for the violation of federal rights." *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 718 (5th Cir. 2012). Here, the federal plaintiffs did not, and do not, have such an opportunity to pursue such claims in state court.

First, as noted above, it would have been temporally impossible for the federal plaintiffs here to make the arguments they have presented to the federal courts in this case. The harms to their constitutional and statutory federal rights simply had not yet occurred while they were in the state proceedings. It is difficult to present arguments about a defendant's liability when they have yet to do anything unconstitutional, illegal, or tortious.

Second, a Rule 8 hearing does not provide an adequate forum to hear the federal plaintiffs' constitutional claims. *Younger* is based in equity and reflects the "longstanding public policy against federal court interference with state court

proceedings." *Younger*, 401 U.S. at 43. A primary source of this policy was the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 43–44.

The adequate state forum condition is not a loose requirement that merely necessitates "potential outcomes that might benefit the petitioner." Rather, the federal plaintiff must have "the opportunity to present his particular federal constitutional claims in state court proceedings." *Jackson v. Whetsel*, 388 F. App'x 795, 799 (10th Cir. 2010). But a Rule 8 hearing provides no such opportunity. Oklahoma's Rule 8.1 of the Rules of the Court of Criminal Appeals provides:

> When the Judgment and Sentence of a court, either in whole or in part, imposes a fine and/or costs upon a defendant, a judicial hearing shall be conducted and judicial determination made as to the defendant's ability to immediately satisfy the fine and costs.

Okla. R. Crim. App. 8.1. Thus, there is one issue in a Rule 8 hearing—the defendant's ability to pay. It does not address the culpability or liability of third parties for constitutional or statutory violations. It does not address the standards by which the government and their private contractors may collect court debt. It only addresses whether the defendant can pay the fine.

Likewise, there is no pre-jailing hearing after the defendant is sentenced in state court. That is because, under Rule 8.4, any hearings occur after defendants are

arrested and those hearings, like the hearings under Rule 8.1, provide no opportunity for defendants to present their federal claims. Defendants are given the opportunity to explain their lack of payment and, if the court is dissatisfied, he or she is returned to jail. *See* Okla. R. Crim. App. 8.4 ("If the defendant fails to make an installment payment when due, he/she must be given an opportunity to be heard as to the refusal or neglect to pay the installment when due. If no satisfactory explanation is given at the hearing on failure to pay, the defendant may then be incarcerated.")

Nor does the rule contemplate consideration of these issues on appeal in state court. Rule 8.8 provides a right to appeal when a judge enters a final order for detention for failure to pay a fine and/or cost. Okla. R. Crim. App. 8.8. This appeal is limited. Rule 8.8 provides: "The appeal shall be limited to whether the trial court abused its discretion in entering its final order of detention. The propriety of any fine, cost, or other assessment made within the original judgment and sentence is not a proper subject of an appeal from an order of detention." *Id.*

By its plain language, the subject of a Rule 8 hearing is purely a factual inquiry concerning whether the state court defendant has the ability to pay the fines and costs. The subject of the federal plaintiffs' claims here are much broader than a factual allegation about ability to pay. Their claims are that the counties' entire court debt collection schemes—issuing arrest warrants without prior inquiry into ability to pay, assessing a 30 percent surcharge on the debt, contracting with a private

company that uses threats and intimidation to collect debts, and ultimately jailing people without proper process—violate the federal Constitution and federal statutes. *See* SAC ¶¶ 89–98. Under a plain reading of Rule 8, the federal plaintiffs could not assert these constitutional claims at a Rule 8 hearing, nor could they in the very limited right of appeal that Rule 8 provides.

In sum, regardless of the availability of the limited hearing that Rule 8 provides, as a matter of law, fact, and common sense, the federal plaintiffs could not and cannot assert their federal constitutional claims in a state forum. Because that is precisely what *Younger* abstention requires, this Court should reverse and remand this case to the district court for consideration of the merits.

CONCLUSION

The district court misapplied the *Younger* factors, but its error was far more serious than that. The district court's ruling transforms *Younger* from a doctrine that forbids federal-court interference with ongoing state criminal and quasi-criminal proceedings into a doctrine that forbids the exercise of federal jurisdiction over virtually anything related to state criminal law. This expansive ruling is inconsistent with the federal courts' "virtually unflagging" duty to exercise the jurisdiction Congress has conferred upon them. *Sprint Commc'ns*, 571 U.S. at 77 (citation omitted). This Court should reverse the district court and remand for consideration on the merits.

Dated: August 13, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 3401 words.

2. This brief complies with the typeface, type-style, and type-volume requirements of Fed. R. App. P. 32(a)(5)–(7) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

Dated: August 13, 2021

/s/ William R. Maurer

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2021, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to all registered participants.

Dated: August 13, 2021

/s/ William R. Maurer